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Orange Fixed, Orange Mobile, Orange Internet (Orange) response to the TRC consultation: Update to the Competition Safeguard Instructions

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Orange

About this document

This is Orange Fixed, Orange Mobile, Orange Internet (Orange) response to the Jordan TRC Update to the Competition Safeguard Instructions consultation.

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1 Introduction

Orange welcomes the opportunity to respond to the Telecommunications Regulatory Commission's (TRC's) proposals for an updated set of Competition Safeguard Instructions to replace those issued in 2006.

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.

Having compared the 2006 instructions with the TRC's 2024 proposals, Orange considers that the new instructions represent a significant improvement in a number of important respects. For example:

- The process for defining markets, set out in Article 5, now aligns with best practice as found in the EU's market review process.
- In the new Article 7(a) and Article 23, the 2024 proposals are helpful in clarifying the distinction between the process used to identify markets where ex-ante remedies are required and the role of ex-post competition law to prevent foreclosure of competition.
- Article 7(b) offers much-needed clarity on the definition of joint dominance, while the new Article 9 provides a useful specification of how the TRC will deal with competition law cases.
- Orange welcomes the TRC's recognition, in various articles of the new instructions, that a dominant operator's behaviour may not represent anti-competitive conduct because it is welfare enhancing or because it can be justified on objective grounds.
- Orange also welcomes the fact that the TRC has dropped clauses from the current instructions where it specifies that failure by a dominant operator to supply required cost information will lead to a presumption of anti-competitive conduct.
- Orange agrees with the TRC's shift in many articles from a specific test to a more flexible approach in which the TRC defines an abuse and then considers whether it has taken place on a case-by-case basis after considering a number of specific factors. Of course it is to be expected that undertakings alleged to have abused a dominant position may wish to engage with the TRC to explore and, if appropriate, challenge its analysis and findings based on this more general approach.

While the update of the Competition Safeguard Instructions is in many respects very welcome, there are aspects where Orange would like to propose changes or seek clarifications. It does so because it considers that such modifications would be in the public interest and in the interests of the telecommunications sector of Jordan.

Orange has some major concerns about the proposed Competition Safeguard Instructions. 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 below.
- Concerns that are specific to the consultation on Competition Safeguard Instructions. These are addressed in Section 3.

Orange then provides more detail analysis and suggestions article-by-article in Section 4 and then answers the TRC's consultation questions in Section 5.

Orange looks forward to engaging further with the TRC on its proposals in subsequent stages of the consultation process.

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 Major concerns with the proposed updates to the Competition Safeguard Instructions

Orange provides detailed comments on individual articles within the Competition Safeguard Instructions in Section 4. In some cases it seeks clarification and in others modest additions to the TRC's proposals. But it also has more substantive comments. These are summarised below:

- In Footnote 1 of the proposed new instructions, the TRC proposes that Articles 23 to 27 should replace the 2009 White Paper on Market Review Process, while leaving the White Paper as "*a non-binding reference document*". Orange objects to this proposal. Articles 23 to 27 provide a useful summary of the way the TRC will conduct market reviews in future. But they do not offer sufficient detail to provide market players with clarity on how the TRC will act. For example we consider that the TRCs explanation of the three criteria test in Article 25 is inadequate. Such lack of clarity create substantial regulatory uncertainty that will undoubtedly affect future investments by market players. Given these objections Orange therefore asks the TRC to update or replace the White Paper. Orange acknowledges that there is a need to streamline the market review process to make it faster and less costly. But it considers that the current proposals lack vital detail. As a result they would, if implemented unchanged, create substantial investment uncertainty.

- The definition of dominance that is central to the general concern of Section 2 is specified in Article 7a of the proposed updates to the Competition Safeguard Instructions. So we repeat our concern here. Orange strongly objects to the proposal to change the definition of dominance to the ability of a market player to "*unilaterally influence or control*" key outcomes in the market. Instead it proposes the definition in the 2023 update to the Competition Law – that is to "*control and influence*" a market. See Section 4.4 for details.

- In a similar fashion Orange strongly objects to the TRC's proposal to change the presumption of dominance threshold from a 50% to a 40% market share. See Section 4.4 for our reasons.

- Article 12 on anti-competitive cross subsidisation, is in our view, unworkable. We ask the TRC to redraft it to take account of the critique provided in Section 4.8.

- Article 23 explains the complementary nature of ex-post competition law and ex-ante regulation arising from a market review in the telecommunications sector. But in Orange's view it does not specify the different purposes of the two forms of regulation. We set out our understanding of these complementary purposes in Section 4.14, considers that a common understanding of them would be helpful in future regulatory debates, and ask the TRC to include some version of this text in Article 23.

- Article 23 also specifies that the TRC will adhere to the Modified Greenfield Approach (MGA) in developing ex-ante regulation in the market review process. Orange welcomes this clarification. But it considers that the TRC needs to specify how it will apply this approach in more detail. We provide draft text that the TRC might want to use in Article 23 to rectify this omission.

4 Orange's concerns on specific articles in the draft Instructions

4.1 Introduction

In this section Orange comments on specific articles in the consultation. In some cases it asks for clarification, in others redrafting and in some for changes. In all cases Orange considers that its requests are based on sound public interest arguments.

