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PRESIDENT ASOC. VALLISOLETANA AFFECTED  
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Dear Mr.:

In relation to the complaint indicated above, you are informed that a report prepared by the General Directorate of Telecommunications has been received, under the Secretariat of State for Digital Advancement, which can be summarized as follows:

I. The 5G National Plan, published by the previous Ministry of Energy, Tourism and Digital Agenda in December 2017, aims to contribute to the achievement of the objectives set at European level in the 5G Action Plan for Europe approved by the Community institutions in April 2016 as a strategy to improve European competitiveness in the development of this emerging technology, which includes various objectives for Member States, including the approval of national work plans.

The Plan is part of an international context in which the main European countries (Germany, France, United Kingdom, etc.) and other regions of the world (USA, Japan, Korea, etc.) are approving their strategies for the development of the 5G, and Spain could not be left behind.

However, the National 5G Plan is not a rule that establishes legal precepts related to 5G deployments, which must be subject to a specific evaluation and prior to its approval and publication, nor a binding document that generates effects against third parties. The Plan is only a type of general document and a reference that defines and tries to promote a strategy of a public politics, in which the types of measures are identified, of a strategic nature, that are considered to be carried out so that Spain is not delayed in the development of this new technology, and may lose the opportunities it will provide in the future. The environmental aspects must be analysed when the actual deployment of the infrastructures that support the 5G technology is rolled out.

II. Thus, the 5G National Plan has not undergone strategic environmental assessment. It is a plan that contains the programmatic principles and relates the strategic lines that are considered to be executed to achieve the momentum of this “New disruptive technology” at social and economic level. It is a strategic document that identifies the guidelines and different public policies that should be taken into account to place our country in a leading position in the adoption and consolidation of 5G technology.

It is not a norm or a binding document that generates effects against third parties, such as a general urban planning plan, that is directly applicable and enforceable, and that, consequently, should have carried out an environmental assessment. Therefore, the 5G National Plan, according to its nature and purpose, "has not been subjected to an environmental impact assessment" (sic).

Another issue is the specific deployment of the network infrastructure, in particular, of the base stations, in which the necessary resources will finally be captured to be able to use 5G technology through the provision of a series of services to institutions, companies and citizens.

In this regard, article 34.6 of Law 9/2014, of May 9, General of Telecommunications, establishes:

*“6. For the installation of radio stations or infrastructures used for the provision of electronic communications services available to the public referred to in the third additional provision of Law 12/2012, of December 26, on urgent trade liberalization measures and of certain services, it may not be required to obtain a prior license for facilities, operation or activity, or other similar or similar class, under the terms indicated in the aforementioned law.*

*For the installation of public electronic communications networks or radio stations in a private domain other than those indicated in the previous paragraph, it may not be required by the competent public administrations to obtain a license or prior authorization for facilities, operation or activity, or of an environmental nature, or other similar or similar licenses or approvals that subject such installation to prior authorization, in the event that the operator has presented to the public administration competent for the granting of the license or authorization a deployment plan or installation of electronic communications network, in which these infrastructures or stations are contemplated, and that the provided plan has been approved by this administration.*

(...)

*Previous licenses or authorizations that, according to the preceding paragraphs, cannot be demanded, will be replaced by responsible declarations, in accordance with the established in article 71 bis of Law 30/1992, of November 26, on Legal Regime of the public administrations and of the Common Administrative Procedure, relating to compliance with the legal provisions established in current regulations. In any case, the declarant must be in possession of the proof of payment of the corresponding tax when its mandatory.*

(...)

*The presentation of the responsible declaration, with the consequent effect of enabling from that moment to execute the installation, will not prejudice in any way the situation and effective accommodation of the conditions of the infrastructure or radio electric station to the applicable regulations, nor will it limit the exercise of administrative powers of verification, inspection, sanction, and, in general, of control that to the administration in any order, state, autonomous or local, attributed by the sectorial order applicable in each case ”.*

In any case, the start of the implementation of the 5G technology in the short and medium term will be carried out through the infrastructure and base stations currently deployed, which are usually using 4G technology in the mentioned frequency bands that are subject to massive use by different commercial radio services (700 MHz, 800 MHz, 900 MHz, 1.8 GHz, 2.1 GHz, 2.6 GHz, 3.5 GHz), base stations that have already been previously authorized both relative to the technical project as in its commissioning.

