

Orange Fixed objections and Request for Reconsideration of the TRC Market Review Decision on Dedicated Capacity Markets

1 Introduction

1. In July 2019, TRC launched the public consultation on the Review of Dedicated Capacity Markets in Jordan. Orange Fixed submitted its responses to the consultation on 31 December 2019. On 29 January 2020, a meeting was held at TRC where representatives of Orange Fixed explained its views on the proposed regulatory decisions. On 20 February 2020, Orange Fixed submitted its comments on the responses provided by other operators.
2. On 30 September 2020, TRC issued its Regulatory Decision on the Dedicated Capacity 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. Orange Fixed welcomes lightening of the regulatory obligations, in particular the removal of SMP and regulatory obligations in wholesale markets for TI. However, Orange Fixed is disappointed to see that TRC maintained its conclusion that Orange Fixed has SMP in the retail market for TI and its decision to impose a price cap. In Orange Fixed view, when reaching these conclusions, TRC still had not taken the competitive pressure from MI into account. This is discussed in the next section.
4. According to Article (17) of the Rule Making Instructions, Orange Fixed hereby submit its Request for Reconsideration to the “Regulatory Decision on the Dedicated Capacity Markets Review” issued pursuant to TRC’s Board of Commissioners decision number (7-12/2020) dated (30/9/2020), which has been published on TRC website.
5. Our objection and Request for Reconsideration is directed to the Regulatory Decision of the Dedicated Capacity Markets Review mainly directed to the following:

III- DEFINITION OF RELEVANT MARKET

1. **Retail Market for Traditional Interface (TI) Leased Lines,**

IV- SUSCEPTABILITY OF THE RELEVANT MARKETS TO EX-ANTE REGULATION

- (i) Retail Market for Traditional Interface (TI) Leased Lines;

V- DESIGNATION OF DOMINANT LICENSEES

- (i) Retail Market for Traditional Interface (TI) Leased Lines;

VI- EX-ANTE REGULATION TO REMEDY THE DEFINED COMPETITION PROBLEMS

6. For the avoidance of doubt, restricting the comments to the selected issues does not imply that Orange Fixed accepts all remaining aspects of the decision. We fully uphold our positions as expressed in the consultation.
7. The responses contain confidential business information of Orange Fixed. **Confidential information that should not be disclosed is put between square brackets.**

2 Competitive pressure from MI leased lines

8. In the Market Review Decision on Dedicated Capacity Markets, TRC defines a separate retail market for leased lines provided over the traditional interface (TI), as opposed to leased lines provided over the modern interface (MI). It also concludes that Orange Fixed has SMP in the retail market for TI, based on the high market share, high barriers to entry, a legacy advantage of a ubiquitous network, and economies of scale, scope and density.
9. The conclusion that Orange Fixed has SMP is a direct consequence of excluding the leased lines provided over MI from the market, and not considering the competitive pressure that the MI-leased lines exert on the TI-leased lines. The number of TI-leased lines declines, while the number of MI-leased lines increases. According to the TRC figures provided in the consultation, 18% of leased lines used the traditional interface in 2017, down from 38% in 2015.¹ Based on the last figures, in 2019 this is most likely to be around 10%.² If a single market were considered, Orange Fixed would not have been found to have an SMP:
 - There are 8 providers in Jordan, all of which offer leased lines that are almost solely based on own infrastructure, which shows that there are no high barriers to entry; no supplier is dependent on wholesale access to the Orange Fixed network, and the demand for wholesale lines is decreasing.³

¹ Consultation on DC Markets. Page 22 and footnote 15 report 82% for Ethernet in 2017. The 2015 figure is based on Exhibit III.1 $4,477/7,201 = 62\%$.

² In the 2017 consultation, TRC reported a total of 13,130 leased lines, both TI and MI (Exhibit III.1). In 2019, Orange Fixed provided 1,453 TI leased lines. If the total remained more or less stable, the share of TI in 2019 should have been around 11%.

³ Consultation on DC Markets , page 13, 19, 32, 48, Exhibit II.2.