4.2 The TRC's proposal to abandon detailed guidance on the market review process

In Footnote 1 of the new Competition Safeguard Instructions the TRC proposes that Articles 23 to 27 should replace the 2009 White Paper on Market Review Process, while leaving the White Paper as "*a non-binding reference document*". Orange objects to this proposal on the following grounds:

- Articles 23 to 27 provide a useful summary of the way the TRC will conduct market reviews in future. But they do not offer sufficient detail to provide market players with clarity on how the TRC will act. For example the TRC's explanation of the three criteria test in Article 25 is inadequate. The proposed status of the White Paper as a non-binding reference document adds to this uncertainty. Such lack of clarity create substantial regulatory uncertainty that will undoubtedly affect future investments by market players.

- Article 23 is wrong in its description of the Modified Greenfield Approach. It also fails to set out clearly the interrelationship between ex-post competition law based regulation and ex-ante based market review regulation. See comments on Article 23 for details.

- The proposal to abandon the White Paper as official guidance on how the TRC will conduct future market reviews is out of line with international best practice. The market analysis guidance provided by the European Commission[16] is a good example of the kind of guidance that is required.

Given these objections Orange asks the TRC to update or replace the White Paper rather than to abandon detailed guidance. Orange acknowledges that there is a need to streamline the market review process to make it faster and less costly. But it considers that the current proposals are both wrong in places and lacking in vital detail. As a result they would, if implemented unchanged, create substantial investment uncertainty.

4.3 Article (5) Competition Analysis – Market Definition

Article 5 in the TRC's 2024 proposals is designed to replace Article 6 from the 2006 Instructions. There are two main differences which are discussed below.

Clause b) of the in the new proposals defines product scope based on demand and supply side substitution tests rather than by starting from for predefined retail markets. Orange welcomes this change. It considers that

[16] 2018 Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services

the 2006 article is out of date and supports the TRC's move to the use of standard economic tests to define product scope for telecommunications markets.

Clause d) in the 2006 Instructions on market definition considers just two possible geographic boundaries: in Jordan or outside Jordan. In the 2024 proposals, the starting proposal is that a geographic market "*may be national, or defined on the basis of political or administrative boundaries, or network topology of the relevant Licensees*". It is correct that all geographic markets should be presumed first to be national and any move away from this needs strong evidence. However, Orange rejects completely the proposal that, for the purposes of considering issues of competition, geographic boundaries might be set by '*political or administrative*' considerations and sees such a proposal being in direct conflict with Clause f):

> "*consideration of whether there are any **competitive or structural differences** across different geographical areas to arrive at preliminary view of whether the relevant geographic market is national or sub-national. In so doing, the TRC will aim to identify **a geographic unit that has stable and transparent boundaries***." (Emphasis added)

Clause e) states that "The relevant geographic market(s) will also be defined on a case-by-case basis". Orange considers this Clause should be redrafted similarly to Clause 6(d) of the 2006 Instructions, wherein markets should be presumed to be national in scope, unless there is:

- Compelling evidence to suggest that distinct sub-national markets exist, **and**
- Evidence that defining sub-national markets would be in the public interest and not disproportionate (i.e. likely to generate substantial extra cost and regulatory burden).

Orange considers that such an addition would lead to proportionate remedies and avoid the difficulties of a complex and unworkable fragmentation of the WLA market.

Clause g) then specifies particular conditions that a sub-national geographic market should meet. Orange supports the specification of conditions necessary to be considered in contemplating a geographic market other than national, but has two major concerns relating to the application of this analysis in Jordan:

- The TRC contemplates that the 2024 Competition Safeguard Instructions should replace the existing 2009 White paper on Market Review Process. In Section 4.2 above Orange details its strong objection to the proposed abandonment of these detailed guidelines, and repeats that objection here, in relation to the prospect of the application of the conditions of Clause g) leading to a fractured, complex and unworkable set of ex-ante regulated wholesale markets, in which it is possible that adjacent streets would be considered as separate geographic markets and there may be hundreds of sub-national WLA markets. At the same time it is important to recognize that fibre WLA products compete with FWA and copper access products in the same product market. In combination these circumstances would lead to a substantially greater requirements for data and data analysis from market players, to a very substantial increase in the complexity of the regulation of the WLA market, and to much higher regulatory costs for both the TRC and market players as well as a much higher chance of regulatory error. Regulators elsewhere in the world have recognized this danger and largely avoided it by defining the WLA market as national in scope.
- Accompanying Orange's concerns for the abandonment of the 2009 White paper on Market Review Process, is its concerns over the way in which the TRC has specified the use of the Modified Greenfield Approach' ("MGA") through Article 23. As noted in our critique of Article 23 in Section 4.14 below, Orange considers the specification of the MGA has errors needing to be corrected and the specification of its proper application needs to be expanded to ensure it is applied properly.

