Responses to Public Consultation Dedicated Capacity

1 Introduction

1. Orange Fixed objects to both the methodology and the data used for the market review analysis in the TRC consultations documents. In this section we provide some general comments. Thereafter we provide our specific responses to each consultation question.

2. The responses contain confidential business information of Orange Fixed. **Confidential information that should not be disclosed is put between square brackets**.

1.1 Lack of market context

3. The market review regulations should be forward-looking, i.e. they should take into account market trends and they should aim to ensure competition and good outcomes for customers in future. However, by overregulating fixed markets, TRC is undermining future competition and the future of the Jordanian digital society; the effect of overregulating fixed networks will be to hamper the healthy infrastructure competition that has developed since the last market review. Rather than contributing to efficient provision of telecommunication and information technology services, TRC focuses on regulating obsolete services (traditional fixed telephony, TI dedicated capacity) which will hamper technological development by slowing down migration to modern services (fibre, VoIP, MI dedicated capacity).

4. The market review analysis fails to recognise the specific features and trends in the electronic communications markets in Jordan, most notably, the development of infrastructure competition in fixed markets. Unlike for instance in Europe, in Jordan there are several fixed networks with high coverage provided over FBWA.[1] This has important implications for the competitive situation:

   - First, to a much larger extent that its West European counterparts, the fixed incumbent in Jordan is not able to exploit its incumbency as it is constrained in its behaviour by the competitive pressure from FBWA.

[1] Only 1.5% of all fixed subscriptions in Europe are wireless; see: https://blog.telegeography.com/changing-faces-an-overview-of-europes-broadband-sector.

5. All regulators should consider best regulatory practice developed in other countries and to build on established robust methods and rigorous analysis. However, country-specific factors need to be taken into account, particularly if decisions relate to different market conditions. We would note that in respect of methodology, the TRC reviews are not in line with best international practice, as we discuss in subsequent sections.

6. TRC may have also built on current regulation in Jordan. However, previous decisions were published in 2010; the period between decisions is three times as long as is considered to be the best international practice, which recommends conducting market reviews every 2-3 years. The market for dedicated capacity has changed substantially, and it will continue changing in future:

   - TI lines are being replaced by MI lines. In 2017, only 18% of all DC lines were TI lines and the share has been decreasing rapidly. MI can be and is delivered on mobile access, Microwave links, FBWA and fibre. As a result, the leading position of the copper network has disappeared.

7. TRC analysis has not considered the importance of these trends for current and future competition, and to investigate how the proposed regulation will interact with the market trends. Had it done so, TRC would have had to acknowledge that the focus on regulating fixed and lack of regulation of mobile services is inappropriate for the current market situation in Jordan.

1.2 Incorrect information

8. The consultation contains incorrect information that is not reflective of the actual market situation, and some information is missing (see Section 9 for an overview). TRC's use of incorrect data and information has led to incorrect conclusions in the TRC consultation.

1.3 Timeframe of the analysis

9. The previous market review was conducted nine years ago. Given that best international practice if to conduct market reviews every two to three years, the Jordanian telecoms market has been subject to obsolete regulation for the past six to seven years. As a result, TRC should have considered a much longer time horizon for its prospective analysis.

10. Even if a two to three-year period was considered, TRC has not taken into account key market trends:

    - TRC recognises that MI leased lines satisfy the same needs as TI leased lines, and that there is migration from TI to MI, but did not define one technology-neutral market for DC or to consider the competitive pressure from MI to TI in the competitive analysis;

- TRC market review analysis has not considered that regulation of old and more and more outdated technologies (TI dedicated capacity) will decrease consumers' incentives to migrate and slow down technological development.

1.4 Lack of transparency

11. The draft decisions generally lack any supporting evidence and the use of sources is not transparent.

12. TRC's overall approach to market definition and competitive assessment is high level, lacks detail and generally is not substantiated with evidence. Only modest data are available on market structure (shares/trends) and there is no supporting evidence on substitution trends (e.g. customer surveys). The consultation documents contain numerous statements that lack references to sources and have no supporting evidence. It is therefore not possible to assess the quality of the sources used by TRC, and whether the data contained in these sources (if any) justify the TRC conclusions.

13. The lack of evidence in this consultation is remarkable, particularly when compared to TRC's approach in the 2010 market reviews. The TRC 2009 White Paper describes the information that was used at that time. This included:

    - Quantitative data, such as: the number of subscribers at the end of each calendar year, annual traffic volumes, annual turnover, the level of churn, and retail pricing data.

