Orange Fixed objections and Request for Reconsideration of the TRC Market Review Decision on the Fixed Markets

1 Introduction

1. In July 2019, TRC launched the public consultation on the Review of Fixed Markets in Jordan. Orange Fixed submitted its responses to the consultation on 31 December 2019. On 29 January 2020, a meeting was held at TRC where representatives of Orange Fixed explained its views on the proposed regulatory decisions. On 20 February 2020, Orange Fixed submitted its comments on the responses provided by other operators.

2. On 30 September 2020, TRC issued its Regulatory Decision on the Fixed Markets Review which has been notified to the Licensees on 7 October 2020. This was accompanied by the Explanatory Memorandum, where TRC addressed the comments submitted during the consultation.

3. Orange Fixed welcomes lightening of some regulatory obligations, in particular the removal of the price cap on out-of-bundle calls, and the removal of the obligation to provide a Statement of Compliance or SLA in the retail market. We also welcome the shortening of the notification period for the introduction and changes in the wholesale products.[1] However, we consider that the proposed notification period is still too long and prevents Orange Fixed from reacting competitively on the wholesale offers of competitors such as FibreTech. It is arbitrarily selected and not supported by arguments or analysis. TRC should at least explain how this period has been set.

4. Aside from the minor changes described above, TRC upheld its main conclusions on the fixed market as expressed in the consultation. We are disappointed to see the arguments and evidence submitted by Orange Fixed during the consultation have not been sufficiently considered and addressed. Many comments and facts presented by Orange Fixed were ignored, and TRC only commented on a small selection of them, without presenting analysis or evidence grounded in market reality.

5. According to Article (17) of the Rule Making Instructions, Orange Fixed hereby submit its Request for Reconsideration to the "Regulatory Decision on the Fixed

[1] We note that on page 30 of the Explanatory Memorandum, TRC erroneously states in its response to Umniah that the price cap on out-of-bundle calls is maintained.

Markets Review" issued pursuant to TRC's Board of Commissioners decision number (14-12/2020) dated (30/9/2020), which has been published on TRC website.

6. In this document, we therefore explain again our position on selected issues raised during the consultation. We hope that after re-examining the arguments and evidence, TRC will reconsider its position on these issues.

7. Our objection and Request for Reconsideration is directed to the Regulatory Decision of the Fixed Markets Review as a whole and mainly directed to the following:

   III- DEFINITION OF RELEVANT MARKET

   IV- SUSCEPTABILITY OF THE RELEVANT MARKETS TO EX-ANTE REGULATION

   V- DESIGNATION OF DOMINANT LICENSEES

   VI- EX-ANTE REGULATION TO REMEDY THE DEFINED COMPETITION PROBLEMS

8. We address these issues in the subsequent sections. The responses contain confidential business information of Orange Fixed. **Confidential information that should not be disclosed is put between square brackets**.

9. For the avoidance of doubt, restricting the comments to the selected issues does not imply that Orange Fixed accepts the remaining aspects of the decision. We fully uphold our positions as expressed in the consultation.

2 Timeframe of the analysis

10. In the responses to the consultation, Orange Fixed commented on the timeframe of the analysis. In particular, we pointed out that the previous market review decisions were published ten years ago. The ten-year period between reviews is at odds with the time horizon which TRC adopts for its forward-looking reviews, which is three years, and is contrary to international best practice. Adopting a three-year time horizon for the analysis, combined with the ten-year period between reviews, means that the Jordanian market is subject to obsolete regulation for past six to seven years. TRC should adopt a much longer time horizon for its prospective analysis, which should be consistent with the period until the next expected review. Given the quick development of competition in the fixed markets and the plummeting market shares of Orange Fixed, considering a longer time horizon would have most likely led TRC to conclude that the market tends towards effective competition within the period of the review, and is therefore not susceptible of regulation.

11. In the Explanatory Memorandum, TRC comments that it would not be reasonable to conduct an analysis with an eight- or nine-year period. It also disagrees that it is best regulatory practice to conduct market reviews every two to three years, and it comments that "the EU has relaxed this recommendation, and in fact, it was not strictly or consistently complied with in any case."[2,3] At the same time, it states that "In common with other jurisdictions, the TRC considers that, for the purposes of market definition, looking forward for a period of two to three years is appropriate."[4,5]

12. TRC apparently does not see the inconsistency between imposing regulation based on an analysis of expected developments within two to three years, and subsequently keeping the regulation in place for ten years. It is not a coincidence that in the international regulatory practice, the two to three-year period applied both to the period of the review (i.e. the period for which forward-looking developments are considered) and the time period between the subsequent reviews. The forward-looking analysis is two to three years precisely because of the expectation that the next market review will be conducted after two to three years.

