Mobile Telecoms Market Review

Zain Reply to Responses from Orange and Umniah

20 Feb 2020

1 Introduction

Zain has read with interest the responses to the TRC's review of mobile markets in Jordan submitted by Orange, Umniah and Jormall. We consider that Orange's response in particular is disconnected from reality. Orange seems to consider that the TRC has got more or less everything wrong in its analysis of the market. It appears to Zain that Orange has taken a deliberate strategy to undermine all of the excellent research and analysis conducted by the TRC in a bid to keep the mobile market in Jordan subject to inappropriate regulation that is not suited to the dynamic and competitive Jordanian market.

It is our view that Orange is seeking to keep this unnecessary regulation in place for the simple reason that it is unable to compete in the market on its own merits and so wants the TRC to place regulation on Zain to compensate for its own lack of competitiveness. We are clear that if Orange has its way then Jordanian consumers will lose out.

We therefore urge the TRC to ignore Orange's plea in paragraph 18 of their response to put this market review on hold and undertake further research. It is clear to us that only Orange will gain from such an action whilst competition and consumers will lose out.

Further, Orange's claim that the TRC should conduct similar in-depth research to that conducted by Ofcom in the UK fails to recognise the structural differences between an advanced complex market like the UK and the developing market of Jordan. It would be disproportionate to follow the UK example in Jordan.

It is Zain's view that if the TRC concedes to Orange's request then the TRC will be in breach of both Article 6 of the Telecommunications Law (no. 13) 1995[1] and Article 36 of the government's General

[1] *"The Commission shall undertake the following duties and responsibilities: To stimulate competition in the telecommunications and information technology sectors, relying on market forces, and so regulating them as to ensure the effective provision of telecommunications and information technology services and to ensure that its regulation is sufficient and effective to forbid or curtail illegal competitive practices or prevent any person with a dominant position in the market from abusing his position, and to take all necessary actions in this regard."*

Policy for the Information & Communications Technology and Postal Sectors, 2018[2] published by the Ministry of Digital Economy and Entrepreneurship.

In this document, Zain first replies to the comments by Orange, followed by Umniah and Jornall.

2 Reply to Orange

In response to Orange, we will address various specific points raised by Orange in their reply in the sections below. However, before doing so there is one general point that we wish to cover regarding what Orange call the "club effect", but what is known more formally as a Tariff Mediated Network Effect (TMNE)[3]. This is mentioned by Orange in various paragraphs: 9, 31, 74, 77, 78, 104, 109, 117 & 118.

2.1 The "Club Effect"

The concept of a club effect is that, in response to differential on and off net tariffs, consumers are attracted to the largest network to benefit from lower on-net price as most of their contacts will be on the largest network, other things being equal. If a club effect exists, we would expect to see a migration of customers from the smaller networks to the largest one. Orange claims that the club effect is a barrier to entry that creates different market definitions and is a source of Zain's alleged dominance in the market.

The problem with Orange's argument is that it is not supported by evidence. According to the TRC's consultation document on the mobile market review (Exhibit II.6) the proportion of all mobile calls to other mobile networks (off-net mobile) increased from 9.6% in 2015 to 16.3% in 2018 and the share of mobile calls to fixed lines (off-net fixed) from 0.7% to 1.3% over the same period. However, if a club effect were present then we would see a decrease in the number of off-net calls rather than the increase shown in the TRC's data. This is because a club effect drives subscribers to the largest network to take advantage of the lower tariff for on-net calls for more of their calls.

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[2] "*Government requires market reviews to be undertaken by the Commission in a timely manner to ensure that the telecommunications market remains competitive. Market reviews have not been carried out for a considerable period of time yet market conditions have changed significantly. Government therefore requires the Commission, as a matter of great urgency, to carry out such market reviews. Specifically, Government requires that these market reviews identify relevant product markets, determine the market power of individual operators within those markets, and specify remedies to mitigate the effects of dominance or significant market power. A specific issue to be covered in forthcoming market reviews will be telecommunications-like services provided over the Internet by service providers lying outside the domain of the current telecommunications law and by foreign companies that are difficult to regulate, Government requires the Commission to consider, amongst other factors determined by the Commission, whether particular regulation of licensees places them at a disadvantage in comparison with such service providers in particular product markets.*"

[3] This phenomenon has been widely researched in academic literature. See for example: Hoernig, S., Inderst, R., & Valletti, T. (2014). *Calling circles: network competition with nonuniform calling patterns*. The RAND Journal of Economics, 45(1), 155-175., Hurkens, S., & López, A. L. (2014). *Mobile termination, network externalities and consumer expectations*. The Economic Journal, 124(579), 1005-1039 and Hoernig, S. (2008). *Tariff-mediated network externalities: is regulatory intervention any good?* CEPR Discussion Paper No. DP6866

Market share data are redacted from the TRC's consultation document. However, the TRC points out that "*Zain gained share in 2016 although its share has fallen again in 2017 and increased in 2018*" (Page 18). If a club effect were present, and Zain benefited from that effect as Orange alleges, we would expect to see a steady increase in Zain's market share rather than the fluctuation that the TRC reports. This would happen because consumers would tend to switch to the largest network to take advantage of more on-net calls.

