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Orange Fixed, Orange Mobile, Orange Internet (Orange) response to the TRC consultation: Implementation of a Margin Squeeze Test for local access and broadband access

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Orange

About this document

This is Orange Fixed, Orange Mobile, Orange Internet (Orange) response to the TRC's consultation on the Implementation of a Margin Squeeze Test for local access and broadband access.

Contents

1 Introduction

Orange welcomes the opportunity to respond to the Telecommunications Regulatory Commission's (TRC's) consultation on *Implementation of a Margin Squeeze Test for local access and broadband access*, being proposals for the introduction of formal margin squeeze tests as part of the remedies to be applied to dominant operators following the 2019 market review.

Orange's response was developed with the support of its consultants, Plum Consulting (Plum). Plum was commissioned by Orange to assist it review the TRC's four consultations, analyse the telecommunications markets in Jordan and develop responses to the consultations. Plum is an independent consulting firm, focused on the telecommunications, media, technology, and adjacent sectors. Plum applies extensive industry knowledge, consulting experience, and rigorous analysis to address challenges and opportunities across regulatory, radio spectrum, economic, commercial, and technology domains.

Orange has a number of serious concerns over the content of this consultation paper, and in this document we set these concerns out in detail, to explain why we consider that a margin squeeze testing regime, as defined in the consultation, is both unnecessary and overly onerous, and would ultimately damage overall welfare. We trust that the TRC will give careful consideration to each of the points included in this document.

In Jordan, margin squeeze, until now, has been an instrument that could be used largely in determining an abuse of market power under competition law, and that is where it should remain. The newly proposed *Implementation of a Margin Squeeze Test for local access and broadband access* consultation arises as part of the 2019 market review remedies where the TRC designated Orange Fixed as a dominant operator in the markets for Wholesale Line Access (WLA), Wholesale Broadband Access (WBA), and the Retail market for fixed telephony access and call origination (FACO); and required that Orange Fixed should provide access to products in a way that does not constitute a margin squeeze.

Orange considers that the overall proposal for the margin squeeze test framework is excessive, overly onerous and does not reflect current market conditions, and consequentially the regulatory requirements of the current telecommunications market in Jordan. The consultation does not acknowledge Orange Fixed's current fulfilment of regulatory demands made of it by the TRC which are provided against a number of regulatory requirements, in particular:

- detailed costing and network dimensioning information to enable the regulation of wholesale prices at a LRIC+ oriented level; and

- cost and other needed related input submissions, examining the forecast blend of demand and costs to demonstrate profitability, provided for all retail offers (these are described in detail in Section 4.2).

The Consultation also does not consider the interaction of margin squeeze with other regulatory remedies – such as the setting of cost-based wholesale prices. Also, unlike other consultations issued simultaneously, this consultation for margin squeeze testing focusses solely on its application to Orange Fixed and Orange Data, rather than being a generic regulation applied to all designated operators. By imposing excessive regulatory restrictions, this remedy will disrupt market dynamics and restrict fair competition. Such an approach entails risk of adversely affecting the stability and expansion of the market and produces an excessive regulatory burden that, in this particular situation, serves no obvious purpose.

Orange has some major concerns about the proposed Implementation of a Margin Squeeze Test. These are of two types.

- Concerns that apply to all four sets of Instructions on which the TRC is now consulting. These concerns are set out in Section 2.

- Concerns that are specific to the consultation on a Margin Squeeze Test. These are addressed in Section 3.

Following on from the general concerns:

- Section 4 includes a general discussion on the use of margin squeeze tests in Jordan and their relation to the existing market and its regulation; and

- Section 5 provides answers to the TRC's direct questions, which should be considered alongside the general observations contained in this document.

2 Aligning regulation more closely with current market conditions

2.1 Orange's main concerns with the TRC's four consultations

Orange has two major concerns with the TRC's four consultations. The first of these can be summarised as follows:

- the current dominance assessments are six years out of date while, in the intervening years, market conditions have changed rapidly; and
- as a result the interests of all of Orange's business units, the wider industry and the public interest, would be seriously harmed if the instructions, presently under consultation, were implemented using the current dominance assessments.

We set out our analysis of this concern in Section 2.2 below.

In addition, Orange is concerned that there is insufficient guidance on the timing aspects for the market review process. This concern is considered in Section 2.3.

To deal with these two problems Orange proposes to the TRC that it:

- conducts a new review of the fixed broadband markets as soon as possible before implementing any of the four sets of Instructions;
- focusses in this review on market definition and the case for including 4G and 5G-based FWA within both the retail and wholesale (WLA and WBA) fixed broadband markets;
- sets a 'regulatory period' of 5 years – the maximum time between the conclusion of a market review of an individual market and the conclusion of the next market review of that market, as is required in the EU. This might mean either a full-scale review of the whole sector or a less expensive review of the one or two markets where conditions are fast changing; and
- consider requests from market players for a more frequent review of an individual market where fast changing market conditions justify such a review.

2.2 The need to undertake a new review of the fixed broadband markets

In three of the four consultations,[1] the TRC's proposals impose significantly greater obligations on dominant operators than on other operators. For such proposals to lead to effective regulation it is therefore important that the dominance assessments used should be up-to-date. Indeed two of the consultations (on KPIs and margin squeeze tests) relate almost exclusively to dominant operators in the fixed broadband wholesale markets and would be largely redundant if that dominance no longer existed.

[1] *Implementation of a Margin Squeeze Test for local access and broadband access*, the *Key Performance Indicators (KPIs) for Wholesale Services Instructions*, and the *Interconnection, Infrastructure Sharing and Mobile National Roaming Instructions*

The TRC's proposals in the consultations will be implemented in 2025 at the earliest. But, if current dominance assessments are used, they will result in regulations that reflect the market conditions from 2018 – the latest year for which data was available to assess dominance in the 2019 market review. In other words current dominance assessments are seven years out of date.

In addition Orange notes that the dominance assessments made in the 2019 review were flawed. In particular they were based on the 2006 Competition Safeguarding Instructions rather than the 2009 White Paper on the Market Review Process. This means that they did not take a forward-looking approach to the assessment of dominance.

Since 2018 market conditions in the fixed broadband markets have changed substantially, driven by three main factors:

- investment in the deployment of new fibre networks by the likes of Orange Fixed, Zain and others;
- rapid rollout of a wholesale only fibre network across Jordan by Fibertech; and
- substantial growth in the use of 4G (and now 5G) FWA which offers a strong competitor to copper and fibre-based wireline broadband services and is now rapidly substituting for TDD based FWA.

Orange considers that, as a result of these developments, the fixed broadband markets have become effectively competitive and that Orange Fixed is no longer dominant in the WLA or WBA markets. If this analysis is correct then the wholesale KPI and Margin Squeeze Instructions now proposed by the TRC, will be largely redundant.

As a result Orange considers it would be wrong to use the 2019 dominance findings when operating the proposed new Instructions. Such an approach would lead to faulty regulation, as a result of which:

- The TRC would no longer be able to meet its mandate under the Telecommunications Law and Government policy on regulating the telecommunication sector that requires the TRC to:
  - "*stimulate competition in the telecommunications and information technology sectors, relying on market forces,…* "[2];
  - "*review its instructions and regulatory decisions periodically*"; and
  - "*…favour a presumption of withdrawal of ex ante regulation where market conditions allow*".[3]
- Competition between licensees would weaken as major, but no longer dominant, market players are restricted in the way they can compete because of regulations that should no longer apply.
- Unnecessary regulatory costs would be incurred. The cost of implementing the margin squeeze and KPI proposals in the consultations are significant. Yet these proposals would not be needed (and the implementation costs would be avoided) if, as seems likely, dominance in the fixed broadband markets has receded.

To prevent such harm Orange asks the TRC to carry out a new market review of the fixed broadband markets – to redefine these markets and reassess dominance within them - before implementing its proposed Instructions.

[2] Telecommunications Law 1995, Article 6(e) (o)
[3] TRC Jordan, 2020, Regulatory Decision on the Fixed Markets Review 2020, p2 references the TRC's need to follow the General Policy for the Information & Communications Technology and Postal Sectors, 2018 (the "Policy").