> The correct use of the MGA is important in considering the setting of geographic market boundaries, as noted by the Board of European Regulators for Electronic Communications (BEREC), in its 2018 Report on the application of the Common Position on geographic aspects of market analysis:
>
> "*The Explanatory Note emphasises that any geographic analysis should be carried out by NRAs following a modified Greenfield approach.*"[17]

While Orange is encouraged by the statement in Clause h): "If there are no differences in the competitive conditions between the different geographic units, the TRC is unlikely to consider a case for a sub-national market definition", it wishes to reiterate its views that Clause e) should be redrafted similarly to Clause 6(d) of the 2006 Instructions, wherein markets should be presumed to be national in scope unless:

- Compelling evidence to suggest that distinct sub-national markets exist, and
- Evidence that defining sub-national markets would be in the public interest and not disproportionate.

4.4 Article (7a) Competition Analysis – Single Dominance

Orange notes that this article has changed between the current 2006 Instructions and those proposed by the TRC in 2024. There are two major changes.

First the current instructions define dominance as the ability of a market player to "***control and affect***" a market. In its 2024 proposals the TRC uses the phrase "***unilateral influence or control of key market outcomes***" instead. See Clause A. Orange objects strongly to this change on three main grounds:

- It is not in line with the 2023 revised Competition Law (33) of 2004 that uses a "***control and influence"*** definition. It is also inconsistent with Clause b(1) of Article 7a where the TRC refers to dominance in terms of "*the ability to* ***control and affect*** *the activity of the market*".
- It is inconsistent with the TRC's guidance on the market review process of May 2009 in which the TRC uses the EU definition of dominance. That is: "*Individual dominance… relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*".
- In the view of Orange the language of the new wording does not indicate significant market power to a layperson. All market players can, having considered market conditions, take decisions on a ***unilateral*** basis that ***influence the market***. This is clearly not the same as control of a market. Orange also notes that the phrase used in the 2024 proposals is ***unilateral influence or control*** rather than the more acceptable ***control and influence*** of the revised Competition Law.

Second, Clause b)(1) proposes that there should be a presumption of dominance for a licensee with a market share of 40% or more and a presumed non-dominance for a licensee with a market share of 40% or less - unless there is clear evidence to the contrary based on, but not limited to, the factors other than market share listed in Clause b)(2).

[17] BEREC, 6 December 2018, Report on the application of the Common Position on geographic aspects of market analysis, https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-the-application-of-the-common-position-on-geographic-aspects-of-market-analysis

Orange considers that the TRC should instead seek to set the threshold for a presumption of dominance at 50% in the telecommunications sector for the following reasons:

- This threshold is consistent with that set in the TRC's 2006 Competition Safeguard Instructions. Orange notes that this threshold was set at 50% when the Competition Law (33) 2004 did not specify any presumption of dominance threshold (only a 40% safe harbour for mergers in Article 9).

- The proposed threshold is out of line with best practice for the telecommunications sector. We note that the directorate of the European Commission responsible for telecommunications regulation has set a threshold of 50%.[18] This threshold is used by the 27 member states of the EU when assessing dominance.

- A threshold of 40% is likely to weaken rather than strengthen competition in a country with the size and market structure of Jordan. Our reasons are set out in Figure 4.1.

Figure 4.1: The appropriate dominance threshold in Jordan

Infrastructure-based competition rather than service-based competition is considered the better way to stimulate investment and innovation in the telecommunications sector.

Jordan now enjoys strong infrastructure-based competition by international standards:

- There are four main providers (and several, mainly local, minor players) offering infrastructure-based competition in the supply of fixed services – Orange(Fixed and Mobile), Zain, Umniah and Fibertech. They use a mix of copper, fibre and fixed wireless access. Orange Fixed supplies at both retail and wholesale (although there is virtually no demand for the latter), Fibertech offers just wholesale fibre access, while Zain and Umniah offer services at retail only – partly through self-supply of their own infrastructure and partly through purchase of fibre access from Fibertech.
- In mobile services there are three suppliers involved in infrastructure-base d competition – Zain, Orange Mobile, and Umniah.

The prospect of further entry into these infrastructure based markets is remote given the high minimum economic scale that infrastructure-based competitors must reach to be competitive, and the modest population of Jordan and relatively low population density.

At the retail level there are three significant market players in both the fixed and mobile markets – Orange Fixed, and Orange Mobile, Zain and Umniah. This position has not changed significantly over the last eight years.

In three player markets such as those in Jordan, there is a high probability that one of the market players will be considered dominant if the 40% threshold is applied. This is likely to mean that:

- The imposition of remedies on this market player will significantly restrict its freedom to compete[19] "on the merits"[20] with its two rivals. Under such restrictions the competitive process would be weakened and economic welfare reduced. The chance of the same problems arising with a 50% threshold are substantially lower.

- The TRC would have taken a step away from Government policy for the sector to "*favour a presumption of withdrawal of ex ante regulation where market conditions allow*".

[18] EC (2018) Guidelines on market analysis… for electronic communications network and services)

[19] Such restrictions might include limits on pricing freedom and the speed with which the market player can respond to its rivals.

[20] When a firm competes in a marketplace and gains competitive advantage by offering better, cheaper and/or more reliable products or services and its rivals.

Orange recognises that the 2023 Competition Law update has added a 40% presumption of dominance threshold. But it considers, based on the arguments set out above, that applying this threshold to the telecommunications sector in Jordan, with its high levels of market concentration would be against the public interest. It therefore requests the TRC, as the administrator of competition law in the sector, to set a 50% threshold for use in the telecommunications sector.

