Orange Mobile objections and Request for Reconsideration of the TRC Market Review Decision on the Mobile Market

1 Introduction

1. In July 2019, TRC launched the public consultation on the Review of Mobile Markets in Jordan. Orange Mobile submitted its responses to the consultation on 31 December 2019. On 29 January 2020, a meeting was held at TRC where representatives of Orange Mobile explained its views on the proposed regulatory decisions. On 20 February 2020, Orange Mobile submitted its comments on the responses provided by other operators.

2. On 30 September 2020, TRC issued its Regulatory Decision on the Mobile Markets Review which has been notified to the Licensees on 7 October 2020. This was accompanied by the Explanatory Memorandum, where TRC addressed the comments submitted during the consultation.

3. In the Regulatory Decision and the Explanatory Memorandum, TRC upheld its earlier conclusions on the mobile market as set out in the consultation. <u>We are disappointed to see that the arguments and evidence submitted by Orange Mobile during the consultation have not been sufficiently considered and addressed.</u> With respect to our major concerns and comments included in the introduction of the responses, and which TRC addresses in Annex 1, we note that TRC did not address most of them. TRC just selected a few comments and addressed them on a very high level.

4. According to Article (17) of the Rule Making Instructions, Orange Mobile hereby submit its Request for Reconsideration to the "Regulatory Decision on the Mobile Markets Review" issued pursuant to TRC's Board of Commissioners decision number (6-12/2020) dated (30/9/2020), which has been published on TRC website.

5. In this document we therefore explain again our position on selected issues raised during the consultation. We hope that after re-examining the arguments and evidence, TRC will reconsider its Regulatory Decision on the Mobile Markets Review hereinafter referred to as "Regulatory Decision".

6. TRC stated in the Regulatory Decision that it will issue a time plan for the implementation of the remedies in the Regulatory Decision. Without prejudice to this objection and Request for Reconsideration, this time plan should be prepared in consultation with the concerned Licensees.

7. For the avoidance of doubt, restricting our request for reconsideration (objection) to the selected issues stated in the Regulatory Decision does not imply that Orange Mobile accepts the remaining aspects of the Regulatory Decision. We fully uphold our positions as expressed in our response to the consultation.

8. In this objection, we are requesting to reconsider the following issues stated in the Regulatory Decision:

   III. Definition OF RELEVANT MARKETS

   1. A retail mobile market consisting of a cluster of voice and data-related services, which includes the provision of access; national, international and roaming calls; SMS and other value-added services, and has the following further characteristics:

   a. The relevant product market comprises both pre-paid and post-paid services; both business and residential services; and all of the technologies used for the provision of mobile services; and

   b. The relevant geographic market for all of the above product markets is national in scope, covering the whole of Jordan.

   IV. SUSCEPTIBILITY OF THE RELEVANT MARKETS TO EX ANTE REGULATION

   V. DESIGNATION OF DOMINANT LICENSEES

   VI. EX ANTE REGULATION TO REMEDY THE IDENTIFIED COMPETITION PROBLEMS:

   a. Wholesale SMS Termination Markets

   b. Removal of ex ante remedies

   c. Transitional provisions and implementation

   d. Responses of TRC stated in the Explanatory Memorandum to the Regulatory Decision on the Market Review of Mobile Markets.

2 Relevant product and geographic market definitions for retail mobile services

2.1 Geographic market definition

9. The White Paper and Competition Safeguard Instructions state that the market should be considered national unless there is evidence of different competitive

conditions and a lack of a common pricing constraint. However, TRC seems to treat this presumption as an excuse not to conduct any research into the existence of local markets, despite clear indications of differing competitive conditions.

10. In the consultation, TRC concludes that competitive conditions do not differ significantly between governorates, and it upholds this conclusion in its final decision.[1] However, TRC does not mention what competition conditions it examined to arrive at this conclusion. The White Paper states that to assess the similarity of competitive condition, the following indicators should be used: [2]

- The number of principal operators and their development (excluding niche operators with no impact on competitive conditions).
- The leading operators' market shares and their evolution.
- Barriers to entry and their development (including evidence of new entry and replication of network infrastructure); and
- Pricing and product strategies (differences in pricing and marketing).

11. In the consultation document, TRC does not show evidence on any of these criteria except for the fact that all MNOs operate based on national license.