- Orange Fixed's market share in retail services was below **[Confidential:]** in 2017 (and has been decreasing quickly). Orange Fixed is only the third largest provider of retail leased lines, after Batelco and Zain Data.⁴ In 2019, the market share of Orange Fixed is **[Confidential]** based on the TRC data.⁵
10. The TRC conclusion on a separate market for TI was based on the observation that substitution between TI and MI is asymmetric, i.e while the users of TI may switch to MI, it is unlikely that users of MI would switch to TI. TRC also points to price differences. However, it estimates these retail prices based on Orange Fixed's regulated wholesale price, due to the lack of reliable publicly available prices. TRC upholds these conclusions in the Explanatory Memorandum.
 11. In the responses to the consultation, Orange Fixed has pointed to a number of flaws in the TRC analysis.
 12. First, the market definition is not technology neutral. TRC makes a distinction between services based on technology, while at the same time it recognises that based on product characteristics, the products should be considered substitutes.⁶ Technology neutrality is one of the basic principles of the market review process.⁷ It is also inconsistent with TRC's approach in other markets. For instance, in fixed markets TRC defines a single market encompassing services over copper, fibre and FBWA, despite the presence of some differences in product characteristics (coverage, speeds) and pricing.
 13. Second, TRC recognises that MI is a substitute for TI, and that users may switch from TI to MI. A logical conclusion would then be that operators offering MI-leased lines exert a competitive pressure on Orange Fixed, which prevents Orange Fixed from exercising market power in the supply of TI.
 14. Instead, TRC concludes that as substitution is asymmetric, TI does not exert a competitive pressure on MI and, therefore, the two services do not belong to the same market. However, TRC forgets that market definition is not an end in itself, but a tool in competitive analysis. If MI is a substitute for TI, then there is a competitive pressure from MI to TI, which needs to be taken into account in the competitive analysis. It could be done by defining a single market for TI and MI, or by taking the pressure into account in the competitive analysis. TRC have not done so. In fact, TRC even did not research this competitive pressure. For instance, while the differential pricing is its only piece of evidence on separate markets, it did not to gather data on pricing from all operators and relies on the estimates.

⁴ Consultation on DC Markets , page 16.

⁵ Orange Fixed provided 2,887 retail leased lines in 2019. The total reported by TRC for Q4 2019 is 11,977.

⁶ Consultation on DC Markets , page 25.

⁷ White Paper, page 9.

15. In its responses to the consultation, Orange Fixed commented, referring to the OECD report *Defining the Relevant Markets for Telecommunications*, that in the presence of asymmetric substitution it is important to choose an appropriate focal product, which should be the one where one suspects competition problems to exist. In the Explanatory Memorandum, TRC comments that Orange has misunderstood and disagrees with this view and says that the focal product should be the one that is “most prevalent”, which in this case is the MI. However, the OECD report states very explicitly:⁸

The BEREC Report (2011) points out that in case of an asymmetric substitution, it is important to define the focal product of the market analysis, i.e. the main product under investigation. Such focal point can, for example, be defined with respect to a product where competition problems are believed to exist.

16. As explained above, this also follows logically from the purpose of the market definition, which is the identification of competitive constraints.
17. Orange Fixed also welcomes the TRC decision to remove the price cap when the share of TI leased lines falls below 5%. We note that the share in 2019 is probably around 10%, which is a sharp decrease from 18% in 2017. If this trend continues, the price cap regulation will be removed within two to three years. TRC should reconsider whether it is proportional to define a separate market and designate Orange Fixed as the SMP operator for the purpose of regulating the provision of 1,500 lines for perhaps two to three years.
18. Without prejudice to our position above, Orange Fixed would like to inform you that during our review of the data submitted to TRC on the exercise of market review, we found that (501) retail TI Lead lines are owned by Orange Fixed and used to connect its switches and buildings,, and needs to be deducted from total count of retail TI Leased lines that was submitted to TRC. Therefore, Orange Fixed share of TI leased lines falls below 5%, and we kindly urge the TRC to remove the regulations imposed on Orange Fixed in the market of retail TI.
19. Therefore, Orange Fixed requests TRC to conduct a new analysis of the competitive pressure exerted by MI on TI-leased lines, and also to the new figures update mentioned in above point (18) for the reconsideration of its conclusions.

⁸ See page 26 of:
https://www.oecd.org/daf/competition/Defining_Relevant_Market_in_Telecommunications_web.pdf