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Orange Fixed, Orange Mobile, Orange Internet (Orange) response to the TRC consultation: Key Performance Indicators (KPIs) for Wholesale Services Instructions

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Orange

About this document

This is Orange Fixed, Orange Mobile, Orange Internet (Orange) response to the TRC's Key Performance Indicators (KPIs) for Wholesale Services Instructions consultation.

Contents

1 Introduction

Orange welcomes the opportunity to provide input to the Telecommunications Regulatory Commission's (TRC's) proposals for a new set of regulatory measures on wholesale key performance indicators (KPIs).

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.

The TRC's consultation on *Key Performance Indicators (KPs) for Wholesale Services Instructions* arise from its *2020 Regulatory Decision on the Fixed Markets Review*. Here the TRC determined that where an operator had been found dominant in a market, regulatory remedies would be imposed. This included a requirement to "*provide information to the TRC on a set of Key Performance Indicators (KPIs) to be specified by the TRC following a consultation*". That obligation was determined for:

- The Wholesale Local Access (WLA) market as part of a non-discrimination and transparency remedy.
- The Wholesale Broadband Access (WBA) market as part of a non-discrimination and transparency remedy.
- The Wholesale Fixed Voice Call Termination market as part of a transparency remedy.
- The Wholesale Fixed Transit market as part of a transparency remedy.

Orange Fixed was found to be dominant in all four of these markets. In addition all operators were found dominant on their own network in the Wholesale Fixed Voice Call Termination market. Orange Fixed was designated to be a dominant operator in WLA/WBA despite the fact that:

- Orange Fixed has zero customers (on the wholesale level) for wholesale Fiber; and
- Orange Fixed has a minimal number of customers on xDSL/Bit-Stream (Copper-based services) – around 250 customers with the absence of demand from Other Licensed Operators (OLOs).

While aspects of the approach proposed by the TRC in developing a KPI based reporting scheme are constructive, it is Orange's view that the KPI regime is unnecessary and if pursued would not be a proportionate response to the competition problems identified by the 2019 market review.

Orange has some major concerns about the proposed Wholesale KPI 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 Wholesale KPI Instructions. These are addressed in Section 3.

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.

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

[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*

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 specific to the TRC's proposals on wholesale KPIs

Orange appreciates the TRC's focus is on ensuring that Designated Licensees comply with their obligation of providing regulated services on a non-discriminatory basis and on ensuring appropriate quality of service in wholesale provisioning and repair. However, we consider the proposal to introduce a suite of KPIs, onerous reporting requirements, and 'target values' for each of them, to be unnecessary regulatory overreach.

3.1 The proposed wholesale KPIs are disproportionate remedies

Orange understands that operators found dominant within a wholesale market should be obliged to provide access to the upstream wholesale inputs necessary to support competition in the downstream retail markets, and that the wholesale inputs should be provided to all access seekers on a non-discriminatory basis. However Orange considers the proposed wholesale KPIs are disproportionate remedies given that:

- Current market conditions probably make the whole of the KPI proposals redundant. In 2025 (the earliest that these proposed remedies could be applied) the WLA and WBA markets are likely to be effectively competitive. The six years since the last determination of dominance in 2019 have seen major developments in the fixed broadband markets of Jordan. As a result it is highly likely that the proposed wholesale KPIs are now redundant. See Section 2 above for more details

- Orange Fixed already provides within its reference interconnect offer (RIO) service level targets and accompanying penalties payable by Orange Fixed in the event of its failure to achieve the stated KPI or SLA. The RIO has been reviewed and approved by the TRC.

- The number of WLA and WBA products that Orange Fixed provides to access seekers is small and is diminishing in the face of alternative competitive wholesale supply.

- The Orange Fixed wholesale product ordering and assurance system is a manual one. To implement the KPI reporting proposed in the consultation would impose significant costs on Orange Fixed, and impose a material impediment to the wholesale operations, hampering its ability to compete. These costs would need to be recovered through charges on wholesale products with a resultant increase in prices to end-users.

We provide analysis of each of these factors below.

3.2 Orange Fixed already provides service KPIs and SLAs within its RIO

Quality of service and non-discrimination are at the heart of Orange's commercially offered Reference Interconnect Offer 2003 (RIO):

- In the Main Offer Document at Article 14 Quality of services:

  "JT shall provide Interconnection Services at the same quality of service level as for similar services provided to JT retail operation."