13. In the explanatory memorandum on fixed markets in 2010, TRC stated that

> "*With regards to future trends, the TRC in its market definition has expressly taken a forward-looking perspective over a forward-looking horizon of three years. TRC notes that this is not an "arbitrary choice", but an internationally accepted standard period in jurisdictions applying market reviews. TRC will be monitoring market conditions during the review period and may carry out a new market review at an earlier date if market conditions change rapidly*"

14. The above quote shows that in 2010, TRC considered "the review period" to refer both to the horizon of the forward-looking analysis, and the time period between reviews.

---

2 Explanatory Memorandum Fixed, page 33.

3 TRC is apparently not familiar with the literature on telecoms regulation where the 2-3 year period is described as a standard and the regulatory best practice. Some examples are: OECD (2016*) Broadband Policies for Latin America and the Caribbean: A Digital Economy Toolkit* or TMG (2013), The second report was prepared for Ministry of Communications and Information Technology with the support of the World Bank.,

4 Explanatory Memorandum Fixed, page 7.

5 The White Paper makes it clear it is not only the market definition that should be forward-looking, but also the assessment of market power: "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" (page

15. When stating that the EU relaxed the recommendation to conduct reviews every two to three years, TRC presumably refers to the new Recommendation on Relevant Markets Subject to Regulation ("The Recommendation"), which was published by the European Commission in August 2020 and is currently under consultation.[6] The Recommendation is not yet in force, and therefore the former three-year period still applies. Most importantly, the Recommendation underlines the point we are making that the period adopted for the forward-looking analysis should be consistent with the period between reviews. In fact, it identifies for the purpose of regulating markets where significant barriers to entry are expected to persist over five to ten years, and it recommends a five-year period for forward-looking analysis.[7] Apparently, the EC does not consider a five to ten-year time horizon for an analysis to be unreasonably long.

16. Therefore, Orange Fixed still considers that TRC should make the period for forward-looking analysis consistent with the time between reviews, and that it should analyse the market developments over the five to ten-year period, consistently both with the period between the subsequent reviews, and the EC recommendation.

3 Geographic market definition

17. The White Paper on Market Review Process ("The White Paper") and the Competition Safeguard Instructions state that the market should be considered national unless there is evidence of different competitive conditions and a lack of a common pricing constraint. However, TRC seems to treat this presumption as an excuse not to conduct any research into the existence of local markets, despite clear indications of differing competitive conditions.

18. The White Paper states that to assess the similarity of competitive conditions, the following indicators should be used: [8]

- The number of principal operators and their development (excluding niche operators with no impact on competitive conditions).
- The leading operators' market shares and their evolution.

6 EU Recommendation on Relevant Markets: https://ec.europa.eu/digital-single-market/en/news/recommendation-relevant-markets?_vx_workflow=8729

7 The Recommendation, paragraph 11.

8 The White Paper on the Market Review Process, Page 23.

- Barriers to entry and their development (including evidence of new entry and replication of network infrastructure); and
- Pricing and product strategies (differences in pricing and marketing).

19. In the consultation, TRC does not show evidence for any of these criteria. The only argument to define a national market is that the same products and services are offered throughout the country. TRC also claims (without showing any evidence) that prices are uniform all over the country, with the exception of higher prices in Amman. However, in TRC's view these different prices cannot be the result of different competitive conditions, because if the prices were the result of a different competitive pressure, then the prices in Amman should be lower.

20. In the responses to the consultation, Orange Fixed pointed to clear indications that at least two of the four criteria specified by the White Paper may be satisfied. In particular, there is evidence of entry and replication of network infrastructure in some regions, as also recognised by TRC, and the number of operators differs. A number of operators have rolled out their own fibre networks in Amman, including Damamax, Umniah, Zain, Vtel, FiberTech and JEIS. In the consultation document, its draft market review, TRC states multiple times that there is more entry and competition in some areas than in others, referring particularly to Amman. However, it chooses to ignore these facts when defining geographic markets. [9]

21. Additionally, in the responses to the consultation, Orange Fixed has shown evidence that Jordan is among a number of countries in the Arab region with low-priced high-speed internet. High-speed internet is available only on fibre networks, and therefore low prices for such internet indicate that competition is strong in areas where fibre networks are available.

