

Answer to request for clarifications received by 14.09.2015, regarding the Terms of Reference for the organisation of the competitive selection procedure with a view to awarding the rights of use for the radio frequencies in the 3410-3800 MHz band.

1. Question:

Please clarify whether, for the operators currently using the 3.5 GHz band, the obligation to effectively use the radio frequencies is deemed fulfilled by using base stations endowed with FWA-type equipment, where such stations are to be put into operation in accordance with the channel arrangements valid from 1 January 2016, according to the provisions of the new licences.

Answer:

Under the conditions mentioned below, after 01.I.2016, one can continue using - by way of exception – the arrangement specific to FWA/NWA networks, as well (see recommendation ERC/REC 14-03), respectively the arrangement specific to BWA networks (see recommendation ERC/REC 12-08). In this case, the base stations using central frequencies in the channels (and the associated bandwidths) quoted from these arrangements will not be counted in checking compliance with the obligation to effectively use the radio frequencies.

As frequently specified by ANCOM, the principle of technological neutrality governs all the technical aspects within the selection procedure, underlying the whole technical framework laid down in the European Commission's Decision no. 2014/276/UE, a regulation implemented in Romania also by organising the competitive selection procedure under the Terms of Reference.

Therefore, the technology used is not relevant in assessing compliance with the obligation to effectively use the radio frequencies. For the said purpose, great importance is placed on the operator's usage of the channel arrangement in managing the assigned subband/subbands.

(Usually, the base stations operating in accordance with the channel arrangements valid from 1 January 2016, must feature central frequencies situated in the middle of the 5 MHz channels, as defined in the new channel arrangements described in sections 2.2 and 2.3 of the Terms of Reference. Nevertheless, due to the principle of technological neutrality and in order to ensure flexibility in managing the assigned subbands - which has been provided for in the Terms of Reference for the very sake of operators -, the base stations specified in paragraph 10 of this document are also eligible for counting in the assessment of compliance with the obligation to effectively use the radio frequencies.)

Thus, in order to approach this issue on a general level, for both frequency bands in the selection procedure, one must duly take into account the fact that channel arrangements specific to FWA/NWA networks (respectively BWA networks), established by:

- recommendation CEPT ERC/REC 14-03 (and provided under item B1 of its Annex B), for the 3400-3600 MHz band, respectively
 - recommendation CEPT ERC/REC 12-08 (and provided under item B2.2.1 in the second section of its Annex B), for the 3600-3800 MHz band,
- are no longer valid starting from 01.I.2016, in accordance with the provisions of the current strategy for the implementation and development of broadband communications systems at the country level, in the 3400-3800 MHz band, in the period 2015-2025.

Obviously, in accordance with the provisions of letter b) of section 2.1 in the Terms of Reference, the holders of usage rights in the 3400-3800 MHz band will be able to manage the frequencies flexibly, i.e. – within the acquired frequencies, with a view to establishing the central frequencies of different bandwidth channels, one can choose other channel arrangements than those provided in licences, on the condition that, in the end, the limits of the subbands allotted by licences should not be exceeded. In this vein, letter a) of the same subsection also provides that guard bands as to networks operating in adjacent sub-bands must be included in the sub-bands to be allotted by licences.

2. Question:

Please clarify the process of re-authorisation of the base stations currently operating in the 3.5 GHz band, if necessary, for an operator to ensure conformity with the new licences for the use of frequencies in the 3.5 GHz band, in force from 1 January 2016.

Answer:

The rights of use currently in force in the 3400-3800 MHz band are available until the expiry of licences, i.e. 31.XII.2015.

From a technical point of view, the operators can continue using the frequency assignments of the base stations notified to the Authority based on the licences in force in the 3400-3800 MHz band, with due consideration of the provisions of letter b) in section 2.1 of the Terms of Reference, while observing the conditions under a) and b) of the respective section, as specified in paragraph 1.