4.5 Article (7b) Competition Analysis – Joint Dominance

Orange is concerned about three main aspects of Article 7b as follows:

Clause a) defines joint dominance as a situation in which two or more licensees can "*jointly influence **or** control key market outcomes*". Orange asks the TRC to reword this text to "*jointly influence **and** control key markets outcomes*" – in line with the arguments it sets out in its response to Article 7a.

In Clause d) it is unclear whether the TRC intends that all five of the conditions listed must be met or whether it can find joint dominance if a subset of these five conditions are met. Orange considers that there is a need to distinguish between the conditions that ***must*** be met and the market features that might indicate the possibility of joint dominance. Orange asks the TRC to clarify its intentions. It considers that the three conditions used in the EU should ***all be met*** before there is a finding of joint dominance.[21] These three conditions are as follows:

- There is sufficient market transparency for the parties suspected of joint dominance to monitor each other's behaviour (as set out in Clause d)(1)).
- Each party has an effective deterrent to ensure that the other party does not deviate from the common policy that they are pursuing (Clause d)(3)).
- The reaction of customers and other market players must not endanger the common policy (Clause d)(5)).

In Orange's view these three conditions need to be distinguished from market characteristics that might indicate joint dominance. Such indicators include a high level of market concentration, product homogeneity, price inelastic demand, and similar cost structures.

In Clause e) the TRC proposes that it should be able to find joint dominance ex-ante without the need to demonstrate actual collusive behaviour. Orange agrees with the TRC that it is often difficult to provide concrete evidence of tacit collusion but asks the TRC, before it finds joint dominance on an ex-ante basis, to:

- demonstrate that the three conditions of market transparency, an effective deterrent, and lack of effective response from rivals are all met; and
- provide evidence that the parties to the joint dominance, charge excessive prices and/or generate unreasonably high profits in situations where the conditions in the relevant market have remained broadly the same over the past several years.

Orange would also like to see the TRC consider evidence on the extent to which the parties to the alleged joint dominance compete with one another. Such evidence can then be set against indicators that market conditions are conducive to joint dominance and any evidence relating to the likely outcomes of tacit collusion.

[21] European Commission (2018). Communication on SMP guidelines. Para 67

4.6 Article (9) Competition Analysis - Process

Orange welcomes the specification of the process that the TRC will follow in considering competition law problems. It:

- agrees with Clause a) on the way in which the TRC will initiate investigations;
- seeks further clarification in Clause b) on what the TRC will do in its Phase 1 investigation. In particular it would like to see the TRC issue a statement of objections to the parties concerned and provide access to its file of evidence on which the objection is based; and
- welcomes the TRC's statement that penalties for a finding of abuse will follow the specification set out in the Competition Law.

4.7 Article (11) Abuse of Dominant Position – Predatory Pricing

Orange agrees with the TRC's definition of predatory pricing and welcomes the new Clause d) which gives a dominant operator an opportunity to explain why its actions constitute a rational and reasonable competitive strategy. But it suggests that the TRC should:

- Consider providing more specific guidance in Clause b) on what constitutes a predatory price. Such guidance would offer greater certainty to market players so that they can avoid any anti-competitive conduct. Orange notes that there is widespread use of the ***average variable cost*** or ***average incremental cost of supplying test*** in other jurisdictions. In the EU for example there is highly influenced case law (AZKO versus the European Commission) which indicates that:
  - predatory pricing is presumed if a price is set below the average variable cost of supply; and
  - predatory pricing might be found if a price is set between average variable cost and average total cost of supply ***and*** it is possible to show intent by the dominant operator to foreclose competition.
- Amend Clause c). This currently implies that the TRC ***may*** consider evidence that the dominant operator will be able to recoup losses once it has successfully foreclosed competition. In Orange's view a necessary condition in establishing predatory pricing is to demonstrate, that, on the basis of market conditions, there is a strong likelihood that the dominant operator would be able to recoup its losses.

4.8 Article (12) Abuses of Dominant Position – Anti-Competitive Cross-Subsidization

Article 12 specifies how the TRC defines and will assess allegations of anti-competitive cross subsidisation (ACCS). Orange considers that this article is unsatisfactory for the following reasons:

- It is important to point out that cross subsidisation between products is a common commercial practice which often has welfare enhancing properties. For example, a market player might want to stimulate take up of a new product (especially one that is an experienced good) and phase out a less cost-effective and functionally poorer legacy product by offering the new product at prices that are below cost of supply. This point is currently missing from Article 12.
- Clause a) of Article 12 specifies that the TRC will consider cross subsidisation anti-competitive if *"competitors (1) lack sufficient resources to be able to match the subsidy, and (2) are unlikely to maintain*

their current market presence, or re-enter the market, following a price increase". This will require the TRC to gather extensive cost, price and demand information from both the dominant operator accused of ACCS and the alleged victims. This requirement is inconsistent with Clause b) where the TRC states that it will base its assessment of ACCS on "*looking at the cost structure of the dominant licensee*" alone. It is also inconsistent with Clause d) which requires the dominant operator, but not others, to supply cost information to the TRC.