Finally, Zain has never been found to have breached the conditions of Board of Commissioners Decision 9-1/2004, which required Zain to set off-net prices within a fixed ratio compared with on-net prices to prevent the development of a "club effect".

Orange would no doubt point to tariff packages that offer a higher number of on-net calls than off-net calls within the same bundle, for example Mish Tabi3i+ which offers 5,000 on-net and 1,000 off-net calls. However, the headline number of minutes in a package is really designed for marketing purposes and far exceeds the average minutes of usage per month. Zain's internal data show that the average minutes of use is around [confidential Figure], well within customers' usage limits. In effect, therefore, both on-net and off-net calls have a zero marginal cost above the package price.

It should also be noted that if the difference between on-net and off-net prices were too high, OTT calling apps, such as Skype and WhatsApp, provide consumers with a simple way to avoid these costs.

We therefore propose that the TRC ignores all of Orange's reference to these club effects as there is simply no evidence that they exist in Jordan.

2.2 Market Definitions

Orange seeks to undermine the TRC's analysis by claiming that the retail market for calls and access should be divided into separate prepaid and postpaid markets and that there are many local geographic markets and not one single national market in Jordan. It makes the same claim about sub-national markets in relation to the wholesale MACO market. We address each of these arguments below.

We first note that there is considerable migration of customers between prepaid and postpaid services. The table below shows the number of Zain's customers who have switched from prepaid to postpaid and vice versa in 2019.

[Confidential Table]

Orange's first stated argument for prepaid and postpaid subscriptions being in the different markets is that, whilst post-paid accounts for 15% of subscriptions, it accounts for 27% of revenues. This claim fails to take account of any reasons for a higher ARPU from post-paid subscriptions.

The fact is that the additional revenue is accounted for by higher costs. In particular, post-paid revenues include handset subsidies and provision for bad debt, the costs of which are passed on to consumers. The potential for bad debt means that Zain is particularly careful about accepting new subscribers to any postpaid product without undertaking a thorough credit check.

Postpaid customers also tend to make more international calls from Jordan and tend to roam outside Jordan more than prepaid customers. Of course, both international and roaming calls have higher costs, which again are passed on to customers resulting in a higher ARPU.

Finally, as the TRC points out, prepaid and postpaid services are clearly supply side substitutes. A hypothetical monopolist of, say, postpaid services would face potential competition by a supplier of prepaid services if it imposed a small but significant non-transitory increase in price (SSNIP), such that a SSNIP would not be profitable. As pointed in Section 2.1 above, Orange's argument in para. 31 of its reply that the club effect creates a barrier to entry is not supported by the facts.

In relation to geographic markets, Orange claims that because Orange, Umniah and Zain have different market shares in different governorates, this constitutes different geographic markets. This claim is not in line with the European Commission's guidelines on SMP, which make it clear that geographic markets are defined by different conditions of competition[4]. This has largely been taken to mean a different number of operators in different areas, rather than market share. As the Orange, Umniah and Zain networks are available across the whole of Jordan the same competitive conditions exist across the whole of the kingdom and therefore the TRC is correct to find a single national market. The fact that one operator has a higher market share in one area of a country rather than another does not result in different markets.

This argument applies to both retail and wholesale markets.

2.3 Susceptibility to *Ex Ante* Regulation

Orange's analysis in answer to the TRC's question 5 – set out in section 4.1 of its response confuses the three criteria test with assessment of dominance by focussing on Zain's market alleged share.

As is well known, assessment of whether a market is susceptible to *ex ante* regulation is based on the three criteria test, which assesses whether the relevant market:

4 European Commission *'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'* 2018. Paragraphs 46 – 51.

i) is subject to barriers to entry;

ii) Is not trending towards effective competition; and

iii) Competition law is insufficient to address any problems.