12. In the responses to the consultation, Orange Mobile pointed to indications that two of the four criteria specified by the White Paper may be satisfied. This includes in particular (i) substantial differences of market shares across governorates, with Zain's market share being above 60% in Amman and (ii) the price differentiation which all mobile operators apply across governorates. In its responses to Orange Mobile's comments in the Explanatory Memorandum, TRC does not dispute this evidence, but seems to reject the relevance of market shares and price differences for the assessment of geographic markets, <u>contradicting both the White Paper and the international regulatory practice based on following</u>:

- First, TRC states that the market shares are not evidence of "clear and stable boundaries" but "may be due to factors such as different network coverage in each region, different local distribution and sales arrangements or other factors, which may all evolve over time". However, the White Paper clearly states that differences in market shares are to be seen as evidence of differing competitive conditions, and should not be seen as evidence of "clear and stable boundaries". Moreover, the factors mentioned by TRC as explaining the differences in market shares – such as different network coverage and differences in

1 Public Consultation: Review of Mobile Markets in Jordan, page 36; Explanatory Memorandum to the Regulatory Decision on the Market Review of Mobile Markets, page 6-7.

2 White Paper on Market Review Process, page 23.

distribution and sales strategy – are in themselves indicators of differing competitive conditions, as also stated in the White Paper which sees "differences in marketing" and "replication of network infrastructure" as indicators of differences in competitive conditions.

- Second, TRC questions the relevance of price differences by stating that if competitive conditions differed across governorates, prices in Amman would be lowest due to most vigorous competition, while they are actually higher than elsewhere. The statement on competition being most vigorous in Amman is surprising as it contradicts the TRC conclusion that the competitive conditions do not differ across the country, and is moreover not supported by any evidence. To the contrary, the fact that Zain's market share in Amman is above 60% (which TRC did not dispute) in combination with higher prices is in itself an indication that competition in Amman may be less vigorous than in the rest of the country. In the Explanatory Memorandum, TRC simply disregards this evidence without providing any arguments or evidence to support its own (contradicting) conclusions regarding competition in Amman being stronger than (or the same as) elsewhere.

13. Rejecting evidence on differing competitive conditions, TRC promotes "clear and stable boundaries over time" to the chief criterion in defining geographic markets. However, TRC misunderstands the role of this condition in the definition of geographic markets which, as made clear both by the White Paper and the EC Guidelines which TRC refers to, is chiefly practical in nature. The White Paper states that "the geographic unit should be transparent and stable over the lifetime of the market review", and that one option is to use geographic units based on political or administrative boundaries, where boundaries are both transparent and stable.

14. The misunderstanding becomes clear when one notes that if the requirement of "clear and stable boundaries" are applied to the boundaries of the relevant markets (rather than a unit of analysis chosen for practical reasons), then it would hardly ever be possible to define any market. The boundaries of any market, whether this refers to product or geographic markets, are never entirely clear-cut, nor stable. In fact, the very reason why regulators are required to conduct market analyses periodically is that the market boundaries may change over time.

15. In conclusion, we maintain our position that TRC does not substantiate its geographic market definition in accordance with the methodology as set out in the White Paper, and with the international regulatory practice. While the White Paper does contain a presumption of a national markets, some of the criteria specified in the White Paper in favour of defining sub-national markets are satisfied. This should have prompted TRC to conduct a proper analysis based on market data, which TRC did not perform. We therefore request TRC again to conduct such an analysis.

3 One market for post-paid and prepaid

16. In its consultation, the TRC concludes that pre-paid and post-paid should be in the same market based on the following:

    - Switching costs are limited, because post-paid customers may switch to pre-paid when their initial contract expires;
    - Pre-paid customers may benefit from handset subsidies when switching to post-paid.
    - There is supply side substitution.

17. In the responses to the consultation, Orange Mobile has argued that the conclusion is not supported by sufficient research and did not take into account the following evidence that may indicate an alternative market definition:

    - Post-paid subscriptions are clearly more expensive than pre-paid subscriptions. According to data included in the draft decision, post-paid subscriptions constitute about 15% of all subscriptions, but generate 32% of data revenues.[3] This is a clear indication that post-paid customers are willing to pay a premium for the service. The price differences are sufficiently large to make it doubtful whether a sufficient number would be willing to switch from pre- to post-paid in response to a 5-10% price increase in pre-paid.
    - Competitive conditions in the post-paid and pre-paid segment differ, as indicated by the variation in market shares of operators in the two segments. In Q3 2016, Zain's market share in post-paid subscriptions was 65%, compared to 33% in pre-paid.[4]
    - The claim that there is supply side substitution is insufficiently substantiated. There are indications of a lack of supply side substitution.
        - Zain has a 60% market share in the post-paid segment, and;
        - Umniah and Orange Mobile face barriers, such as the club effect caused by Zain on-net/off-net differentiation and a lack of mobile number portability to increase their share in that segment.