- Clause c) provides an alternative specification of what constitutes ACCS It requires the dominant operator to "*charge a price that is lower than the appropriate costs involved in providing that product or service*" [presumably the product in the competitive market being priced below cost of supply]. This is different from the definition of ACCS specified in Clause a).

- Clause c) refers to the profits in "*another market*". It is not clear whether this is a market where an operator is dominant, another market on its own, or all markets other than the one that is being cross subsidised.

- In estimating product profitability (as required by Clause c)) the TRC will need to allocate fixed and common costs between products in different markets and estimate depreciation charges for the assets used to supply them. There is a wide variety of ways to do this. As a result there is a wide variety of different outcomes that might arise from the TRC's assessment of ACCS. This uncertainty of outcomes raises questions as to the validity of any assessment.

Given these concerns Orange asks the TRC to reformat its specification of ACCS to remove the inconsistencies noted above and to make the proposed test one that Orange, as a prospective dominant operators in key markets, can carry out so that it can avoid any allegations of anti-competitive cross subsidisation. The specification of Clause a) would require Orange to have access to cost, price and demand information from its rivals. It does not have this access and it would be unreasonable for the TRC to expect Orange to comply with a test that it cannot implement for itself.

4.9 Article (14) Abuse of Dominant Position – Margin Squeeze

Article 14 is almost identical to that specified in the 2006 Competition Safeguard Instructions and Orange considers it workable. However, in parallel the TRC is consulting on the Implementation of a Margin Squeeze Test for local access and broadband access. Orange considers that the Margin Squeeze Test for local access and broadband access, proposed to be applied in an ex-ante manner, is faulty, unnecessary, and should be withdrawn, as detailed in our submission to that consultation. In the absence of a dominant licensee in the broadband access market (see Section 2 above) and given the other regulatory price measures already in place, any allegation of a margin squeeze abuse should be addressed under the measure specified in this Article 14.

4.10 Article (15) Abuses of Dominant Position – Excessively Long-Term Contracts

This article prohibits, as anti-competitive conduct, a dominant operator from setting excessive contract periods at either the wholesale or retail levels. There are two significant additions to the 2006 instructions in the TRC's 2024 proposals.

First Clause b) states that "excessively long-term contracts may be viewed as anti-competitive ". Orange agrees that such contracts may weaken both end user choice and competition by locking in end-users to a supplier. But it does not agree that a prohibition on excessively long-term contracts should apply only to operators that are deemed dominant. Instead it considers that this prohibition should, if made at all, apply to all market players and not just to those operators found to be dominant in a market. It argues as follows:

- Excessive contract periods, along with other barriers to switching supplier, weaken competition. This is especially true at the retail level where they raise end user costs of switching and thereby restrict both end user choice and competition.

- If such actions are prohibited for the dominant operator alone then this puts a major supplier (the dominant operator) at a significant competitive disadvantage to its rivals and weakens competition in the market overall.

- In effect the dominant operator cannot compete fully on the merits of the prices and functionality of its products because it cannot compete for customers who are tied into excessive contract periods set by other non-dominant operators. This should not be the aim of competition law – which is to allow the greatest possible competition while prohibiting a dominant operator from abusing its dominant position to foreclose competition.

- EU jurisdictions, as an example of best practice, take a different approach to this problem. They impose General Conditions (similar licence conditions[22]) that apply to all market players (and not just dominant market players) to refrain from excessive contract periods.

With these arguments in mind, Orange asks the TRC to remove this article from the list of 'Abuses of Dominant Position' of the Competition Safeguard Instructions and adopt a symmetric approach in Jordan so as to maximise competition.

Secondly Clause d) in the updated proposals would mean that the TRC could seek evidence from licensees to demonstrate why a contract is not excessive. Orange has no objection to this new clause provided it is applied symmetrically to all market players and not just to those with dominance. Our arguments are the same as those set out above.

4.11 Article (20) Collusion

This article is unsatisfactory in that it fails to make a sufficiently clear distinction between:

- horizontal and vertical agreements. Orange would suggest separate sections for each;

- issues related to tacit coordination that are better dealt with under Article (7b) on joint dominance, and issues that relate to agreements that will lessen competition in the market where Article (20) is the appropriate place; and

- collusive behaviour that clearly restrict competition (restriction by object in EU legislation) and collusive behaviour where the TRC would first need to demonstrate anti-competitive effect (restriction by effect).

In addition Article 20 fails to consider the question of when cooperation agreements between market players are anti-competitive. International best practice suggests that such agreements are pro-competitive rather than anti-competitive when they involve activities such as research and development, standardisation, and joint purchasing See for example "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*."

[22] In the EU communications providers do not require a license to operate but can be subject to conditions of general application.

Orange asks the TRC to revise Article 20 in the light of these comments. Such revisions would give Orange greater clarity on agreements that it might wish to make with other parties that are both welfare enhancing and commercially attractive, without the risk of allegations of anti-competitive conduct.

4.12 Article (21) Review of Acquisition or Transfer of Interests in Licenses for Anti-Competitive Effects

This article sets out how the TRC would assess any proposed transfer of licence or control of the licensee to see whether it would lead to a substantial lessening of competition and should be banned.