22. Despite this evidence and acknowledging the existence of some differences in the competitive conditions, TRC did not conduct any analysis that would verify its assumption regarding the market being national. TRC also maintains this position in the Explanatory Memorandum, where the conclusion on the markets being national is upheld but not supported by any additional arguments or evidence. Instead, TRC cites Zain, saying that the conclusion would have been the same even if such an analysis were conducted. However, Zain's opinion does not free TRC from its duty to base their conclusions on analysis and evidence, as specified in the White Paper.

23. Rejecting evidence on differing competitive conditions, TRC promotes "clear and stable boundaries over time" to the chief criterion in defining geographic markets. However, TRC misunderstands the role of this condition in the definition of geographic markets, which, as made clear both by the White Paper and the EC

---

9 Consultation on Fixed Markets, page 33, 34, 68, 100, 101, 104, 111.

Guidelines which TRC refers to, is chiefly practical in nature. The White Paper states that “the geographic unit should be transparent and stable over the lifetime of the market review”, and that one option is to use geographic units based on political or administrative boundaries, where boundaries are both transparent and stable.

24. The misunderstanding becomes clear when one notes that if the requirement of “clear and stable boundaries” applied to the boundaries of the relevant markets (rather than a unit of analysis chosen for practical reasons), then it would hardly ever be possible to define any market. The boundaries of any market, whether this refers to product or geographic markets, are never entirely clear-cut, nor stable. In fact, the very reason why regulators are required to conduct market analyses periodically is that the market boundaries may change over time.

25. Furthermore, defining separate geographic markets in areas with competing fibre networks is a common regulatory practice in many countries, including during roll out periods, when the boundaries are not “clear and stable”. Apparently, other regulators do not see this as an obstacle. To the contrary, it is precisely because the fibre networks are still developing that in many countries areas with competing fibre networks are regulated differently than areas with one legacy infrastructure. In its responses to the consultation, Orange Fixed has shown examples of such geographical differentiation, which TRC chooses to ignore. A clear example is the geographic area of operation of FiberTech which includes Amman, Zarqa, Balqa and Madaba, which are the most densely populated areas in Jordan, covering 1.4 million households, which is 70% of all households in Jordan.

26. In conclusion, we maintain our position that TRC does not substantiate its geographic market definition in accordance with the methodology as set out in the White Paper, and with the international regulatory practice. While the White Paper does contain a presumption of a national markets, some of the criteria specified in the White Paper for defining sub-national are satisfied. This should have prompted TRC to conduct a proper analysis, based on market data, which TRC did not perform. We therefore request TRC again to conduct such an analysis.

4 Orange Fixed SMP in WLA and WBA markets

27. In the consultation, TRC concludes that the wholesale markets for WLA and WBA are susceptible to ex ante regulation. TRC also concludes that Orange Fixed has SMP in these markets. These conclusions were upheld in the TRC Decision on Fixed Markets.

28. The TRC conclusions on Orange Fixed SMP in the WLA market are based on the following:[10]

- Orange Fixed has a market share of well in excess of 50%, and it is unlikely that alternative operators could increase their market shares sufficiently over the lifetime of this review to effectively compete with Orange Fixed;
- Orange Fixed is highly vertically integrated;
- Barriers to entry and expansion in this market are high;
- Orange Fixed has the benefit of economies of scale, scope and density, network effects and technological advantages and its network will not be easily replicated;
- Orange Fixed has a ubiquitous access network;
- With the exception of wholesale access via FBWA, Orange Fixed is the only potential provider of wholesale local access, and no wholesale products are active in the market.

29. The arguments on WBA are similar. In addition, TRC states that

- Other operators 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;
- No other customer purchases a significantly high volume of wholesale broadband service to exert countervailing market power.

30. In its responses to the consultation, Orange Fixed provided arguments and evidence showing that the fixed markets are competitive, and therefore the TRC conclusions on susceptibility to regulation and SMP are erroneous. In particular:

31. First, beside Orange Fixed, there are four operators in the market with nearly ubiquitous infrastructure: Zain, Mada, Umniah and FiberTech. There is evidence from the literature that a fixed market with three operators is competitive.[11] In the Mobile Market Decision, TRC considers the presence of three operators to be an argument in favour of the market being competitive, but it does not explain why it would not suffice in the fixed markets.

32. Second, there is evidence that barriers to entry are low:

[10] Market Review Decision on Fixed Markets, page 7.

[11] Xiao, M., & Orazem, P. F. (2011). Does the fourth entrant make any difference?: Entry and competition in the early US broadband market. International Journal of Industrial Organization, 29(5), 547-561.

- There are at least 7 other fixed operators beside Orange Fixed with own networks (Umniah, Zain, Al-Nayi, Damamax, Jordan European Internet Services Co, V-Tel and Mada). One of these operators, Al-Nayi, has recently entered the market (in 2017).