Nevertheless, from an administrative point of view, the process of notifying the frequency assignments of the above-mentioned base stations must be resumed after 01.I.2016, based on the provisions of the new licences obtained following the selection procedure, which are to enter into force on this date and – according to the provisions of ANCOM President's Decision no. 353/2015 on the procedure of granting radio frequency usage rights.

The Authority must be notified the soonest possible after 01.I.2016, depending on the process initiated by each operator envisaging to continue operation in the 3.4-3.8 GHz band, with a view to refarming and, if applicable, to migrating the current frequency assignments.

3. Question:

Taking into account the last paragraph of 3.3.3. "[...] the existence of such bilateral or multilateral agreements, as well as their content will be notified to the Authority.", please indicate the procedure applicable in this instance with regard

to the notification term, format and applicable sanction in case of failure to pursue the procedure.

Answer:

According to the last paragraph of section 3.3.3 in the Terms of Reference, the existence and content of bilateral or multilateral agreements concluded between licence holders, by which they agree to use some technical parameters that are less restrictive than the ones provided in section 3.3.3.1 of the Terms of Reference, must be notified to the Authority.

Existing agreements will be notified to the Authority as soon as possible, not later than 15 days before their entry into force. Such agreements will be sent both in electronic format, and as hardcopy.

These bilateral or multilateral agreements signed between the operators are mandatory only for the signing parties and cannot be imposed on the radio spectrum administrations. Irrespective of its format, such an agreement cannot affect the radio spectrum usage by a rights holder that is not a party in the respective agreement.

The sanction for not presenting such an agreement in the above-mentioned terms consists of the Authority's ignoring it, if harmful interference occurs due to the more relaxed usage conditions provided in the agreement.

4. Question:

Taking into account the request in Section 4.5.2 letter c) "financial statement for the last year, approved under the legal provisions, according to the applicable accounting reference", please indicate the following:

- 1. What document could a candidate present should [it A/N] be registered for less than one year prior to submitting its application in the Auction, therefore being unable to provide such a financial statement?*
- 2. Must the document requested above (including following the clarification requested by question 1 above) be registered with a public authority or does it suffice to be issued by the applicant?*

Answer:

1. The request under section 4.5.2 letter c) shall be interpreted by reference to the provisions of section 4.6.1 letter d), being laid down with a view to checking the qualification criterion regarding the candidate's average turnover for the past year or, as applicable, the subscribed and paid share capital of minimum RON 2,000,000. According to the Romanian law system, in order to be valid, an obligation must be fulfillable. Thus, for a newly established company, this condition is deemed fulfilled upon presenting the document under letter b) of section 4.5.2, including the mention provided by item (iv).
2. The condition is deemed fulfilled in the above-mentioned situation, only upon submitting a statement-of-facts issued, by the National Trade Registry Office (or a similar foreign body) at most 30 days prior to entering the application file, mentioning the details regarding the (subscribed and paid) share capital in the amount provided under 4.6.1 letter d) in the Terms of Reference. In the other cases, the financial statements must be approved under the legal provisions, according to the applicable accounting reference.

5. Question:

Taking into account the request in section 4.5.2 letter f) "the tax clearance certificate on the fulfilment of the standing payment obligations to the state budget, the social insurance budgets and to the special funds, of the taxes, dues, contributions and other revenues, issued according to the legal provisions in force", please specify:

- 1. What document must be made available by a foreign legal person that is not fiscally registered in Romania?*
- 2. Must the requested document be submitted with regard to the fulfilment of the applicant's standing obligations in its country of origin, or in relation with the candidate's obligations in Romania?*

Answer:

- 1. In this respect, the provisions of the last paragraph in section 4.6.1 of the Terms of Reference shall apply, the obligation being fulfilled only by reference to the budgets managed by the Romanian authorities.*
- 2. The request envisages only applicants that are legal persons fiscally registered in Romania.*