2.2.1 Market conditions have changed significantly since the last market review, especially in the fixed broadband market

The major market developments

Over the five years since the 2019 market review, the fixed broadband market in Jordan has seen four major developments:

- A substantial improvement in the price performance of FWA products following the rollout of 4G and now 5G technologies in Jordan. It is important to note that today, Orange Mobile has a market share of less than ✂ in the mobile services retail market and only around ✂ of the supply of FWA-based fixed broadband.
- The rapid rise in the importance of fibre access when compared with other access technologies for fixed broadband. Figure 2.1 illustrates.
- The rapid rise in the market shares of Fibertech in the WLA market. In 2019 Fibertech held a negligible share of the WLA market. But Orange estimates that Fibertech now has a ✂ share of fibre access connections. As a result, the share of fibre access of Orange Fixed is declining quickly as shown in Figure 2.2.
- In addition both Zain and Umniah now self-supply fibre access as well as purchasing fibre access from Fibertech. So the number of fibre connections self-supplied by these two operators has grown substantially over the past five years.

Figure 2.1: Fixed broadband technology – changes in connections (000s) ✂

✂

The need to include 4G/5G FWA in the FBB markets

In the 2019 review TDD-based FWA was included in the definition of the fixed broadband retail and wholesale markets, but 4G based FWA was excluded. Orange considers that this exclusion is no longer appropriate given the following evidence:

- 4G FWA is now being sold by all three mobile operators in Jordan as a separate product from contracts offering a combination of mobile data, voice and text.
- In Orange's view these products are now being used by those who buy such stand-alone data plans as a substitute for wireline fixed broadband products.
- As a result, 4G and 5G-based FWA is now substituting rapidly for TDD based FWA as Figure 2.2 illustrates.
- Exclusion of 4G and 5G based FWA would be inconsistent with the TRC's principle of technology neutrality.
- 4G and 5G-based FWA are seen as a substitute for wireline fixed broadband in many other jurisdictions – especially in areas of relatively low population density where the cost of fibre broadband connections are substantially higher than in urban areas. Recognising this relationship between wireline and wireless-

based fixed broadband is an important step in maximising the availability of cost-effective fixed broadband on a nationwide basis.

Figure 2.2 Demand for FWA technology is changing fast ✂

✂

Effective competition in the fixed broadband markets

Orange Fixed estimates its WLA market share by fixed broadband connections (all technologies) has fallen significantly since 2019 as shown in Figure 2.3 – driven partly by the rapid rollout of fibre access by Zain, Fibertech and others, and partly by growth in the use of 4G and 5G based FWA.

Figure 2.3: Market shares by connection for Orange Fixed over time ✂

✂

Figure 2.3 indicates that:

- The market share of Orange Fixed in WLA will have fallen from ✂, if 4G and 5G FWA connections are included in the FWA markets.
- If 4G and 5G FWA connections are excluded, then the market share of Orange Fixed in the WLA market will have fallen from ✂.
- At the same time the retail share by connections of Orange Fixed will have fallen more slowly – from ✂.

In addition Orange estimates that Fibertech's share of the WLA market will have grown from ✂[4].

Using these market shares and applying the Modified Greenfield Approach (now endorsed by the TRC in its 2024 Competition Safeguard Instructions proposals) Orange estimates that the fixed broadband retail market will be effectively competitive in the absence of ex ante regulation based on the market review process. Specifically Orange notes that:

- There will be no market player with a retail share in excess of ✂ by 2025.
- There will be no wholesale supplier with a share in excess of ✂ by 2025.

As a result Orange considers that the fixed broadband market, at both the retail and wholesale levels, should be freed from existing ex-ante market review regulation.

[4] 4G FWA included in the WLA market.

2.2.2 The 2019 dominance analysis was flawed

The 2019 assessment

In the *Regulatory Decision on the Fixed Markets Review 2020*, the TRC's determination of dominance in the WLA market noted that Orange Fixed:[5]

- Clause (1) …*has a market share in excess of 50%, the threshold for the presumption of dominance established required by Article 8(b) of the Competition Safeguards, and it is unlikely that alternative operators providing and/or self-supplying wholesale local access could increase their market shares sufficiently over the lifetime of this review to a level that would allow them to effectively compete with Orange Fixed or constrain its power*.

- Clause (3) *Barriers to entry and expansion in this market are high (Competition Safeguards, Article 8(c), Numbers 13 and 14*).

- Clause (6) *With the exception of wholesale access via FBWA, Orange is the only potential provider of wholesale local access, and no wholesale products are active in the market. Therefore, there is no potential for countervailing buyer power (Competition Safeguards, Article 8(c), Number 6).*

In its dominance assessment for WBA the TRC cited clauses (1) and (3) above, as well as: [6]

- Clause (5) *While other operators (notably fibre providers) self-supply wholesale broadband services over their own infrastructure, they remain reliant on Orange Fixed's bitstream product outside their areas of geographical coverage and this is likely to remain the case during the lifetime of this review (Competition Safeguards, Article 8(c), Numbers 2 and 3).*

- Clause (6) *The largest customer of Orange's wholesale broadband service is Orange Data, and no other customer purchases a significantly high volume of wholesale broadband services to allow it to exercise countervailing buyer power (Competition Safeguards, Article 8(c), Number 6).*

The flaws in this assessment

Orange considers that the 2019 assessment of dominance was flawed because it:

- drew on the guidelines for assessing dominance as detailed in the *Competition Safeguards 2006*, whereas it should have been guided by the *White Paper on Market Review Process 2009;* and

- did not take a forward looking approach.

The TRC has developed two distinct guidelines: one for use in the application of ex-post competition law – the *Competition Safeguards* – and the other for ex-ante market reviews – the *White Paper on Market Review Process*. Within the market review guidelines there is no percentage threshold for presumption of dominance. There is reference to the use of indicative market share percentages by the European Commission, along with a range of other considerations that need to be taken into account. The reliance upon the wrong guidance clearly led to inappropriate determinations of dominance.

[5] TRC Jordan Regulatory Decision on the Fixed Markets Review 2020, p7
[6] TRC Jordan Regulatory Decision on the Fixed Markets Review 2020, p8

A key difference between the assessment of dominance in the case of an ex-post analysis to support a concern of historic abuse, versus the assessment of dominance in the case of considering the imposition of ex-ante regulation, is that the latter needs to be forward looking, taking into account expected or foreseeable market developments – such as the entry of Fibertech. The White Paper on Market Review Process clearly states this:[7]

> *Whereas under competition rules one will be measuring market power at that point in time when an alleged abuse occurred, **a sector-specific regulator will take into account the possibility of that market power diminishing over time,** given the need for it to conduct a forward-looking analysis*.(Emphasis added)
>
> *A hallmark of the process of market review lies in the fact that markets must be reviewed in a manner that **takes into account the technological and commercial developments** that are likely to occur within the timeframe **covered by the market review period**, at least insofar as these developments may have an impact on the soundness of the conclusions drawn by a regulator with respect to the outer boundaries of a relevant product market, and **with respect to the existence or non-existence of dominance**. This is expressed in the notion that the task of a regulator under the process of market review must be "forward looking".* (Emphasis added)
>
> *The temporal aspect associated with market shares is crucial, as changes in market shares over time are likely to provide an insight into the dynamics of the relevant market and may be useful in assessing the nature and extent of competition in that market. In addition, the risks associated with adopting a snapshot view of the affected market are avoided. For example, volatile or rapidly decreasing market shares may indicate under certain circumstances the existence of effective competitive constraints.*

The above analysis is supported by references to the 'regulatory approach to market analysis' specified by the European Commission in its Guidelines on market analysis and the assessment of significant market power:[8]

> *"… NRAs should **take into account existing market conditions as well as expected or foreseeable market developments over the course of the next review period**…"* (Emphasis added)

The proposed changes to the Competition Safeguards Instructions, presently out for consultation, note that following the adoption of the proposed changes, the new Competition Safeguard Instructions will supersede the current White Paper. Within the proposed changes to the Competition Safeguard Instructions, useful distinctions are proposed to acknowledging the difference between the requirements of ex-post and ex-ante approaches. However, as we elaborate on within our response to the consultation on the Update to the Competition Safeguard Instructions, the currently proposed changes to accommodate the differences in undertaking an ex-ante market review, do not go far enough or replicate sufficiently the detailed and useful processes included within the current White Paper. Either more of the ex-ante market review specific processes need to be included within the Competition Safeguards, or the White paper needs to be retained to provide clear guidance as to how the TRC intends to conduct market reviews.

A summary of Orange's conclusions

A finding of dominance in the 2019 market review would not have been arrived at if the TRC had followed the guidance of its market review guidelines and considered both the diminishing market shares of Orange Fixed, and taken a forward looking approach that included the expected entry of Fibertech, Zain's expanding fibre network and growing use of mobile delivered fixed wireless access (FWA).