    - Qualitative data, gathered through a questionnaire. This included "the nature and extent of distribution channels, the level of marketing and advertising expenses, the extent of minimum contract periods, the degree to which contracting occurs with large business customers, and the advantages which any operator may have over another in terms of various factors such as control of essential facilities, access to capital markets, economies of scale and scope, and so forth. In addition, the questionnaires provide an opportunity to highlight commercial practices and difficulties in negotiating and concluding wholesale agreements."

14. TRC states that it collected data from operators and met with operators to take account of their experiences in the market. The draft decisions do not present any information on, say, for example, churn that would be relevant both for the market definition and for the competitive analysis. Moreover, and unlike in 2009, TRC did not gather qualitative information through a questionnaire. TRC notes that some operators did not provide data. This is unacceptable; TRC should have ensured that all operators responded appropriately.

15. It is further not clear how the information collected from operators in interviews has been used for the analysis.

16. The lack of transparency and thorough research is even more striking when compared to international best practice such as Ofcom market reviews:

- First, Ofcom provides an overview of the sources of the evidence used and the documents are extensively referenced in the decisions. Ofcom also provides annexes to its statements, providing detailed descriptions of the documents used. This enables the operators to assess the evidence used and whether it supports statements by the regulator. In contrast, TRC decisions are poorly referenced and lack appropriate detail.

- Second, Ofcom (and other regulators e.g. in the Netherlands and Austria) regularly conduct additional in-depth research including consumer surveys, econometric analysis (e.g. price correlations), quantitative hypothetical monopoly tests, detailed analysis of geographical coverage, and in-depth assessments of the impact of regulation. No such analysis has been reported in the TRC draft reviews.

- Third, as can be seen from the list of documents used, Ofcom makes extensive use of, publicly available information, such as publications by the European Commission, publicly available reports, press releases, operator annual reports, operator press releases, operator price lists, national statistics and other information. The TRC decisions contain very few references to such documents, suggesting that TRC did not make use of publicly available information.

1.5 Lack of impact assessment

17. TRC has not conducted a formal impact assessment of its proposed regulatory interventions to compare the regulatory costs to benefits.

1.6 Conclusion

18. Given the above concerns, Orange Fixed requests that the TRC puts on hold the market review consultation for further study and data investigation to avoid uncertain conclusions that could harm the telecom business, competition and future market developments.

19. We next provide our responses to each of the consultation questions, notwithstanding our view that the consultation should be halted.

2 Question 1 Market definition - retail markets

20. Question 1: Do you agree with the TRC's preliminary conclusions regarding the relevant product and geographic market definitions for retail leased line services?

21. TRC defines two retail markets for dedicated capacity ("DC"):

- A national market for traditional interface ("TI") leased lines, including all infrastructures and bandwidths.
- A national market for modern interface ("MI") leased lines, including all infrastructures and bandwidths.
- Broadband services, VPN and dark fibre are considered not to belong to the DC markets.

22. The market definition has changed since the previous market review round, as in 2010, TRC defined four retail markets, which was based not on technology but on speeds and a distinction was made between international and local lines, namely:

- Retail market for local and national DC services up to/including 2 Mbps.
- Retail market for local and national DC services above 2 Mbps.
- Retail market for international DC services up to/including 2 Mbps.
- Retail market for international DC services above 2 Mbps.

23. Orange Fixed disagrees with the distinction between TI and MI and considers that the DC market definition should be technology-neutral. TRC has conducted insufficient research into the product market definition and did not sufficiently take into account the competitive pressure from MI on TI. This is discussed further below in Section 2.1. Orange Fixed also considers that TRC has conducted insufficient research into the possibility of defining local markets, despite indications that competitive conditions may differ across regions. This is discussed below in Section 2.2.

2.1 Separate markets for TI and MI

24. In the draft review, TRC notes that there are functional similarities between TI and MI leased lines:[2]

> *"Both TI and MI leased lines share functional characteristics in offering a dedicated symmetric connection with low contention, jitter and latency, and high level Service Level Agreements (SLAs)."*

25. TRC also observes that a market trend of migration from TI to MI.[3]

> *"There has been a pronounced shift towards the use of modern Ethernet leased lines, away from traditional legacy leased lines, and this migration is likely to*

[2] Public Consultation: Review of Dedicated Capacity Makets in Jordan, page 25.

[3] *Idem*, page 5.

continue." In 2017, TI leased lines accounted for 18% of all leased lines, down from 38% in 2015.[4]

26. Despite these developments, TRC defines separate markets for TI and MI. This is based on the reasoning 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 provides the following statements in favour of asymmetric substitution:

   - Price differences. Due to the lack of reliable publicly available prices, TRC estimates a price based on Orange Fixed regulated wholesale prices. It finds that the equivalent TI (legacy E1) price for a Fast Ethernet circuit (100 Mbit/s) at 815.6 JD/month would be 2,210 JD/month. The TRC concludes that "*the price differences are well in excess of the level of a SSNIP of 5-10%*".[5]
   - Customer Premises Equipment for TI is no longer manufactured.
   - There is a general trend of migration.
   - Lack of supply side substitution.