Orange has the following comments on this article:

- In Clause d) there is an omission. Orange considers that "*the will look to undertake…* " should read "*the TRC will look to undertake…*".
- In Clause d)(6) it is not clear what is meant by the term "*Enterprises*" and how this term relates to "*the resulting Enterprise*" of Clause d)(*5).*
- In Clause c)(8) it is unclear what is meant by "*negatively affected*".
- In evaluating whether a transaction should proceed, Clause d) says that the TRC will assess whether "*on balance the benefits outweigh the risks*". It is not clear to Orange from the text of the Article what is meant by "*the risks*". Orange assumes this is the risks associated with the lessening of competition that the transaction might create, and if so, suggests this be made clear.

Orange asks the TRC to make the appropriate clarifications and modifications.

4.13 Article (22) Review of Acquisition or Transfer of Interests in Licenses and Licensees – Process

This article specifies the process the TRC will follow in approving or prohibiting an acquisition or transfer of interests.

Orange has two main comments on this article:

- It does not allow the relevant Enterprise to offer undertakings that will meet the TRC's initial concerns about the transaction and so allow a speedy approval. Such a mechanism, used in many other jurisdictions, would allow transactions to proceed more quickly and reduce uncertainty amongst market players in the sector.
- It does not appear to contain a mechanism for the TRC to specify remedies that the Enterprises concerned should meet so that the proposed transaction can proceed. Introducing such a step in the processes of Article 22 would bring Jordan more into line with international best practice.

Orange asks the TRC to make the appropriate additions to this article.

4.14 Article (23) Approach to ex-ante market reviews

Orange welcomes Articles 23 to 27 which set out how and where the application of competition law in the telecommunications sector and the use of ex-ante market reviews, relate to each other. Such clarification is extremely useful. Orange has three main comments on these articles – all of which relate to Article 23.

First Orange notes that Article 23 fails to set out the complementary purpose of competition law and ex-ante market reviews in the telecommunications sector. In Orange's view:

- The main purpose of ex-ante market reviews is to develop remedies that will lower barriers to entry and move a market towards effective competition by imposing suitable and proportionate remedies on dominant operators. In the EU for example *"A key aim of the regulatory framework is to enhance user and consumer benefits in terms of choice, price and quality by* ***promoting and ensuring effective competition.***[23]*"*

- One of the main purposes of competition law[24] is to prevent a dominant operator from abusing its position so as to foreclose competition. In doing so it should not prevent that operator from competing on the merits of the prices and functionality of its products.

- The two parallel approaches interact most strongly when the TRC applies the three criteria test. If a competition problem is identified in the course of an ex-ante review then it should be dealt with wherever possible through competition law (Criterion 3) and not through remedies developed through the market review process. This is in line with Paragraph 21 of the Government's policy for the sector[25] of which "*requires the TRC to favour a presumption of withdrawal of ex ante regulation where market conditions allow*".

Orange therefore asks the TRC to include text along the lines set out above to make it clearer to all market players how competition law and ex-ante reviews work together to create the most effective regulation.

Second the TRC refers to the EU's modified greenfield approach (MGA) in Clause a)(5). It says "*The market review process will adhere to the 'Modified Greenfield Approach' ("MGA") wherein the reviewed market will be analyzed under the assumption that there are no dominance-based ex-ante obligations currently in place in the market in question*".

Orange considers that the TRC needs to expand and modify its description of the MGA approach to determining which markets in the value chain should be regulated. Orange proposes following:

- The TRC will start by considering each defined retail market. If it considers that this retail market is effectively competitive in the absence of all regulation it will not regulate and should remove any existing ex-ante regulation in either the retail market or any upstream market in the value chain.

- If the retail market would not be effectively competitive absent upstream regulation then the TRC will first regulate the most upstream market in the value chain by imposing remedies on the operator dominant in that market.

[23] European Commission, 2007, Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Second edition) {(C(2007) 5406)}). P19

[24] There are two other purposes - to prohibit agreements that unduly restrict competition and to control mergers that would otherwise lead to a substantial lessening of competition.

[25] General Policy for the Information & Communications Technology and Postal Sectors, 2018

- If the TRC considers that this regulation on its own is likely to lead to a retail market that is effectively competitive it will go no further. But if this is not the case it will consider the effect of imposing remedies in the next most upstream market and repeat this process until it is satisfied that there is sufficient regulation to remove competition problems at retail.

- In extreme circumstances the TRC might impose remedies in the retail market itself if no regulation at wholesale will suffice.

Third Clause a)(2) of Article 23 references a forward-looking perspective of two to three years for the application of ex-ante remedies. Orange considers that this period is inadequate on three grounds:

- It is not consistent with best practice. The EU currently operates with a forward-looking time horizon of five years which is synchronised to the time between market reviews.

- It is not consistent with the frequency of ex-ante market reviews in Jordan – where the interval between market reviews has in practice been 10 years (2010 to 2020). This contributes to a major problem - that current regulations are often many years behind current market conditions - leading to over-regulation of the sector. This problem is considered in more detail in Annex A.

- As far as Orange can tell, the TRC's timescales are not based on any Government requirements to meet specific constraints – either in terms of the forward-looking time horizon or the maximum period between market reviews.