[7] TRC Jordan, White Paper on Market Review Process 2009, Section 1.1 (p8 and 9), Section 4.1 (p28)

[8] European Commission (2018), Communication on SMP guidelines, Available at: https://digital-trategy.ec.europa.eu/en/library/communication-smp-guidelines clause 17

Further, if a forward looking approach had been adopted by the TRC, then it would have likely reached quite different conclusions on the other key considerations of:

- the lack of barriers to entry – Fibertech had or was about to enter the market;
- the technology shift away from copper based ADSL to fibre and wireless; and
- the growth of FWA, and use of self supplied fibre.

Even if the above outcomes had not been foreseen clearly in 2019, they cannot be ignored in 2024.

2.2.3 Orange's proposal to the TRC

Based on the analysis set out above, Orange proposes that the TRC should:

- conduct a new review of fixed broadband markets as soon as possible before implementing any of the four sets of Instructions; and
- focus in this review on market definition and the case for including 4G and 5G-based FWA within both the retail and wholesale (WLA and WBA) fixed broadband markets.

2.3 Revising the timing of the market review process

2.3.1 The timing issues to be reviewed

There are two timing aspects to consider in undertaking a market review:

- how often the market review is undertaken – the time between market reviews; and
- the forward looking perspective – the time horizon projection within which a regulator should look to take account of future market developments in carrying out the market review process.

Orange considers that the TRC needs to revise both of these aspects and align them, to make regulation more timely and more relevant.

2.3.2 The case for revision

It is clearly important, if regulation is to be effective, that the interval between market reviews should lead to regulations that reflect current market conditions as far as possible.[9] On the other hand conducting market reviews are expensive and time-consuming for both the TRC and those they regulate. So what is the appropriate frequency for market reviews?

Currently there is no guidance on the frequency with which market reviews should take place in the telecommunications sector of Jordan. Neither the Law, the Policy, nor the White Paper on Market Review Process, specify the time between market reviews or how often the TRC should undertake a market review to

[9] We note that In practice there was a full scale market review in 2010 and another in 2019. There have been no similar reviews since and there are currently no signs of a new review being imminent.

meet the requirement of a government policy. [10] As a result the TRC has taken over 10 years to reach a final decision in its most recent 2019 market review[11] but has still not concluded its decision on remedies – the subject of these consultations – and is not likely to until 2025: fifteen (15) years following its last market review.

> ***"requires the TRC to review its instructions and regulatory decisions periodically*** *and, where market conditions allow and where, in the judgment of the TRC this is appropriate, to amend such instructions and regulatory decisions in line with these conditions."* (Emphasis added)

However, the White Paper on Market Review Process does reference '*market review period*' and specify the forward time horizon within which a forward view should be taken.[12]

> *"A hallmark of the process of market review lies in the fact that markets must be reviewed in a manner that takes into account the technological and commercial developments that are likely* ***to occur within the timeframe covered by the market review period****…".*
>
> *"Market reviews are conducted with a* ***forward looking perspective of 2-3 years****. Therefore, it is important that these reviews are* ***repeated at such intervals*** *in order to ensure that new technological and market developments that may result in different market definitions and analysis are taken into account, and which* ***may require ex ante obligations to be modified, abandoned*** *or new ones introduced."* (Emphasis added)

Elsewhere in the White Paper on Market Review Process it notes that:[13]

> *"In performing this task****, the TRC will consider the EU approach to be an important reference point****…" (*Emphasis added)

In the EU both the period between market reviews and the forward looking time horizons are required to be the same and are referred to as the '*regulatory review period*'.[14]

> *"13. In carrying out a market analysis in accordance with Article 16 of Directive 2002/21/EC, NRAs will* ***conduct a forward-looking, structural evaluation of the relevant market over the relevant period****."*
>
> *"14.* ***The length of the relevant period (the next review period) is the one between the end of the ongoing review and the end of the next market review*** *(11), within which the NRA should assess specific market characteristics and market developments."* (Emphasis added)

At the inception of the EC regulatory framework in 2002 the regulatory review period was set at 5 years. For a short period it was reduced to 3 years but in the latest review of the EC framework, it was reset to 5 years. It has never been left to extend out to 10 or 15 years.

[10] General Policy for the Information & Communications Technology and Postal Sectors, 2018, Paragraph 21
[11] The final decision of the previous market review was in 2010 and the final decision of the 2019 market review was published in 2020.
[12] TRC Jordan, 2009 White Paper on Market Review Process, p9
[13] TRC Jordan, 2020, Regulatory Decision on the Fixed Markets Review 2020, p11
[14] European Commission (2018), Communication on SMP guidelines, Available at: https://digital-trategy.ec.europa.eu/en/library/communication-smp-guidelines clause 13 and 14

> *"(177) However, in the interest of greater stability and predictability of regulatory measures,* ***the maximum period allowed between market analyses should be extended from three to five years****, provided market changes in the intervening period do not require a new analysis."* (Emphasis added)

If the TRC were following international best practice, following its 2020 Final Decision, it would have started preparing a new market review at least a year ago, so that it could issue new instructions for the markets and not issue instructions to put regulations on the outputs of the market study that was issued in 2020.

2.3.3 Orange's proposal to the TRC

Based on these considerations Orange proposes that the TRC should (perhaps in consultation with the Government):

- set a 'regulatory period' of 5 years – being the maximum time between the conclusion of a market review of an individual market and the conclusion of the next market review of that market, as is required in the EU.[15] This might mean either a full-scale review of the whole sector or a less expensive review of the one or two markets where conditions are fast changing. This might be done either by implementing the full four step market review process or simply reviewing (say) the assessment of dominance; and

- consider requests from market players for a more frequent review of an individual market where fast changing market conditions justify such review.

We consider that these proposals for the timing of future market reviews would help the TRC in achieving some of its key objectives such as "*improving legal certainty as to the basis upon which an ex ante regulation will apply*" and "*targeting remedies to address identified competition problems".* At the same time this proposal would help avoid a repetition of the problems identified above.

[15] In the EU this period is known as the 'regulatory period'. In practice, in order for a National Regulator to undertake and conclude its market review within the regulatory period, it will normally commence its data gathering and analysis some 18 months to two years before the end of the regulatory period.

3 Orange's observations on the margin squeeze proposals

In this section we detail Orange's key concerns and observations regarding the TRC's proposed regulations on margin squeeze tests. In some areas Orange appreciates the TRC's intentions to provide increased clarity and transparency of the margin squeeze test and tool. However this does not take away from the fact that Orange considers there is no requirement for this regulation in the Jordanian market in general, and there are also areas where Orange has some major concerns over the current drafting of instructions.

3.1 Concerns over the existence of the margin squeeze proposals

Orange does not consider there is any need for the margin squeeze testing regime, as outlined in the proposals, to be implemented. These proposed instructions should be withdrawn. There are three key reasons for this.

- The telecommunications markets in Jordan are significantly different now compared to at the time of the last market review. Orange considers that a new market review, as would be expected given the time which has passed since the last analysis, would find that there is no designated dominant operator in the market. With no designated operator, there would be no mandate for a margin squeeze testing regime. Our arguments for the need for a new market review are set out in Section 2.

- Telecommunications services in Jordan are already heavily regulated in a number of ways, including cost-oriented pricing for wholesale networks, defined competition safeguards, and pre-authorisation of tariffs. The addition of another regulatory system would lead to a loss of flexibility in pricing, lower consumer welfare, and lower investment in networks and technologies. We examine these impacts in Section Error! Reference source not found..

- Not only are the margin squeeze proposals not needed, but they are likely to actively contradict existing regulations and regulatory objectives. Orange Fixed already provides cost and other needed related inputs to the TRC ahead of the introduction of a new tariff, and these tariffs must be authorised before introduction. Moving to a proactive margin squeeze regime as described in this consultation would mean this authorisation would take significantly longer, be more costly, and introduce new cost-oriented regulation on products which the TRC has previously stated do not need to have this imposed.

Orange considers that there will be no positive impacts arising from the imposition of this regulation – there have been no instances where margin squeeze has been alleged and proven in the past, and prices are already pre-authorised – but there will be significant negative impacts in terms of regulatory burden, fewer tariff choices, and lower consumer welfare. It needs to be remembered that the Competition Safeguard Instructions address margin squeeze as an abuse of a dominant position. We recommend that these margin squeeze testing proposals be withdrawn.