Thus, this needs to bring up again the attention on the General Law of Telecommunications, whose article 34.7 expressly provides for the assumption of a purely technological renovation of a previously installed base station, not subjecting it to a rigorous administrative control in different fields of action, including environmental:

*“7. In the event that on a public network infrastructure of electronic communications, fixed or mobile, including electronic communications radio stations, whether it is located in the public or private domain, technological innovation or technical adaptation actions involving the incorporation of new equipment or the realization of radioelectric emissions in new frequency bands or with other technologies, without changing the elements of civil work and mast work, no type of concession, authorization or new license or modification of the existing one or responsible declaration or communication will be required prior to the competent public administrations for reasons of land, urban or environment”.*

This concludes that the 5G National Plan, taking into account its nature and purpose, has not been subjected to an environmental impact assessment nor has its evaluation been requested.

III. The 5G National Plan of Spain foresees the realization of pilot projects to test the new functionalities that 5G technology will offer. In particular, 2 pilot projects have been convened by the public entity Red.es, which have been awarded by said entity by means of Resolution of April 30, 2019.

A part of these tests are developed by introducing new functionalities in existing and in-service 4G stations. When the installation and operation of a new station is required for a period of time, for the installation and use of the same, the regulation of the use of the public radioelectric domain is applicable, which guarantees an exhaustive control in the installation and use in time of any center radio transmitter or base station.

IV. The limits of radio emissions do not depend on the technology used in communication (2G, 3G, 4G or 5G) but on the specific characteristics of each frequency band. The frequency bands that will be used for 5G technology, in a first stage or later, will be the ones that are already being used massively by different commercial radio services (700 MHz, 800 MHz, 900 MHz, 1.8 GHz, 2.1 GHz, 2.6 GHz, 3.5 GHz) with the only addition of the 26 GHz band. This last band has not yet been allocated for the use of 5G in Spain for mass commercial services.

The international organisms of standardisation are already working on a technical standard that covers the calculation and measurement procedure of emissions in the millimeter bands, such as 26 GHz.

Specifically, the International Electrotechnical Commission (IEC) is developing the IEC standard 62232 (Determination of RF field strength, power density and SAR in the vicinity of radiocommunication base stations for the purpose of evaluating human exposure), in an advanced state of elaboration, which will allow the evaluation of emission levels in these millimeter bands.

Likewise, the International Commission on Non-Ionizing Radiation Protection (ICNIRP) is studying and reviewing the scientific guidelines for it. These guidelines derived from studies of exposure to electromagnetic fields served as a basis for Recommendation 1999/519 / EC of the European Union Health Council of 12 July 1999, concerning the general public's exposure to electromagnetic fields since 0 Hz to 300 GHz. This is the European framework that guarantees the level of protection of the population in exposure to electromagnetic fields from electrical and electronic products and appliances.

ICNIRP will publish, if it deems necessary, an update of the scientific guidelines. And in the event that this revision occurs, it is expected that the Recommendation 1999/519 / EC of the Health Council of the European Union will be revised accordingly, as well as Royal Decree 1066/2001 approving the Regulation establishing protection conditions of the public radio electric domain, restrictions on radio electric emissions and health protection measures against radio emissions. This decree incorporates the health protection criteria established in the Recommendation, and its annex II establishes the exposure limits, which include the maximum emission limits for the frequency bands used by mobile communications, which are also used by 5G technology. Thus, this Royal Decree establishes that the Ministry of Health and Consumer Affairs will adapt the aforementioned Annex II to scientific progress, taking into account the precautionary principle and the evaluations carried out by competent national and international organizations.

The scientific guidelines of ICNIRP are the international standards that have the backing of the World Health Organization (WHO). WHO recommends strict adherence to the aforementioned international standards, which have been developed to protect both mobile phone users, people who work near or live around mobile phone base stations, and people who do not makes use of this type of communication. WHO also recommends that no arbitrary limits be imposed, disallowing or distrusting existing regulations, as this is based on scientific knowledge.

V. The Regulation on the use of the radioelectric public domain, approved by Royal Decree 123/2017, provides mechanisms for monitoring exposure levels, through the presentation of certifications and reports by telecommunications operators, the completion of inspection plans and the preparation of an annual report.

The Regulation on the use of the radioelectric public domain, establishes that operators who establish certain networks, including mobile phone networks, have to prepare a detailed study, carried out by a competent technician, indicating the levels of radio exposure in areas near its radio installations, in which people can usually remain, and that this study has to be submitted to the Ministry of Economy and Business incorporated in the project that must be submitted to request authorization of the radio installations.

