

# Comments on Zain's responses to the Public Consultation on Fixed Markets

1. Orange Fixed wishes to comment on a number of statements made by Zain in its responses to the Public Consultation on Fixed Markets.
2. Zain claims that:
  - VULA is not a product in the market for fixed access, but a remedy, while the market is one for physical access
  - The fixed market in Jordan is very small due to ineffective regulation of Orange Fixed
  - Orange Fixed has a dominant position in fixed markets
  - TRC should consider structural separation of Orange as in the UK
  - Orange Fixed has an advantage in rolling out fibre and therefore it should provide access to CEI
  - The reporting obligations on Orange Fixed should be made more strict.
3. We address these statements in turn below.

## 1 VULA as a product vs. remedy

4. Zain states that TRC confuses market definition with remedies, and VULA is not a product but a remedy, while the relevant market is a market for physical access.
5. First, Orange Fixed considers that in a market with a developed infrastructure competition such as the fixed market in Jordan, defining an artificial wholesale market is pointless.
6. However, given that such an artificial wholesale market is being defined, then we do not understand Zain's distinction. For instance, in its WLA market review, Ofcom says:

*Therefore, in order to define what we mean by WLA it is helpful to unpack the key features of this access market. First, there is a range of possible **wholesale products**, including service agnostic "passive" infrastructure (e.g. duct and pole access, sub-loop unbundling and local loop unbundling)*

*as well as wholesale “active” products (e.g. VULA, which is a bitstream product available for interconnection at BT’s fibre-enabled exchanges).<sup>1</sup> [Emphasis added]*

7. Zain also contradicts itself here by referring to VULA and ULL as “products”

*Where a firm is in a dominant position in this market, the regulator may require it to provide access to these copper and fibre local loops through **products** such as LLU or VULA respectively.<sup>2</sup> [Emphasis added]*

8. Furthermore, Zain says:

*Physical and virtual unbundling are required to ensure that downstream competitors can access the copper or fibre loops and so compete with the dominant firm in the WLA market, providing physical access to the wholesale broadband market.<sup>3</sup>*

9. This statement is incorrect. Physical access and virtual unbundling can only be provided by **owners** of fixed infrastructure, not by its purchasers. Purchasers can then use physical and virtual unbundling to provide wholesale broadband access or retail services.

## 2 The small size of the fixed market is not due to insufficient regulation of Orange Fixed

10. Zain claims that the fixed market in Jordan is less developed than in other middle income countries, and that the reason for this is ineffective regulation of Orange Fixed. To support this claim, Zain gives an example of an increase in the mobile market after Umniah obtained a license, and of an increase in the number of ULL-based broadband subscriptions after the structural separation of BT in the UK. Zain also argues that Orange Fixed’s past behaviour has stifled competition.
11. We disagree with the statement that the relatively low fixed penetration in Jordan is due to ineffective regulation. First, the fixed penetration in Jordan is in line what could be expected given its income and geography. For the comparison of fixed penetration Zain chooses only 15 out of 60 countries defined by the World Bank as

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<sup>1</sup> Ofcom, Wholesale Local Access Review: Statement, 28 March 2018, Volume 1, paragraph 3.33.

<sup>2</sup> Zain Response to TRC Review of Fixed Markets, page 5.

<sup>3</sup> *Idem*, page 6.

upper middle income.<sup>4</sup> However, when all middle income countries are examined for the ITU provides data, Jordan ranked in 2018 roughly in the middle, as 35<sup>th</sup>.<sup>5</sup> Furthermore, Jordan's GDP per capita is much lower than the average for middle income countries (4,200 USD versus 8,869 on average according to World Bank), and it can therefore be expected that penetration is lower. Additionally, the countries shown in the table differ in population density and its distribution, which heavily influences fixed penetration. Jordan's low penetration is to a large extent due to its geography, and its further development has been hampered by the growth of mobile telephony. As noted in the Telegeography report from 2018:

*For roughly the last five years Jordan's broadband sector, in-particular the fixed-wireless segment, has been undermined by the rapid expansion of cellular data networks and take-up of 3G and 4G services. Jordan's geography and the spread of its population previously forced ISPs to rely heavily on fixed-wireless technologies, such as WiMAX, to provide affordable broadband services to customers across the country but the ubiquity of mobile networks, combined with the greater technological capabilities and competitive pricing for these alternatives led to customers migrating to fully mobile platforms such as HSPA+ and LTE.*

12. Second, contrary to Zain's claim, there is no evidence that access regulation has a positive impact on sector growth. The examples given by Zain to support its claim are misleading:
  - The growth of the mobile market in Jordan was due to the technological developments that lowered the cost of mobile services, and to the extent it was accelerated by the entry of Umniah, this was with own infrastructure, not access regulation. Access-based entry into the mobile market has played no noteworthy role in the development of the mobile market in Jordan.
  - The example of LLU in the UK only shows that the regulation of access increased the take-up of LLU, but it says nothing about the impact of regulation on penetration.
13. By contrast, there is evidence that such regulation can discourage the development of own infrastructure, and therefore can hamper the development of infrastructure

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<sup>4</sup> See the list on <https://data.worldbank.org/?locations=XT-JO>.

<sup>5</sup> ITU data Fixed Broadband 2000-2018 December 2019.

competition.<sup>6</sup> This is one of the reasons why regulators often refrain from regulation where investment in infrastructure is still to be expected.

14. Therefore, there is no evidence that low fixed penetration in Jordan is in any way linked to the absence of ULL-based providers in the past, or that entry of new providers based on access to Orange Fixed's network regulation would increase penetration in future. The declining importance of copper makes any serious demand for access to the copper network unlikely, and imposing fibre access has little impact on competition given that fibre is mostly rolled out in areas where already more operators are present. In order to increase fixed penetration in Jordan, it is vital to keep incentives for operators to invest in fibre, which can best be done by keeping regulation to the minimum.
15. As for Zain allegations on Orange Fixed refusal to open Zain geographic numbering ranges, Orange Fixed would like to stress on its position as follows:
  - Zain failed to abide by legal and regulatory requirements to agree with Orange Fixed to add its wholesale fixed call termination service to the interconnection agreement. Zain as a dominant operator on the mobile market has amended its Mobile Call Termination service to cover also the fixed termination service under the same RIO. Our argument was that Zain cannot legally change their mobile reference interconnection offer without a prior public consultation and prior approval by TRC, based on the interconnection instructions.
  - Zain decided after 2013 to establish a separate service schedule for the Fixed Call Termination, without consulting this with Orange Fixed as required by the procedures stipulated in the interconnection instructions and in the existing interconnection agreement. Instead they addressed the new service schedule to the TRC directly who took a unilateral decision to approve the amended Interconnection Agreement that was not even presented to Orange Fixed as a party to the agreement. Needless to say that the regulatory decision on fixed market review has designated each fixed operator dominant on the termination to its own network, by which they are obliged to publish the reference offers after completing public consultation process and TRC approval in accordance to the interconnection instructions.
  - Orange Fixed has been unfairly fined by the TRC. Therefore, Orange Fixed could not accept these enforced amendments on its interconnection agreement and the non-legal fine, and Orange Fixed has filed a legal case. That means that

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<sup>6</sup> M. Grajek, L.-H. Röller (2012), "Regulation and Investment in Network Industries: Evidence from European Telecoms", *The Journal of Law and Economics*, vol. 55, no.1. page 44. NERA Economic Consulting (2018), "Telecommunications Infrastructure International Comparison".

opening Zain's numbers is a matter of legal dispute which is currently pending before the judiciary, and we have no authority to take action pending a court decision on the case.