3.2 Concerns over a lack of detail in consultation instructions

The exact form of the margin squeeze test is reliant solely on the consultation paper. However, the consultation document does not provide a definitive text for how margin squeeze will be implemented, nor does it provide detailed instructions for building a margin squeeze test tool (MSQT). There is no clarity as to whether operators will be given access to the MSQT, or how input data and assumptions will be included within the calculation. There are, indeed, a large number of uncertainties that must be clarified before any margin squeeze tests can be implemented. These include the following.

- How 'flagship offers' will be defined and categorised. The TRC indicates that 'flagship offers' will be structured in such a way that these form 75% of the operators' portfolio, but there may be multiple ways of aggregating offers.

- The amount of data that would be required each time a margin squeeze test were performed, both on ad hoc and regular bases. While the consultation paper details the cost base to be used in tests, and defines that the costs of an equally efficient operator are to be used, it also requires cost data to be supplied in a highly disaggregated form – data which may not be available.

- How the costs for bundles will be calculated, particularly where bundles comprise some regulated and some non-regulated services. Information on how retail costs will be separated between different levels of bundling is also absent.

- Which services and products are within the scope for margin squeeze tests – there is much confusion and contradiction.

  – **Fibre:** The consultation document indicates that not all but only certain fibre products are included – for instance, the statement "*TRC proposes to apply: An ex-ante MSQT whenever: A new retail offer is launched (If the broadband service is fiber-based, only flagship offers will be considered*)".[16] What constitutes 'A new retail offer' and what are 'flagship offers'? As we illustrate in Section 4.5 below, the specification of 'flagship offer' is not clear and is open to multiple interpretations.

    Elsewhere the consultation states "*LLU is not considered for the same reason why the wholesale margin squeeze test is **focused on WLA fibre services***".[17] Indicating that the MSQT is focused on fibre.

    Similarly

    Is the MSQT focused on all fibre, some fibre, not on fibre?

  – **Copper based broadband:** The statement, "*for avoidance of doubt, all new or amended copper-based broadband offers will be analysed*"[18] seems to be clear, that every new or modified broadband service that uses copper infrastructure (like ADSL) will be reviewed, under the margin squeeze test. But why is that, when elsewhere the consultation notes that *"[b]ecause fibre broadband services are more dynamic than copper-based services, the TRC proposes to analyse ex-ante, only fibre offers classified as flagship*". With further confusion added with the statement "*LLU is not considered for the same reason why the wholesale margin squeeze test is **focused on WLA fibre services***".

    Overall we do not consider that the TRC has considered how the proposed margin squeeze test regime fits within the overall suite of regulation proposed.

- Who the margin squeeze test is to be applied to. Throughout the consultation the TRC makes reference to the test being applied to Orange Fixed or Orange Data, as designated dominant operators. However, should other operators be found to be dominant, then regulations should be applied equally across the market, if imposed at all.

[16] Consultation document Section 4.2.1 page 11
[17] Consultation document Section 2.1 page3
[18] Consultation document Section 4.2.1 page 11

We set out, in Section 5, our responses to the individual questions in the TRC's consultation paper, where many of these clarifications are needed.

One other concern is the time limit to regulation. Throughout the consultation document the TRC refers to the need for collection of historic cost and volume information, and also states that "the [margin squeeze test] focuses on assessing whether the vertically integrated operator has set wholesale and retail prices in the past in a way that has led to insufficient margins for its downstream competitors". Orange requests that the TRC clarify what is meant by "historic data" in this context, and how such data would be used. It is not reasonable for tariffs, which have been approved by the TRC in previous years, to be retrospectively analysed using a new definition of margin squeeze.

3.3 Concerns over impacts on industry and consumers

There is a more fundamental question over whether these tests should be imposed at all. The purpose of the margin squeeze test regime proposed by the TRC appears to be to provide economic certainty over how regulatory compliance will be monitored.

The proposed regulation does not do this, but instead tries to introduce a complex and difficult procedure, requiring intense modelling and analysis, while introducing a number of subjective decisions over how costs are to be calculated. This will result in significant additional costs for both Orange Fixed and the TRC, for no clear benefit. In addition, the multiple layers of regulation will prevent Orange Fixed if it were to remain the designated dominant licensee, from being able to react to competitive pressures or changes in consumer demands.

A margin squeeze test is designed to look only at whether prices are being set too low by a dominant operator, and does not consider how the welfare of the industry or consumers is affected. Where a dominant operator has been established to be operating efficiently with a low cost base – as is the case with Orange Fixed – then a focus on regulated margins may mean new entrants are unable to compete, and any reduction in operators or consumer choice should be avoided. The imposition of regular margin squeeze tests is likely to lead to higher prices for consumers and a reduction in the number of tariffs.

As indicated above, there is also considerable uncertainty as to which services and products will be included in the regulation. In addition, the existence of other regulation on the same services means that margin squeeze tests are unnecessary or, worse, actively damaging.

These concerns are set out in Section 4Error! Reference source not found.

4 Discussion on the use of margin squeeze tests

4.1 Introduction

In this Section Orange sets out concerns over the use of margin squeeze tests within the context of existing regulation, in particular the interaction of a margin squeeze with regulated wholesale prices.

The TRC is proposing that, as part of a set of market review remedies, margin squeeze tests should be applied to products of a dominant operator in three instances:

- on an ex-ante basis, for each and every new wholesale service;
- on an ex-ante basis, for any new retail service which is considered to be a replacement for, or linked to, an existing 'flagship offer'; and
- on an ex-post basis, every six months, on an aggregated cost and revenue base across all retail services.

In addition a dominant operator will also remain constrained in setting its prices by competition law – as set out in the articles of the Competition Safeguard Instructions relating to abuse of a dominant position.

As discussed in Section 2, the market has changed significantly from the structure in 2019 at the time of the previous market review, and Orange considers that a new fixed broadband market review will determine that Orange Fixed will be found not to be dominant. This means that many of the margin squeeze tests envisaged by the TRC's latest proposal will be redundant, particularly as the consultation paper is focussed on application of tests to Orange Fixed rather than a generic designated operator.

Nevertheless, it is important to note that Orange has some serious concerns over the structure of these proposed tests, notwithstanding the fact that it does not consider that they will apply to its business going forward.

In order to understand the key concerns that Orange has, we must consider how the proposed margin test structure relates to:

- the instructions under consultation for competition safeguards;
- the existing cost and other needed related inputs made by Orange Fixed for new services and products, which enable the TRC to understand the profitability of offers by using assumptions over take-up and product mix, and applying a retail markup;
- current price and cost regulation, particularly relating to wholesale products; and
- the set of products that Orange Fixed offers.

These are considered in turn below, before the implications of these relationships are summarised.

4.2 Relationship to competition safeguards instructions

The key use of margin squeeze tests is to check whether an operator with a dominant position is pricing in a manner that could foreclose competition. The tests help ensure that operators with market dominance are not able to temporarily underprice retail services or charge excessive wholesale prices to drive competitors out of the market. Margin squeeze is not a regulation in itself, but rather a tool to ensure that certain regulatory objectives are being met.

The exact methodology of margin squeeze testing is not explicitly defined in any existing instructions, nor in the proposed new instructions. In the Competition Safeguards Instructions, within the current consultation document, the use of margin squeeze testing is proscribed as shown below.

Figure 4.1: Use of margin squeeze tests within competition safeguards – 2024 proposed instructions

Article (14) Abuses of Dominant Position – Margin Squeeze

a) A "margin squeeze" or "vertical price squeeze" is the practice that occurs when a Licensee or its affiliate competes in a market, and the Licensee is also a dominant seller to its competitors of a critical input, and the Licensee inflates the charge for that input so as to raise the average cost base of its rivals and/or charge a retail price relative to the charge of that input so as to damage competition.

b) To determine whether a particular situation involves a margin squeeze or simply an inefficient Licensee, the TRC requires a demonstration that the alleged violator or its affiliate is (a) dominant in the relevant market for a product which is an input for a service in a market in which the alleged violator also competes; (b) charging unreasonably high wholesale prices and/or unreasonably low retail prices such that the Downstream competitor is unable to maintain a sufficiently high margin to operate. In addition, the TRC requires a demonstration that a competitor is: (i) buying important inputs from its dominant Licensee rival at prices that exceed reasonable levels, thereby inflating its costs; (ii) unable to find or purchase inputs from other sources at lower prices; and (iii) has a cost structure that would reasonably allow it to survive in the market in the absence of the dominant provider's allegedly abusive practice.

c) In determining whether a margin squeeze exists, the TRC shall apply an imputation test that compares the retail price of a dominant firm for a particular service to the sum of its price for the wholesale service and the incremental costs of providing the retail service (such as marketing, billing and collection). The TRC, however, may exempt certain regulated services from the imputation test where application of the test would otherwise conflict with existing dominant Licensee regulations, license conditions or specific articulated policy goals.

d) For purposes of applying the imputation test, the TRC may require the Licensee that is the subject of a margin squeeze allegation to submit internal cost information to the TRC.