Likewise, prior to the start of emissions, operators must obtain the authorization for commissioning the stations provided for in Title IV of the mentioned regulation on the use of the radioelectric public domain, and to grant it the inspection services of the Secretariat Status for Digital Advance check

compliance with emission levels in the case of stations that require technical recognition, or operators have to present a certificate of exposure levels made by a competent technician in telecommunications, in the case of stations to which the substitute certification procedure for technical recognition is applicable.

In addition to the above, in accordance with the provisions of “I have” four of the Order CTE / 23/2002, of January 11, which establishes conditions for the presentation of certain studies and certifications by radiocommunication service operators, the operators must submit to the Ministry of Economy and Business, in the first quarter of each calendar year, a certification issued by a competent technician that the exposure limits established in Annex II of the Regulation establishing the regulations have been respected during the previous year, restrictions on radio emissions and sanitary protection measures against radio emissions, approved by Royal Decree 1066/2001.

Additionally, the Ministry carries out annual inspection plans. They include carrying out measures in the environment of a sample of radio stations and an audit of the certifications presented by the operators.

Likewise, and due to the importance that Spanish regulations grant to sensitive spaces (kindergartens, pre-school, primary education centers, compulsory education centers, health centers, hospitals, public parks, residences or geriatric centers, etc.), they are also carried out specific work to check the levels of radio exposure in these sensitive places.

It is concluded that the current regulation on the use of the radioelectric public domain and control of emission levels is adequate, includes the decisions taken by the competent international organizations and incorporates the precautionary principle in the delimitation and setting of exposure limits to radioelectric emissions, guaranteeing the timely and strict control in their compliance.

So far the information received from the Secretary of State for Digital Advancement, to which this institution has addressed, on this same date, the following considerations:

1. The first thing that should be noted is that the environmental assessment of plans has a different purpose and is subject to a different procedure than the environmental impact assessment projects.

Law 21/2013 defines in general the environmental assessment as the process through which the significant effects that the plans and projects have on the environment have or may have, before their adoption, approval or authorization. This analysis includes the effects of those on the population, human health, flora, fauna, biodiversity, geodiversity, land, soil, subsoil, air, water, climate, climate change, landscape, material goods, including cultural heritage, and the interaction between all the mentioned factors.

Based on the general definition, the Law distinguishes between the strategic environmental assessment, to which the plans must be submitted, and the environmental impact assessment, which is appropriate with respect to the projects.

To clarify the issue, the Law defines what should be understood by plan and what should be understood by project.

Article 5.2 b) of the Law defines a plan as the set of strategies, guidelines and proposals aimed at satisfying social needs, not directly executable, but through its development through one or several projects. On the other hand, in article 5.3 b) of the Law, a project is defined as any action that consists of: 1st the execution, exploitation, dismantling or demolition of a work, a construction, or installation, or 2nd any intervention in the natural environment or the landscape, including those intended for the exploitation or use of natural resources or soil and subsoil, as well as continental or marine waters.

Once the purpose of the evaluation is defined, the Law defines the specific purpose of one and another evaluation as it falls on a plan or a project. The strategic environmental assessment requires incorporating sustainability criteria in strategic decision making. This means that in the development of the plan, environmental aspects, along with economic and social aspects, must be assessed and taken into account in order to achieve a high degree of environmental protection and promote sustainable development (article 1 of Law 21/2013).

Through the evaluation of projects, adequate prevention of the specific environmental impacts that may be generated is guaranteed, while establishing the necessary measures to correct or compensate for such impacts.

The distinction between both types of evaluation is reflected in a different process. Thus, the procedure to evaluate the plans is regulated in article 6 and in Chapter I of Title II of Law 21/2013; and that of the projects, in article 7 and in Chapter II of Title II.

Focusing now on the strategic environmental assessment, this requires, in synthesis, the preparation of the strategic environmental study; the holding of a process of public information and consultations with the affected Public Administrations and interested persons and a strategic environmental declaration that includes the determinations, measures or conditions that must be incorporated in the plan that is finally approved or adopted to guarantee its sustainability

2. Made the distinction between both forms of evaluation, to find out if the National 5G Plan must undergo an environmental evaluation, it must be checked whether it meets the requirements established in the legislation.