27. However, price differences (if they are apparent, which is not certain given that TRC has not collected data on prices) in themselves are not evidence of a lack of substitution or competitive pressure. TRC has not investigated why customers are willing to accept a much higher price for TI. A likely reason is that they are still using legacy equipment compatible with TI and switching to MI would involve a switching cost for changing equipment. However, consumers may be willing to switch if the price differential becomes larger than the switching cost. TRC has not investigated the size of such a switching cost.

28. We would note that all TI users are expected to switch to MI at some stage, the key question being when. A user of TI lines considering a switch to MI would likely delay the switch if the price of MI increased (there are also equipment upgrade switching costs). An increase in the MI price would therefore slow down the adoption of MI lines. This effect would reduce the profitability of a price increase by a hypothetical MI monopolist, resulting in a disciplining effect. In contrast, any reduction in the price differential between higher and lower capacity products may speed up migration. Therefore, while there may be no switching from MI to TI, the presence of TI still exerts a competitive pressure on MI.

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4 *Idem*, page 22 and footnote 22 report 82% for Ethernet in 2017. The 2015 figure is based on Exhibit III.1 4,477/7,2017 = 62%.

5 *Idem*, page 25.

29. Most importantly, the analysis of asymmetric substitution is not in line with best international practice. According to the OECD document on defining relevant markets, there are two possible approaches possible to asymmetric substitution:6

- First, the focal product should be identified, based on where competitive problems are considered to lie.
- If the asymmetric substitution is from the focal product away to another product, then this other product should be included in the market.
- Alternatively, two different markets may be defined, and asymmetric substitution should be taken into account in the competitive analysis (three criteria test).

30. Due to the trend in increased demand for retail Ethernet Leased Lines, TRC took these as the "focal product" for the market definition exercise. However, given that TRC's primary concern is competition in the TI markets, it would have been more appropriate to choose this segment as the focal product. This would have led to a different market definition as TRC acknowledges that MI can be substitutes for TI. Alternatively, TRC should have taken competitive pressure from MI to TI in its analysis of susceptibility to regulation and SMP. However, the market analysis has failed to adopt the approach recommended by the OECD.

2.2 Geographic market

31. TRC defines one national market for retail services, based on the following statements:

- Operators do not differentiate the product characteristics or prices by region.
- Most leased lines are offered using operators' own infrastructure, where investment is likely to focus on concentrated business areas. The TRC states, however, that as the boundaries of such areas are not stable, they cannot be a basis for a geographic market definition.

32. Orange Fixed considers that the geographic market definition is not adequately substantiated, and that TRC should have conducted appropriate research into the possibility of the existence of local geographic markets. The White Paper states that to assess the similarity of competitive conditions across markets, the following indicators should be used:

- 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.

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

- Barriers to entry and their development (including evidence of new entry).
- Pricing and product strategies (differences in pricing and marketing).

33. 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, this statement does not excuse TRC from conducting a proper analysis of the market.

34. There are indications that the competitive conditions in the market may differ per region. TRC notes that there has been a shift in the market towards higher speed leased lines. Such higher speeds are most often provided on fibre, and therefore it is the geography of fibre infrastructure that is most relevant for the leased lines market. As TRC discusses in its draft review of fixed markets, there are areas in Jordan (such as Amman) where there are several operators present with their own fibre network. Such areas are clearly different from other regional markets where no fibre has been rolled out. Moreover, it is possible that across regions, the only or main operator differs, and that therefore each relevant operator should be designated as having SMP in its respective regions. There is no indication in the draft review that TRC has conducted any investigation of geographical differentiation.

35. Defining local geographic markets with sufficient competition between fibre networks and not imposing regulation in such areas would be in line with best international practice. In a 2012 report for FttH Council Europe, the consultant notes that deregulating areas with sufficient network competition has a positive impact on investment.[7] Separate geographic markets have been defined in many European countries including the UK, Italy and Finland.[8]

36. TRC sees as an obstacle to defining local geographic markets that boundaries of fibre networks are not fixed because the networks are still being rolled out. However, it is not clear why it would be an obstacle in Jordan while it is not in other countries. It should be possible to define local geographic markets that are already competitive based on the presence of fibre, as it is clear that these markets would not become less competitive in future. During the next regulatory review, as fibre roll out progresses, the competitive, deregulated geographic market could be expanded to include additional areas.