- In October 2019, TRC issued a license to a new Umniah/JEPCO fibre JV (Jordan Advanced Fiber Company - FiberTech).

33. To note, FiberTech announced that it wants to specialise in wholesale services for FttH, and it already provides wholesale services, both VULA and WBA with Umniah, Zain, Damamax and Vtel among its clients.[12] **This also shows that the TRC premise that Orange Fixed is the only provider of wholesale services apart from FBWA is not correct.[13] As this is a crucial premise which has an impact on TRC conclusions, TRC should conduct a new analysis based on correct market information.**

34. It is also not clear why TRC disregards competition from wholesale provision of FBWA.

35. Third, market shares of Orange Fixed in subscriber lines and WBA revenues were just 50% in 2018 (respectively **[Confidential]** and **[Confidential]**) and falling very quickly (respectively by **[Confidential]** and **[Confidential]** percentage points. This makes it very likely that the market share of Orange Fixed in WBA, WLA and FACO subscriber lines will fall below 50% within the period of the review, which is shown in details under point 40 below.

36. Fourth, other operators are expanding their fibre networks, which will substantially intensify competition within the market review period:

    - In April 2019, Umniah/JEPCO fibre JV company (FiberTech) obtained the licence from TRC to roll out FttH using infrastructure in areas where JEPCO has electricity infrastructure including electricity poles.

    - FiberTech aims at covering all the areas that JEPCO provide electricity service to, which constitute around 70% of Jordanian households. It expects to reach this coverage by the end of 2025, which is within a five-year period that the European Commission recommends as the timeframe for prospective analysis.[14]

---

12 FiberTech press conference on 7/10/2019; https://www.petra.gov.jo/Include/InnerPage.jsp?ID=114384&lang=ar&name=news].

13 Explanatory Memorandum on Fixed Markets, Annex 2, point 124

14 See footnote https: https://www.facebook.com/TRCJO/vedios/720146481865335/?sfnsn=mo&extid=HZDfzVPywOEN1Aqt

- Zain signed agreements with several municipalities to install poles and cabinets for FttH roll out:

- In April 2019, Zain signed an agreement with Irbid municipality, foreseeing an investment to install 20,000 poles.

- Zain has also signed agreements with the municipalities of Zarqa and Rusaifah.

37. Fifth, all operators are vertically integrated, not only Orange Fixed. Therefore, vertical integration does not give Orange Fixed an advantage that would contribute to SMP.

38. Sixth, additional competitive pressure will be exerted within the market review period by the National Broadband Network ("NBN"). The Ministry of Digital Economy and Entrepreneurship is currently exploring public-private partnership with local operators to utilise/complete the NBN.

39. Seventh, there is a substantial competitive pressure from mobile broadband. This is confirmed by:

    - The fact that a vast majority of Jordanian consumers (around 97%) accesses internet via mobile networks;

    - The MoICT Household Survey 2017, which shows at that time, consumers considered mobile broadband as a suitable alternative to fixed. These networks are likely to be even closer substitutes in 2020.

    - Mobile broadband speeds being comparable to ADSL and FBWA;

    - Fixed broadband prices falling quickly since the introduction of 3G and 4G on mobile.

40. In the Explanatory Memorandum on its decision on Fixed Markets, TRC does not rebut this evidence:

    - TRC states that "latest data" show the market share of Orange Fixed is still above 50%.[15] However, it did not report what the market shares are and what period they refer to. In Annex 2, TRC agreed that FBWA market share increased from 37.4% in 2017 to 41.8% in 2018. According to the publicly available data collected by TRC, the number of internet subscriptions provided by Orange Fixed competitors on FBWA increased by 15% during 2019, from 165,339 in Q4 2018 to 192,991 in Q4 2019[16], while the number of ADSL subscriptions

15 Explanatory Memorandum, page 16.

16 Telecommunications Market Indicators in Jordan, Q4/2019: https://trc.gov.jo/Pages/viewpage?pageID=86

provided on Orange Fixed's copper network did not change. In the first half of 2020, the number of newly purchased FBWA subscriptions was six times as high than the number of new ADSL subscriptions.[17] Therefore, the market share of Orange Fixed already fell below 50%. In the Explanatory Memorandum, TRC should have shown the market shares for 2019, given that it already has the data.

- TRC does not analyse the falling market share of Orange Fixed in the light of the obligation to conduct a forward-looking review. This is especially the case if the five-year period for the review period is adopted as recommended by the new EC Recommendation (see Section 2).