1<sup>st</sup>. As stated, Article 5.2 b) of the Law defines a plan as the set of strategies, guidelines and proposals aimed at satisfying social needs, not directly executable, but through its development through one or several projects. From the definition given by that Secretary of State for Digital Advancement, through the report of the General Directorate of Telecommunications, and from the content of the plan itself it follows that the 5G National Plan conforms to this definition.

Thus, according to DG, *“The National 5G Plan aims to place Spain among the most advanced countries in the development of this new technology, so that when 5G reaches its technological and commercial maturity, Spain is the best prepared to take advantage of to the maximum the opportunities of this new technological paradigm.*

*The National Plan (...) is a document that defines and tries to promote a strategy of a public policy that will cause beneficial effects for the Spanish economy and society, ... (...) This Plan is only a document*

*of a general nature in which the types of measures are identified, of a strategic nature, that are considered to be carried out so that Spain is not delayed in the development of this new technology, and may lose the opportunities it will provide in the future.*

*Therefore, this Plan is framed in an international context in which the main European countries (Germany, France, United Kingdom, etc.) and other regions of the world (USA, Japan, Korea, etc.) are approving their strategies for the development of 5G, and Spain could not be left behind in these aspects. These national strategies, as well as the 5G Action Plan for Europe, and the 5G National Plan published in Spain, constitute reference documents in each of the countries, in which the great strategic measures to be carried out for the 5G development, but it is not a matter of specific normative measures that must be subject to approval and publication of a specific evaluation and on a specific case as far as its impact in different aspects is concerned ”.*

In accordance with the foregoing, the Plan defines the strategic objectives, the strategic measures (including actions for the management and planning of the radio spectrum, implementation of pilot projects and development of legal instruments that provide legal certainty to facilitate investments in the deployment) and the roadmap for the deployment of key actions. From the above it is concluded that the National 5G Plan fits without difficulty to the legal definition and is a plan for the purposes of Law 21/2013, as it constitutes a set of guidelines and proposals aimed at satisfying social needs, not directly executable.

2<sup>nd</sup>. Article 6.1 determines the plans that must be submitted to ordinary strategic environmental assessment in accordance with the following:

*- To be adopted or approved by a public Administration. In this case, that Secretary of State for Digital Advancement has not informed that the Plan has been formally approved by the Council of Ministers through an agreement or through an order or resolution of an organ of the Ministry of Economy and Business. However, it is not entirely clear that Law 21/2013 requires an act of formal approval in the strict sense, since it is enough that the plan has been “adopted” by a public Administration, which occurs in this case, because as just Indicate, and this is recognized by the General Directorate of Telecommunications, the Plan is a reference document prepared and disseminated by the Ministry, which defines the steps to be taken and the timetable to be fulfilled for the deployment of 5G technology.*

*- That its preparation and approval is required by a legal or regulatory provision or by agreement of the Council of Ministers or the Governing Council of an autonomous community. This provision transposes Article 2 a) second indent of Directive 2001/42 / EC of environmental evaluation of plans and programs. This Directive refers to plans that are required by legal, regulatory or administrative provisions. In accordance with the foregoing, it should be interpreted that the provisions that provide for the adoption of a plan are not limited to the state or regional level as stated in Law 21/2013, but that its need may also derive from provisions or acts emanating from the community institutions. As indicated by the Directorate General of Telecommunications, the 5G National Plan, is a consequence of the need to meet the objectives set at European level in the 5G Action Plan for Europe approved by the Community institutions in April 2016 “as a strategy to*

*improve European competitiveness in development of this emerging technology, which includes various objectives for Member States, including the approval of national work plans ”. Indeed, the 5G Action Plan for Europe was adopted by the European Commission through Communication 2016 (588). Communications are atypical acts of the law derived from the EU. Therefore, the 5G National Plan falls into the category of provisions referred to in the Directive and, therefore, also meets the stated requirement.*

*- That the plans establish the framework for the future authorization of projects legally subject to environmental impact assessment and refer among other matters to telecommunications, urban and rural land management, or land use. The subject matter of the Plan falls under the category "telecommunications" and obviously establishes the framework for the authorization of projects, because as is clear from the information provided by the General Directorate of Telecommunications, the National 5G Plan of Spain provides for pilot projects to test the new features that 5G technology will offer. In particular, under the National 5G Plan, 2 pilot projects have been convened by the public entity Red.es, which have been awarded by said entity through Resolution dated April 30, 2019. Therefore, the Plan serves as a framework for the Project authorization.*

The Law establishes other alternative requirements for plans that must also be subject to evaluation, for example, that significantly affect Red Natura 2000 spaces.