37. Regarding the observation that investment continues and that therefore the areas with fibre competition are expanding, this is not an obstacle to defining markets. This

7 DotEcon (2012), “Regulatory policy and the roll-out of fibre-to-the-home networks, A report for the FTTH Council Europe, July 2012”, Section 2.5.3.

8 See Ofcom, (2018), “Promoting investment and competition in fibre networks: approach to geographical markets”, 2 December 2018. Italy: https://www.cullen-international.com/product/documents/FLTEIT20190002. Finland: https://www.cullen-international.com/product/documents/CTTEEU20190087.

applies particularly to those that are already competitive, as it is unlikely that they would become less competitive in future. This has for example been conducted by Ofcom in its geographic definition of markets for fixed access.[9]

2.3 Conclusion

38. Orange Fixed disagrees with TRC conclusion that TI and MI leased lines constitute separate markets. This conclusion is the result of incorrect methodology applied by TRC to define markets. As the main concern for TRC is the competitive situation in TI, TRC should have taken TI to be the focal product and analyse whether MI is a substitute for TI. As TRC recognises that MI is a substitute for TI, this should have led to a conclusion that there is one market for leased lines, encompassing both TI and MI technology.

39. Orange Fixed also disagrees with the TRC conclusion that the market is national. Due to investment in fibre in some areas, particularly in Amman, competition in these areas is stronger than in areas without fibre. The analysis failed to analyse properly the possibility of defining separate geographic markets based on the presence of fibre, as is commonly done by other regulators.

3 Question 2 Market definition – wholesale markets

40. Question 2. Do you agree with the TRC's preliminary conclusions regarding the relevant product and geographic market definitions for wholesale leased line services?

41. TRC defines the following wholesale markets for dedicated capacity:

- Wholesale market for TI trunk segments of leased lines.
- Wholesale market for TI terminating segments of leased lines.
- Wholesale market for MI trunk segments of leased lines.
- Wholesale market for MI terminating segments of leased lines.

42. Each of the defined markets includes wholesale leased lines on all infrastructures, of all bandwidths, but excluding dark fibre. All markets are defined as national in scope.

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9 Ofcom, (2018), "Promoting investment and competition in fibre networks: approach to geographical markets", 2 December 2018.

43. Orange Fixed disagrees with the distinction between TI and MI and considers that the DC market definition should be technology-neutral. In the draft review, TRC notes that there are functional similarities between TI and MI leased lines:[10]

> *"Both TI and MI leased lines share functional characteristics in offering a dedicated symmetric connection with low contention, jitter and latency, and high level Service Level Agreements (SLAs)."*

44. TRC also observes that a market trend of migration from TI to MI.[11]

> *"There has been a pronounced shift towards the use of modern Ethernet leased lines, away from traditional legacy leased lines, and this migration is likely to continue."*

45. Despite these developments, TRC defines separate markets for TI and MI. This is based on the reasoning 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.

46. This analysis of asymmetric substitution is not in line with best international practice. According to the OECD document on defining relevant markets, there are two possible approaches possible to asymmetric substitution:[12]

    - First, the focal product should be identified, based on where competitive problems are considered to lie.
    - If the asymmetric substitution is from the focal product away to another product, then this other product should be included in the market.
    - Alternatively, two different markets may be defined, and asymmetric substitution should be taken into account in the competitive analysis (three criteria test).

47. Given that TRC's primary concern is competition in the TI markets, it should have chosen TI as the focal product. This would have led to a different market definition as TRC acknowledges that MI can be substitutes for TI. Alternatively, TRC should have taken competitive pressure from MI to TI in its analysis of susceptibility to regulation and SMP. However, TRC did not adopt the approach recommended by the OECD.

48. TRC has not conducted research on the market demand for Ethernet interconnection (MI). Should TRC have done it, it would have concluded that all interconnected licenses are ready for IP interconnection and there will be no more demand on the TI interconnection for wholesale DC services.

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10 Public Consultation: Review of Dedicated Capacity Makets in Jordan, page 25.

11 *Idem*, page 5.

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

4 Question 3 Susceptibility to ex ante regulation – wholesale markets

49. Question 3. Do you agree with the TRC's preliminary conclusions regarding the wholesale leased line markets found to be susceptible to ex ante regulation?

50. TRC concludes that the following wholesale markets are susceptible to ex ante regulation:

- The wholesale market for TI terminating segments of leased lines.
- The wholesale market for TI trunk segments of leased lines.
- TRC concludes also that both wholesale markets for MI are not susceptible to ex ante regulation.