- TRC states that the presence of alternative infrastructures does not lead to effective competition, because the alternative infrastructures are limited in terms of geography and available products.[18] However, this contradicts the TRC acknowledgement that FBWA operators have ubiquitous infrastructure.[19]

- Furthermore, TRC states that the fact that FBWA operators have ubiquitous infrastructure does not mitigate Orange Fixed SMP, which contradicts its argument that the ubiquitous infrastructure of Orange Fixed contributes to its SMP. [20],[21]

- On fibre roll-out by Zain and Umniah, TRC comments that these are "interesting potential developments in the market, but they are at a very early stage of implementation".[22] Obtaining a license or signing agreements with municipalities are clear signs of their intention to roll out fibre in the near future. FiberTech announced a plan to roll out infrastructure to 1,400,000 homes within the next five years. According to the FiberTech press conference, North Amman is already covered and services have been launched, and other areas are being covered now. FiberTech is already covering main areas of Zarqa and service is also launched. Mada, Damamax and Umniah are its clients and providing retail services using FiberTech's infrastructure. TRC should have taken this into account in its prospective analysis.

---

17 TRC QoS report for H1/2020: https://trc.gov.jo/Pages/viewpage?pageID=204.

18 Explanatory Memorandum, page 16.

19 Explanatory Memorandum, page 19.

20 Explanatory Memorandum, page 19 and page 16. Market Review Decision on Fixed Markets, page 7.

21 On page 19 TRC also introduces a new argument, namely that the future of FBWA is uncertain, but this is not explained or supported by any evidence. According to TRC 2019 figures, the number of internet subscription over FBWA increased by 15% between the first and last quarter of 2019.

22 Explanatory Memorandum, page 19.

41. TRC further does not address the other arguments listed above, for instance, on all operators being vertically integrated or the competitive pressure from mobile.

42. Therefore, we conclude that TRC has not demonstrated that the wholesale fixed markets are susceptible to ex-ante regulation. In particular, it underestimates current competition from **FBWA** operators, it does not conduct a prospective analysis by disregarding Orange Fixed market share and the fast and intensive rollout of **alternative fibre infrastructures** in different governorates, and neglects the competitive pressure from **mobile**. We therefore request TRC to conduct a new analysis, which would take these factors properly into account. This analysis should lead to the conclusion that Orange Fixed is not dominant on the WLA and WBA markets.

5 Orange Fixed SMP in the retail FACO market

43. TRC defines a retail market for fixed access and call origination, in which it finds Orange Fixed to have SMP. This conclusion is based on:[23]

- Market share of Orange Fixed above 50%;
- High barriers to entry and expansion, as well as economies of scale, scope and density in access networks;
- Orange Fixed being the largest fixed telephony operator in terms of national coverage, network capacity and access to capital markets, which cannot be easily replicated by entrants;
- Orange Fixed being vertically integrated;
- Retail purchasers not being able to switch easily to alternative suppliers.

44. In the consultation, Orange Fixed provided arguments and evidence, showing that the conclusion on SMP in the FACO market is erroneous.

45. First, by applying a market definition which combines fixed access with call origination and separates it from broadband, TRC creates a distorted view of the market which leads to incorrect conclusions on competition. Consumers do not consume connections, but services, i.e. broadband services and calls. Most consumers combine fixed access with broadband. In this bundle, it is broadband that is the primary service that drives the consumer choice, while fixed telephony is

[23] Market Review Decision on Fixed Markets, page 10.

an add-on. Because of its definition of the market, TRC uses the market share in fixed calls as evidence of Orange Fixed SMP in the FACO market, which leads to a distorted view of competition in the provision of connections which is driven by broadband, not fixed telephony.

- In the Explanatory Memorandum, TRC comments that by suggesting combining the FACO with broadband, Orange Fixed does not recognise the difference between a physical connection and services that run over it. However, this is not an argument against defining a bundle market. First, TRC also combines connections and services by placing fixed access and call origination in one market. Second, it only makes sense to make such a distinction if customers purchase a connection and services separately. This is clearly not the case in Jordan, where a connection is in any case always purchased with broadband.

46. Second, any operator can provide fixed telephony using broadband access, and customers can make themselves using OTT services. Alternative providers had almost **[Confidential:]** of fixed access connections in 2018, using their own infrastructure, and this share is rapidly increasing.

47. Third, there is a strong competitive pressure from mobile, which is clear from the falling number of consumers purchasing traditional fixed telephony services.