18. With regard to the demand side substitution, the TRC "maintains that a customer of a pre-paid service could readily switch to a post-paid service, and vice versa, in response to a Small Significant Non-transitory Increase (SSNIP) in the price of the

3 Public Consultation: Review of Mobile Markets in Jordan, Exhibit II.11.

4 TRC Quarterly reports.

customer's existing service." However, the question is not whether a customer could switch, but whether it would be willing to.

19. TRC does not provide any evidence that the customer would be indeed willing to switch in response to such a price increase. The TRC claims that no evidence of a lack of demand- or supply side substitution was found, nor provided by Orange Mobile. However, it is TRC's task to conduct market research and supply evidence for its conclusions. Orange Mobile has no power to collect data from Zain or Umniah. In the consultation, we have shown facts that are strong indications that there may be different pre-paid and post-paid markets. These facts should have prompted TRC to conduct a serious analysis into this issue, which it did not perform.

20. In the consultation responses, Orange Mobile has also addressed the following indications that there is a potential lack of supply side substation:

- In Q3 2016, Zain's market share in post-paid subscriptions was 65%, compared to 33% in pre-paid. This is a clear asymmetry between the pre- and post-paid market;

- Umniah and Orange Mobile face barriers, such as the club effect caused by Zain on-net/off-net differentiation and a lack of mobile number portability to increase their share in that segment.

21. In the Explanatory Memorandum, the TRC points out that "the underlying network and service provision for pre-paid and post-paid services are not materially different from a technical standpoint". The TRC did not respond on the indications that were brought forward by Orange Mobile. The underlying technical network does not relate to the hazard of on-net/off-net differentiation and a lack of mobile number portability, nor does it explain the asymmetry between the segments.

22. Finally, TRC refers to the regulatory practice in other countries. However, is not a sufficient argument as the market analysis should be based on the specific market conditions in Jordan.

23. In conclusion, we maintain our position that TRC has did not take all relevant factors into account in determining the relevant markets. TRC claims that there is no evidence of a lack of demand- and/or supply side substation, while Orange Mobile has provided evidence for both demand- and supply side substation. TRC has not refuted the evidence in Orange Mobile's Consultation Response, nor explained how this evidence is taken into account in determining the relevant markets. Orange Mobile therefore concludes that TRC fell short in their research to substantiate their definitions of the relevant markets.

4 Mobile Markets are susceptible to ex-ante regulations and SMP designation

4.1 Introduction

24. In its 2010 decision, TRC concluded that the wholesale market for mobile access and origination ("MACO") is susceptible to regulation and Zain has an SMP in the wholesale MACO market (Mobile Access and Call Origination) for the following reasons:[5]

- Zain's high market shares. TRC considered that market shares for the number of subscribers, revenues, traffic etc. Market shares were high, generally above 50%.
- Zain is the largest operator, enjoying economies of scale.
- Lack of mobile number portability ("MNP").
- Excessive profits compared to regulatory WACC.
- Network effects caused by on-net/off-net differentiation.
- Zain is a member of an international group, enabling it to offer attractive terms for international calls.
- Lack of competitive MVNO offers.

25. In the consultation of its new decisions, TRC concludes that the retail mobile market and the MACO market are not susceptible to regulation, because:

- There are three mobile operators established in the market[6];
- Prices are competitive[7];
- On most measures of market shares, mobile operators are close competitors.[8]

5 Regulatory Decision on the Mobile Markets Review, 21 December 2010. Explanatory Memorandum to the Regulatory Decision on the Mobile Markets Review, 21 December 2010.

6 Public Consultation: Review of Mobile Markets in Jordan, page 55.

7 Public Consultation: Review of Mobile Markets in Jordan, page 55.

8 Public Consultation: Review of Mobile Markets in Jordan, page 57.

26. In the consultation, TRC does not analyse all the other factors that made it conclude in 2010 that Zain has SMP, nor does it explain what changes occurred in the market to make it reach different conclusions. This is surprising, as both decisions should be based on the same methodological premises, and thus similar market conditions should lead to similar conclusions.

