Zain Response to Orange's Request for Reconsideration of TRC Market Review Decision on the Mobile Market

Draft

Introduction

1. Zain has carefully read the document entitled "Orange Fixed objections and Request for Reconsideration of the TRC Market Review Decision on the Mobile Market" (Request) and wishes to make the comments set out in this document. Our overall view is that Orange has failed to provide evidence to support a reconsideration by the TRC and that the TRC should therefore refuse Orange's request. It remains Zain's opinion that the TRC conducted a thorough review of the market and provided an evidence-based assessment of the market definitions and assessment of Significant Market Power (SMP).

2. There is a theme that runs through many of the comments we make below, which is that there is a difference between conditions of competition and the outcome of competition.
   i. Conditions of competition refer to legal and economic factors that affect all participants in the market. In mobile markets this would include (but not necessarily be limited to) the geographic coverage of a specific licence, economies of scale and scope and the input costs of network equipment.
   ii. Competitive outcomes refer to the results of competition between operators, such as market share.

3. If the conditions of competition favour one party, for instance because it has unduly favourable economic or legal advantages, then it is inevitable that that party will benefit. However, if the conditions of competition do not favour any one party then better outcomes for one operator or another will be the result of better management decisions and not a matter for regulation.

4. It is Zain's view that all operators in the mobile market face the same conditions of competition and so no operator has any inherent advantage, either nationally or in an area of the country. Therefore, there is no need for *ex ante* regulations as the outcomes of competition are based on fair rivalry.

5. At any given time, one operator or another may enjoy a larger market share and/or a better return on investment than its rivals. However, this is the normal competitive process and, provided such success is built on the merits of its own performance, there is no need for a National Regulatory Authority (NRA) to impose *ex ante* regulation. Instead, if one operator should become dominant, any competition problems can be addressed using competition law.

6. On this basis, it is Zain's view that the TRC should reject Orange request for a reconsideration of its decision on the mobile market.

7. In the remainder of this document we respond to some of the issues raised by Orange in the order they raise them. Where we have not made comments on specific issues this does not mean that Zain agrees with Orange.

Geographic Market Definition

8. Orange repeats its claim that Jordan should be divided into separate geographic markets on the basis that Zain has a larger market share (said by Orange to be 60%) in the Amman region.

9. In considering whether this claim has any merit, it is worth referring to the European Commission's Guidelines on SMP[1], which describes the circumstances in which a National Regulatory Authority (NRA) may find multiple geographic markets within one country. In particular, the European Commission states (para. 48):

   *"…the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the **conditions of competition** are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing **conditions of competition** are significantly different. Areas in which the **conditions of competition** are heterogeneous do not constitute a uniform market.*[2] (Emphasis added).

10. The Guidelines also state (para 51):

    In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined based on to two main criteria:
    a) *the area covered by a network; and*
    b) *the existence of legal and other regulatory instruments.*

11. Orange claims that because Zain has performed better in Amman than its rivals this results in it having SMP in Amman and should therefore be subject to regulation in this capital city area.

12. Such a claim would have merit if Zain's success in Amman was built on asymmetric competitive conditions that give Zain an unfair advantage. However, the facts are quite different.

13. The core building block of a mobile network is spectrum. Spectrum licences are national and thus create the same conditions of competition in all areas of the country. As noted above in para. 9, the EU Guidelines point out that the geographical scope of a market has traditionally be based on the area covered by a network. As all three mobile

[1] European Commission (2018) '*Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'*
[2] Para. 48

networks in Jordan have national licences, the area covered is clearly the whole of Jordan.

14. In fact, Orange enjoys superior conditions of competition when it comes to spectrum as it has a total of 32.5MHz of spectrum it can use for 4G, including 10MHz in the 2600MHz capacity spectrum band. By contrast, Zain has just 20MHz it can use for 4G, all in the 1800MHz spectrum band. This allows Orange to offer higher speed services to its customers than its competitors.

15. Another effect of this spectrum allocation is that Orange can use more of its spectrum for mobile broadband and use its ADSL/FTTX network for fixed broadband. By contrast, Zain has to use its 3G and 4G spectrum to provide broadband for households.