There are marginal differences between the proposed instructions and the current text dating from 2006 relating to margin squeeze, but the substantial question of when margin squeeze should be applied remains the same.

The text in these instructions is clear – that margin squeeze tests should be used "*[t]o determine whether a particular situation involves a margin squeeze*", and such tests should be used relating to "*the alleged violator*". Such tests are shown to be important when identifying if a firm, which is observed to be charging a lower price than its competitors, is actually making a subnormal profit, or if its competitors are instead simply less efficient.

The use of margin squeeze tests defined through this regulation, therefore, must only be done in a reactive way, comparing the margins of two retail operators and considering inefficiencies. There is nothing within the Competition Safeguards Instructions which would imply ex-ante regulation – unless there is an "alleged violator", there is nothing for a margin squeeze test to investigate. Further, the margin squeeze consultation paper repeatedly refers to how regulation will be applied to Orange Fixed, meaning that the TRC is conflating Orange Fixed with an "alleged violator", rather than this being a theoretical exercise. Orange would like to repeat that it has not been alleged to have violate any margin squeeze regulations.

Given this, a proactive approach to margin squeeze tests – as described in the current consultation document – is solely related to revisions to the price control remedies which have been set out in response to the 2019 market review, and does not relate to a more general competition safeguards regime. The ex-ante tests, and regular ex-post tests, would exclusively be related to these new regulatory decisions.

Nevertheless, if an operator with clear dominance was expected to consistently set prices at a level below that which a competitor could afford to match, there may be a justification that tariffs should be pre-approved through use of ex-ante margin squeeze testing. This does not reflect the reality in Jordan, where no such abuse of dominance has been found – and, indeed, as discussed in Section 4.3, Orange Fixed has already been demonstrating that its retail tariffs have not been priced below cost for a number of years.

4.3 Relationship to existing submissions

Despite the lack of a previous definition of margin squeeze testing, Orange Fixed has been proactively submitting cost and other needed related inputs to the TRC for each and every new tariff proposed. These submissions have included an input sheet containing the predicted speed mix and average usage per user for bitstream services, and a basic cost model for services (including the provision of a fixed line, and consistent with the regulated prices of fixed-to-mobile traffic and fixed termination). These submissions demonstrate that these offers are made above cost, and the TRC may use these to carry out replicability tests. While these tests are not as rigorously defined as the margin squeeze tests outlined in the TRC's consultation, and they differ with some of the assumptions and calculation methodologies, the aim is the same – to ensure that Orange Fixed is not setting prices artificially low below cost, and preventing others from competing in the market.

The TRC has set an uplift to allow for retail costs using historic information from Orange Fixed's operations, and reflects what is considered to be the costs of an operator equivalent to Orange Fixed in the retail market. In the current consultation, this is analogous to the 'equally efficient operator' standard, but when taken as an aggregate over all retail products, rather than calculating an incremental retail cost for each product.

These submissions require significantly less effort and expense from Orange Fixed, as they are aligned with the estimation of current regulated costs for wholesale inputs, and apply a single retail uplift rather than requiring extensive retail costing models. They do require modelling work to be undertaken on the structure of bundles, particularly where different consumers may demand different speeds and other specifications. Such submissions are consistent with those historically carried out in other jurisdictions, and can be used where a tariff approval process is required.

From the introduction to the margin squeeze consultation, it appears that the TRC envisions an ex-ante margin squeeze test to be part of an overall tariff approval process, whereby every new wholesale tariff, and any new retail tariff considered to be for a "flagship product", must be demonstrated to not be anticompetitive. As mentioned in Section 4.2 above, this is inconsistent with the TRC's proposals for competition safeguard regulation, and furthermore the process of a full margin squeeze test is costly and would take a considerable time to complete. This time gap would substantially reduce the ability of Orange Fixed (if it were to remain a designated dominant licensee) to respond to price changes and new products from competitors, or to offer new technologies and services to consumers. Such pre-approval would therefore weaken the overall strength of competition in the retail fixed broadband market.

Given this analysis, Orange considers that the TRC has not provided an adequate explanation as to why the current submissions are not sufficient for the purposes of monitoring Orange Fixed's tariffs – indeed these submissions appear to go further than is required.

4.4 Relationship to price and cost regulation

Within the margin squeeze consultation, the TRC is proposing three different types of margin squeeze test. Two of these are at the retail level, while the third is at the wholesale level, comparing the price charged for certain wholesale products to the costs of provision, which have in many cases been established through a TSLRIC+ modelling exercise.

However, the wholesale products which the TRC examines in this area – the prices of WBA and WLA – are already both set by regulation in Jordan at a cost-oriented level (or, in the case of fibre products, at a level where wholesale pricing is not deemed to be "excessive", as per the 2020 Market Review Instructions). Where such regulation is in place, it is not possible for a dominant operator to engage in a margin squeeze, since the prices are set at pre-determined levels. If a margin squeeze test were to be carried out, and it were to fail, then this would indicate that the regulated prices had been set at an incorrect level and that regulatory model would need to be rebuilt.

Given this, the imposition of ex-ante margin squeeze tests on copper-based wholesale markets does not make sense and should be disregarded, unless the TRC plans to remove the requirement for cost-orientation of wholesale prices. To the extent that fibre-based wholesale markets are also price regulated, again a margin squeeze test should not be imposed.

Orange wishes to emphasise that it has significant concerns over the risks that arise from overlapping regulations, with the potential for redundant requirements or confusion over which regulations are to apply. This is true both for the interaction for margin squeeze with other pricing regulations, as well as the internal overlapping regulations of ex-ante and ex-post margin squeeze.

4.5 Relationship to existing products

The margin squeeze consultation is, at times, unclear as to which products are to be included in the scope of a margin squeeze. The focus for the adjustments in regulation across the suite of consultations put out by the TRC is on fibre products., but the TRC seems to expect a significant focus on margin squeeze tests for copper broadband products.

In particular, the TRC makes the following statements.

> **“For avoidance of doubt, all new or amended copper-based broadband offers will be analyzed.”**

> **“Because fiber broadband services are more dynamic than copper-based services, the TRC proposes to analyze, ex-ante, only fiber offers classified as flagship.”**

> **“LLU is not considered for the same reason why the wholesale MSQT is focused on WLA fiber services.”**

The focus for ex-ante regulation appears to be on the more important fibre retail products, which are designated as 'flagship' – this designation is discussed further below. However, the first of these statements implies that each and every change to copper-based broadband prices will also be subject to an ex-ante test. In contrast the last of the statements above indicates that the TRC does not consider copper to be a market where margin squeeze tests are needed, specifically at the wholesale level.

Orange notes that copper-based broadband is a legacy product, and there is virtually no use of the wholesale product. The number of copper-based broadband lines fell from approximately 121,000 to approximately 102,000 between 2022 and 2023, and of these all but 200 were supplied at the retail level directly by Orange Fixed. Given this, there is no competition for Orange Fixed to attempt to drive out of the market through use of a margin squeeze, and the imposition of ex-ante margin squeeze tests on any variation to the retail tariffs would be entirely disproportionate.

For fibre products, it is unclear how products will be designated to be 'flagship'. The TRC notes that flagship offers will "be the ones that cumulatively account for at least 75% of the operator's customer base or revenues". The TRC must clarify whether services should be ordered in terms of their market share, and then summed starting with the largest services until the threshold of 75% is reached. However, how this grouping of services is reached is not defined – would two retail offers which are identical other than the amount of included data be considered as one service or two? Further, while Orange Fixed may have internal projections over the popularity of new retail offers, such forecasts are not certain and the TRC has not defined how it will determine if such a new offer is part of the 'flagship offer'. The instructions provided by the TRC are incomplete and would not provide certainty over which products should be considered as 'flagship' – it is therefore impossible to determine the product scope for analysis.

Overall, the consultation document is not sufficiently clear over which services and offers will be included in margin squeeze testing, whether ex-ante or ex-post. The discrepancy between these two types of test is a further cause for concern, with some offers (those not designated as flagship) not requiring an ex-ante assessment but being included in the aggregated ex-post tests. As previously stated, Orange does not consider that either of the tests specified in the consultation document should be implemented, but even forgoing this, it is crucial that regulation should be applied on a consistent basis.