- In the Operations and Maintenance Manual at Article 5 Quality of services:

"Jordan Telecom shall provide call conveyance Interconnection Services to the Licensee at same level of quality as for its own customers."

- Included within the Manual is a form to be completed manually, for reporting faults.
- In the Annexes to the RIO at Appendix E is a Service Order Form – again for completion manually by the wholesale customer.
- In the 12 page Service Level Offer annex to the RIO, detail specifications are provided for:
  - Delivery Lead times
  - Availability of specific services
  - Quality of Service Measures
  - Fault Repairs
- The objective of the Service Level Offer states:

  "This document sets out the service levels to which JT commits with regards to the provision and maintenance of Interconnection Services under the terms of the Interconnect Guidelines."

  - At Article 2 Delivery Lead times, JT commits:

  "… to deliver within the lead times outlined below, and to pay the relevant penalties for late delivery shall only apply to services ordered in accordance with the procedure for ordering and provisioning set out in Annex E, and within the forecast provided by the Licensee under the procedure set out in Annex E."

  - Article 2.2.1 provides a table of order types and the accompanying service level associated with that provision of deliver of interconnect links.
  - Article 2.2.2 provides applicable penalties payable by JT should it fail to meet its documented service levels.

The Service Level Offer continues to detail specific delivery and fault repair response times and accompanying penalty payments or credits payable by JT in the event that it fails to meet the agreed KPIs.

The current RIO, and all updates or new RIOs, such as the new *Wholesale FTTx Access Reference Offer (RIO)*, are required to be presented to the TRC for its review and acceptance. Orange considers that this is the proper place to consider adjustments to service KPIs.

3.3 WLA and WBA products sales by Orange Fixed are small and diminishing

Figure 3.1 details the wholesale products in service compared with Orange Fixed in service products, and how they have diminished since the 2019 market review. Currently Orange Fixed does not sell any new products to access seekers in the WLA market. In the WBA market since 2018, there has been a ✂ fall in products in service and no new sales. If one compares the current number of xDSL based WBA connections in service with Other Licenced Operators (OLOs), to all WBA product sales, including self supply and fixed wireless based broadband, we see it comprises an insignificant proportion of just ✂

Figure 3.1: ✂[16]]

✂

3.4 Retrofitting KPI reporting to the manual systems is not proportionate

Orange Fixed has been providing wholesale products to access seekers since early 2000s. Over that time all product sales and repair requests have been raised and tracked through manual systems. These systems, developed to manage copper based wholesale products, are old and there are no plans or call for their refurbishment. Furthermore, the copper based products are nearing their end of life and are expected to be replaced over the coming years by fibre and wireless technologies. The TRC has correctly determined, that given the multiple infrastructure based competitors in the WLA and WBA markets utilising modern technologies, neither fibre nor wireless based services need or should be regulated on an ex-ante basis.

At the same time copper based wholesale products sales are small and diminishing. To retrofit new reporting systems to meet the proposed KPI definitions, which have slightly different functional definitions to the KPIs and SLAs currently offered in Orange's RIO, would require the development of new operational support systems. The cost of such a development would need to be borne by the beneficiaries of the new non-discrimination reporting – the wholesale customers. We expect that this cost, shared by so few wholesale customers and spread over so few wholesale product sales, will result in a material increase in the cost of those wholesale products, leading to increased prices to end-users.

In the UK, as part of the Fixed Access Market Review of 2014, Ofcom imposed quality of service (QoS) KPI reporting on Openreach as part of its regulated obligations having been found to have SMP in the WLA market. When imposing a requirement for Openreach to report its KPIs, Ofcom undertook an extensive study and consultation to assess the additional costs Openreach was likely to incur in order to meet the new QoS KPIs. Ofcom determined that that Openreach was likely to incur costs and that those costs should be included in the regulated cost for access products – the charge control.

> *"We consider that we need to recognise as part of Openreach's operational costs calculated in the charge control any additional costs that occur as a consequence of imposing minimum standards. To do this we have assessed what additional costs occur and adjusted the base year cost for the charge control (as described in Annex 13)."*[17]

It is neither desirable nor proportionate to impose such an expensive burden on a diminishing set of products.