27. In response to the consultation, Orange Mobile provided an analysis of a number of factors that are relevant for the SMP assessment. The analysis has shown that the competitive situation in the mobile market did not improve since 2010. In particular, Orange Mobile pointed to:

- Zain's much higher market share that has not decreased since 2010;
- Increasing importance of mobile broadband, where Zain's market share is even higher, with market shares above 60% in most profitable market segments (postpaid and Amman);
- Lack of mobile number portability due to Zain reluctance to implement it, which limits switching especially for post-paid consumers and perpetuating Zain's advantage in that segment;
- Zain's largest spectrum holding (57 MHz vs. 47.5 MHZ held by Orange Mobile Jordan and 35 MHz held by Umniah), highest network coverage and highest brand recognition;
- New taxes and fees introduced in the mobile sector since 2010, which disproportionally affect smaller operators;
- The club effect, due to the on-net/off-net price discrimination, that favours the largest operator as long as the termination rates are above the marginal cost of termination;
- Decreasing competitive pressure from fixed telephony.

28. In its final decision, TRC upheld its conclusion that the mobile market is competitive, and that Zain has no SMP. In response to Orange Mobile's arguments, TRC stated that:

- The Jordanian market is less concentrated than other markets with three mobile operators, where regulators generally do not find SMP;
- According to TRC's recent information, the revenue-based market share of Zain decreased in 2019 and is below 50%, where Orange Mobile and Umniah have increased their revenue-based market share in 2019;
- The off-net/on-net pricing issue is less relevant given that termination rates are based on costs;

- A CS/CPS remedy in the mobile market would be disproportionate;
- Low prices of mobile services are indicative of strong competition.

4.2 Market shares

29. TRC did admit that, contrary to its statement from the consultation, Zain's market share in 2018 was substantially higher (about 10% points) than that of the second operator. [9] It also admitted that Zain's revenue market share (which is the most appropriate market share measure for assessing SMP according to Competition Safeguard Instructions) was higher than 50% until (and including) 2018.[10] TRC also remarked that "the market shares estimated and published by TRC [*which show the 10% difference – comment Orange Mobile*] are based on a different methodology compared to that referred to in the Market Review".

30. In the consultation, we have pointed out several other inconsistencies in the TRC data, to which TRC's reply is sometimes that this is due to different methodologies, and sometimes it simply states that the data used for analysis is correct, but not providing any explanation.[11] In some cases, figures are estimated as Zain or Umniah did not provide data. This casts doubt on the data used for analysis.

31. TRC did not explain how the different methodologies used for data collection differ and why the figures it used for the market review are most suitable for this analysis than other figures it collects. Given that Zain's market share in the mobile in the market is close to 50%, using an inappropriate methodology can impact the conclusion on SMP. Therefore, TRC should explain the methodology behind its data collection for different purposes, explain why the methodology it used for the market review is most suitable for this purpose, and present a robustness analysis using alternative methodologies.

32. Moreover, it is not clear where TRC included stand-alone mobile subscriptions in its analysis. In response to Orange Mobile's comment, TRC states that it analysed substitution between fixed and mobile broadband.[12] However, the question is whether TRC included stand-alone mobile broadband in the calculation of market shares, and in which market.

[9] Explanatory Memorandum, page 29.

[10] Explanatory Memorandum, page 34

[11] Page 29, comment 2. Page 30, last comment. Page 31, last comment. Page 34, third comment.

[12] Explanatory Memorandum, page 36, comment 3.

33. In any case, the fact that Zain's market share in revenue was above 50% until 2018, and the substantial 10% difference in subscriber share as compared to the second largest operator are clear indicators that Zain's advantage in the mobile market, and thereby its market power, did not decrease since 2010, when TRC considered it to have SMP. TRC has not examined the same SMP factors as in 2010 and did not show that the market conditions changed to justify the different conclusions. While TRC states that mobile markets with three operators are rarely regulated, we also point out to the fact that in the European merger practice, four-to-three mergers in mobile telecoms have often been blocked by the European Commission. This shows that the mobile markets with three operators are regulated.