16. Thus, to the extent that are different conditions of competition in Amman and elsewhere the beneficiary of these conditions is not Zain, but Orange.

17. Zain's market position in Amman, therefore, comes from its superior competitiveness on the merits of its services rather than an in-built advantage due to competitive conditions. Orange and Umniah operate under the same conditions of competition that would allow to compete effectively with Zain. The fact that they choose not to is a failure of management rather than of the market and thus cannot lead to finding separate geographic markets in Amman and elsewhere.

One market for post-paid and prepaid

18. Orange also claims that there should be separate post-paid and prepaid markets, again on the basis that Zain enjoys a higher market share in the post-paid market.

19. Similar comments to those made above may be made in relation to this claim. Zain has made a strategic decision to target the higher spending post-paid sector of the market (though it still represents a small proportion of its customer base) and has been successful in so doing. This is an outcome of the competitive process and not a result of some in-built advantage for Zain that is not shared by Orange or Umniah. As such, it cannot lead to finding separate markets.

20. By contrast, Umniah has a youth-centred strategy, as noted in a press release announcing it had been named as the fastest growing telecoms company in Jordan in 2019. The press release states: "*Since its launch in 2005, Umniah has cultivated a solid reputation within the Jordanian market by delivering unparalleled value for money and adopting an aggressive youth-centric strategy*"[3]. Youth markets are generally accepted as more likely to purchase prepaid services rather than post-paid. This would suggest that any lower proportion of post-paid customer subscribing to Umniah is likely to be an effect of management strategy, rather than conditions of competition that favour Zain in the post-paid segment.

[3] https://www.umniah.com/en/explore-umniah/umniah-named-fastest-growing-telecom-company-in-jordan-during-the-2019-international-business-magazine-awards/

21. At para. 17 of its Request, Orange repeats the claim that there is a "club effect" based on Zain's on-net/off-net price differentiation. We have previously explained that the "club effect" (or "tariff mediated network effects") only exists when prices of off-net termination are high. The very low mobile termination rates in Jordan and the increasing use of internet call apps (such as WhatsApp or Facetime) means that there is little or no opportunity to develop a club effect. It is for this reason that we agree with the TRC's decision to repeal TRC Board Decision no. 9-1/2004.

22. Zain has taken advantage of low mobile termination rates to offer enhanced levels of off-net minutes within our most popular bundles. Our most popular bundle is Mish Tabe3i+, which includes 1,000 off-net minutes within the bundle price of 8JD. A review of our calling data for this bundle shows that average consumers use only about [CONFIDENTIAL DATA:] of off-net minutes within a bundle meaning that they could double the number of calls to off-net contacts without incurring any additional charges. Thus, there is no tariff wall that prevents them making more off-net calls and so the club effect that Orange complains of simply does not exist.

23. Orange's continued spurious use of alleged club effects only demonstrates their desperation to keep Zain regulated when they have never been able to present evidence to support their claim.

Mobile markets are susceptible to ex ante regulation and SMP designation

24. Orange's comments in this section of their Request confuse the Three Criteria Test, used to determine whether a market is susceptible to *ex ante* regulation, with an assessment of SMP.

25. In its consultation document, the TRC successfully demonstrated how the market does not fulfil the second criterion (that the market is not trending towards effective competition) and, like three-operator mobile markets elsewhere in the world, is therefore not susceptible to *ex ante* regulation. As Umniah points out on the "About us" page of its website, Jordan is "one of the region's most competitive markets"[4].

26. Orange has provided no evidence in its request that the market is not effectively competitive and therefore its argument does not warrant further assessment by the TRC.

27. Although Zain's market share has increased in the last few years, Jordan remains as competitive as many EU Member States with three mobile networks, where the MACO market has been found not to be susceptible to *ex ante* regulation. The TRC was therefore correct in its conclusion that the Jordanian MACO market is not susceptible to *ex ante* regulation as it is already effectively competitive.