Orange recognises that the current forward-looking perspective of two to three years is set out in other existing TRC documents that are not the subject of this consultation. But it considers that the problem of misaligned timescales is so serious that urgent TRC action is required to correct it.

5 Responses to the TRC's questions

5.1 Introduction

In this section of its response Orange replies to each of the TRC's seven questions about the proposed new Competitive Safeguard Instructions. In doing so it draws on the text of Section 4 above. These are made in the context of Orange's main concerns:

- that the current dominance assessments that the TRC would use in applying the four sets of Instructions are six years out of date and need to be revised before implementing any of the Instructions;
- that the market review process needs to be reviewed so that it is applied on a more timely and forward-looking basis;
- that changing the definition of dominance and the threshold for presumed dominance, as the updated Competition Safeguard Instructions propose, would weaken competition and substantially delay the removal of ex-anti regulation in a telecommunications sector where competition is now flourishing;
- that it would be wrong to replace detailed existing guidance on applying the market review process with Articles 23 to 27 of the Competition Safeguard Instructions. Such a change would substantially reduce regulatory certainty; and
- that Article 15 of the proposed new Competition Safeguard Instructions is unworkable and Article 23 is both incomplete and, in places, wrong.

5.2 Question 1 on market definition

Does the industry agree with the updates to the market definition process as set out in Article (5) of the draft updated Instructions? In particular, the TRC proposes to remove any references to pre-defined product or geographic markets, and instead undertake a market definition exercise on a case-by-case basis, based on evidence around demand-side and supply-side substitutability, and other relevant considerations. If not, please state why this is not the case, with reasons, and propose alternative definitions.

Orange broadly agrees with the provisions of Article 5 on product market definitions and with the TRC's proposal to remove any specification of predefined markets. However, there are several clauses within Article 5 that raise concerns:

- Clause e) states that "The relevant geographic market(s) will also be defined on a case-by-case basis". Orange considers this Clause should be redrafted similarly to Clause 6(d) of the 2006 Instructions, wherein markets should be presumed to be national in scope, unless there is:
  - Compelling evidence to suggest that distinct sub-national markets exist, and
  - Evidence that defining sub-national markets would be in the public interest and not disproportionate (i.e. likely to generate substantial extra cost and regulatory burden). Orange considers that such an addition would lead to proportionate remedies and avoid the difficulties of a complex and unworkable fragmentation of the certain markets.

- In regard to Clause f), it is correct that all geographic markets should be presumed first to be national and any move away from this needs strong evidence. However, Orange rejects completely the proposal that, for the purposes of considering issues of competition, geographic boundaries might be set by 'political or administrative' considerations and sees such a proposal being in direct conflict with the latter part of Clause f).

- Clause g) specifies particular conditions will be assessed in determining the existence of sub-national geographic market should meet. Orange supports the specification of conditions necessary to be considered in contemplating a geographic market other than national. However Orange notes a rote application of these conditions could risk leading to a fractured, complex and unworkable set of ex-ante regulated wholesale markets. As set out above, Orange is concerned with the proposed abandonment of the 2009 White paper on Market Review Process and the way in which the TRC has specified the use of the Modified Greenfield Approach.

5.3 Question 2 on assessment of single dominance

Does the industry agree with the definition and proposed categorisation of the Impact Factors that the TRC proposes to consider when assessing whether a Licensee holds a position of single or joint dominance in the relevant market(s) as set out in Article 7(a)? In addition, does the industry agree with the distinction in the approach to dominance designation in the context of ex-post competition investigations, compared to ex-ante market reviews? If not, please state why this is not the case, with reasons, and propose an alternative approach

Orange disagrees fundamentally with:

- the definition of dominance as the ability to "*unilaterally influence or control key market outcomes*"; and

- the proposal to set the presumption of dominance threshold in the telecommunications sector at 40%.

See Section 4.4 above for Orange's alternative proposals and their supporting rationale.

Orange agrees that the other impact factors specified in Article 7a are all relevant to an assessment of single dominance. It also agrees that the same definition of dominance should be used for ex-ante and ex-post regulation while recognising that the temporal application of this definition is likely to differ – between a forward-looking approach for ex-ante regulation and a current or historic perspective for ex-post regulation.

5.4 Question 3 on joint dominance

Does the industry agree with the provisions regarding the identification of joint dominance, including the considerations that the TRC will take into account in its assessment, as set out in Article 7(b)? If not, please state why this is not the case, with reasons, and propose an alternative approach.

Orange welcomes the inclusion of an article on joint dominance. But it disagrees with much of the article.

Clause a) defines joint dominance as a situation in which two or more licensees can "*jointly influence **or** control key market outcomes*". Orange asks the TRC to reword this text to "*jointly influence **and** control key market outcomes*" – in line with the arguments it sets out in its response to Article 7a.

In Clause d) Orange seeks clarification on whether the TRC intends that all five of the conditions it lists must be met or whether it can find joint dominance if a subset of these five conditions are met. It therefore asks the TRC to distinguish between the conditions that ***must*** be met and the market features that indicate the possibility of

joint dominance. It considers that the three conditions used in the EU should ***all be met*** before there is a finding of joint dominance.[26] These three conditions are as follows:

- There is sufficient market transparency for the parties suspected of joint dominance to monitor each other's behaviour (as set out in Clause d)(1)).
- Each party has an effective deterrent to ensure that the other party does not deviate from the common policy that they are pursuing (Clause d)(3))
- The reaction of customers and other market players must not endanger the common policy (Clause d)(5))

These conditions contrast to the market characteristics that indicate joint dominance. Such indicators include a high level of market concentration, product homogeneity, price inelastic demand, and similar cost structures.