4.6 Implications for the use of margin squeeze tests

Given the complications highlighted above, these some clear issues that must be addressed regarding the way that the TRC has defined and set out the margin squeeze testing regime. These issues arise due to a need for clarity on some instructions, as well as inconsistencies with the way that the tests should be imposed on selected markets. As well as the relationships with other regulations, there are some concerns which arise from inconsistencies within the margin squeeze consultation itself.

Orange has reached four important conclusions that it considers the TRC should take fully into account when revising its 2024 margin squeeze proposals:

- prices in wholesale markets should not be subject to margin squeeze tests;
- retail prices are already examined through profitability analysis;
- aggregated ex-post tests and disaggregated ex-ante tests would give inconsistent results and further be inconsistent with existing regulation; and
- any margin squeeze test regime would need to be proportionate.

4.6.1 Prices in wholesale markets should not be subject to margin squeeze tests

As described in Section 4.4, copper-based wholesale prices are already subject to cost-orientation regulation, and so the use of margin squeeze tests is meaningless; it is not allowed, or indeed possible, for a dominant operator to set wholesale prices at a level designed to drive out competition, and prices will reflect costs. On the contrary, where TSLRIC+ models are used to set upstream prices, as in the case of bitstream products in 2024, a dominant operator may be forced into a margin squeeze situation if the regulated upstream product is set at too low a price.

There is one potential exceptions to this general observation: if regulated prices were set to remain constant for a significant period of time, but costs were to increase, then it may be possible that an operator would be selling at a price level lower than the current retail cost. Even in this case, since the dominant operator would not be able to adjust their price, it would not be justified to run a margin squeeze test.

Currently, fibre-based wholesale products do not have a similar TSLRIC+ cost model requirement, and the level of the competition in the market – with wholesale services from Fibretech and others, and self-provision by many other operators – has led to the TRC not constructing such a cost model. In the 2020 Market Review Instructions, the TRC states that:

> “**FTTx services of Orange Fixed shall be excluded from the cost orientation obligation, but the TRC retains the right to monitor prices, and to take action in the event of excessive wholesale pricing**”

No such action has been taken. Given that the TRC apparently considers that there is sufficient competition in the fibre-based market, therefore, it is inconsistent that Orange Fixed alone should be targeted with ex-ante margin squeeze tests on all fibre-based wholesale services. This is particularly true where the TRC is requiring that the margin squeeze tests should be set with input costs based on TSLRIC+ inputs – which regulation does not require for the fibre-based market at present. Instead, to be consistent with the way in which margin squeeze tests are defined in the competition safeguards instructions, the appropriate input price for a service should be taken as the wholesale price.

Indeed, if the margin squeeze test were to be specified with TSLRIC+ costs as the input price, this would effectively mean that the TRC were imposing a cost-orientation regulation on a service (fibre access) which is not regulated in this way.

Finally, the TRC has defined that the wholesale margin squeeze test is specifically designed to look at the margin between WLA and downstream wholesale services (such as bitstream or WBA), and WBA fibre products and VULA. In both these cases there is a difference in price because the contents of the services are differentiated, not just because of the cost of sales, and the services are designed for very different markets. Considering a direct value chain between the two levels of service is not an accurate way to consider the market.

Therefore, Orange considers that there should be no margin squeeze test applied to the wholesale market.

4.6.2 Retail prices are already examined through profitability analysis

In the consultation paper, the TRC does not describe the system of submitting cost and other needed related inputs which is currently undertaken by Orange Fixed (as described in Section 4.2 above), and only briefly mention that retail tariffs must be pre-authorised (in Sections 4.2.1 and 4.3.1 of the consultation). These submissions fulfil largely the same role as a formal ex-ante margin squeeze test on new offers, but the structure of the submissions is considerably less onerous and time-consuming, allowing Orange Fixed to effectively react to consumer demand and competitive pressures.

The TRC has not demonstrated that these current submissions are failing to obtain its regulatory objectives and allowing for margin squeeze to take place. Given this, we do not agree that the enhanced ex-ante margin squeeze tests on retail offers are required.

4.6.3 Aggregated ex-post tests and disaggregated ex-ante tests would give inconsistent results and further be inconsistent with existing regulation

As mentioned in the consultation document, there will be discrepancies between different regulations, in terms of the cost base considered. While the network cost in both ex-ante and ex-post tests is proposed to be based on TSLRIC+, the amount of retail cost recoverable varies between the two different assessments. In an ex-ante assessment, the appropriate retail cost is the increment only: no common or fixed retail costs can be included, meaning that the cost base is smaller. When the ex-post assessment is carried out, retail costs will be assessed over the entire portfolio of services, meaning that they will include a portion of the common cost.

This could mean that at its first assessment, prior to deployment, a tariff could be judged acceptable, but at the ex-post stage the higher cost base would indicate prices to be too low. The TRC acknowledge this and says that costs for the aggregated ex-post analysis will be higher, but do not acknowledge how this may impact on the regulatory regime.

The ex-post evaluations are proposed to be carried out at an aggregated level. An aggregated test in this case would usually mean that network costs and retail costs are totalled before being compared to retail revenues, to ensure that there was no systematic margin squeeze in place across all services. However the text for the proposal does not make it clear how the aggregated test will be done, referring instead to the TRC using "a portfolio approach" (where previously the paper states this means the test "covers the entire product portfolio of the regulated company or a subset of the offers"). The paper them contradicts this proposal by then also stating this will be done by "aggregating the offers that have been analysed ex-ante and including up-to-date information on users and traffic volumes". This seems to exclude any products that were not subject to ex-ante tests, or at least does not explain how they would be included.

Where the TRC proposes using the ex-ante assessments for all products to create the ex-post aggregated analysis, this would significantly reduce Orange's pricing flexibility – this would lead to a fall in competitive pressure and ultimately a reduction in consumer welfare. In addition, the fact that "non-standardised offers for business customers" (which, in reality, comprises almost all enterprise customers) would rightly be excluded from the regulation means that it would be difficult to run an aggregated test without very detailed cost modelling and cost apportionment.

4.6.4 The final margin squeeze test regime needs to be proportionate

In imposing margin squeeze tests on dominant operators the TRC needs to take account of three key factors if its proposals are to be proportionate.

1. It is highly likely that the fixed broadband markets (retail and wholesale) are now effectively competitive – see Section 2Error! Reference source not found. for more details. If so, many of the TRC's current proposals for margin squeeze tests will be redundant.

2. Given the retail fixed broadband market is determined by the TRC to be effectively competitive, and while Orange Fixed may presently be determined dominant in the ADSL wholesale market, this is a legacy market with no competition problems to rectify and where prices are already set by regulation to be cost oriented. As a result there is no need for a margin squeeze tests here.

3. The TRC's proposal to apply margin squeeze tests before approving retail tariffs significantly weakens competition. Orange Fixed already provides cost and other needed related inputs to the TRC ahead of the introduction of a new tariff, and these tariffs must be authorised before introduction. The proposals constrain Orange Fixed (if it were to remain a designated dominant licensee) or any dominant operator's retail pricing freedom and slows down its ability to react to competitive initiatives by rivals. As such it prevents Orange Fixed or any dominant operator from competing on the merits of its products and prices and hence weakens competition in the markets overall.

4.6.5 Recommendations for margin squeeze frameworks

Given the four considerations set out above Orange proposes the following as a possible way forward, that would both protect non dominant market players from margin squeezes and remain a proportionate way to deal with the competition problems that might exist. This would prevent the threat of over-regulation, remove the need for massive resources to cope with the amounts of data and information required by a margin squeeze regime, and would maintain pricing flexibility and consumer welfare.

Orange strongly recommends that the TRC does not seek to implement a new ex-ante margin squeeze test, but instead relies on existing tariff approval mechanisms. This existing regulation offers sufficient safeguards to prevent foreclosure of competition while any dominance persists at the wholesale level in the fixed broadband market.

Similarly, Orange strongly recommends that the TRC does not implement a regular ex-post margin squeeze test, but instead relies on the regulations built into the existing competition safeguards, where these are relevant.

5 Responses to the TRC's questions

5.1 Introduction

In this section Orange replies to each of the TRC's questions set out in the consultation paper. The responses here draw heavily from the text in previous sections, and responses must be considered alongside that text. In particular, discussion of whether aspects of the margin squeeze test are reasonable must not be considered as an agreement with the use of margin squeeze tests in the first place.

No responses in this section should be considered to override Orange's overarching belief that a new market definition study is required to establish the appropriate dominance in the market.