[4] https://www.umniah.com/en/about_us/#

Assessment of SMP

28. Despite the evidence that the Jordanian market does not fulfil the three criteria test and so is not susceptible to *ex ante* regulation, Orange attempts to claim that Zain is in fact dominant in the market. We wish to make a number of points in relation to this claim:
    i. Orange appears to argue in para. 29 of its Request that a 10 percentage point difference in market share between the largest and second largest player is significant in the determination of dominance. There is no reference in the Competition Safeguards or in the White Paper to such a difference being significant and Zain is not aware of any international precedent. We note that Orange has given no reference to where such a criterion may be found to support its claim.
    ii. At para. 33 Orange states that "*four-to-three mergers in mobile telecoms have often been blocked by the European Commission. This shows that the mobile markets with three operators are regulated*". We make two comments in relation to this statement by Orange.
        i. First, the TRC should be aware that in June 2020 the EU's General Court upheld an appeal by CK Hutchison, the owner of Three in the UK, against the European Commission's ruling blocking its proposed merger with O2, finding errors of law and in the assessment of the theories of harm on which the decision was based[5]. The current legal position therefore is that the merger is not blocked on any basis put forward by the Commission, subject to any further appeal by the Commission[6].
        ii. Secondly, Orange should understand the difference between regulation and competition law. The fact that a merger or acquisition is blocked by a competition authority does not mean that the market is regulated. Rather they remain unregulated but subject to competition law. The MACO market in the UK is not subject to regulation.
    iii. At para. 35 Orange states "*The number of firms active in a market is only one of indicators (sic) of competition,* ***and of a rather minor importance***" (emphasis added). Orange here has a rather different view to that it presents in its Request regarding the Fixed market. In that document it makes a strong point of the alleged number of competitors in the market in, for example, paras 20 and 31 of the Fixed Request. It is inconsistent for Orange to claim that the number of operators matters in one market but is of "minor importance" in another.
    iv. Finally, in the penultimate bullet point of para. 35 Orange "doubts" whether Zain's market share has decreased and "strongly believes" the evidence provided by SPC Network to Zain is not accurate but presents no evidence to support its claims. The evidence based regulation to which the TRD rightly aspires cannot rely on unsupported doubts and beliefs.

[5] https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-general-court-annuls-the-european-commissions-prohibition-of-the-three-o2-merger

[6] In the meantime, Telefonica and Liberty Global have agreed to merge their O2 and Virgin Media subsidiaries in the UK (subject to approval by the UK Competition and Markets Authority) meaning that the O2/Three merger will not now happen anyway

29. Orange lists the additional "impact factors" (para. 40) that the TRC may consider in assessing whether any operator is dominant in the market. Orange has failed to demonstrate that any mobile operator benefits from these impact factors. However, to the extent that any operator has an advantage, however, Orange is in a stronger position in relation to, for example:
    i. **Size/Access to Capital** – Orange Jordan is part of the Orange Group which has a market capitalisation of €27 billion compared with Zain's €1.1 billion.
    ii. **Vertical and Horizontal Integration** – as the TRC points in its Decision on the Fixed Market, "*Orange Fixed is highly vertically integrated, and is active on all relevant markets across the value chain. The existence of different Orange affiliates, operating in different market segments, does not affect this conclusion, as these affiliates are all under common ownership and control, thus constituting a single economic entity for the purposes of competition*"[7].
    iii. **Bundling of products and services** – Orange is able to bundle fixed and mobile services which cannot be replicated by rivals.
    iv. **Barriers to expansion** – as noted above, Orange has an advantage in capacity spectrum bands that allow it to expand its services especially in high density areas.

30. As we have noted above, there is a difference between the conditions of competition and the outcomes of competition. The impact factors are largely conditions of competition and apply equally to all operators, with some advantages to Orange. Zain has managed to use these same conditions to provide better services and so attract a higher market share. These do not result in Zain having a dominant position in the market and so do not result in a need for the TRC to impose *ex ante* regulation.