51. Orange Fixed agrees that the wholesale markets for MI are not susceptible to ex ante regulation.

52. Orange Fixed disputes that the wholesale markets for TI are susceptible to ex ante regulation. This conclusion is based on an incorrect market definition which separates TI from MI technology. As discussed in the answer to Question 1 (Section 2.1), MI exerts a competitive pressure on TI. This is apparent from the following:

- At the retail level, there is migration from TI to MI.
- At the wholesale level, the share of TI in total leased lines decreased from [Confidential: x].[13]

53. We would also note that at the market definition stage, the TRC identifies wireless as belonging to the same market (below "higher capacities of circuit") yet fails subsequently to consider wireless as a possible potential competitive constraint.

54. TRC concludes that the wholesale market for MI is competitive. In 2017, the market share of Orange Fixed in MI leased lines was approximately [Confidential: x], which is shows that it is a minor player in this market.[14] In 2017, MI accounted for [Confidential: x] of all leased lines. Therefore, it is clear the technology-neutral market encompassing both MI and TI is highly competitive. The market shares of Orange Fixed in both trunk and terminating segments were less than [Confidential: x] already in 2017, as shown in [Confidential: Table 4-1 .

13 Public Consultation: Review of Dedicated Capacity Makets in Jordan, Exhibit II.2

14 Market shares included in the text of the consultation as confidential and provided to Orange Fixed by TRC.

[Confidential: Table 4-1 Orange Fixed market share in wholesale DC markets in 2017]

55. End of 2019, this share is most likely to be much lower, given that the Orange Fixed's market share in retail DC has halved in two years between 2015 and 2017, as [Confidential: Table 4-2 shows. It is difficult to understand why in conducting a prospective competitive analysis, TRC uses 2-year old market shares and fails to conduct the analysis prospectively by ignoring the rapid decline of Orange Fixed market shares.

[Confidential: Table 4-2 Retail leased lines market shares by number of active retail leased lines]

56. When the competitive pressure from MI is taken into account, it is clear that wholesale TI leased lines offered by Orange Fixed are subject to strong competition:

- There are 8 providers in Jordan, all of which offer leased lines based almost solely on own infrastructure; no supplier is dependent on wholesale access to the Orange Fixed network, and the demand for wholesale lines is decreasing;[15]
- Orange Fixed's market share in all wholesale services was below 50% already in 2017 and is likely much lower now. Orange Fixed is only the third largest provider of retail leased lines, after Batelco and Zain Data.[16]
- Orange Fixed market share (retail and wholesale) has been decreasing, while the market share of the largest operator, Batelco, has been increasing.[17]

57. It is possible that in some regions, there is only one operator, and therefore that operator has an SMP on terminating segments in that region. However, where that occurs, the sole operator may be another operator rather than Orange Fixed. TRC should have investigated local competition conditions. Following such an investigation it may have been concluded that across the various regions, different operators have SMP and should be mandated to provide access.

58. Summarising, TRC conclusion that the wholesale market for DC is subject to ex ante regulation is not accurate as it is based on an incorrect market definition which artificially separates the market by technology. If a correct, technology neutral market definition is adopted, it is clear that the market is fully competitive.

15 *Idem*, page 13, 19, 32, 48, Exhibit II.2.

16 *Idem*, page 16.

17 *Idem*, page 19.

5 Question 4 Susceptibility to ex ante regulation – retail markets

59. Question 4. Do you agree with the TRC's preliminary conclusions regarding the retail leased line markets found to be susceptible to ex ante regulation?

60. The TRC concluded that the following retail leased line markets are found to be susceptible to ex ante regulation:

   - Retail market for TI leased lines.
   - It concluded that the retail market for MI leased lines is not susceptible to ex ante regulation.

61. Orange Fixed agrees that the retail market for MI leased lines is not susceptible to ex ante regulation.

62. Orange Fixed disputes that the retail market for TI leased lines is susceptible to ex ante regulation. TRC has adopted an incorrect market definition, which does not take into account substitution and competitive pressure from TI to MI, despite having acknowledged that such substitution exists. When a correct, technology-neutral market definition is adopted, it is clear that the retail market for DC is fully competitive and therefore not susceptible to regulation:

   - There are 8 providers in Jordan, all of which offer leased lines based 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.[18]
   - Orange Fixed's market share in retail services was below [Confidential: x] in 2017 (and has been decreasing quickly). By now, the market share will be much lower. Orange Fixed is only the third largest provider of retail leased lines, after Batelco and Zain Data.[19]
   - Orange Fixed's market share in all wholesale services was way below [Confidential: x] already in 2017 and is likely to be much lower now.
   - Orange retail market share has been decreasing, while the market share of the largest operator, Batelco, has been increasing.[20]

18 *Idem*, page 13, 19, 32, 48, Exhibit II.2.

19 *Idem*, page 16.

20 *Idem*, page 19.

