Zain Response to Orange's Request for Reconsideration of TRC Market Review of the Fixed Markets

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 Fixed Markets" (Request) and wishes to make the comments set out in this document. Our overall view is that Orange has failed to provide any 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 objective and evidence-based assessment of the market definitions and assessment of Significant Market Power (SMP) and the appropriate remedies imposed on Orange.

2. In this response, Zain addresses the comments made by Orange in the order in their Request. Where Zain has not made any comment, this should not be interpreted as Zain agreeing with Orange.

Geographic Market Definition

3. Orange repeats its claim that Jordan should be divided into separate geographic markets on the basis that there "*is evidence of entry and replication of network infrastructure in some regions*" (para. 20) , particularly in Amman. However, Orange provides no additional evidence on the extent of competitive build and, more importantly, how any entry and replication has changed competitive conditions in Amman to such a degree that it justifies being defined as a separate geographic market.

4. Although not legally binding in Jordan, it is interesting to note the European Union's approach to the definition of geographic markets. The European Commission's guidelines of Significant Market Power (SMP) explain that geographic markets can be identified when conditions of competition within an area are homogenous but are significantly different from competitive conditions in neighbouring areas[1].

5. To understand the proper process of defining geographic markets, it may be of value briefly to outline the approach to geographic market definition adopted by the UK regulator, Ofcom, in its Wholesale Fixed Telecoms Market Review (WFTMR)[2]. In the Wholesale Local Access (WLA) element of this review, Ofcom identifies three geographic markets within the UK[3], which it names Areas 1, 2 and 3. The three areas are defined as follows:

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[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*' Para. 48.
[2] Ofcom '*Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26*' January 2020
[3] Excluding the area around the city of Kingston upon Hull which has never been covered by BT's network.

- Area 1: Where there is material commercial deployment of infrastructure by at least two alternative providers.
- Area 2: where there is already some material commercial deployment by rival networks to BT or where this could be economic.
- Area 3: where there is unlikely to be material commercial deployment by rival networks to BT.

6. No part of the UK is found to be Area 1 and so the country is split between Areas 2 and 3 (about 70% is in Area 2 and 30% in Area 3). When defining geographic markets, Ofcom assessed competitive conditions at the level of a postcode sector, each of which covers about 2,500 households[4] on average. Contiguous postcodes that the meet the relevant criteria and then allocated to Areas.

7. In determining whether the postcode sector falls into Area 2 or 3, a key metric for Ofcom is the extent of an alternative operator's coverage in that postcode sector. Ofcom has decided that the operator's network would need to pass at least 50% of households for presence to be considered material and therefore to change competitive conditions such that a separate geographic markets can be defined[5].

8. It should be noted that although Ofcom has found Areas 1 & 2 to be separate geographic markets, it has also found BT to have SMP in both markets.

9. Other European countries have also found geographic markets on the basis of network presence and the market share of the SMP operator. The table below shows the coverage requirements and SMP operator's maximum market share used for calculating geographic markets in those EU countries where the NRA has found geographic markets in the Wholesale Local Access market. The maximum share for the SMP operator means that if the SMP operator has a market share above that threshold in a geographic area, then that area is deemed as not competitive irrespective of the extent of coverage.

	No. of operators other than SMP	Minimum coverage requirement	Maximum SMP operator market share
Hungary	2		50%
Poland	2	65%	40%
Portugal	2 or 1	50% 20%	50%

10. Orange lists a number of operators that are rolling out fibre networks in Amman (para. 20), but it does not provide evidence of either the location of those networks, the extent of their coverage or those operators' effect on Orange's market share. Therefore, Orange does not provide evidence to counter the TRC's finding that Jordan forms is a

[4] There are approx. 28 million households in the UK and 1,192 postcode sectors.
[5] WFTMR, Volume II, Para 7.24

single geographic market. In addition, Orange does not propose an alternative methodology to that used by the TRC.