[16] ✂

[17] Ofcom, 26 June 2014, Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30 Volume 1:Statement, paragraph 11.128, https://www.ofcom.org.uk/phones-and-broadband/telecoms-infrastructure/statement/

4 Specific concerns about Wholesale KPIs

Not withstanding Orange's view that a new market review of the fixed markets would find no operator dominant in these markets, and thus the imposition of these proposed regulated KPIs are not needed, and the targeted wholesale services are small and diminishing, resulting in a disproportionate and expensive burden to be borne by a small set of access seekers, it also responds to some of the specific proposals of 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.

4.1 Article 1. Purpose and Scope of these Instructions

4.1.1 The TRC has cited no findings prompting these additional obligations

The article notes that these new proposals arise as a consequence of the TRC's 2020 Regulatory Decision on Fixed and Mobile Markets, in which it determined that Designated Licensees (an licensee found dominant within a specific market) would be required o:

> *"…provide information to the TRC on a set of Key Performance Indicators (KPIs) to be specified by the TRC following a consultation. Their purpose will be to demonstrate that the Designated Licensee is compliant with its access and non-discrimination obligations."*

It is not clear why the TRC determined during the 2019 market review process that there was a need for its increased intervention to "*..demonstrate that the Designated Licensee is compliant with its access and non-discrimination obligations."* Nowhere in the 2019 market review did the TRC cite findings by it of failings of Orange Fixed in its current obligation to provide regulated services on a non-discriminatory basis. Orange Fixed has always accepted this requirement and documents it in its RIO. The TRC provides no evidence to support its decision to impose more onerous obligations on Orange Fixed.

Furthermore, it is clear that market conditions have changed significantly since the last market review, especially in the fixed broadband markets, as detailed in Section 2 above, so the need to evidence non-discrimination is redundant.

In its 2019 Public Consultation: Review of Fixed Markets in Jordan, the TRC cited the EC's 2013 Non Discrimination Recommendation.[18] Within the 2013 EC Recommendation are a number of proposals aimed at, addressing, amongst other objectives, "*significant* ***inconsistencies … across the Union*** *in the application of non-discrimination obligations….*"(emphasis added) Given Jordan does not face the need for consistency across multiple autonomous states, such an objective is of no relevance to the TRC or Jordan. Elsewhere it references other non-discrimination measures around the concept of "*ensuring equality of access*". The focus of the recommendation at the time, was upon ensuring continued regulated access to copper based broadband products while new fibre based high speed networks emerged. A key difference between the circumstances of the 2013 EC Recommendation and Jordan in 2019, let alone in 2025, is the presence in Jordan of wholesale only fibre providers able to transparently demonstrate wholesale provision and repair services against which a regulated wholesale provider can be compared by access seekers.

[18] EC 11 September 2013, Commission Recommendation 2013/466/EU https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0466

4.1.2 What evidence is there that the TRC needs to impose '*secondary remedies*'?

The 2019 market review was conducted by the TRC following the guidance of the *White Paper on Market Review Process 2009*. Our review of the White Paper finds that in Section 5.1 Approaches to remedy selection, (1) Primary and secondary remedies, Secondary remedies:

> *"The obligation not to discriminate in relation to quality of service (e.g., delivery terms) is more difficult to implement. Some of the supporting instruments are included in Reference Offers and include Key Performance Indicators (KPIs) and Service Level Agreements (SLAs) with penalty payments".*[19]

Further on in the section it provides an explanation as to when the imposition of secondary remedies might be appropriate.

> *"...a primary remedy need not always be accompanied by a secondary remedy. In circumstances where competition problems are less serious, for example, it might be proportionate to only impose a primary remedy."*

The White Paper continues to provide guidance as to the need to target "*appropriate remedies*" to address identified "*particular market failures*", followed by a discussion on the "*proportionality of remedies*".

It is clear that the impositions of KPIs is a discretionary obligation open to the TRC, in addition to the fundamental requirement for a Designated Licensee to provide regulated services on a non-discriminatory basis. Not in its 2019 Public Consultation: Review of Fixed Markets in Jordan, nor in its 2020 Regulatory Decision on Fixed and Mobile Markets, nor in this consultation does the TRC explain why it considers it appropriate or proportionate to escalate existing non-discrimination obligations to the extent of imposing onerous secondary measures.