The impact of other regulatory issues

31. At para. 47, Orange makes the claim that the high level of taxes and spectrum fees is a barrier to expansion for Orange (and presumably Umniah) but not for Zain and therefore should be considered as "*increasing Zain's SMP*".

32. Zain would certainly agree that all mobile operators are subject to a very high level of taxation and all three operators have seen massive increases in Special Tax, Data Tax and Roaming Fees in the past three years. However, it is an extraordinary claim to say that it increases Zain's SMP.

33. Economics recognises that taxation on the sales of goods and service can result in a deadweight loss, reducing total welfare whilst transferring some surplus from suppliers and consumers to the government. This transfer of surplus means that the tax rise is paid either via increased consumer prices or lower dividends to shareholders, if the taxed operator has enough margin to absorb some of the price rise[8]. In a market as competitive as Jordan, we can expect that nearly all the price rise caused by tax will be

[7] TRC '*Regulatory Decision on the Fixed Markets Review*' Sept. 2020. Page 7.
[8] For a basic description of the deadweight loss from taxation see Sloman and Sutcliffe (2001) *'Economics of Business'* Second Edition p.393

passed on to consumers as the operators make insufficient margin for the tax to be paid by shareholders.

34. It is, therefore, simply not the case that taxes and spectrum fees provide Zain with any form of inherent advantage let alone increase its competitive position relative to its rivals. All mobile operators are subject to the same level of taxation, regardless of size.

SMS designations and imposed *ex ante* remedies

35. In our response to the TRC's consultation, Zain supported the TRC's proposal to regulate the price of SMS termination as we agreed with the TRC that the potential collapse of the current voluntary Bill and Keep arrangement creates a danger that all three operators would charge the monopoly price for SMS termination, which would be passed on to consumers raising the price of SMS services. In our view, Orange does not present any new arguments that are worthy of reconsideration on this matter. Nevertheless, we respond to some of the points made by Orange below.

36. At para. 61 Orange refers to an article by Harbord and Pagnozzi from 2008 as justification for not using Long Run Incremental Costs plus a mark up for common costs and a network externality surcharge (LRIC+) to set mobile termination rates (MTRs) based on evidence from the UK. Zain is surprised that Orange refers to this article for two reasons.

37. First, the article refers to an outdated methodology for calculating MTRs. In 2009 the European Commission issued a recommendation on fixed and mobile termination charges[9]. In this Recommendation the Commission proposed that both fixed and mobile termination rates should be based on what is known as "pure LRIC", i.e. without the mark up for common costs and externalities. Thus, Pure LRIC is close to the marginal cost.

38. The effect of this is that the average MTR per minute in the EU fell from €c7.83 (Fils 65.8) in 2009 to €c0.84 (Fils 7.06) in 2020[10]. This is still above the current blended MTR in Jordan of Fils 5.2 per minute.

39. Secondly, the authors of the paper recognise that the findings are '*partly based on research undertaken for Hutchison 3G UK Ltd'*. Three (Hutchison 3G UK Ltd brand in the UK*)* was and is the smallest of the UK mobile networks and so is most likely to benefit from a switch from MTRs to Bill and Keep. The approach proposed by Harbord and Pagnozzi has not been accepted by the EU or its Member States where the Calling Party Pays approach is still utilised.

[9] '*COMMISSION RECOMMENDATION of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU'*

[10] See BEREC *'Termination rates at the European level, January 2020'* Figure 13

40. Orange again comes back to claiming that Zain will somehow benefit from a "club effect" without presenting any evidence. Orange has never been able to demonstrate that Zain enjoys such an effect. Orange also fails to recognise that messaging apps (e.g. Facebook Messenger or WhatsApp) by pass SMS termination and so would disrupt any club effect, should it exist.

Conclusion

41. Zain has always recognised that the TRC has undertaken a thorough and rigorous analysis of the mobile market in Jordan when preparing the current market review and has come to evidence-based conclusions that reflect the market conditions and are in line with international best practice. The arguments put forward by Orange in its Request are not substantiated by strong evidence and so, in our opinion, the TRC should reject this Request and implement the findings of the market review as soon as practical.