In our reply to the TRC's consultation, we accepted that there are both economic and regulatory barriers to entry, caused by the cost of building a network and the need for a spectrum licence. However, we also showed that the Jordanian market is highly competitive and that the largest operator, Zain, has a lower market share than the largest operator in all EU countries with three mobile network operators. The market is not only trending towards effective competition but is already effectively competitive and has been for many years. The second criterion is clearly not met.

As all three criteria need to be met, then the TRC was correct in finding the Jordanian mobile market not susceptible to *ex ante* regulation.

The above notwithstanding, we would like to make some comments on the data and arguments presented by Orange in specific paragraphs of Section 4.1 of their response.

In paragraph 68 Orange states:

> *"Second, the most recent TRC data (Q1 2019), published by TRC, albeit without naming the operators, indicate the following number of active customers (3,605,262 , 2,462,921, 2,007,079), which implies that Zain's market share is 44.6%."*

The number of Orange subscribers reported here is different that in Orange SA's annual financial report[5], which gives the number of subscribers in Jordan as 2,093,000 for Q1 2019: some 85,000 more than report to the TRC (assuming Orange is the smallest of the three operators). This means that Orange has either provided incorrect information to shareholders via its financial report or has provided misleading information to the TRC.

Figure 4-1 of Orange's response shows market shares for the main line provided by IPSOS up to June 2018. Similarly, Figure 4-2 shows revenue market shares provided by the Arab Advisors Group. Zain has issues with both these charts.

Figure 4-1 is based on a sample of 2,610 respondents from a total market of some eight million mobile subscribers in Jordan. The reported market shares are therefore bound to include a margin of error, which is not reported.

[5] See *Orange Investor's Data Book, Q4 2019*. P. 63. Available at https://www.orange.com/en/content/download/53756/1478587/version/2/file/4Q%202019%20-%20Databook%20KPIs%20-%20VD.PDF

The caption for Figure 4-1 states: “Subscribers are assigned to operators based on the operator of the line which they consider as their main line”. This says something very interesting about competition in Jordan. If consumers have a “main line”, this implies that they also have a secondary line. At least for those subscribers that have two or more lines, mobile operators are competing not just for the subscription (after which they have a captive customer) but also each time the customer uses the handset to make a call or access the Internet. This intensifies the level of competition and requires all operators to continually provide high quality of service to ensure customers use their handset.

The market share of main lines is therefore not a source of market power, but a reflection of superior quality of service offered by Zain. If that quality of service deteriorated, those customers with two lines could costlessly switch to a competitor.

Orange provides very little information about the source of Figure 4-2. However, it is interesting to note that the most recent data in this Figure are for Q3 2016 and so are some 3½ years old. This is interesting because in response to the fixed market reviews, Orange complains about the TRC using data which are out of date. Clearly it has no problems about using out of date data itself.

In paragraph 71, Orange refers to Zain’s market share in mobile broadband “*according to data available to Orange*”. Two comments need to be made here. First, what is this data available to Orange? They have provided no source of the data. The TRC should not make judgements on the basis of unreferenced data sources.

Secondly, let us suppose that Zain does have a higher market share in mobile broadband, that does not mean that Zain has SMP. Zain has developed its market position in mobile broadband in a market that has always been competitive. In fact, Zain was not even the first company to offer mobile broadband as Orange launched their 3G service first, as shown Figure 1 below. Zain has earned its position as market leader not by inheriting the position of a former state monopoly but by competing on the quality of its service against two strong rivals.

Figure 1: Launch Dates of 3G and 4G services

	2010	2011	2012	2013	2014	2015	2016
Orange	◆					❖	
Umniah			◆				❖
Zain		◆				❖	

◆ 3G ❖ 4G Source: SPC Network[6]

Orange states in paragraph 73 that Zain has the largest spectrum holding: 57 MHz compared with 47.5 MHz for Orange and 35 MHz for Umniah. It is indeed true that Zain has the largest spectrum holding, but Zain does not have 57 MHz of spectrum but 52.5 MHz[7].

More importantly, and as we explained in our response to the consultation, the spectrum allocated to Orange in the 900MHz and 2600MHz bands is not specified for use by a particular generation of mobile technology and so may be used for 2G, 3G or 4G as Orange sees fit. By contrast Zain's spectrum in the 900MHz band is constrained to 2G voice services until the licence is renewed in February 2021 and 2 x 10MHz of its 2100MHz spectrum is constrained to 3G until 2026 and the other 2 x 10MHz until 2029.

The allocation thus gives Orange an in-built advantage for 4G services where it can deploy up to 2 x 32.5 MHz of spectrum in multiple bands and Zain can only deploy 2 x 20 MHz of 1800MHz spectrum. Further, as Orange can deploy its 900MHz spectrum for 4G, this gives it superior in-building penetration and coverage. The allocation of 2 x 10 MHz of spectrum in the 2600 band is also advantageous to Orange as this band has better capacity characteristics than low frequency bands.