- On the other hand, we expressed to TRC concerns regarding permitting Zain as a mobile operator to provide fixed services. Zain will be the only convergent licensee in the market providing fixed services by using different components of mobile network infrastructure, while both Orange Fixed and Batelco (and other fixed operators) are providing fixed services through separate legal entities. We therefore asked TRC to thoroughly investigate and study the competition impact by allowing a convergent operator to compete against other licensees in the market in considering the following facts:
  - Cost: Zain is providing fixed services over most components of its mobile network (gateway switches, interconnection links, .....etc ), This will give an advantage to Zain compared to other fixed operators having separate network for fixed services under separate legal entity.
  - Tax and Customs Exemption: Zain mobile has been granted customs and tax exemption by the Government on building mobile infrastructure (with a purpose to provide mobile services only). Utilizing such exempted mobile infrastructure to provide fixed services will be in violation of the Government decision. Besides, Zain will have advantage over other fixed operators who have not being granted such exemptions.
  - On-net calls: In case of Zain providing offers including bundled minutes limited to call Zain mobile and Zain fixed customers, one should consider the cost of terminating calls between Zain fixed and mobile subscribers, especially that these calls on the same Zain network. One should also take into consideration that accounting separation is not implemented by Zain.
  - Markets review decisions: the requirements stated in the markets review decisions, that force Orange Fixed to get prior TRC approval on new of bundle offers four weeks before the launch date, have not been applied to Zain.
- Since 2005 till now, TRC has not established the universal service fund, meaning that Orange Fixed is designated the sole universal service provider without being compensated by the material competitive disadvantage of providing the universal service until now.
- Accordingly, and due to an unprecedented case of a convergent licensee in the market providing both mobile and fixed services under one network and one legal entity, we urged TRC to study the impact on the competition, and to take the necessary actions to oblige Zain to provide fixed services under separate entity in accordance to article (4.1) of the individual license which states that *"The TRC may issue Regulations directing the Licensee to operate its Licensed*

*Activities and/or other services through affiliated companies, established under the Companies Law. The purpose of such Regulations shall be to segregate a particular service from other services that may be provided by the Licensee, and to ensure that the Licensee does not engage in anti-competitive practices of the type described in the License Agreement or applicable Regulations. The TRC shall monitor compliance with the Regulations, and may issue such further Regulations as it considers necessary, to ensure compliance with the License Agreement or Regulations relating to anti-competitive practices”.*

16. As for Zain allegation of Orange Fixed refusal to open LLU, Orange Fixed would like to mention that since the date of issuing the fixed broadband markets review, Orange Fixed showed its cooperation and submitted the reference unbundling offer to TRC in 2012 which was subject to public consultation. Although Orange Fixed was very cooperative in answering TRC and OLOs comments on the submitted version, no decision was issued by TRC on the final version of the reference offer. However, TRC in 2017 approved and published this offer. Without prejudice to our position on the LLU prices and terms and conditions adopted by TRC, and TRC's failure to establish the Universal Service Fund, Orange Fixed has not received any request from any licensed operator including Zain to buy this service since the date of publishing the reference offer till now.

### 3 The fixed market is effectively competitive and Orange Fixed is not dominant

17. Zain claims that the fixed markets are not effectively competitive and that Orange Fixed has a dominant position in these markets. However, market presented by TRC show that the fixed markets in Jordan are characterised by effective competition.
18. First, there are three operators with national coverage (Orange Fixed on copper and Umniah and Mada on wireless), and even more operators who are rolling out fibre networks. In its responses to the consultation on mobile markets, Zain argues that a market with three operators is effectively competitive. Zain cites literature that supports this conclusion especially for the fixed markets:
  - A study that entry of fourth entrant in the broadband market in the US did not lead to increased competition;<sup>7</sup>

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<sup>7</sup> 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

- The Ofcom consultation document Promoting investment and competition in fibre networks', which considers an area with three fixed networks to be competitive.<sup>8</sup>
19. Second, the legacy copper infrastructure of Orange Fixed is declining in importance. As a result, the market share of Orange Fixed in fixed access and broadband is not "well above 50%" as claimed by Zain, but it was just above 50% in 2018 and has been rapidly declining, meaning that it is most likely below 50% now. A decline in market share from above 90% in 2010 to approximately 50% is a clear sign that competition is vigorous and that, prospectively, it will increase even further.
  20. In many areas of Jordan such as Amman, several operators with fibre networks are present meaning that in those areas Orange Fixed's market share is probably even lower. Furthermore, the use of wholesale products of Orange Fixed such as WBA has been in decline, showing that in the presence of infrastructure competition there is little demand for access.
  21. Zain's arguments in favour of Orange Fixed SMP are flawed:
    - Zain argues that there is no case to build a second fixed network in Jordan. However, Zain overlooks that there are already three ubiquitous fixed networks in Jordan, and multiple initiatives to roll out fibre network.
    - Zain argues that Orange Fixed has an advantage because of vertical integration. However, all fixed operators are vertically integrated as they all offer retail services using their own infrastructure. Therefore, Orange Fixed has no advantage above its competitors because of its vertical integration.
      - Orange Mobile and Orange Fixed are separate legal entities, just like Zain and Mada. If they are to be treated as one entity, then all major operators (Zain & Umniah) in Jordan are similar position as they are also able to offer mobile services, and they have a competitive advantage that they are providing their services under one legal entity, where Orange Fixed and Orange Mobile are two separate legal entities.
    - Zain also argues that Orange Fixed controls an essential facility, as:

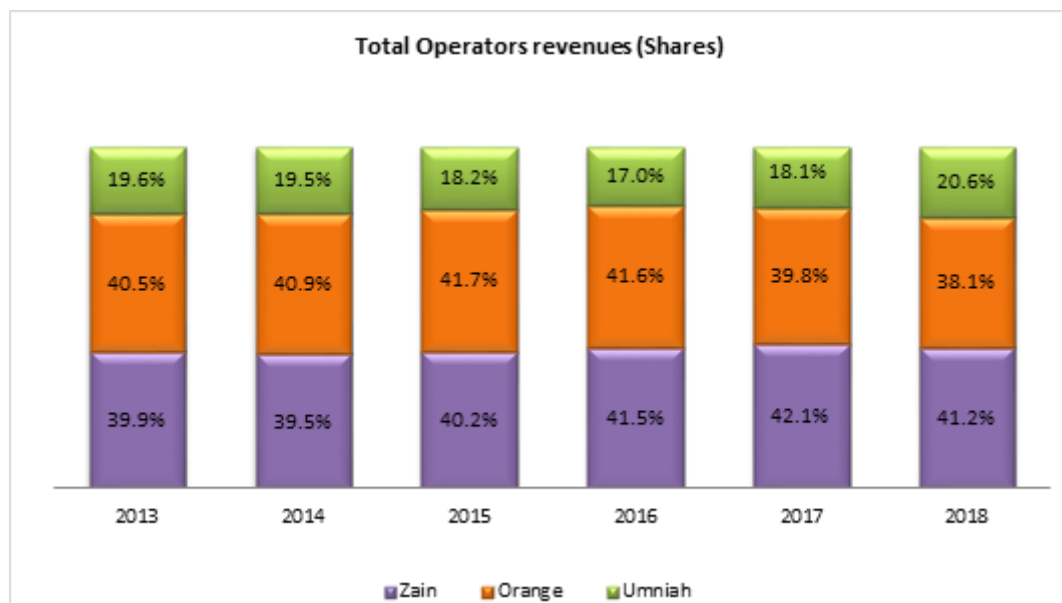
*Any firm wishing to offer a competitive access services must be able to use at least one of these essential facilities, which it can only do with the co-operation of Orange.*<sup>9</sup>

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<sup>8</sup> Ofcom consultation published on 11th December 2018.

<sup>9</sup> Zain Response to TRC Review of Fixed Markets, page 7.

22. Orange Fixed disagrees that it has control of an essential facility. Each of the operator with own infrastructure is able to offer any wholesale or retail services without using Orange Fixed's network. Approximately half of the fixed broadband subscriptions are provided by other operators. They do it using their own infrastructure which clearly shows that they do not need access to Orange Fixed's network.
23. Finally, the fixed providers are subject to strong competitive pressure from mobile.
- Only 1% of call volumes are fixed
  - 97% consumers use mobile to connect to internet, compared to 7.2% consumers using FBWA and 4.3% ADSL. Most consumers who do not use fixed say it is because they have mobile.
24. When total telecom market revenues are considered, including fixed and mobile, it becomes clear that it is not Orange, but Zain that is the largest telecom operator.



25. Furthermore, Zain is confused about the purpose of regulation of fixed access. Its purpose is not that other operators can offer fixed access to the network of the dominant operator; it is to enable operators who do not have their own infrastructure to offer services using the dominant operators' infrastructure.