11. In our reply to the responses of Orange and Umniah to the market review consultation, we pointed out that Orange had not proposed a suitable geographic unit for determining a geographic market[6]. We also note that it has not proposed a measure of presence nor what effect the entrants would need to have on Orange's market share to create significantly different competitive conditions. Without these key metrics, it is not possible to assess whether competitive conditions in one area are significantly different to elsewhere to define a separate geographic market.

12. It remains our view, therefore, that there is insufficient evidence to determine a separate geographic market to cover Amman or any other area of Jordan and that therefore the TRC is correct to maintain a single national market.

Orange Fixed SMP in WLA and WBA markets

13. This section of Orange's response is somewhat confusing and at time contradicts the previous section on geographic markets. Orange says that in its response to the consultation it "*provided arguments and evidence showing that the fixed markets are competitive, and therefore the TRC conclusions on susceptibility to regulation and SMP are erroneous*" (para. 30). It then repeats some of these arguments in the Request.

14. However, in doing so Orange confuses susceptibility to *ex ante* regulation under the Three Criteria Test and assessment of SMP in the relevant market.

15. As the TRC is fully aware the Three Criteria Test requires that the market must fulfil all three of the following criteria and these must be assessed in the order set out below:

    - The market is characterised by high and persistent barriers to entry;
    - The market is not trending towards effective competition; and
    - Competition Law alone would not adequately address any competition concerns.

16. The reason for the ordering is that criterion (a) establishes that the market is not contestable by new entrants; criterion (b) establishes that the market is not moving towards competition even if no more suppliers can enter the market; and criterion (c) means that competition law would still be the default mechanism to protect competition. *Ex ante* regulation is only applicable if competition law cannot adequately deal with the competition concerns.

17. In the Request, Orange reverses the first two criteria, claiming first that there are four operators other than Orange with "nearly ubiquitous coverage" (para. 31) before asserting that barriers to entry are low (para. 32). We examine each of these claims below, but in the correct order.

[6] Zain '*Reply to Responses of Orange and Umniah'* February 2020, page 6.

18. Barriers to entry arise due to various factors. These barriers are different between the WLA and Wholesale Broadband Access markets.

19. In WLA the TRC rightly identified the barriers to entry in its consultation document as economies of scale, scope and density and the sunk cost of network build. Zain pointed out in its response to the consultation that whilst barriers to entry may be lower in some parts of the country (e.g. West Amman) due to road layout and density of housing. In most of Jordan, however, barriers to entry remain very high for a variety of reasons. In these areas there is a very high sunk cost in building a network and it would be very hard for an entrant to gain the necessary economies of scale, scope and density to compete effectively with an entrenched incumbent like Orange.

20. In WBA, the TRC rightly identifies the lack of wholesale products available from Orange, which blocked Local Loop Unbundling (LLU) and does not provide Virtual Unbundled Local Access (VULA), as the key barrier to entry. The Fibertech network is not yet available on a widespread enough basis to make it an effective alternative wholesale operator (see para. 23 below).

21. We therefore agree with the TRC that barriers to entry in both the WLA and WBA markets remain high and enduring and thus these markets fulfil the first criterion.

22. The second criterion refers to competition in the market and whether it is trending towards effective competition.

23. Orange's claim (para. 31) that the market fulfils this criterion on the basis that there are four operators with ubiquitous coverage is simply incorrect. Our market intelligence suggests that the number of households passed (**not** subscribers with the exception of Mada) by each of the four networks mentioned by Orange is:

- Zain: 350,000 households. Of which 230,000 are passed by Zain's own network and 120,000 by Fibertech.
- Mada: 20,000 subscribers.
- Umniah: A recent press release from Umniah[7] states that it is present in the following districts: New Zarqa, Hay Al-Baraka, Khalidi area, Al-Saliheen, Tabarbour, Tla' Al-Ali, Al Yasameen, and Abu Nsair. Collectively, this amounts to about 200,000 households.
- Umniah is a 49% shareholder in Fibertech indicating that the Fibertech network is the same as Umniah.

24. Later, at para. 36, Orange contradicts its claim of ubiquity and states that "*other operators **are expanding** their fibre networks*" (emphasis added) and mentioned specifically Umniah, Fibertech and Zain.