63. TRC stated that "Orange Fixed and Orange Data are considered to be a single economic entity" and also that "Orange has a virtual monopoly in this market, which is likely to persist", Orange Fixed objects to the TRC treating Orange Fixed and Orange Data as a single economic entity, which are separate legal entities on the ground that each of them has an individual license. TRC should consider that there is no real or virtual monopoly on this liberalized market, where there are 8 providers in Jordan, all of which offer leased lines almost solely based on own infrastructure.

64. Had TRC defined the market in a technology-neutral way, it TRC would have concluded that the market not only tends towards effective competition, but is already effectively competitive, and therefore the market is not susceptible to regulation. Any remaining problems can be effectively solved applying competition law.

6 Questions 5, 6 and 7 - SMP analysis

65. Question 5. Do you agree with the TRC's preliminary competition assessment and SMP designations on the market for wholesale TI trunk segments of leased lines?

66. Question 6. Do you agree with the TRC's preliminary competition assessment and SMP designations on the market for wholesale TI terminating segments of leased lines?

67. Question 7. Do you agree with the TRC's preliminary competition assessment and SMP designations on the market for retail TI leased lines?

68. TRC concludes that Orange Fixed has SMP in all retail and wholesale markets for TI leased lines.

69. Orange Fixed disagrees with these conclusions. TRC has adopted an incorrect market definition, which does not take into account substitution and competitive pressure from TI to MI, despite having acknowledged that such substitution exists. When a correct, technology-neutral market definition is adopted, it is clear that the retail market for DC is fully competitive and therefore not susceptible to regulation:

- There are 8 providers in Jordan, all of which offer leased lines based almost solely on own infrastructure; no supplier is dependent on wholesale access to the Orange Fixed network, and the demand for wholesale lines is decreasing;[21]
- Orange Fixed's market share in retail services was below [Confidential: x] in 2017 and decreasing quickly. By now, the market share will be much lower.

[21] *Idem*, page 13, 19, 32, 48, Exhibit II.2.

Orange Fixed is only the third largest provider of retail leased lines, after Batelco and Zain Data.[22]

- Orange retail market share has been decreasing, while the market share of the largest operator, Batelco, has been increasing.[23]

70. Additionally, TRC does not provide the full details of its SMP analysis in the consultation, such as the market shares or other factors it considered. Furthermore, TRC bases its conclusion on incorrect information. TRC states that "From 2015 to 2017, there were three operators providing retail (TI) leased lines: Orange Fixed, V-Tel and Orange Data. [24] This information is inaccurate as there were other operators providing retail TI lease lines of fibre and FBWA, namely Batelco, Umniah, Zain and Damamax.

71. Furthermore, Orange Fixed objects to the TRC statement that "Orange Fixed and Orange Data, which together constitute a single economic entity, enjoy a dominant position in the retail TI leased line market". Orange Fixed and Orange Data are separate legal entities, and TRC should not extend the (alleged) dominance of one legal entity (Orange fixed) to another legal entity (Orange Data) just because the second is an affiliate.

7 Questions 8 and 9 –Wholesale remedies

72. Question 8. Do you agree with the TRC's preliminary assessment of competition problems and appropriate remedies in the wholesale market for TI trunk segments of leased lines?

73. Question 9. Do you agree with the TRC's preliminary assessment of competition problems and appropriate remedies in the wholesale market for TI terminating segments of leased lines?

74. The TRC identified potential competition problems in wholesale TI markets:

- Refusal to supply.

- A possible "ransom strip" (deny access and/or price excessively) between wholesale leased lines product and international gateways.

22 *Idem*, page 16.

23 *Idem*, page 19.

24 *Idem*, page 58.

- A risk that Orange Fixed could excessively price wholesale trunk and terminating segments of leased lines, and that these prices could be passed through to retail customers.

75. TRC proposes the following remedies to address these potential problems.

- Access.
- Non-discrimination.
- Transparency.
- Accounting separation.
- Cost accounting and price control.

76. Orange Fixed disagrees with imposing these remedies. TRC has adopted an incorrect market definition, which does not take into account substitution and competitive pressure from TI to MI, despite having acknowledged that such substitution exists. When a correct, technology-neutral market definition is adopted, it is clear that the wholesale market for DC is fully competitive and therefore should not be regulated. The problems described by TRC relate to refusal of access or high prices of access. However, given that all operators provide services based on their own infrastructure and the demand for wholesale services is very low and decreasing, this problem is largely theoretical. As TRC states:[25]

"[...] new demand for legacy leased lines will be very limited, and that the next few years will see a continuing technical migration from legacy to Ethernet leased line products."

77. TRC also states that "there have been issues concerning Orange Fixed bundling trunk and terminating segments and refusing to supply one without the other".[26] However, TRC does not support this statement with any evidence or examples of cases.