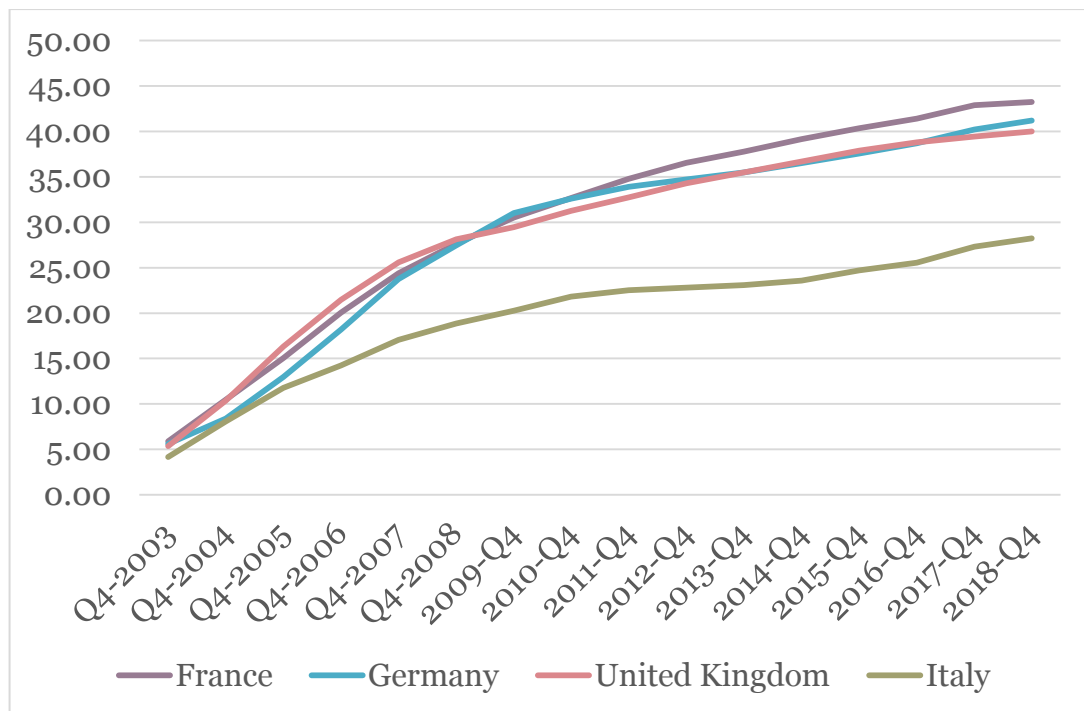
## 4 Structural separation

26. Zain argues in favour of structural separation of Orange Fixed. We consider this a remarkable proposition given the degree of infrastructure competition in Jordan. The international examples given by Zain are misleading. Structural separation is a

drastic remedy which is applied only in a small number of countries as an extreme form of access regulation, where the probability that a competing infrastructure would be built was small. Obviously, the situation in Jordan, where there are multiple competing infrastructures and the market share of alternative operators is close to 50% and increasing, is very different.

27. There is also no evidence that structural separation has contributed to the development of the broadband market. Broadband penetration in the UK and Italy who introduced structural separation has been rising slower than in other European countries that started at similar penetration levels and did not apply structural separation, such as Germany and France.

**Figure 1 Increase in broadband penetration in the UK, Italy, France and Germany**



Source: OECD historical data on broadband penetration.

## 5 Access to civil engineering infrastructure

28. Zain argues that Orange Fixed has an advantage in rolling out fibre due to having the copper network at its disposal, and that it is necessary to mandate access to Orange Fixed's civil engineering infrastructure, most notably poles. Zain gives an example of Spain and Portugal where such regulation was introduced.