6. Question:

Taking into account 4.6.1 letter d) "the candidate's average turnover over the last year or, as applicable, the subscribed and paid share capital should be at least RON 2,000,000" please clarify the following:

- 1. Are the criteria for fulfilling this request alternative or cumulative?*
- 2. Can a candidate that cannot prove a turnover of RON 2 million for the last year fulfill the request if it proves to have available a subscribed and paid share capital of RON 2 million?*

Answer:

- 1. Alternative.*
- 2. Yes.*

7. Question:

How can an applicant prove the fulfillment of conditions under 4.6.1. [letters A/N] e) and f)?

Answer:

By submitting the statement of facts specified at letter b) of section 4.5.2 in the Terms of Reference, a document containing the mentions under items vii) and viii) of the above-mentioned paragraph.

8. Question:

Taking into account the provisions of section 4.6.1 letter h) "the bidder has fulfilled the exigible payment obligations to the state budget, the social insurance budgets and special tax funds, contributions and other revenues; the taxes, contributions and other revenues which benefited from payment facilitation (postponements, phasing etc.) granted by the competent bodies are not deemed exigible payment obligations, to the extent the conditions imposed at the facilitation granting were observed", please indicate how can this request be fulfilled by a foreign legal person that is not fiscally registered in Romania, considering the last paragraph

in the section, reading "this shall be deemed fulfilled only by reference to the budgets managed by the Romanian authorities"?

Answer:

The criterion established under section 4.6.1 letter h) shall be deemed fulfilled only by reference to the budgets managed by the Romanian authorities, so that a foreign legal person that is not fiscally registered in Romania does not have to fulfil this condition.

9. Question:

Is the condition provided under 5.5.5 letter c) "each bidder should be assigned consecutive radio channels as part of the awarded frequency sub-bands" implicitly fulfilled in all cases in the assignment round? Or may there be instances where a winning bidder can be assigned unconsecutive radio channels in one band? If the answer is affirmative, please indicate under which conditions one can be assigned unconsecutive radio channels.

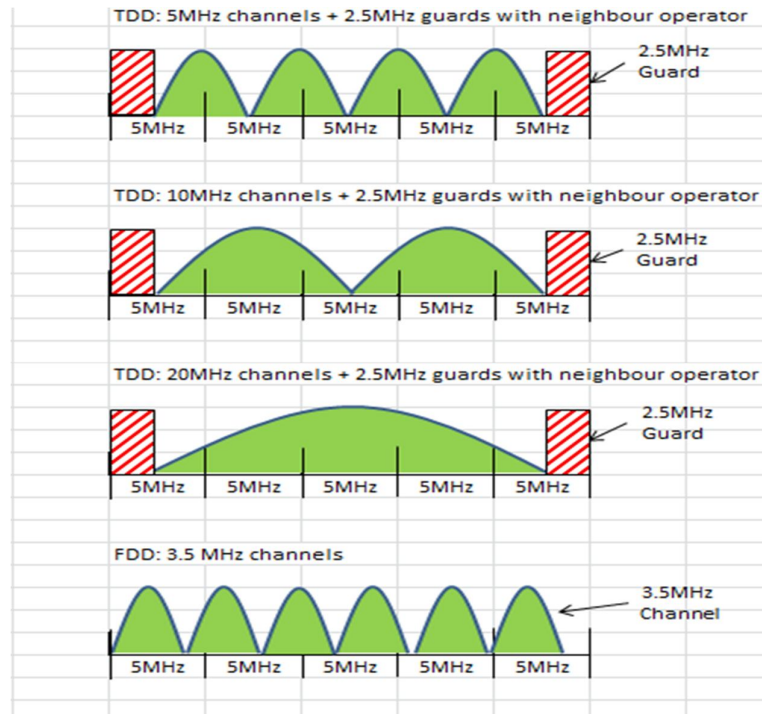
Answer:

In the above-mentioned situation, the Authority will pursue that the general rule be observed, i.e. all operators should obtain consecutive radio channels in each of the two radio frequency bands.