48. Therefore, it is very difficult to see how Orange Fixed could exploit its market share in traditional fixed calls. This market share, even if high, is not evidence of market power. It simply shows that fixed telephony is an obsolete service which other operators do not want to provide and customers do not want to purchase as they have better alternatives. This is confirmed by the decreasing number of fixed telephony subscriptions, and also TRC acknowledged in the consultation document (page 173) that "The TRC notes also that, particularly for retail fixed calls, this is a market in decline, and one that is increasingly constrained by alternative calls options such as mobile and OTT".

49. TRC partially recognises these market developments and it comments that it did not lead them to impose regulatory obligations on retail or wholesale legacy fixed voice calls. However, TRC still imposes regulatory obligations on retail fixed access based on Orange Fixed's high market share in fixed calls, despite the retail broadband market being competitive.

50. It is moreover not clear why TRC stops halfway in its conclusions. If there is sufficient competitive pressure not to impose regulation, then the conclusion should be that Orange Fixed has no SMP.

51. Orange Fixed therefore requests TRC to conduct a new analysis, taking the above into account. This should lead to a conclusion that Orange Fixed has no SMP in the FACO market.

6 *Ex ante* regulation of WLA, WBA and Civil Engineering Infrastructure

52. The TRC Market Review Decision imposes regulatory obligations in the WLA and WBA markets on Orange Fixed. This includes obligations to provide access at cost-oriented prices, non-discrimination, transparency, accounting separation, cost-oriented pricing and cost accounting. These obligations apply both to Orange Fixed's copper and fibre network, with the exception of the cost orientation obligation from which the fibre network is excluded. TRC, however, retains the right to monitor wholesale prices in fibre and intervene without a new market review.

53. In its responses to the consultation, Orange Fixed welcomed the decision not to regulate fibre access prices based on cost. However, we also raised a number of objections to imposing SMP regulation of access to the fibre network and to civil engineering infrastructure.

54. First, as summarised in Section 4, we provided evidence that fixed markets are competitive, and there is therefore no basis for imposing access regulation.

55. Second, in the consultation we have cited research on fibre regulation having negative impact on investment and provided examples of countries where regulatory holidays were applied to fibre in the early stages of development.[24]

56. Third, related to our position on geographic markets, we have pointed to the need for geographical differentiation in fibre remedies.

57. In the Explanatory Memorandum, TRC rejected these arguments. It repeated its stance that Orange Fixed has SMP in the WLA and WBA markets and should therefore be subject to regulation. However, as discussed in Section 4, evidence from the market does not support this conclusion.

58. Furthermore, TRC does not address the argument that the state of development of fibre infrastructures is very different in different regions, and therefore the competitive conditions and the regulatory obligations should be geographically differentiated. TRC should have conducted an analysis into geographical differentiation of markets. Such analysis may well show that in different geographic areas, different operators have SMP and should be subject to access obligations.

59. TRC further considers that, by not imposing cost orientation on fibre, it sufficiently accounted for the need to maintain incentives for investment, and that this approach is consistent with other jurisdictions. However, TRC does not cite any literature or examples from other countries, and it does not address the evidence

24 Orange Fixed responses to the consultation on the fixed markets, Section 14.1.

provided by Orange Fixed. It also does not conduct any analysis on how access regulation will impact the investment in fibre, given its early stage of development in Jordan.

60. TRC further notes that there is a similarity between the obligations in infrastructure sharing instructions currently under consultation and the SMP obligations imposed on Orange Fixed in the Market Review. However, TRC considers that it is uncertain how the infrastructure sharing instructions will impact the market, and for that reason, it sees it as appropriate to maintain SMP obligations on Orange Fixed. TRC further states that it "will keep the evolution of infrastructure sharing obligations under review, with the aim of moving to a single symmetric set of obligations when appropriate".

61. Orange Fixed welcomes the TRC intention to move to more symmetric obligations in future. However, there is no reason why this should not be applied under the current Market Review, especially given that the regulation should be based on forward-looking analysis.

62. Finally, as already noted in the introduction, we consider that the five months notification period is too long. Such a long period prevents Orange Fixed from adequately reacting to wholesale offers of its competitors (e.g. FiberTech). TRC does not explain how it arrives at this period. Given the obligation of non-discrimination and transparency, Orange Fixed will have to provide the same information to other operators as it does to its own affiliates. Therefore, all Orange Fixed retail competitors will be able to compete in the retail market on equal footing with Orange Fixed itself.

63. In the view of the above, Orange Fixed requests TRC to conduct a new analysis and reconsider its conclusions on regulation access to fibre and civil engineering infrastructure. The new analysis should lead to the conclusion that access regulation is unnecessary and harmful. Additionally, the notification period for the wholesale products should be shortened, where such long notification period is not practiced internationally.