In view of the doubts that may arise regarding the concurrence of the necessary requirements to carry out said evaluation, it is significant that the Secretary of State did not consult the environmental body at the time about the appropriateness of processing said evaluation. It should be remembered that the Administration objectively serves the general interests and acts in accordance with the principles of effectiveness and coordination, with full submission to the law and the Law, which enables the substantive body to consult the environmental body if there are doubts about the origin to apply Law 21/2013, whose precepts bind all public administrations. Article 2 h) of the Law establishes a principle of active collaboration between the bodies involved in the evaluation process; and according to article 3.1, Administrations that may be interested in the plan, due to their environmental responsibilities, will be consulted on the information provided by the promoter and on the request for adoption or approval of a plan. Finally, the Law foresees the possibility that the environmental body decides to submit a plan for a simplified evaluation when the requirements of Annex V of Law 21/2013 are met, including risks to human health or the environment and the magnitude and spatial extent of the effects (geographic area and population size that may be affected). For this, you must have knowledge of the Plan, which must be sent by the substantive and promoter of the Plan.

It should also be remembered that the need to submit the 5G National Plan to this type of evaluation was claimed by several associations in the public information process of the Plan. This institution has no record, since that Secretary of State has not proceeded to report on it, how these allegations have been assessed or whether a reasoned response has been given about the way in which they were taken into account in the adoption of the Plan. It should be noted that one of the purposes of the strategic environmental assessment is to guarantee public participation in decision-making and ensure that the environmental variable is properly taken into account in this process (articles 2 i) and k), 17.1 d) and following of Law 21/2013).



This requires that that Administration include the result of the public information and the manner in which the allegations have been taken into account both in the technical analysis of the file and in the strategic environmental declaration, in the terms established in articles 24 and 25 of the Law 21/2013 and 3.2 and related to Law 27/2006 on access to information, public participation and access to justice in environmental matters. In addition, the substantive body must publish in the Official State Gazette, together with the adoption of the Plan, an extract that includes the following aspects: 1<sup>st</sup>. How environmental aspects have been integrated into the plan; and 2<sup>nd</sup>. How the results of public information and consultations have been taken into consideration in the plan, among other issues.

In the document that summarizes the process of public information, available on the website of the Ministry of Economy and Business, there is no response to the allegations raised about the need to submit the 5G National Plan for evaluation. Thus, although a process of public information has been held, the absence of assessment of allegations and information to the public of how these allegations have been taken into account, public participation in the decision-making process has been incomplete.

Nor has that Secretary of State reported that it would transfer these claims to the environmental body. With this way of proceeding, it has also ignored the provisions of article 3.4 of Law 21/2013, according to which, the substantive body must inform the environmental body of any incident that occurs during the processing of the substantive administrative procedure for the adoption of a plan that is relevant to the effects of the environmental assessment process.

3. The foregoing considerations lead to the conclusion that the 5G National Plan was not subjected to strategic environmental assessment and that said decision was adopted unilaterally by the substantive body (and promoter of the Plan) without consulting with the environmental body on the appropriateness of carrying out such evaluation, although the Plan could meet the requirements of Law 21/2013, even doubts could arise regarding the lack of formal approval.

Regarding the latter issue (the need for formal approval of the plans) it should be stated that while it is not unreasonable to interpret that the plans must be approved by the Administration that prepares it (or other) to be environmentally evaluated, it is also true that by the way of not dictating a norm or an act that formally approves a plan, the evaluation could easily be avoided, even of plans that met the other requirements indicated by Law 21/2013. In the case of the 5G National Plan, there is a contradiction that it is essential to *“place our country among the most advanced countries in the development of this new technology so that when 5G reaches its technological and commercial maturity, Spain is prepared to take advantage to the maximum the opportunities of this technological paradigm ”*, has not been object of formal approval and that the General Directorate of Telecommunications affirms that it lacks binding effects, although its content is being fulfilled.

In any case, there are state plans (for example, infrastructure plans), with a nature, purpose and structure similar to the 5G National Plan (although more detailed and complete), which have been formally approved and have undergone strategic environmental assessment . That Secretary of State, however, has not explained the reasons for the lack of formal approval of the 5G National Plan, despite the importance attached to the fulfilment of its content to achieve the proposed objectives.