If, following the auction, there will be no assignment combinations in the 3600-3800 MHz band so that all of the winning operators could hold consecutive frequency sub-bands in this band, the Authority will auction out exclusively the assignment combinations where only one of the operators could acquire frequency sub-bands assigned non-consecutively, per combination.

10. Question:

Please clarify the interpretation of the provisions of 2.1 letters a) and b) of the Terms of Reference, by reference to the one-but-the last paragraph of section 3.3.2 in the said document, regarding the obligation to actually use the radio spectrum. In the same context, please confirm that managing an assigned 25 MHz frequency sub-band, in the (non-exhaustive) modalities illustrated below (by 5 MHz, 10 MHz and 20 MHz channels), is allowed under the new licence.



Answer:

First, please be informed that, under the new licence, an operator is allowed to implement the management modalities presented (as examples) for an assigned 25 MHz band, since they observe the provisions of letters a) and b) of section 2.1 in the Terms of Reference.

As mentioned under items 1 and 2 above, ANCOM has searched to support the operators that are to hold rights of use in the 3400-3800 MHz band, by providing letter b) in section 2.1 of the Terms of Reference, thus allowing flexibility in managing the frequency sub-bands to be assigned to the respective operators, while observing the conditions under letter a) et b) of the above-mentioned section.

Furthermore, as already specified under item 1, the base stations using central frequencies (and the associated bandwidths) of channels taken over from the channel arrangement in force up to 31.XII.2015 in the 3.4-3.6 GHz band, respectively in the 3.6-3.8 GHz band, will not be considered in checking compliance with the obligation to effectively use the radio frequencies.

Base stations using other central frequencies (and the associated bandwidths) of channels other than those in the channel arrangement valid up to 31.XII.2015 in the 3.4-3.6 GHz band, respectively in the 3.6-3.8 GHz bands, will be taken into account in checking compliance with the obligation to effectively use the radio frequencies, if the conditions under a) and b) of section 2.1 in the Terms of Reference are fulfilled.

If the base stations fulfil the conditions mentioned in the paragraph above, we will deem – taking into account the principle of technological neutrality – that these base stations observe the new channel arrangements valid from 01.I.2016.

11. Question:

Regarding the power of attorney provided under section 4.5.2 letter a) of the Terms of Reference, " the authenticated power of attorney granted to at most three natural persons acting on behalf of the candidate, which is to certify that these persons are authorised to engage the candidate during the selection procedure and is to show the limits of the respective power of attorney granted to each of these persons (...)", please specify the kind of limits the above text refers to.

Answer:

The limits of a power of attorney may be decided by the respective representative. Where limits are laid down in the power of attorney, these must be clearly and unambiguously stated, and shall not restrict the representative (holding the power of attorney) in making decisions within the selection procedure, including as regards the submission of financial offers or any other issues that concern the selection procedure in general.

On the other hand, the text of section 4.5.2 letter a) in the Terms of Reference provides on a power of attorney granted to maximum three people, a situation in which the power of attorney cannot contain any limitations regarding the three representatives jointly signing offers.

12. Question:

Please specify whether at the beginning of each additional primary round, each bidder has an eligibility status equal to that of the initial bid (as provided in the third paragraph of section 4.7)".

Answer:

Yes, the maximum number of frequency blocks for which an offer may be submitted and rights of use may be obtained in the auction stage (including primary rounds, additional primary round/rounds and assignment rounds) is limited by the total number of eligibility points.

Within the additional primary round/rounds, the provisions of the third paragraph in section 4.7.2 of the Terms of Reference are also applicable, i.e. *„All the bidders have access in the additional primary round/rounds, **irrespective of their eligibility available at the completion of the primary rounds** and irrespective whether they have obtained frequency blocks in the primary rounds or not“.*

13. Question:

Regarding section 4.4.4 letter c) of the Terms of Reference, please note that section 4.9.3 does not exist in the Terms of Reference, so kindly clarify provisions it refers to.