In Clause e) the TRC proposes that it should be able to find joint dominance ex-ante without the need to demonstrate actual collusive behaviour. Orange agrees with the TRC that it is often difficult to provide concrete evidence of tacit collusion but asks the TRC, before it finds joint dominance on an ex-ante basis, to:

- demonstrate that the three conditions of market transparency, an effective deterrent, and lack of effective response from rivals are all met; and
- provide evidence that the parties to the joint dominance charge excessive prices and/or generate unreasonably high profits in situations where market conditions have remained broadly the same over the past several years.

5.5 Question 4 on the process for handling a competition law case

Does the industry agree with the overall, proposed complaint and assessment process (and the key process steps within it) set out in Article (9) of the draft updated Instructions? Additionally, does the industry agree with the proposed timelines set out by the TRC as part of the guidance on the complaint and assessment process? If not, please state why this is not the case, with reasons, and propose specific amendments to the overall process or timelines.

Orange welcomes a specification of the process that the TRC will follow in considering competition law cases and agrees with Clause a) on the way in which the TRC will initiate investigations. But it seeks further clarification in Clause b) on what the TRC will do in its Phase 1 investigation. In particular it would like to see the TRC issue a statement of objections to the parties concerned and provide access to its file of evidence on which the objections are based.

5.6 Question 5 on assessing anti-competitive conduct

Does the industry agree with the proposed amendments to the substantive assessments that the TRC will look to undertake when assessing each of the anti-competitive behaviours outlined in Articles (11) to (20)? If not, please state why this is not the case, with reasons, and propose alternative substantive approaches.

[26] Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (Text with EEA relevance) (2018/C 159/01)

Orange broadly agrees with the proposals in the new Articles 11 to 20 on anti-competitive conduct and agrees with the TRC's shift in many articles from a specific test to a more flexible approach in which the TRC defines an abuse and then considers whether it has taken place on a case-by-case basis after considering specific factors. Of course it is to be expected that undertakings alleged to have abused a dominant position may wish to engage with the TRC to explore and, if appropriate, challenge its analysis and findings based on this more general approach.

In addition Orange seeks amendments to selected articles as follows:

- On Article 11 Orange asks the TRC to consider providing more specific guidance in Clause b) on what constitutes a predatory price. Such guidance would offer greater certainty to market players so that they can avoid any anti-competitive conduct. Orange notes that there is widespread use of the *average variable cost* or *average incremental cost of supplying test* in other jurisdictions.

- Also on Article 11 Orange asks the TRC to amend Clause c). This currently implies that the TRC ***may*** consider evidence that the dominant operator will be able to recoup losses once it has successfully foreclosed competition. In Orange's view a necessary condition in establishing predatory pricing is to demonstrate, that, given the market conditions, there is a strong likelihood that the dominant operator would be able to recoup its losses.

- Orange considers that Article 12, on anti-competitive cross-subsidisation, is unworkable. It seeks a redrafting that takes account of the points made in Section 4.8 above.

- Article 15 deals with excessive contract periods. Orange asks the TRC to apply this prohibition to all licensees and not just to dominant licensees for the reasons set out in Section 4.10

- Orange asks the TRC to clarify Article 20 as specified in Section 4.11. It also asks the TRC to make clear what subjects within a co-operation agreement with other parties will be safe from allegations of collusion.

5.7 Question 6 on assessing a substantial lessening of competition

Does the industry agree with the detailed guidance presented on the substantive approaches that the TRC will look to adopt in its assessment of proposed transfers of ownership or control, as set out in Article (21) of the draft updated Instructions?

Orange welcomes Article 21 on assessing the competitive effects of a transfer of interests. But it seeks clarification on the four points specified in Section 4.12 above.

5.8 Question 7 on dealing with a transfer of ownership

Does the industry agree with the information that the TRC proposes to be included as part of a formal notification of a transfer of ownership in Article (22)? Is there any additional information that the TRC should request as part of the initial notification to potentially streamline the TRC's formal investigation? Further, does the industry agree with the proposed investigation process and associated timelines proposed by the TRC? If not, please state why this is not the case, with reasons, and propose specific amendments to the overall process or timelines.

Orange agrees with the article's proposals on the information that should be supplied when notifying the TRC of a proposed transfer of interests. But it asks the TRC to make two additions to the process specified in Article 22. They are:

- to include a mechanism that allows the relevant enterprise to offer undertakings that will meet the TRC's initial concerns about the transaction and so allow a speedy approval. Such a mechanism, used in many other jurisdictions, would allow transactions to proceed more quickly and reduce uncertainty amongst market players in the sector; and

- to include a mechanism for the TRC to specify remedies that the enterprises concerned should meet so that the proposed transaction can proceed. Introducing such a step into the processes of Article 22 would bring Jordan more into line with international best practice.