Put simply, Zain's spectrum holdings do not confer it with any dominant position. In fact, the contrary is the case. Orange has a much larger amount of spectrum available for broadband services that allows it to offer a higher quality of service. If the amount of spectrum available for broadband is normalised by the number of subscribers, Orange has about three times as much spectrum per customer as Zain; allowing it to offer a higher quality of service.

2.4 Prices in Jordan

In Section 4.1.4 of Orange's response they discuss the low prices available to Jordanian consumers. Zain is confused about the point Orange is trying to make. The continuously falling prices since 2011 that Orange refers to in para. 81 suggest a highly competitive market rather than one susceptible to *ex ante* regulation, let alone one with a dominant operator able to behave independently of competitors and consumers. The data presented in this section of Orange's response seems only to support the TRC's and Zain's view that the market is highly competitive and not in need any *ex ante* regulation.

[6] '*Electronic Communications Markets in Jordan: The need for a new market review*' June 2017

[7] Zain returned 4.5MHz of spectrum in the 900MHz band due to interference from other services that meant the spectrum could not be used efficiently.

We certainly agree with Orange that spectrum prices and taxes are too high in Jordan and have a negative impact on the market. Indeed, Zain continues to present the case to the Jordanian government to reduce the heavy tax burden.

However, we certainly disagree with the implication of the comment in para. 83 that Zain is profitable due to its "advantageous position". Orange's Figure 4-4 is redacted so we do not know what it shows, though presume it has been made available to the TRC. However, the point that needs making is Orange presents no evidence to support its claim that Zain's apparent profitability is a result of a dominant position in the market. Zain may just be a better managed company than Orange or Umniah and is able to generate more revenue through its superior products and keep a better control on costs, offering consumers greater utility. As noted above, Zain has only about 1/3rd as much 4G spectrum per customer as Orange, which can hardly be said to put it in an "advantageous position".

Orange proposes (paragraph 94) that the TRC should follow Sri Lanka and other countries and introduce a price floor. Whilst Zain agrees that low mobile prices in Jordan are affecting firms' ability to invest in the next generation of mobile services and would like to see prices rise, we are opposed to the introduction of price floor for two principal reasons.

First, setting a price floor means the regulator and not the competition is setting prices in a competitive market. It is our view that the three mobile network operators have a better understanding of their costs than the TRC does and, therefore, what price should be set. The less price intervention from the regulator the better to ensure competitive outcomes.

We would actually go further and say that a price floor is akin to a cartel agreeing prices between its members: an action that is illegal under Jordanian competition law. There is a strong risk that a price floor will result in consumer welfare being transferred to suppliers, which would be a bad outcome for consumers.

Secondly, the evidence presented by Orange of the effectiveness of price floors is weak for three reasons. First, in para. 93 Orange claims that a price war in Sri Lanka began after the introduction of a fifth mobile licence in 2009 and that the regulator needed to impose a price floor to prevent an unsustainable decline in mobile prices. Orange does not consider the obvious counterfactual: what would have happened had the regulator not issued a 5th licence and left the market with just four operators? There are very few five operator markets in the world as national mobile markets tend not to be able to support that many operators. Perhaps if the regulator had not issued the fifth licence there would not have been a price war as the market would have had a sustainable number of competitors. It should also be noted that Etisalat, one of the operators in Sri Lanka exited the market in 2018 and so now there are just four operators.

Secondly, Orange's claim that the price war was caused by the entry of the fifth operator does not align with the data they provide in Table 4-3. This table shows the decline in profitability beginning in 2008 and losses reaching their lowest point in 2009 – the year the fifth licence was issued. This suggests that the industry was involved in a price war even before the fifth licensee entered the market.

Finally, Orange claims that the regulator's introduction of a price floor in 2010 increased investment. Again, this is not supported by the data presented by Orange in Figure 4-12, which shows that investment actually started to increase in 2008 – well before the introduction of the price floor in 2010. It is quite likely that the increase in investment was caused by two other factors: the launch of the first 3G network by Dialog in 2006, followed by Mobitel in 2007, Etisalat in 2011 and Hutchison 3G in 2012 and the launch of Bharti Airtel in 2009. All of these would have had a significant effect on total investment. It is therefore far too simplistic to claim that the price floor introduced by the Sri Lankan TRC had a positive effect on investment.