[7] See https://www.umniah.com/en/explore-umniah/umniah-launches-high-speed-fiber-optic-services-in-new-zarqa/ Sept. 20th 2020

25. It is clearly a contradiction to claim that networks are ubiquitous and simultaneously expanding. “Ubiquitous” means that the network is everywhere. If it is everywhere, it has no need for expansion. Further, if we look at the claimed expansion by Orange, the most ambitious project is Fibertech which “*aims*” (para. 36) at covering 70% of households (about 1.4 million) by 2025. Current evidence suggest they pass around 200,000 households and so have a long way to go to meet this targe. Zain is mentioned as having agreements to use the poles of various municipalities to roll out a fibre network but no timetable is given. Umniah is a partner in the Fibertech network and provides no additional coverage.

26. Orange also refers to the National Broadband Network (NBN) and claims that this will be a competitive constraint on itself (para. 38). However, Orange does not present any evidence that it will be a competitive constraint over the period of this review. It should also be noted that Orange may apply to be a partner in the NBN.

27. The evidence supplied by Orange is, therefore, simply insufficient to claim that the market is currently competitive or trending that way across the Kingdom of Jordan. Thus, the market does clearly fulfils the second criterion.

28. The third criterion refers to the effectiveness of the competition law at addressing any issues in the market. It is important that this criterion is fulfilled to ensure that *ex ante* regulation is only imposed when competition law would be insufficient. The insufficiency of competition law in this market is quite clear from the flagrant breaching of LLU and 06 obligations by Orange, as noted by the TRC in its consultation document and by Zain in our response. Competition law is not designed to open up monopoly markets to competition but to protect existing competition within a market. It would therefore be insufficient to address the issues arising as a result of high barriers to entry and a lack of a trend towards effective competition.

29. Having established that the market fulfils the Three Criteria Test, the next step is to assess whether any firm enjoys a position of dominance in the market.

30. Despite claiming in para. 35 that its market share is below 50%, Orange Jordan’s own annual report states that it has a market share in fixed services of more than 90%[8]. This is well above the threshold at which dominance is presumed. Orange, therefore, clearly has a dominant market position in the WLA market.

31. With this level of market share, there is no need to assess the other impact factors that might mitigate Orange’s SMP. However, a quick assessment would show that as well as an overwhelming market share Orange enjoys:

- The control of essential facilities;
- A lack of countervailing buyer power;
- Superior access to capital given its membership of Orange Groupe SA;
- Superior economies of scale, scope and density; and

[8] Jordan Telecommunications Company *‘Annual Report 2019’* p. 21.

- Is protected by significant barriers to entry and expansion.

32. It is therefore evident that despite Orange's list of objections in paragraphs 31 – 39 of its Request, Orange is without doubt the dominant operator in the WLA market.

33. Orange also claims that Jordan enjoys amongst the lowest priced broadband in the Arab region as evidence of the competitiveness of the market (para. 21). International price comparisons are notoriously difficult, as one has to take into account purchasing power parity and local taxation conditions. Thus, international comparisons should only be done net of local taxes and using Purchasing Power Parity (PPP), as calculated by the OECD[9]. Orange does not explain the methodology used to establish the low prices it claims for Jordan.

34. Further, in its comments on prices, Orange makes the simplistic assumption that low prices are the result of a competitive market. This is generally the case: however, such an assumption cannot be made without a proper assessment of the cause of low prices. Given Orange's dominant position in the Fixed Market in Jordan it is possible that low prices have been set by Orange as a deliberate strategy to use its superior economies of scale to drive smaller operators out of the market: a practice known as predatory pricing.

35. Zain is not accusing Orange of implementing predatory prices. However, we have pointed out to the TRC in our response the Fixed Market consultation that Orange has previously behaved in an anticompetitive manner regarding access to LLU and geographic number ranges (known as the 06 case). Given this track record of Orange, it is quite feasible that what it claims are low prices are not a result of competition buy are set deliberately to deter market entry by rivals.