78. It is disproportional to impose regulation on wholesale products for which there is no or only limited demand. TRC should have conducted an impact assessment of its proposed remedies; had it done so, it would have most likely concluded that the costs of regulation do not outweigh the largely non-existent benefits.

79. TRC states further that, regulation should be focussed on protecting customers in the installed base of TI lines. However, such measures are disproportional given that TI constitutes a small and quickly declining part of the market. We would note that Ofcom applied regulation to TI leased lines in its Business Connectivity

[25] *Idem*, page 19.

[26] *Idem*, page 63.

Market Review in 2016. [27] At that time, in the UK, the installed base of TI lines was 257,760, some 46% of the total. The TRC proposes to apply detailed regulation to TI leased lines, yet according to the TRC, in Jordan the installed base of TI lines stands at 2,319, 18% of the total. The TRC states that this represents "*a significant installed base of legacy leased lines*".

80. We question whether (as stated) the detailed regulatory remedies are appropriate to address the perceived problems during a period of fast-moving technological change and migration. We would for instance note that it is costly for operators to maintain both TI and MI technology. A more cost-efficient outcome is if all users switched to MI. Relatively higher TI prices may encourage customers to switch to MI, thereby speeding up migration. Reduced TI prices via price regulation will slow down the migration process and perpetuate an obsolete technology. The TRC needs to consider its broader policy, obligations and duties within the sector. A narrow regulatory focus on a perceived short run issue with accompanying remedies may be damaging for the sector in the medium and longer term.

81. Given that TI services are in decline and that migration to MI services continues, the TRC could consider whether it should implement a regime that fosters continued migration and applies ex post competition law to issues if and when they arise. The TRC should consider broader policy objectives, duties and obligations, together with the potential costs of its regulatory proposals. The price differentials between IT and MI should not be kept artificially low but should be allowed to increase to foster migration, especially where there are customer switching costs (such as the necessity to purchase new equipment).

82. In addition to opposing any form of regulation, Orange Fixed strongly objects to the following specific obligations:

- The obligation to provide an annual Statement of Compliance with the non-discrimination obligation, with all the details as specified in Annex 4. This obligation places an unnecessary administrative burden on Orange Fixed, which will incur considerable costs to provide the required information. There is also no need to impose this as TRC already has all the necessary powers to monitor the compliance of all operators with market regulation, not only the SMP operator.

- The obligation not to withdraw access to any wholesale product or associated facility without the prior approval of TRC, including the withdrawal of a product or service in a particular geographic area.[28] Such an obligation will

[27] Ofcom (2016), "Business Connectivity Market Review – Volume I Review of competition in the provision of leased lines". Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0015/72303/bcmr-final-statement-volume-one.pdf

[28] Public Consultation: Review of Dedicated Capacity Makets in Jordan, page 64.

seriously harm Orange Fixed's ability to modernise its network by replacing obsolete technology with a modern one. To protect the interests of wholesale customers, it would be sufficient to require a notice period for the withdrawal, which would allow customers time to switch to a new service. At the very least, TRC should be required to approve proposed changes within a reasonable period of time, and to withhold permission without a good reason and proper motivation.

- The obligation to notify the launch of a new wholesale product 6 months in advance, changes to products 3 months in advance, and an additional 1 months' notice to TRC. Such a long period puts a high burden on Orange Fixed, it deprives it of flexibility and makes it impossible to effectively compete in the highly competitive DC market. It is also at odds with the best international practice:
  - Ofcom requires a notice of 90 for introducing new products and changes to existing products, but only 28 days' notice for prices, terms and conditions of such products. It also does not require an additional period for itself.[29]
  - The Dutch regulator, ACM, requires a two-months' notice for introducing new products and changes to existing wholesale products.[30]

8 Question 10 – Retail remedies

83. Question 10. Do you agree with the TRC's preliminary assessment of competition problems and appropriate remedies in the retail market for TI leased lines?

84. TRC identifies the following potential competition problems in the retail market for TI leased lines:

    - Little (or no) choice of supplier for TI leased lines.
    - A risk of excessive retail pricing.

85. TRC's proposed remedies include:

    - Non-discrimination.
    - Transparency.

[29] Ofcom (2016), "Business Connectivity Market Review – Volume I Review of competition in the provision of leased lines". Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0015/72303/bcmr-final-statement-volume-one.pdf,

[30] ACM, Marktanalyse hoge kwaliteit wholesalebreedbandtoegang en wholesalehuurlijnen, 2012.

- Accounting separation.