Orange Fixed is not aware of any complaints to the TRC, sufficient for the TRC to consider non-discrimination as a competition problem 'more serious' to warrant the imposition of the secondary remedies. In making this judgement the TRC does not discuss the costs of Orange Fixed moving from a manual system for reporting KPIs to an automated system. Yet this is an important factor in deciding whether the KPI reporting specified in the new instructions are proportionate or not.

4.2 Article 1.2 Scope of these Instructions

> *"These instructions apply to Designated Licensees"*

Orange considers that once a new market review is undertaken, six years after the 2019 market review, it is unlikely that Orange Fixed or any licensees will be found dominant in any wholesale market and hence these Instructions will be redundant. See Section 2 above.

4.3 Article 4. Key Principles

Orange supports the principles of quality of services in the overall user experience, and ensuring Designated Licensees fulfil their regulatory obligations. However, Orange considers the imposition of these proposed remedies has neither been justified on an evidentiary basis nor are likely to be relevant if a new market review is undertaken in 2025. Such a review is most likely to find no operator dominant in any fixed broadband wholesale or retail market in Jordan.

[19] TRC Jordan 2009, White Paper on Market Review Process 2009, p39

The TRC proposes to reserve itself the right to publish the KPI data. While Orange understands the principle and benefit of transparency, it is also mindful that depending on exactly what the TRC publishes, it might inadvertently reveal commercially sensitive information. Should these KPI Instructions proceed and if there was a Designated Licensees to whom the Instructions might apply, Orange requests that the TRC undertakes to consult with the Designated Licensee to agree how any of the KPI information is made public. It might be preferable to share selected KPI information with individual operators.

4.4 Article 5. Reporting and Monitoring

Orange considers that the probability that wholesale KPIs are needed is small. It suggests that, if such KPIs were introduced, then it propose that the TRC should allow a grace period for the initial reporting cycle, during which Designated Licensees can align their internal systems with the KPI requirements. This would ensure a smooth transition and minimize the risk of errors in the initial reports.

> *"Designated Licensees shall provide KPI reports to the TRC twice a year (every six (6) months)."*

Orange considers reporting every 6 months would be an unnecessary burden, particularly given the low number of wholesale transactions. If these Instructions were to come into force, Orange suggests that the reporting period be amended to be once a year.

> *"The TRC has the right to request the Designated Licensees to provide any additional information including the raw data."*

Orange considers the TRC needs to amend this statement to include the recognition that a Designated Licensee can only be required to provide information it has available to it.

4.5 Article 6.1 Overview

> *" …the TRC has taken into consideration international best practice and the recommendations of international standards organizations."*

Orange requests that the TRC share its sources of best practice and international standards.

> *"…The TRC has considered the relevance of the KPIs for the Designated Licensees and the compatibility of the indicators …"*

Orange considers the proposed KPIs detailed in Annex A of the Instructions are both incompatible with 'services that do not involve rental of physical assets provided by the Designated Licensees. For example there is no provisioning or repair to be provided for voice origination or transit services provided on a wholesale basis, both markets in which Orange Fixed has been found dominant. And they make no sense at all in the case of the proposed KPIs for billing and complaints (Service Administration KPIs). How are these customer interactions to be measured against the internal, integrated management processes of Orange Fixed?

4.6 Article 6.2 KPI Thresholds

> *"These threshold target values have been defined based on international benchmarks and best practices"*

Orange requests that the TRC share its sources of international best practice. Orange is not aware of any consultation with industry as to what might be appropriate target values and suggests that it is Orange Fixed and its wholesale customers who are best placed to determine what should be target values.

The TRC has specified quality of service (QoS) threshold based on international best practice without first consulting industry players on which KPIs are required and what threshold values to use. This is unfortunate. Orange has not had the time, within the consultation timetable and given the parallel nature of the four consultations, to carry out the detailed analysis required to determine which threshold values might require upgrades to the QoS it currently provides through its RIO. Upgrades might involve substantial costs that would lead to higher charges for access seekers and ultimately to higher prices for end users. In effect the TRC might be raising end-user prices unnecessarily.

Orange Fixed also notes that it already provides on a commercial basis within in its RIO, a range of provisioning and assurance KPIs and associated SLA, accompanied by penalties payable by Orange Fixed in instances where Orange Fixed has failed to meet the agreed SLAs. There is no need for the TRC to second guess more appropriate parameters for Orange Fixed and its wholesale customers.