5.2 Question 1 on retail efficiency levels

Do you agree with TRC's preliminary conclusion that an EEO approach should be considered for estimating downstream costs in the retail MSQT? If not, please indicate your alternative views and provide evidence to substantiate your position.

Yes. Orange agrees that, in the event that a full ex-ante margin squeeze test is required, an appropriate approach to retail cost estimation would be through the EEO method, rather than assuming a potentially unrealistic level of efficiency for competitor operators.

The TRC considers two scenarios where it might be appropriate to deviate from the EEO standard: when market entry or expansion has been frustrated in the past; and in markets where alternative operators have low volumes and significantly limited geographic reach compared to the SMP operator.

Considering the market dynamics in Jordan, there is no evident reason to depart from an EEO approach. Key points supporting this include the expansion of Zain, the third operator; evidence suggesting that operators can reach customers across various geographic areas; and the fact that most operators self-provide WLA or WBA equivalent services. This strategy is in line with the competitive dynamics of the Jordanian broadband market, where players like Fibretech, Umniah and Zain have amassed significant scale that has enabled them to effectively compete. The fact that these operators can run profitably and take use of economies of scale is reflected in the EEO standard. Additionally, by keeping the playing field level and motivating all market players to pursue efficiency and cost-effectiveness, the EEO strategy ultimately helps consumers

The use of EEO as a standard would allow a dominant operator to ensure it was able to recover its own retail costs, and was not artificially penalised for potentially unrealistic efficiency gains. However, the TRC must recognise that such a calculation of retail costs, with apportionment and allocation to different services, is a very time-consuming exercise. Further, for new offers, the estimated costs before a service is launched can be very different to the final costs experienced; the TRC has not offered guidance on how such costs should be estimated.

In commercial decisions it is common for retail costs to be estimated by a markup on input costs, in the same way as the current revenue and cost submissions are calculated by the TRC for approval of retail tariffs. If the TRC insists on the application of ex-ante tests to pre-approve new offers, we recommend that an appropriate markup is used instead to allow the tests to be carried out on a timely basis and to give more certainty over the result.

5.3 Question 2 on wholesale efficiency levels

Do you agree with TRC's preliminary conclusion to consider an EEO approach for estimating downstream costs in the wholesale MSQT? If not, please indicate your alternative views and provide evidence to substantiate your position.

Partially. Given that copper-based wholesale prices are currently regulated on a cost-orientated basis with clearly defined cost categories, a margin squeeze test is not required. For fibre products, as set out in Section 4.6.1 above, there is currently no requirement for TSLRIC+ cost orientation for upstream inputs, and in this case Orange agrees that an EEO approach would be most appropriate for considering downstream costs – although, as described in Section 4.6.5, Orange does not consider that any margin squeeze testing regime is required in the wholesale fibre market in any case.

Following the explanation given in the consultation document, the TRC must ensure that the costs included within the existing price regulation reflect the true costs of Orange Fixed's downstream operators.

5.4 Question 3 on timings for retail margin squeeze tests

Do you agree with TRC's preliminary conclusion that the retail MSQT should be applied on an ex-ante basis, complemented with an ex-post MSQT every six months? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. Orange does not agree that it is appropriate for retail offers to be judged individually on an ex-ante basis, with a further assessment every six months on an aggregated ex-post basis.

Orange Fixed already submits cost and other needed related inputs such as but not limited to, predicted speed profiles and consumer usage, for every new tariff that is proposed. This data includes basic costing information for fixed line operations which is based on the regulated prices of fixed-to-mobile and fixed termination services. This analysis demonstrates that these services are not loss-making – that is, they are sold above cost, including a mark-up for retail costs. The TRC is able to use this information, including the retail cost of services, to carry out a replicability test which ensures that alternative operators would be able to make a sufficient margin to cover retail costs and profits. Such submissions fulfil the TRC's objectives of maintaining a competitive environment, without imposing an overly onerous calculation and modelling exercise. There have been no instances where a tariff, proposed by Orange Fixed following this series of submissions, has been investigated and found to fail a margin squeeze test.

The use of these pre-authorisation submissions gives the TRC, Orange Fixed, and all competitor operators certainty over the acceptability of Orange Fixed's tariffs, without needlessly delaying their introduction or requiring an excessively costly regulatory exercise.

5.5 Question 4 on identifying flagship offers

Do you agree with TRC's preliminary conclusion on the criteria proposed to identify retail fibre flagship offers? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. The TRC's description of how 'flagship offers' should be defined is unclear and Orange requests that the TRC provides additional clarity on these proposals. The threshold of 75% of the market could be made up in a variety of ways, including the smallest to the largest products or vice versa, and measuring market share in terms of number of connections, revenues, profits, or other metrics. It is also undefined how 'services' are to be defined; a single retail offer may make up 40% of the market, but within that offer there may be multiple choices over which equipment is provided, what the overall data cap is, whether there is traffic shaping or throttling, and so on – meaning that each individual configuration makes up only 2% of the market.

Orange is broadly in agreement that, if an ex-ante margin squeeze is required, then it is crucial that this only applies to the most important tariffs and offers on the market. Operators must have the flexibility to create niche tariffs for small marginal groups of users, to maximise total welfare. However, the TRC's current instructions do not give the required clarity to achieve this. The TRC must clearly set out the criteria used to determine which are 'flagship' offers.

5.6 Question 5 on timings for wholesale margin squeeze tests

Do you agree with TRC's preliminary conclusion that the wholesale MSQT should be applied on an ex-ante basis? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. Orange does not agree that there is a need for ex-ante regulation of wholesale products. Prices for copper-based wholesale products are regulated through a cost-orientation regime, with TSLRIC+ modelling determining the prices that dominant operators are allowed to charge. Prices for fibre-based products are not regulated in the same way since the TRC has evidently decided that such onerous cost modelling regulation is not required. It does not make sense to impose a margin squeeze test on this market, when input costs and wholesale prices are determined by regulation.

Instead, in line with the Competition Safeguard Instructions, Orange recommends that the TRC may consider ex-post margin squeeze testing for instances where there has been an alleged violation by a designated dominant operator.

5.7 Question 6 on levels of aggregation for ex-ante retail tests

Do you agree with TRC's preliminary conclusion to apply the ex-ante MSQT at the level of individual offers? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. As stated above, Orange does not agree that an individual assessment should be carried out on each and every new tariff proposed by a dominant operator.

When looking at retail costs, there is a significant difficulty in assessing the costs of individual services, since much of retail cost is involved in general branding and marketing, as well as billing and customer acquisition systems which are common between tariffs. Deriving an appropriate allocation key to spread this cost across tariffs and services depends on having accurate data on subscribers and revenues, but these are not available for services which are yet to launch. The TRC has implied that ex-ante margin squeeze should only consider the incremental retail cost, which would to some extent overcome this issue. However, exactly which costs are to be included is not defined.

5.8 Question 7 on levels of aggregation for ex-post retail tests

Do you agree with TRC's preliminary conclusion that the ex-post MSQT should be applied at the portfolio level? If not, please indicate your alternative views and provide evidence to substantiate your position.

Partially. Orange supports the idea of an ex-post margin squeeze test carried out at a portfolio level for a dominant operator. It is simple and should be effective at monitoring for margin squeeze and preventing foreclosure of competition, especially in parallel with the competition law constraint on margin squeeze as an abuse of a dominant position. However, such a test should not be carried out on a regular basis, but rather only where there is an alleged violation of competition rules, as determined by the Competition Safeguards Instructions.

However, if all retail costs were to be included within this calculation, this would not accurately reflect the ways in which tariffs are designed internally within a dominant operator, since new tariffs would only look at incremental costs for downstream operations. To maintain consistency, it is reasonable for downstream costs across the service portfolio to be included as a markup to network and wholesale costs, as is currently undertaken by Orange Fixed in its submissions of costs and revenues for proposed new tariffs.

5.9 Question 8 on levels of aggregation for ex-ante wholesale tests

Do you agree with TRC's preliminary conclusion that an offer-by-offer approach is the appropriate level of aggregation to be considered in the wholesale MSQT? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. As stated above, Orange does not consider it is necessary to have an ex-ante wholesale margin squeeze test.

5.10 Question 9 on net present value calculation

Do you agree with TRC's preliminary conclusion that an NPV approach should be used in the retail and wholesale MSQT for broadband offers? If not, please indicate your alternative views and provide evidence to substantiate your position.

Yes. Orange agrees that a net present value (NPV) approach should be used when assessing the cost of network and retail in future years, as well as when assessing the expected revenue of a tariff. Use of NPV reflects the way in which the business makes investment decisions, and provides a consistent method of discounting.