86. Orange Fixed disagrees with these remedies. TRC has adopted an incorrect market definition, which does not take into account substitution and competitive pressure from TI to MI, despite having acknowledged that such a substitution exists. When a correct, technology-neutral market definition is adopted, it is clear that the retail market for DC is fully competitive and therefore not susceptible to regulation. Reduced TI prices via price regulation will slow down the migration process and perpetuate an obsolete technology. The TRC needs to consider its broader policy, obligations and duties within the sector. A narrow regulatory focus on a perceived short run issue with accompanying remedies will be damaging for the sector in the medium and longer term.

87. Notwithstanding, Orange Fixed strongly opposes imposing new regulation on services that have not been regulated until now, namely retail and wholesale TI services with speeds above 2Mbps. In 2010, these services were not regulated as they were included in the deregulated market for leased lines above 2Mbps. It is disproportional to impose new regulation on services which in the meantime have become more competitive.

88. Furthermore, Orange Fixed objects to the following specific remedies:

    - The obligation to publish and keep up-to-date information on retail products, including the tariffs. This obligation is unworkable as most tariffs are negotiated individually with business customers. It would be a great burden to publish tariffs for all customers, and the customers would object to disclosing this information.

    - The obligation to provide information in order to assess compliance with the price cap. TRC states: “Assessing compliance with the imposition of a safeguard price cap could involve requiring Orange Fixed to certify that retail prices have not increased. The TRC could require Orange Fixed to report annually on volume of retail TI circuits sold, and revenue, and to confirm that prices have not increased. Additionally, Orange could be required to submit a sample of contracts and invoices to the TRC, showing that retail prices have not increased, and that it is compliant with its price control obligation”.[31] This is a very heavy obligation, which places a high administrative burden on Orange Fixed.

89. The market review analysis has failed to conduct an impact assessment of the costs and benefits of the proposed obligations. The remedies are very heavy and disproportional when imposed on a low-volume, declining service such as TI which is subject to a strong competitive pressure from MI. Any benefits from such

31 Public Consultation: Review of Dedicated Capacity Makets in Jordan, page 70.

a regulation do not outweigh the cost that implementing them would impose on Orange Fixed.

9 Detailed queries

90. Below we provide detailed queries on errors and omissions in specific paragraphs of the TRC consultation.

Page	Section	Paragraph	Comment
13	2.2	Exhibit II.1 Number of leased lines (retail)	The total figure (12,988) is inconsistent with footnote of page (22) where TRC states that the total active retail leased lines is (12,735), and in Exhibit III.1 page (23), the total number of leased lines by technology is (13,131).
13	2.2	Six of the eight retail operators use only their own network to deliver the services (Orange Fixed, Zain, Damamax, Batelco, Mada, Al-Nayi); one uses own infrastructure plus a small number of lines provided using a wholesale input from another operator (V-Tel), with one (Orange Data) relying solely on wholesale inputs (from Orange Fixed).	Umniah is missing as it provides leased lines services to all public schools (3000 schools) across all Jordan using mainly wireless connections (FBWA & microwave links).
16	2.2	Exhibit II.5 Proportion of active wholesale termination lines by speed	Damamax should have been included.
16	2.2	Footnote: Damamax is not included as it did not provide information disaggregated by speed.	TRC should have ensured that all operators responded appropriately.
18	2.3	Taking both volume and revenue data into account, the overall retail leased line market has three operators (Orange, Zain and Batelco) with significant market shares, and a further five operators with market presence.	Batelco Jordan is owned by Umniah. MoE project won by Umniah shouls also be considered.
21	3.1	It should be noted, however, that hypothetical supply-side substitution is not sufficient, on its own, for the purposes of market definition; it is supply-side substitution that should be relied upon as the primary criterion.	Is this a typo and TRC should have stated “demand-side” as the primary criterion?
24	3.3	However, the focus for the purposes of this market review is on the connectivity, because it is the local access part of the circuit where competition problems are most likely to arise, and where barriers to entry are potentially highest.	It is not possible to assess changes in market structure objectively as no data on volumes/revenues by operator are provided. Limited data (snap shots) on prices are provided; no evidence on profitability. Please refer to snap shots of prices on page (25), (26) and (27).
42	4.2	A TRADITIONAL INTERFACE (TI) WHOLESALE MARKET FOR TERMINATING SEGMENTS OF LEASED LINES	No mention is made of potential competition from wireless solutions yet the TRC stated in its conclusion on wholesale market definition at page (39) that Wireless leased lines belong to the same market as wired leased lines.
43	4.3	A TRADITIONAL INTERFACE (TI) WHOLESALE MARKET FOR TRUNK SEGMENTS OF LEASED LINES	"No mention is made of potential competition from wireless solutions yet the TRC stated in its conclusion on wholesale market definition at page (39) that Wireless leased lines belong to the same market as wired leased lines.