4. In any case, taking environmental considerations into account in decision-making is a requirement of sustainable development and, therefore, the environmental effects of public decisions must be assessed

even if a regulated procedure is not followed. Article 3 of the Treaty on European Union includes among its objectives the establishment of "a high level of protection and improvement of the quality of the environment". And in the same vein, Article 11 of the Treaty on the Functioning of the EU states that "the requirements of environmental protection must be integrated into the definition and implementation of the policies and actions of the Union, in particular in order to encourage sustainable development. " In the light of the above, it can be concluded that the Secretary of State has not taken environmental considerations into account when deciding and approving the 5G National Plan.

This institution cannot deduce from the content of the 5G National Plan whether or not it significantly affects the environment. Without prejudice to what is referred to radioelectric emissions (on what will become later), the lack of information on the locations of deployment of new infrastructure, on possible effects on protected areas, or on the landscape, or on the use of land, put in evidence that the environmental variable has not been taken into consideration. However, it cannot be ignored that the 5G National Plan itself states that "the development of 5G services will involve the massive deployment of new network elements in the Spanish territory, since either in new locations or at sites that are used for other technologies and services. " Therefore, a greater degree of definition of the technology deployment strategy would have been desirable and, as has been said, that the criteria of the environmental body regarding the need to practice a regulated evaluation of the Plan would have been sought. Even if the environmental condition of the 5G National Plan is not significant, the valuation of the environmental variable should have been included in the Plan adoption process and taken into consideration, at least to justify that a strategic environmental assessment was not necessary, in accordance with the requirements demanded by Law 21/2013.

5. Noting the above, there is little room for manoeuvre to remedy the lack of evaluation and assessment of environmental aspects in the adoption of the 5G National Plan. On the one hand, Article 9 of Law 21/2013, determines the lack of validity of the plans that have omitted the mandatory strategic environmental assessment. However, since the 5G National Plan has not been formally approved and lacks binding legal effects, the lack of validity loses its meaning in this case. In addition, the Plan designs the action guidelines until 2020, so that the temporal scope of planning is nearing its end. Given this situation, this institution can only conclude on this point that the National Plan has not taken into account the environmental aspects of the Plan and has not assessed them even for the purpose of justifying that a regulated evaluation was not required under Law 21 / 2013.

6. Regarding the environmental impact assessment of the awarded pilot projects, it should be noted that the Secretary of State has not referred at any time to article 7 of Law 21/2013, which establishes the requirements for impact assessment Environmental projects. In accordance with this article, those included in Annex I must be subject to ordinary environmental impact assessment; and should be subject to a simplified environmental impact assessment, among others, any project that may significantly affect places in the Natura 2000 Network that is not included in Annex I.

From the information available on the two pilot projects awarded in Andalusia and Galicia, it does not appear that they are included in any of the cases listed in Annex I of the Law. On the other hand, it seems that the actions will be developed in urban settings, in technology parks, in port facilities and other highly anthropized environments, so that pilot projects may not significantly affect sites of the Natura 2000 Network. However, this is a mere assumption, given the total lack of assessment of the

environmental effects of the projects by the substantive body or the environmental body, even to justify that such evaluation is not necessary, in accordance with the requirements of Law 21/2013.

It should be noted that to justify the lack of evaluation of the pilot projects, that Secretary of State refers at all times to the provisions of the General Law 9/2014 of Telecommunications and not to the requirements required by Law 21/2013. Regarding this issue, it is necessary to clarify that the exemption of the environmental license made by the General Telecommunications Law regarding projects in this area does not reach the environmental impact assessment procedure, which will be mandatory when the projects meet the requirements established in the Law 21/2013.

The state legislation on environmental assessment is a transposition of a mandatory Community Directive that does not protect the rules from excluding a certain category of projects from the duty to assess whether they could have negative and appreciable effects on the environment. That is to say, by application of the Telecommunications Law, it cannot be argued a priori that no project on the subject has appreciable effects on the environment and, therefore, in no case will the evaluation that regulates Law 21/2013 be enforceable. On the contrary, telecommunications projects must be subject to regulated environmental impact assessment if they meet the requirements established in Law 21/2013; and should not submit if they do not comply.