36. With regard to WBA, in which Internet Service Providers acquire wholesale access from Orange, the lack of a wholesale access product such as LLU or VULA[10] creates a strong barrier to entry. In fact, this barrier to entry is so strong that it both means that the market is susceptible to *ex ante* regulation and ensures that Orange is dominant in the market.

37. Orange claims (para. 39) that fixed broadband faces substantial competitive pressure from mobile broadband, providing various statements that it claims support this statement. We make the following comments on Orange's statements in the same order:

    - Many consumers in many countries use both fixed and mobile networks for Internet access, but this does not mean fixed and mobile are in the same market. Consumers may use these two forms of internet access in different

[9] Purchasing power parity (PPP) is a measurement of prices in different countries that uses the prices of specific goods to compare the absolute purchasing power of the countries' currencies. The PPP exchange rate may differ from the market exchange rate because of relative wealth, tariffs, and other transaction costs.

[10] Virtual Unbundled Local Loop

circumstances and for different purposes, making the two products complements rather than substitute. The Hypothetical Monopolist Test would need to show that fixed and mobile are demand or supply side substitutes.
- Given the increased roll-out of FTTH by Orange and other operators, albeit in limited areas, we find it hard to accept Orange's claim they are likely to be closer substitutes by 2020. Orange offers fibre broadband access of 500Mbps and 1Gbps symmetrical. 4G mobile services cannot compete with speeds even in perfect circumstances. We find it hard therefore to accept that fixed and mobile are substitutes.
- Whilst mobile broadband may be comparable to ADSL under perfect circumstances, it is far from comparable with fibre. We note from the TRC data that there are now more FTTX connections than ADSL[11].
- Also as noted earlier (para. 34) low prices are not necessarily the outcome of competition and may be used by a dominant firm to deter competitive entry. Orange needs to provide more evidence that the fall in fixed broadband prices is a result of competition from mobile broadband.

38. Overall, Orange has not demonstrated that:

- WLA and WBA markets are not susceptible to *ex ante* regulation;
- That Orange is not dominant in the WLA market; and
- That Orange is not dominant in the WBA market.

39. On this basis, it is our view that the TRC should not accept Orange Request to reconsider its findings in these important markets.

Ex Ante Regulation on Wholesale Fixed Call Termination

40. Zain disagrees with Orange and considers it perfectly reasonable that an operator that has such a strong position in the fixed markets should be the only operator under an obligation of cost accounting. A similar obligation on other operators would be disproportionate.

41. As an example, BT in the UK is subject to a cost account obligation in the fixed call termination market. Other operators are not subject to such an obligation as they terminate significantly fewer call minutes than BT[12].

Obligation to notify retail bundles

42. Bundling of products is a well-known anticompetitive practice that can be used to exclude rivals from a market. There are many famous examples of bundling being designed to or having the effect of excluding rivals, such as Google/Android and Microsoft Windows/Internet Explorer. Bunding is particularly anticompetitive when a firm that is dominant in one product market bundles that product with one where it is

[11] TRC '*Main Telecommunications Market Indicators in Jordan 2019'* Slide 4.
[12] Ofcom '*Narrowband Market Review Statement'* November 2017, Section 13.

not dominant so as to leverage its dominance into the non-dominant market and so exclude competitors from that market. This was the effect in both the examples above.

43. To prevent such leveraging of dominance in markets subject to *ex ante* regulation, national regulatory authorities have often prevented firms with SMP from bundling products in the market it dominates with products from market it does not. We therefore do not consider that the obligation to notify retail bundles is disproportionate and hope that the TRC will keep this obligation in place.

Conclusions

44. Our analysis of Orange's Request that the TRC reconsider its findings in the Fixed market review shows that they have not presented sufficient evidence to justify such a review. The evidence that they have produced is partial, sometime contradictory and Orange appears confused between the evidence appropriate for the determination that a market is susceptible to *ex ante* regulation and an assessment of SMP.

45. In Zain's opinion, Orange has not presented a sufficient argument backed up by compelling evidence to justify the TRC reconsidering its findings and we therefore hope that the TRC will reject Orange's request.