34. In response to question 5 of the explanatory Memorandum, TRC states that:[13]

> *The TRC disagrees with Orange Mobile's views on the alleged lack of effective competition on the mobile market in Jordan. As also shown in the statistics provided by Zain, the Jordanian mobile market is actually less concentrated than most three-operators markets – whose regulators do not, generally, find these markets to be susceptible to ex ante competition.*

35. TRC depended on the statistics included in the White Paper prepared for Zain by SPC Network and submitted to the TRC in 2017, and ignored the following Orange Mobile arguments against the said statistics in its response to Zain comments, which are reiterated below:[14]

- The number of firms active in a market is only one of indicators of competition, and of a rather minor importance. Regulators tend to rely more on market shares in combination with other factors such as revenue market share, barriers to entry and competitive advantages enjoyed by the dominant firm.
- Zain's states that according to TRC it gained market share in 2015, but lost in 2017. However, in 2017 the TRC changed its methodology of calculating number of active subscriber. That means the figures for 2016 and 2017 are not comparable and cannot be used to draw conclusions on changes in market shares. As TRC states, Zain's market share in 2018 increased. That means that Zain's market share increased at least in 2015, 2016 and 2018, while the growth figure for 2017 is not available.[15]

13 Explanatory Memorandum, page 12.

14 Comments on Zain's responses to the Public Consultation on Mobile Markets, page: 2.

15 TRC, Public Consultation: Review of Mobile Markets in Jordan Mobile consultation, July 2019, page 18.

- We doubt whether the market share of Zain has substantially decreased over the past years. A recent IPSOS survey shows a stable and sometimes increasing market share.[16]
- According to the newest TRC figures for Q1 2019, the largest operator's share in mobile subscriptions is 44.6%. This is much higher than the market share presented by Zain in Figure 1 of Zain response to mobile market review[17], and would place Jordan among countries with one of the highest market shares of the leading operator, between Austria and Greece.

36. Orange Mobile strongly believes that the white paper provided by SPC Network to Zain is not based on accurate data, and TRC should not rely on such study provided to Zain without investigating the data source and methodology used of this study.

4.3 Factors relevant for the assessment of SMP

37. In response to question 5 of the explanatory Memorandum, TRC states that:[18]

> *According to the TRC's recent information, both Orange Mobile and Umniah have increased their revenue-based market share in 2019, compared to Zain, whose corresponding share has decreased below 50%.*

38. TRC limited its conclusion –market for retail mobile communications is not susceptible to ex ante regulation- to a recent TRC's figures submitted in 2020, where in the consultation which was issued in July 2019, TRC reached the same conclusion of no SMP in the mobile retail market for years 2015-2018 in spite of no data was available regarding the MNOs revenues for 2019! Therefore, Orange Mobile strongly believes that TRC should thoroughly address the arguments and evidence submitted by Orange Mobile to the consultation document on this critical issue.

39. Moreover, a market share below 50% does not necessarily mean that Zain does not have SMP. Article 7 of the Competition Safeguard Instructions state that TRC shall apply a test based upon specified percentage thresholds of market share. These percentages are further specified in article 8/b/2 of the said instructions which states that:

> *A Licensee with a market share of at least 25% in a relevant market but less than 50% of that market shall be subject to classification as dominant in that*

16 Comments on Zain's responses to the Public Consultation on Mobile Markets, page: 3.

17 Zain Response to TRC Mobile Markets Review, page 5.

18 Explanatory Memorandum, page 12.

market if consideration of evidence establishes that the Licensee has the ability to control and affect the activity of the market, based on factors including, but not necessarily limited to, the Impact Factors listed in subparagraph C of this Article.

40. The factors listed by Competition Safeguard Instructions relevant for the assessment whether an operator has SMP are:

    1) Its size, measured by revenue, number of subscribers, and network capacity as compared to the size of other competitors in the market,

    2) Its control of essential facilities, meaning facilities that competitors rely upon for participating in the relevant market,

    3) Network effects, including the geographic availability of its services in the relevant market,

    4) Its conduct in the market with respect to competitors and customers, including end users,

    5) Its technological advantages or disadvantages with respect to competitors in the marketplace,

    6) Countervailing power, if any, of competitors and customers, including end users,

    7) Access to capital markets / financial resources compared to such access by competitors,

    8) Bundling of products or services and the effect of such bundling on competition in the market

    9) Economies of scale and/or scope, including relationships with affiliated Licensees,

    10) Vertical integration, including relationships with affiliated licensees,

    11) Characteristics of its distribution network,

    12) Absence or presence of competitors and potential competition in the market,

    13) Barriers to expansion in the market, and

    14) Barriers to entry in the market.