7 Ex ante regulation on wholesale fixed voice call termination

64. In the market for wholesale fixed voice call termination, TRC designated all operators as having SMP on termination of calls on their respective networks. Orange Fixed agreed with this decision. However, inconsistently with this conclusion, TRC applies asymmetric regulatory obligations on Orange Fixed. In particular, Orange Fixed is the only operator to which the obligation of cost accounting applies.

65. Orange Fixed considers that such an asymmetry is unreasonable. If TRC considers all operators to have SMP, then the same ex ante obligations should apply.

66. On the other hand, in article (3.5/3); TRC stated that the appropriate cost standard should be forward-looking long-run incremental costs (FW-LRIC), while in article (3.5/4); TRC stated that Orange Fixed must follow the existing TSLRIC hybrid model developed by the TRC. Therefore, Orange Fixed request a clarification which prevails over the other and should be applied.

8 Wholesale Fixed Transit

67. In article (4.5/3); TRC stated that the appropriate cost standard should be forward-looking long-run incremental costs (FW-LRIC), while in article (4.5/4); TRC stated that Orange Fixed must follow the existing TSLRIC hybrid model developed by the TRC. Therefore, Orange Fixed request a clarification which prevails over the other and should be applied.

9 Obligation to notify retail bundles

68. As a remedy in the FACO market, TRC imposed on Orange Fixed an obligation not to unreasonably bundle its offers for retail FACO with other services in a way that would lead to a margin squeeze or predatory pricing. As a part of this obligation, TRC imposed an obligation to submit bundled offers for pre-approval at least four weeks in advance. In the Market Review Decision, TRC states that it can vary this four-week period.

69. For the purpose of this obligation, TRC defined a "bundle" as

- combinations of retail services and/or products, one or more of which are also marketed separately;
- which is offered as a single package and a single tariff to end-users; and
- which includes products or services that fall both within markets that are subject to ex ante regulation and markets that are not subject to such regulation.

70. In the responses to the consultation, Orange Fixed objected to this obligation. First, we pointed that TRC has not conducted any impact analysis or clarified the precise nature of the supposed competition problem that is addressed by the obligation to submit bundles for approval. Second, we pointed out that the obligation deprives Orange Fixed of flexibility in changing its offer and decreases its competitiveness by making it impossible to react quickly to competitors' actions. Third, we pointed to

the lack of clarity regarding the type of bundle offers subject to the obligation, for instance whether the offers will include VoIP over fibre internet.

71. In the Explanatory Memorandum, TRC comments that the point of this obligation is "to ensure that an SMP operator cannot use bundling products and services e.g. as a way of cross-subsidising between regulated and unregulated services, or leveraging power from one market to another."[25] TRC also says that what matters is not whether other operators can offer bundles, but whether they can "replicate" them.[26] However, TRC has not presented any analysis showing that competitors cannot replicate other operators' bundles, especially regarding VoIP bundled with retail broadband services.

72. However, TRC did not explain how such cross-subsidy or leveraging would work in the FACO market. Cross-subsidy occurs if an operator uses above-competitive profits it earns in the market in which it has SMP (and which is therefore regulated) to offer services in a market which is competitive (and therefore unregulated) below cost. This harms competition in the competitive market. However, it is also unclear how competitors' ability to compete against Orange Fixed could be harmed by their inability to offer traditional fixed telephony services, given that:

- they are able to (and do) replicate Orange Fixed bundles as they offer managed VoIP, which, according to TRC's market definition, is a substitute for traditional fixed telephony; and
- consumers' purchase of a fixed connection is driven by demand for internet services, with traditional fixed telephony playing a marginal (and declining) role.

73. Therefore, it remains unclear what competition problem TRC attempts to address by this obligation. The TRC conclusion is particularly surprising with regards to bundles where voice services are provided on VoIP. On copper, the PSTN service is required to provide the Internet over ADSL. It is the opposite on fibre, where the internet is required to provide VoIP and VoIP is not sold as a standalone product. The retail BB services are not subject to ex-ante remedies, and the VoIP service is a value-added service over retail broadband. Therefore, there is no reason to consider VoIP+FTTH (or VoIP +ADSL) as a bundle offer that needs prior approval of TRC to be launched.