29. Orange Fixed believes that there is no need to grant access as other fixed operators in Jordan already have access to poles:
  - 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. It will enable Umniah to reach 1.4 million homes and businesses.<sup>10</sup>
  - Zain signed agreements with several municipalities to install poles and cabinets for FttH roll out:<sup>11</sup>
    - 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.
30. These deals of Zain with municipalities create artificial barriers to entry for other operators who have to provide similar or higher financial compensation to roll out their networks in these municipalities.
31. TRC should also consider the obstacles that the operators are facing with municipalities for fiber roll-out due to high municipalities fees and compensations required which the licensees incur additionally to high cost of fiber roll out.
32. The examples of Portugal and Spain need to be seen in the context of other measures adopted by the regulator:
  - In Portugal, access to CEI was combined with the deregulation of access to the network. The regulator (ANACOM) decided to de-regulate wholesale broadband access in competitive urban areas (i.e. Lisbon or Porto with three or more operators and a high number of households with cable access). In the view of the FTTH Council, this was one of the main reasons for Portugal Telecom's significant investment in the roll-out of its FTTH network across the country.<sup>12</sup> Access to the fibre network of the fixed incumbent was never

<sup>10</sup> Telegeography, Umniah inks fibre deal with utility firm, 5 Apr 2019

<sup>11</sup> See e.g. a press release at <https://alghad.com/بمليون-وزين-إربد-بلدية-بين-اتفاقية-دي/#:~:targetText=%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A%D8%A9%20%D8%A8%D9%8A%D9%86%20%D8%A8%D9%84%D8%AF%D9%8A%D8%A9%20%D8%A5%D8%B1%D8%A8%D8%AF%20%D9%88%E2%80%9D%D8%B2%D9%8A%D9%86%E2%80%9D%20%D8%A8%D9%85%D9%84%D9%8A%D9%88%D9%86%20%D8%AF%D9%8A%D9%86%D8%A7%D8%B1&>.

<sup>12</sup> DotEcon, Regulatory policy and the roll-out of fibre-to-the-home networks - July 2012, page vi.

regulated in Portugal, based, among others, on the strong presence of fixed wireless operators which led to the incumbent's falling market shares.<sup>13</sup>

- In Spain, which Zain presents as successful example of regulation of access to CEI, symmetric regulation for all fibre providers was imposed, and local fibre network was excluded from SMP regulation.

*The NRA adopted a decision in 2009 imposing symmetric regulation, on which basis the first operator deploying the fibre local access segment within a building (i.e. the segment of an NGA network that connects end-user premises to the first distribution point) must make it available to third parties at reasonable prices. The decision was adopted on the basis of provisions in Spanish law that were similar (but not identical) to those existing under Article 5 of the Access Directive and Article 12 of the Framework Directive, and which enabled the NRA to impose, in exceptional circumstances, symmetric obligations on operators regardless of their SMP status. As a consequence, access to the fibre local access network available within buildings is excluded from the scope of SMP regulation in market 3a, since it is already covered by the symmetric obligations imposed by CNMC in 2009.<sup>14</sup>*

## 6 Reporting obligations

33. Zain supports the reporting obligations imposed on Orange Fixed and argues that they should be made more strict. In particular, it argues that:
  - To ensure compliance with non-discrimination, KPI's should be made available not only to TRC but also to operators;
  - Orange Fixed should be obliged to publish all accounts on its website;
  - Margin squeeze test should be conducted before, and not after prices are changed;
  - Accounting separation should be required for fixed voice termination market.
34. We strongly oppose the obligation to provide information about KPI's and accounts to other operators or making them public. TRC is the regulatory body charged with monitoring compliance and there is no need for any other party to have access to

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<sup>13</sup> See <https://www.cullen-international.com/product/documents/FLTEPT20170002>.

<sup>14</sup> BEREC Report on access to physical infrastructure in the context of market analyses, 13 June 2019, page 15.

this information. It would put Orange Fixed at a competitive disadvantage if other operators had access to its confidential financial and technical information.

35. We also oppose any obligations to conduct an ex- ante margin squeeze test. First, there is no need for a margin squeeze test at all, given that all operators provide services using their own fixed infrastructure. Introducing such a test, and even more making it ex ante, deprives Orange Fixed of the pricing flexibility which is indispensable in a strongly competitive market.
36. Finally, there is no need for accounting separation in the market for fixed voice termination, given that the termination rates are determined by a model, and not based on individual operator accounts. If such a separation is introduced for Orange Fixed, there is also no reason not to introduce it for other operators.