41. As also described in the consultation and summarised above, all the above conditions, except condition 12 (absence of competitors) are satisfied at least to some extent with respect to Zain.

42. In addition to the above, TRC should consider the difference in profitability between Zain and other operators over the last years, as shown in Figure 4.4 of Orange Mobile responses to the consultation, is also an indication of Zain's competitive advantage. While Zain is making significant and excessive profits, other MNO's have failed to make a profit or generate a return that would cover the cost of capital. This partly reflects Zain's dominant position in the most profitable and fastest growing mobile market segments (Amman, postpaid, broadband). Not designating Zain as the SMP operator and the lack of ex ante regulation will perpetuate and strengthen Zain's dominant position over the next regulatory period.

43. Regarding the club effect, we do not dispute that lowering of termination rates makes it less severe, but that does not mean that it disappears and has no effect on the market any more. As the long run incremental cost is typically higher than the short-term marginal cost, Zain would still have incentives to set on-net retail prices below the MTR. This applies when they result in a positive contribution towards the costs that are fixed in the short run (even though they may be variable in the long run). Therefore, the club effect still exists and contributes to Zain's market power.

4.4 The impact of other regulatory issues

44. In the responses to the consultation, Orange Mobile pointed to several regulatory problems which have an adverse effect on competition in the mobile market, such as the lack of mobile number portability (MNP), high spectrum fees and taxes. In response to this, TRC states the following: [19]

> *The TRC notes that suggestions of actions it could take are outside the scope of the market review. For example, while the introduction of mobile network portability (MNP) could indeed contribute to competition on the mobile retail market, this would normally be a symmetric remedy, applicable to all mobile network operators' regardless of their (actual or alleged) dominant position. Issues to do with taxation and spectrum fees are also broader concerns than those dealt with in the market review process.*

45. Regarding MNP, it is well known to TRC that the instructions for implementing MNP are in place since 2005. The 15-year delay in implementation is due to Zain's reluctance. As TRC itself states, MNP facilitates switching, and therefore its absence constitutes a barrier to entry and expansion for smaller operators. This applies especially to those mobile markets where Zain is dominant. In these markets, Zain's market share is 60%.

[19] Explanatory Memorandum, page 13.

46. It is worth to mention that in previous TRC mobile market review decision, TRC considered the implementation of MNP as one of the conditions taken into account in the implementation of ex ante remedies in the MACO market.[20]

> *In this respect, due consideration will be taken of the developments of competition in the provision of international calls, **the impact of Mobile Number Portability (MNP)** when introduced, as well as the competitive dynamics of the mobile sector relative to the costs of implementing consolidated billing. [Emphasis added]*

47. As for taxes and spectrum fees, this factor should be considered in the light of Zain's ability to absorb such high level of taxation and spectrum fees, which is not the case for other operators. They should therefore be considered as barrier to expansion, and increasing Zain's SMP.

48. In the light of the above, Orange Mobile requests TRC to re-examine its analysis, in particular to review the criteria on the basis of which it found Zain dominant in 2010, and either align the conclusions or justify the change by pointing to the changed market conditions. Orange Mobile considers that just as in 2010, Zain has SMP and should be subject to ex ante regulation, in particular the prohibition of off-net/on-net price discrimination.

5 SMS designations on the market of wholesale mobile SMS termination and imposed ex ante remedies

49. In 2010, TRC concluded that the market for wholesale SMS termination was not susceptible to ex-ante regulation as the Bill-and-Keep regime minimised any potential abuse of market power.

50. In the 2019 consultation, TRC states that the Bill-and-Keep regime is based on voluntary agreements between operators, and that, according to its information, at least one operator wants to dissolve the agreement and raise SMS termination prices. Therefore, it is possible that the bill-and-keep regime will fold, and operators may raise SMS termination prices above the competitive level. As a remedy, TRC proposed a regulation of SMS termination tariffs based on the LRIC model.

51. In its responses to the consultation, Orange Mobile disagreed with the above remedies proposed by the TRC. We argued that allowing the Bill-and-Keep regime

[20] TRC Market Review Decision on Mobile Markets 2010, Section 2.4.

to collapse and replacing it with LRIC-based regulation will have a number of negative consequences. In particular, increasing the cost of SMS-termination above zero would allow Zain to apply on-net/off-net discrimination on SMS in addition to voice services, exacerbating the club effect.