Another thing is that, on a case-by-case basis, the Administration reasonably decides that a specific project should not be subjected to an environmental impact assessment before its authorization (even if it meets the legal requirements for it), when any of the cases regulated in Article 8 of Law 21/2013, that is, projects in defence, civil emergency, critical infrastructure and so on. But even in these cases it is necessary for the substantive body to assess whether it is necessary to submit the project to another alternative form of evaluation and that such valuation be made available to the public and communicated to the European Union before its approval.

7. In relation to the state of scientific knowledge about the effects of 5G technology on health, it should be reiterated that this institution relies on the information provided by the scientific and health authorities. However, the following should also be noted:

1<sup>st</sup>. Notwithstanding the Recommendation 1999 / 519CE of the EU Health Council, Spain is also a member of the Council of Europe and must follow the recommendations it approves, including Recommendation 1815 (2011) on the potential dangers of electromagnetic fields and its effects on the environment. This Recommendation urges Member States, among other things, to take precautionary principles and ALARA into consideration (keep exposure levels as low as possible); to take all reasonable measures to reduce EMF exposure, particularly for children and young people; to pay special attention to electrosensitive people suffering from intolerance syndrome to electromagnetic fields; to carry out appropriate risk assessment procedures and improve evaluation standards; and keep electrical installations a safe distance from homes. The Recommendation therefore requires that certain vulnerable groups have a specific consideration beyond the exposure levels established for the population as a whole. This specific attention is not found in the 5G National Plan or in the awarding of pilot projects.

While this institution shares the criteria on that arbitrary limits should not be imposed, disregarding or distrusting the existing regulation based on scientific knowledge, neither has the Administration

conclusively justified that the Council of Europe Recommendation should not be adhered to paying particular attention to certain vulnerable groups.

2<sup>nd</sup>. That Secretary of State says that, as far as the limits of radio emissions are concerned, these limits do not depend on the technology used (4G or 5G) but on the specific characteristics of each frequency band; and that the bands that are going to be used for 5G technology are going to be the ones that are already used at mass level in Spain, with the only exception of the 26 GHz band. This band, according to that Administration, has not yet been awarded for the use of 5G for mass commercial services; and international standards bodies are already working on a technical standard that covers the calculation and measurement procedure of emissions in the 26 GHz band.

This information confirms what was indicated by the Scientific Committee on Radio Frequency and Health (CCARS) in its report on this matter for 2013-2016, which expressly refers to the absence of data on exposure limits of 5G technology in bands greater than 6GHz *"They are still in the process of discussion, definition and subsequent standardization, which is not expected to close before 2020."*

Having said the above, it should be noted that although the use of the 26 GHz band may not be massive, as said Secretary of State, this institution has been able to verify that the regulatory basis for the award of pilot projects contemplates the use of the 26 GHz band and this is valued "particularly" in the project selection criteria (Article 13 b) and Annex III) of Order ECE / 1016/2018, of September 28, which establishes the regulatory bases of the granting of subsidies to pilot projects of 5G technology).

In addition, in the pilot projects so far awarded in Andalusia and Galicia, according to the information provided by Red.es (a public business entity of the Ministry of Economy and Business that depends on that Secretary of State) it is expected that the deployment of 5G technology be performed in the bands 3.7 and 26 GHz. This means that a band - 26 GHz - will be used for which the safe exposure levels have not yet been set.

This assumption is the scope of the application of the precautionary or precautionary principle. According to this principle, when an activity represents a threat or harm to human health or the environment, precautionary measures must be taken even when the cause-effect relationship has not been conclusively proven scientifically.

The precautionary principle is mentioned in Article 191 of the Treaty on the Functioning of the European Union in order to guarantee a high level of environmental protection although its scope is broader and extends to human, animal and plant health.

For its part, Royal Decree 1066/2001, which approves the Regulation establishing conditions for the protection of the public radio domain, restrictions on radio emissions and health protection measures against radio emissions, refers to this principle in the article 7, when it imposes on the Ministry of Health the duty to adapt the limits of exposure to radioelectric emissions to scientific progress, taking into account the precautionary principle and the evaluations carried out by the competent national and international organizations.

The Commission Communication on the use of the precautionary principle (COM (2000) 1 final of 2.2.2000), states that measures based on the precautionary principle should be proportional to the level

of protection chosen, not discriminatory in its application, consistent with similar measures already taken, based on the examination of the possible benefits and costs of the action or lack of action, be subject to review, in the light of new scientific data, and be able to designate who is responsible provide the necessary scientific evidence for a more complete risk assessment.