5.11 Question 10 on the time horizon

Do you agree with TRC's preliminary conclusion that the retail and wholesale MSQT should use the average customer lifetime for the time horizon? If not, please indicate your alternative views and provide evidence to substantiate your position.

Yes. Orange considers that it is reasonable to consider the average consumer lifetime when determining margin squeeze. However, care must be taken to ensure that asset life is appropriately accounted for. If assets would require replacement (for example, if software licences have an asset life of one year while the average consumer lifetime was over one year) then this must be reflected in the calculation; further, if assets would necessarily continue to have use after the end of service lifetime, then either continued use or disposal should be taken into account. Overall, the use of a customer lifetime will guarantee that the margin squeeze test would take into account a reasonable timeframe for cost recovery and margin assessment, taking into account standard company procedures.

5.12 Question 11 on reasonable rates of profit

Do you agree with TRC's preliminary conclusion that the reasonable rate of profit should consider the approved WACC rate? If not, please indicate your alternative views and provide evidence to substantiate your position.

Yes. Orange agrees that an appropriate discount rate for use in the calculation of margin squeeze is the regulatory WACC. This ensures consistency between regulations.

5.13 Question 12 on the cost standard for retail ex-ante tests

Do you agree with TRC's proposed approach for estimating the costs to be used in the ex-ante retail MSQT? If not, please indicate your alternative views and provide evidence to substantiate your position.

Partially. For retail products, the margin squeeze assessment should be made based on the wholesale price of network services which are used as an input to those products. Since copper-based wholesale products are regulated at TSLRIC+, then Orange agrees that this is an appropriate cost standard to use. However, such a regulated price does not exist for fibre-based products, and Orange Fixed is not required to provide the TRC with detailed TSLRIC+ costs for fibre. If the TRC were to insist on TSLRIC+ as an input cost for the margin squeeze test, this would effectively be imposing price regulation on a product which is currently not regulated in this way. Such an exercise would not only be beyond the TRC's current regulatory scope, it would also be time-consuming and costly. Since fibre products are not price-regulated at cost, then it would be erroneous to consider the cost of the wholesale input rather than the actual wholesale price charged.

In terms of retail costs, however, it is not clear which costs are to be included in the ex-ante margin squeeze test, other than the TRC's indication that it wishes only incremental costs to be included. To reflect the commercial decisions made in a competitive environment, downstream costs should be incremental costs of providing the dominant operator's service volumes, not including costs common with other services. This gives the dominant operator maximum pricing freedom while constraining any abuse of dominance

Orange would like a clear indication of which costs would be considered.

5.14 Question 13 on the cost standard for retail ex-post tests

Do you agree with TRC's proposed approach for estimating the costs to be used in the ex-post retail MSQT? If not, please indicate your alternative views and provide evidence to substantiate your position

Partially. As above, the wholesale costs should be charges that would be paid by an access seeker to carry volume of service generated by the dominant operator; these are regulated at TSLRIC+.

When considering the aggregated ex-post margin squeeze test, the TRC has indicated that all retail costs of the entire portfolio should be included in the test. This is inconsistent with the methodology used for the ex-ante tests, and is also inconsistent with the decisions a competitive operator would make. To ensure that a dominant operator is able to remain competitive and maintain pricing flexibility to provide its consumers with tariffs they demand, we recommend that a summation of incremental costs should be used instead.

5.15 Question 14 on the cost standard for wholesale ex-ante tests

Do you agree with TRC's proposed approach for estimating the costs to be used in the ex-ante wholesale MSQT? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. For wholesale products, prices are either cost-oriented according to the TSLRIC+ standard that is used in other regulation, or regulation of prices has not been considered necessary. As stated above, there is no need for margin squeeze regulation where prices are regulated n this way.

5.16 Question 15 on relevant retail services

Do you agree with TRC's preliminary conclusion that the retail MSQT should be implemented separately for VULA, bitstream copper, and bitstream fibre whenever these services are relevant for the provision of the retail broadband service considered? If not, please indicate your alternative views and provide evidence to substantiate your position.

As stated in Section 2 Orange does not agree with the implementation of margin squeeze tests on the list of products defined in the first question above, without an appropriate market review taking place to determine the scope of these services.

Notwithstanding this objection, Orange does agree that it is useful to consider different wholesale services separately within the retail ex-ante margin squeeze assessment, as this allows the retail offer to be priced most effectively for consumers. By ensuring that each wholesale service's distinct cost structures and market dynamics are appropriately reflected in the margin squeeze test, this method avoids a homogenous application that can skew competitive dynamics.

The exact nature of this calculation is unclear, however. Orange requests clarification regarding the TRC's approach to handling situations in which numerous wholesale inputs are utilised for a single retail offer. A retail offer, for example, may depend on bitstream and VULA services. In these situations, it would be crucial to know if the margin squeeze test will evaluate each relevant input's costs collectively or individually.

5.17 Question 16 on relevant wholesale services

Do you agree with TRC's preliminary conclusion to implement the wholesale MSQT, considering the VULA service as the relevant input? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. Regarding wholesale services, again Orange does not consider that it is necessary to implement a margin squeeze test, given the regulated prices within the market.

5.18 Question 17 on bundling

Do you agree with TRC's preliminary conclusion to assess bundles in the retail MSQT adopting an aggregate approach? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. Currently, all operators in Jordan offer fixed broadband services bundled with other communication services, including fixed telephony, pay TV services, or mobile services. The TRC proposes an aggregate approach for the assessment of a dominant operator's bundled retail broadband offers in the retail margin squeeze test, as it allows for replication by the main alternative providers in Jordan's market and avoids the complication of allocating revenues and costs to individual services included in the bundle.

Orange does not agree with this aggregated approach, and instead supports a cost analysis of the bundle's regulated components. It is crucial that the TRC is able to evaluate each regulated service's actual cost, and its value inside the bundle, with transparency. If considered on an aggregated basis, any dominant operator would need to include the cost of non-regulated services, requiring an additional extensive modelling exercise, and reducing the flexibility for operators to offer consumer welfare-enhancing packages at reduced costs. Further, so that the TRC was able to judge the accuracy and comprehensiveness of the costing exercise, the dominant operator would be forced to report the costs of non-regulated services, representing an overreach of regulation.

Assessing bundles on an aggregated basis would also reduce incentives for dominant operators to invest in other related areas such as television content or Internet services. Such investment is often made in the hope of gaining additional profits when including services in bundles, which would not be possible if the services were included in an overall margin squeeze assessment. Lowering investment would necessarily lead to worsening consumer outcomes.

5.19 Question 18 on promotions

Do you agree with TRC's preliminary conclusion that the promotional costs incurred by the regulated operator in the ex-post retail MSQT should be considered? If not, please indicate your alternative views and provide evidence to substantiate your position.

No. Orange disagrees with the TRC and considers the costs of promotions should be recovered over the average lifetime of the offer rather than every six months.

The TRC has recommended that costs of promotion are included in the margin squeeze test and profitability should be judged over a maximum of six months. However, many promotional offers would not regain their original profitability within this period, since the business justification for promotions is made over the contract length (at least one year) or the average consumer lifetime.

Incorporating promotional expenses would cause distortion in the evaluation of retail prices since it would not account for the pricing schemes' long-term viability. Since promotional expenses are usually transient, they cannot be used to predict future cost structures or operational effectiveness. Rather, they are transient marketing initiatives focused on attracting new clients or keeping existing ones, and they have no bearing on the service's fundamental profitability. Because tariffs are set based on a long-term consumer profitability, expecting that promotional costs are recovered within six months is not reasonable.

For consistency with the time horizon for the margin squeeze test, we recommend that promotions are assessed over the average consumer lifetime.

5.20 Question 19 on non-residential offers

Do you agree with TRC's preliminary conclusion to limit the application of the retail MSQT to residential and standardised non-residential broadband offers? If not, please indicate your alternative views and provide evidence to substantiate your position.

Yes. Orange agrees that margin squeeze regulation should be restricted to standard offers, and than non-standard enterprise contracts are out of scope of this analysis. In reality, all contracts with enterprise customers are bespoke and would therefore be excluded. This is consistent with the consideration that only flagship offers are subject to margin squeeze tests in the retail market, and recognises that it would be unrealistic to carry out a detailed margin squeeze test for every one of the bespoke deals made with enterprises across Jordan. The increasing level of competition in the enterprise market also ensures that, if there were any concerns over anti-competitive practices, these would be dealt with on an ex-post basis.