52. In addition, Orange Mobile pointed to significant disruptive effects of this change in regulation:

- The current offers in the market include free bundles of SMSs, where the increased cost of SMS termination **will put the operators in a situation where they have to increase their retail prices for all offers that include SMS bundle. Orange Mobile surprised from TRC position of not considering the impact of this decision on the mobile customers under its role by the telecom law to protect the beneficiaries' interest.**

- Setting SMS termination rates above zero will have a highly imbalanced impact between operators, especially when this rate is above marginal costs, due to the "club effect". As a result, Zain will have an extra competitive advantage, which will strengthen Zain's position and weaken Orange Mobile's position. This could lead to less competition in the SMS retail market.

- Contracts between the mobile operators with Bulk SMS providers are based on Bill-and-Keep termination rates. Raising these rates will make it necessary to terminate these contracts, damaging the market and leading to legal disputes. It will disrupt the bulk SMS market and may eventually lead to its end, as all entities (banks, advertisers, shops, etc.) move away from SMS to digital media (apps notifications, social media, etc.).

- Cost regulation leads to higher regulatory and administrative costs than Bill-and-Keep.

53. Orange Mobile's position expressed in the consultation is that for these reasons, rather than introducing cost-based regulation leading to the above mentioned negative effects, TRC should secure the future existence of the Bill-and-Keep and prevent operators from withdrawing from this regime.

54. In the Explanatory Memorandum, TRC maintained its position from the consultation, but did not address the Orange Mobile comments included in its response to the consultations.[21] According to TRC, the Bill-and-Keep regime is voluntary and at least one operator wants to withdraw, which makes it necessary to introduce regulation. TRC recognises that the new regulation will change the market

[21] In particular, Orange Mobile responses to the consultation on the mobile markets, Section 4.2, paragraphs 97-102.

dynamics, but in its view, the proposed regulation "will address any risks of a distortion of competition". In particular, TRC states that the Bill-and-Keep system also has risks of distortion, such as "a refusal to terminate SMS generated on another network or its discriminatory treatment". We, however, do not see the hazard of this discriminatory treatment, as this is already regulated by article 29, 29 biz, and article 57 of the Interconnection Instructions and the licence agreements. To the contrary, the decision will lead to a distortion of competition by increasing Zain's dominant position, which, given the lack of regulatory intervention, it will be able to maintain over the next regulatory period.

55. The decision is a *de facto* approval of Zain's withdrawal from the Bill-and-Keep agreement and of an increase in SMS termination rates. To our knowledge, increasing termination rates is unusual in the international regulatory practice.

56. The increase will have a highly asymmetric impact on the operators in the market, increasing Zain's advantage. Orange Mobile will be highly impacted due to the fact that the majority of A2P SMS are generated by Orange Mobile and terminated on other MNOs network. On the other hand, Zain also has contracts with bulk SMS providers and there are no barriers that impede it from securing additional contracts from bulk A2P SMS and to generate higher traffic. <u>Allowing Zain to withdraw from Bill-and-Keep will favour Zain and affect Orange Mobile revenues negatively.</u>

57. TRC should consider that the voluntary agreement between the operators create a base of effective competition on this market, and should consider embedding Bill-and-Keep in regulation, or at least exert a regulatory pressure on the maintenance of this regime. No cost-benefit analysis was conducted to show that cost-based regulation is a better solution to the potential distortions of competition than maintaining (or enforcing) Bill-and-Keep.

58. <u>By not assessing the impact of this decision, TRC violates article 19 of the ICT policy, which states</u>:

> *With respect to all decisions that are likely to have a material impact on the market, Government continues to require that the Commission engages in a transparent and open public consultation process. In this process, consultations and submissions made to the Commission will be made publicly available so that others may make their own submissions before decisions are announced. <u>The Commission will publish "reasoned decisions" for all decisions that are likely to have a material impact on the market, setting out not only why the decision was made but also providing the full objective legal and necessary analysis that underlies that conclusion, an assessment of the impact on affected parties of the resulting regulatory burdens and to observe the gradual application of these decisions</u>".*

59. TRC should carefully study such impact and the consequences of its decision on the operators, bulk providers and the end users, who will face higher prices.