Obviously, the analysis of these aspects and the potential health risk of the use of 5G technology through the 26 GHz band exceeds the functions of this institution and requires the intervention of bodies and public administrations other than that Secretary of State, among them the public health administration. The tenth additional provision of the Telecommunications Law provides for the creation of the Interministerial Commission on Radio Frequency and Health, which should be the body, at the state level, able to address these issues in a coordinated manner. The Commission has the function of advising and informing the public, all public administrations and the various agents of the industry about the restrictions established on radio emissions, the health protection measures approved against radio emissions and the multiple and periodic controls to which the facilities generating radioelectric emissions are subjected, in particular, those related to radiocommunications.

Likewise, said Commission must carry out and disseminate studies and research on radioelectric emissions and their effects and how emission restrictions, health protection measures and established controls preserve people's health, as well as, in view of those studies and research, will make proposals and suggest lines of improvement in the measures and controls to be performed.

In any case, the Ministry of Health and the Carlos III Health Institute will be part of the interministerial Commission, in addition to the competent body in telecommunications. It will also have an advisory or collaborating group on radio frequencies and health, with the participation of autonomous communities, the association of local state-level entities with greater implementation and a group of independent experts, scientific societies and citizen representatives, to make Evaluation and periodic monitoring of the prevention and protection of the health of the population in relation to radioelectric emissions, proposing research studies, consensual identification measures, preparation of records and protocols for citizen care.

This Commission has not yet been constituted despite this institution having suggested it to the then Ministry of Health, Social Services and Equality in 2017 and without said department having offered reasons that justify disregarding the mandate of the Law. In view of the exposed considerations, in particular the deployment of 5G technology through a band for which exposure levels to safe radio emissions have not been established, its constitution is inescapable, in order to rule on the application of the precautionary principle in this case.

In the opinion of this institution, it cannot be ignored that there is a citizen's concern about the effects of the deployment of this new technology and that its claims about the effects of electromagnetic fields on health begin to be addressed by the courts of justice, which they recognize, by virtue of the medical reports provided, certain pathologies due to exposure to radio emissions.

The Administration can be convinced of the safety of emissions when the safety values set by the International Commission for the Protection against Non-Ionizing Radiation (ICNIRP) are respected, below which no biological effects have been reproduced on people. But this does not exempt it from implementing the mechanisms provided for in the legislation on research, advice, participation and

public information, nor from assessing and applying the necessary precautionary measures to ensure that the deployment of the new technology does not cause health damage, especially when the levels of safe exposure for a given frequency band have not yet been determined, whose use, however, has been authorized.

By virtue of the above considerations, and in accordance with articles 28 and 30 of Organic Law 3/1981, of April 6, the Ombudsman has resolved to address the following resolutions to the Secretary of State for Digital Advancement:

### **LEGAL DUTIES REMINDER**

**“Submit the plans and projects in the field of telecommunications to strategic environmental assessment and environmental impact assessment respectively, when they meet the requirements established in Law 21/2013 of environmental assessment”.**

### **SUGGESTIONS**

- 1. “Prepare, together with the Ministry of Health, Consumption and Social Welfare, the draft regulation by which the Interministerial Commission on Radio Frequency and Health should be regulated and, after completing the mandatory procedures, submit it to the Council of Ministers for approval.**
- 2. Once constituted, submit to the Commission for consultation how to proceed with respect to the application of the precautionary principle in the development of projects that involve the use of the 26 GHz band, as long as the safe exposure limits are not determined to radioelectric emissions required for said frequency ”.**

The Secretary of State has also been requested to report the measures adopted to evaluate the possible health effects that could be derived from the pilot projects in Andalusia and Galicia; if these Autonomous Communities have been consulted on these projects; and if new ones have been awarded or will be awarded during the temporary scope of the 5G National Plan.

You will be informed of the response that you receive to these resolutions, as well as the actions that proceed.

Best regards,  
Francisco Fernández Marugán  
Ombudsman (e.f.)

**NOTE:** This document is an unofficial translation from(Spanish → English) and **is a replication** of the layout from the original document.

See original spanish version here: <http://www.avaate.org/spip.php?article2834>

Translation: Version 1.1 (<https://helbredssikker-telekommunikation.dk/nyheder/spanish-ombudsman-5g-missing-environmental-assessment>)