Answer:

This is a material error, reference should be made to section 4.8.3 of the Terms of Reference.

14. Question:

Regarding the second paragraph of section 4.7.3 in the Terms of Reference, please confirm that, in accordance with section 5.5.4 of the Terms of Reference, each bidder has the right to submit an offer each assignment option, i.e. several offers, not a single one.

Answer:

Yes, according to paragraph 3 of section 5.5.4 of the Terms of Reference "[...] Each bidder may submit one assignment bid **for each option** listed in its bid form, indicating the amount it is willing to pay in order to acquire the respective assignment option."

15. Question:

Please specify whether the announcement regarding the organisation of a new round is to be communicated during the break – i.e. a round will start immediately after the break – or the announcement will be made after the break – i.e. the interval between the rounds will consist of the break and the time interval required for making the announcement (e.g.: minimum 30 minutes break + 15 minutes announcement).

Answer:

A new round will begin as soon as the break is over, the announcement on the organisation of the new round being communicated at the end of the previous round, not during nor after the break. Thus, the bidders will know – at the end of each round – the break duration and the starting time of next round.

16. Question:

Please confirm that during the additional primary round the bid price will start from the price applied in the last primary round where excess demand was registered and not from the price of the last primary round.

Answer:

No. according to letter a) of the second paragraph in section 5.4.3 of the Terms of Reference, the bid price in the additional primary round cannot be lower than the prices reached in the last primary round, for the categories in which excess demand was registered during the primary rounds.

A different approach could have driven to putting a person having gained rights in the last primary round at a disadvantage.

17. Question:

Please confirm the fact that priority shall be granted to the condition under letter c) of section 5.4.5 in the Terms of Reference as to the criterion regarding the highest value of all the possible combinations in section 5.4.5 in the Terms of Reference.

Answer:

Yes. During the additional round, the Commission will establish the winning combination based on the cumulative conditions provided in paragraph 2 of section 5.4.5 in the Terms of Reference, ANCOM intending, mainly, to award all the rights of use.

18. Question:

Please communicate whether the assignment rounds for each of the two frequency categories will take place on the same day or on separate days.

Answer:

Assignment rounds will be scheduled taking into account the rules and the time interval established according to section 5.5.1 in the Terms of Reference.

19. Question:

Please specify how much time in advance of the start of the primary rounds will the list of available options be communicated to the bidders. We mention the fact that for analysing these options and taking a bidding decision, a 2-working day period is required.

Answer:

ANCOM agrees the suggestion received and will grant a term of at least 2 working days for the primary/additional primary rounds winners' analysing the assignment options prior to the assignment round.

20. Question:

Please confirm the fact that ANCOM will send each bidder a list of options that fulfills the following conditions:

- *each option will include consecutive radio channels;*
- *the list of options for each bidder will include all the possible choices of consecutive blocks, so that - for each option - the number of blocks should be equal to the number of blocks gained by the respective bidder in the relevant band, while the consecutive assignment of blocks for the respective bidder allows the consecutive assignment of blocks gained by the rest of the bidders.*

Answer:

Yes, except for the situation under item 9 of this document.

21. Question:

Please confirm ANCOM's position for situations in which the consecutive assignment of blocks will not be possible.

Answer:

See answer at item 9 of this document.

22. Question:

We hereby request that the last paragraph in Annex 4 should be accepted in the following format: "The law courts in Romania are competent to settle any dispute raised in relation to this letter of guarantee".

Answer:

The respondent's proposal is in line with the provisions of section 4.4 in the Terms of Reference, therefore the two-but-the-last and the one-but-the-last paragraph in Annex 4 to the Terms of Reference will be deemed to regard only the letter of bank guarantee.