60. Regarding the club effect, TRC's view is that the on-net/off-net discrimination and club effect will disappear with cost regulation as it happens with voice. We disagree with this view. The effect of regulation will also be very different for SMS than it was for voice. LRIC-based regulation of voice termination rates leads to their *decrease*, which diminishes incentives to discriminate. The LRIC-based regulation of SMS termination will *increase* the rates as compared to the current situation, leading not to a disappearance of the club effect, but to a strengthening.

61. As long as termination rates are above the marginal cost, there are inefficiencies and a scope for a club effect. This effect has been recognised in the literature. Harbord and Pagnozzi (2008) review the LRIC model implemented by the UK telecom regulator Ofcom. They argue that "the regulation of pence per minute (ppm) mobile termination charges should in principle be based on marginal costs, and not on the fully-allocated costs estimated by Ofcom's LRIC model".[22] Their view is that implementing the LRIC method might lead to an overestimation of the marginal termination costs, which in turn may lead to on/off network discrimination. True marginal costs of termination are probably close to zero.[23] Therefore, setting the termination rates at zero is most efficient from the economic point of view as it sets the rates at approximately the marginal cost, while the administrative and regulatory costs of cost-based regulation are avoided at the same time.

62. For above reason, it is still Orange Mobile's view that the remedies proposed by TRC do not adequately address the problems in the mobile markets. In particular, instead of addressing the problem posed by the dominant position of Zain, the proposed (de)regulation will strengthen its position. The disadvantaged position of low profitability of other operators will exacerbated, impeding their ability to invest in current and future networks to the detriment of Jordanian consumers. TRC did not show any analysis that shows how the LRIC system adequately addresses these risks, how the new regime will impact the market, and why the LRIC system is preferred over a Bill-and-Keep system.

63. While Orange Mobile's view and position that TRC should secure the future existence of the Bill-and-Keep and prevent operators from withdrawing of this regime, TRC should at least consider adopting a 2-3 years transition period of implementation with glide path on SMS termination rate starting by 2023. Adopting such glide paths is a standard approach in TRC's practice. For instance, in

22 https://mpra.ub.uni-muenchen.de/14540/1/MPRA_paper_14540.pdf

23 For instance, Harbord and Pagnozzi state that "Very few, if any, mobile telecommunication costs are traffic sensitive". This view is also expressed in Quigley, N. and I. Vogelsang (2003) Interconnection Pricing: Bill and Keep Compared to TSLRIC, Charles River Associates (Asia Pcific) Ltd.

its Regulatory Decision on Charges for Mobile Interconnection Services based on TSLRIC+ dated 15 October 2017, TRC stated that:

> *When the new charges were considered not to be close to the previous ones and the regulated services under consideration were material under the current market situation, a glide path has been defined so as to smooth the impact on the market of this Decision.*

6 Summary of requests for consideration

Article in the decision	Orange Mobile request
III Definition of the Relevant Markets	Define local geographic markets Define separate pre-paid and post-paid markets
IV Susceptibility of mobile markets to regulation	The retail mobile market, and at least Amman and postpaid susceptible of ex ante regulation
V SMP	Zain has SMP in the retail mobile market, at least in Amman and postpaid and should be subject to asymmetric ex ante regulation
VI Remedies	Maintaining Bill and Keep in SMS termination and at least introducing transition period of 2-3 years with a glide path.

7 Other comments

Table 7-1 Errors that should be corrected in the final version of the report

Paragraph	Comment
Page 8 under article iii) syates that " Other operators cannot credibly threaten to refuse to interconnect in response to high termination rates, as they would expect to lose a significant number of users if their network does not provide access to all fixed line operators".	"to all fixed line operator" is not part of the context on the wholesale mobile voice termination
Page 13 of the explanatory memorandum which is considered an integrated part of the Regulatory decision on the Mobile Market review, states in the conclusion that: To conclude, the TRC disagrees both with the view that mobile markets other than the markets for wholesale mobile voice call and SMS termination are susceptible to ex ante regulation, and with the merits of the specific remedies proposed. TRC therefore maintains its conclusion that (i) the market for retail mobile communications and the market for wholesale mobile voice call termination are both not susceptible to ex ante regulation; and that, by contrast, (ii) the wholesale markets for mobile voice call termination and mobile SMS termination on each MNO network are susceptible to ex ante regulation.	It should be "wholesale mobile voice call origination" not "wholesale mobile voice call termination".