However, if in the highly unlikely instance that a new market review would find a licensee dominant and the TRC were to progress with such a KPI and threshold regime, which Orange would not recommend, we suggest that, in cases where specific KPI thresholds did not align with the operational capability of Orange Fixed, the TRC allows for some flexibility, especially in exceptional circumstances. This would ensure that KPI targets remain achievable without compromising service quality.

> *"The indicator thresholds that have been defined are indicative and primarily allow the TRC to monitor the performance of the Designated Licensees."*

However, if implemented, they will set expectations, and if not based upon specific conditions, arrangements and processes in practice in Jordan, could lead to unnecessary and unhelpful complaints and misplaced expectations. Orange suggests that the setting of any such targets be determined through an industry led consultation.

4.7 Article 6.3 Changes to KPIs

Orange notes that the TRC proposes to have the right to modify the KPIs detailed in Annex A and any other requirements within the Instructions. If these Instructions were to prevail, and if there were any Designated Licensees to whom they might apply, Orange would propose that any such future changes to the Instructions only be implemented following a specified introductory period and consultation held by the TRC with stakeholders.

4.8 Article 6.5 Audit of compliance

Orange requests that the TRC provide clear guidelines on the audit frequency, methodology, and scope to ensure that Designated Licensees are well-prepared for audits. Additionally, allowing Designated Licensees the opportunity to address any discrepancies before the final audit report would ensure a fair and transparent process.

4.9 Article 6.6 Compliance and penalties

Orange proposes that the TRC implement a corrective action mechanism before penalties are imposed. This would allow Designated Licensees to implement corrective measures within a specific timeframe to address performance issues, ensuring continuous improvement while avoiding punitive measures.

4.10 Appendix A – Wholesale KPI definition and methodology

As noted previously, the TRC's proposals for imposing KPIs arise from the TRC's *2020 Regulatory Decision on the Fixed Markets Review*, in which the TRC determined that where an operator had been found to be dominant in a market, regulatory remedies would be imposed including the requirement to "*provide information to the TRC on a set of Key Performance Indicators (KPIs) to be specified by the TRC following a consultation*". That obligation was determined for:

- Wholesale Local Access (WLA) market as part of the non-discrimination and transparency remedy.
- Wholesale Broadband Access (WBA) market as part of the non-discrimination and transparency remedy.
- Wholesale Fixed Voice Call Termination market as part of the transparency remedy.
- Wholesale Fixed Transit market as part of the transparency remedy.

Clause 45 states that:

> *"For each relevant service provided in a market that has been identified .... as a market requiring ex ante regulation ..... the Designated Licensee is subject to the obligation to measure and report to the TRC KPIs covering the following activities."*

In this Annex three classes of KPI are defined:

- Service Ordering and Provisioning
- Service Assurance
- Service Administration

Without repeating the recommendations and requests made above in our response, Orange would just reiterate that the identification of specific tasks, their definition and specification, along with KPIs and target values, are best left to industry to define. Should these KPI Instructions proceed, Orange suggests that the TRC consult with the Designated Licensee to agree appropriate KPIs and target values, as it does today in approving the detail of a RIO.

We note that regulated KPIs are proposed for transparency reasons in the markets of Wholesale Fixed Voice Call Termination and Wholesale Fixed Transit markets. It is not clear what provisioning or assurance services are provided to wholesale customers separate to those provided contemporaneously to a Designated Licensee's own customers. How, therefore the proposed KPIs, developed to evidence non-discrimination, are expected to assist fulfilment of the regulatory obligations of these two markets is a mystery. Orange requests that the TRC explain how the proposed KPIs are expected to work in these two voice interconnect markets.

Orange proposes that the Service Administration KPIs be removed for any proposed set of regulated KPIs. We can find no examples in other jurisdictions where services such as billing and commercial complaints are subject to a requirement of non-discrimination. Service Administration, focused as it is on billing and complaints, is not an appropriate activity to ensure non-discrimination. While timely resolution of billing and complaints is important, it does not directly affect end-users and so is not an activity requiring a regulated non-discrimination mandate. It is more a commercial matter better addressed through the contractual arrangements of an interconnection agreement, a contract that is already subject to the TRC's scrutiny and approval.