74. Furthermore, TRC seems to forget that preventing cross-subsidies by means of bundles is already covered by the License Agreement (Schedule D/Anti-competitive

25 Explanatory Memorandum, page 40.

26 Explanatory Memorandum, page 46.

activities), which already prevents all licensees (not only the dominant one) from engaging in any anti-competitive practices:

The Licensee shall not alone or together with others, engage in or continue or knowingly acquiesce in any anti-competitive practices and, in particular, the Licensee shall:

- *not engage in any anti-competitive cross-subsidization;*
- *not engage in the abuse of its dominant position, if any;*
- *not engage in any anti-competitive tied or linked sales practices, provided that the Licensee may bundle services so long as the bundled services are also available separately;*

75. According to the modified Greenfield Approach as set out in the White Paper, market review process should be conducted under the assumption that the existing "symmetric" obligations are in force.[27] Therefore, (hypothetical) competition problems that are already addressed by the Licensing Agreement cannot be a rationale for ex-ante regulation.

76. In response to Orange Fixed's comments that the obligation to pre-notify bundles harms its flexibility, TRC introduced the possibility to vary the four-week period. However, it is not clear how it addresses the raised problem, as this gives more flexibility to TRC, not to Orange Fixed. In the Explanatory Memorandum, TRC says that if it assesses the bundle earlier, the bundles may be brought to the market earlier. However, nothing obliges TRC to do a quicker assessment, and the current wording of the decision suggests that TRC could also make this period longer. Therefore, we do not consider that this change addresses the concern raised in the consultation, and it may even worsen it, unless the wording is changed to "TRC may reduce any of these periods".

77. In page 20, Article 5.3, the TRC stated: "Orange Fixed must provide relevant accounting information for any products and services in the retail fixed access and call origination (FACO) market, as further specified by the TRC". Orange Fixed therefore requests the TRC to identify which costing model would be adopted. Orange Fixed insists that any relevant accounting information should be specified following consultation with Orange Fixed in similar manner for the same remedies in the Regulatory Decision on the Mobile Market Review.

78. Finally, in response to the request for clarification on the type of bundles subject to the obligation, for instance in relation to VoIP over fibre, TRC responds that further clarification will be provided in the implementation phase. This lack of clarity

[27] The White Paper, page 10.

introduces substantial legal uncertainty. Every bundle of fixed retail services includes fixed access (even if it does not include fixed telephony service), which, according to TRC definition, is a part of the regulated FACO market. Therefore, the obligation may potentially apply to all Orange Fixed retail services, including the bundles of VoIP over fibre which can be replicated by competitors. Moreover, it is not clear to Orange Fixed how to perform the costing calculation of the VoIP in case of (FTTH + VoIP) especially that it is reliant on the FTTH platform, which is excluded from cost oriented prices as per the Regulatory Decision.

79. Therefore, Orange Fixed requests TRC to conduct a new analysis and reconsider the obligation to notify bundles. This should lead to the removal of the obligation to notify bundles, at least for bundles offering VoIP on FttH.

10 Summary of Orange Fixed request for reconsideration

Article in the decision	Orange Fixed request
III Definition of the Relevant Markets	Define local geographic markets Define retail market for bundles including broadband and voice services
IV Susceptibility of fixed markets to regulation	No fixed market is susceptible of ex ante regulation except for the market for fixed call termination
V SMP	Orange Fixed is not an SMP operator on any of the defined markets, except for the market for fixed call termination where all operators have SMP
VI Remedies	There should be no ex ante regulation of access to WLA, WBA and CIE. Any access obligations should be symmetric. There should be no requirement to notify retail bundles, in particular bundles including VoIP.

11 Other comments

80. Orange Fixed would like to point that the Regulatory Decision does not provide certainly over the TSLRIC costing model submitted to TRC on February 2017; Orange Fixed cannot start the work on a new or updating Top-Down (TD) TSLRIC model without having the TRC's feedback on the 2017 model. Moreover, TRC should identify the year based on which the top-down model is to be built, Orange Fixed assumes it is to be built based on the data of year 2020. It is worth mentioning that building the new top-down costing model is a project that should be conducted by Orange Fixed with a third party; TRC and Orange Fixed should define and agree on the suitable time-plan for accomplishing this work, and before

starting the work, Orange Fixed should understand what are the services that should be contained in the top-down TSLRIC model.

81. On the other hand, regarding the Accounting Separation remedies; Orange Fixed would like to emphasize that any relevant accounting information should be specified in consultation and coordination with Orange Fixed the same as applied in the mobile market review, and the time plan for the implementation of the top-down TSLRIC should be together with the requested accounting separation information.

82. TRC stated in the decision that it will issue a time plan for the implementation of the remedies in the Regulatory Decision. Without prejudice to this objection and Request for Reconsideration, this time plan should be prepared in consultation with the concerned Licensees.