In Figures 4-13 and 4-14 Orange presents data on mobile penetration in countries that have introduced priced floors. Again, though, there is no counterfactual. Orange does not show the growth in countries that do not have price floors, so we cannot tell whether these countries are growing faster or slower than countries without such a remedy.

2.5 Wholesale SMS Termination

Orange disagrees with the TRC's view that SMS termination should be regulated to prevent prices being set above the competitive level in the event that the current bill and keep (B&K) arrangement breaks down. Orange therefore proposes that the TRC should aim at maintaining the B&K arrangements (para. 99).

Zain set out its reasons for supporting the TRC's proposed move to a regulated termination rate in our responses to the consultation document. It remains our view that the best way to protect consumers from operators setting monopoly prices for SMS termination is to set a regulated price and use the same calling party pays (CPP) approach as for voice calls.

In our view this is particularly important given the dominance of A2P SMS messages where the current cost of the message is borne by the receiving party and not the sending party. This could lead to inefficient allocation of resources in the market as the party who most values sending the message is not paying for it. Instead the receiver, who may receive no utility from the message effectively pays.

In Para 9 (bullet point 1) Orange claims that "the increased cost of SMS termination will put the operators in a situation where they have to increase their retail prices". We do not agree with Orange on this point. Changing from a B&K to a CPP system does not result in an increase in the cost of termination but does ensure that the party that values the message most (the sender in most cases) pays for the transmission of the message rather than the receiver. The costs are therefore redistributed to the party with the highest utility from the message rather than increased. In our experience, most A2P message are originated on Orange's mobile network and so it is economically correct that Orange should be charged a termination fee by the terminating operator.

2.6 Remedies in Mobile Voice Call Termination

In para. 106 Orange proposes that the MTR should be lower from Zain than for either Orange or Umniah. It also suggests that the MTR at the weighted on-net price for Zain should be maintained.

As we explained in Section 2.1 above, there is no evidence whatsoever that there is a tariff mediated network effect in Jordan. If there were then the firm that benefits from this effect would be seeing a consistent rise in subscriber numbers and there would be an increase in on-net calls. We have shown evidence in Section 2.1 to show that neither of these trends are occurring.

Orange's proposal to move away from symmetric termination rates is quite extraordinary and very far away from international best practice. We hope that the TRC will swiftly reject this suggestion. As the former Chief Economist of DG Competition at the EU pointed out as long ago as 2006:

> *The European Commission's Relevant Market Recommendation makes it clear that if concerns arise about market power in call termination, then these concerns apply to all firms, irrespective of size.* ***If the objective is to constrain the exercise of SMP, that objective implies the equal treatment of all firms providing the same call termination services****.*[8] *(Added emphasis)*

On this basis, Orange's proposal should be given no further consideration by the TRC.

2.7 Conclusion

Overall, it is Zain's view that Orange's response to the TRC's consultation provides no strong evidence on which the TRC should even consider complying with Orange's request to put the whole market review process on hold and start again. Orange has not provided any evidence that the

[8] Valletti, T. (2006). Asymmetric regulation of mobile termination rates. *Imperial College London and University of Rome.< https://www. researchgate. net/publication/232710139*.

market definition is wrong or that the MACO market, in particular, fulfils the Three Criteria Test and therefore is susceptible to *ex ante* regulation.

Zain is, therefore, of the opinion that the TRC should reject Orange's self-interested plea in para. 18 of its response and continue to push ahead with the regulations proposed in its market review that are justifiable and proportionate.

3 Reply to Umniah

In answer to **question 5** from the consultation, Umniah states that it believes carrier selection/pre-selection (CS/CPS) should be enforced in the MACO market. Zain has never understood why CS/CPS is applicable in this market, and it is certainly not applicable when no firm has been found to be dominant.

All three operators are vertically integrated and able to self-supply access and calls. CS/CPS was originally introduced to fixed markets as a remedy for companies that could provide calls but not access, due to the economic barriers to entry in fixed access markets. These companies therefore needed some access to their calls service. As all three mobile operators in Jordan self-provide their own access and as the TRC has not found any operator to be dominant in access, there is absolutely no reason for CS/CPS to be mandated.

In answer to **question 6** Umniah agrees with the TRC's methodology and conclusion regarding the assessment of SMP in the termination market, but then suggests that Zain somehow has more influence than either Umniah or Orange in the market.

This position is inconsistent. Whatever the relative size of the networks, termination of calls on one network is still not a substitute for termination on another network. We, therefore, refer the TRC to quote from Valletti above and suggest that this comment from Umniah is ignored.

Umniah answers **question 8** by suggesting that that Board Decision 9-1/2004 should be retained. As with Orange, Umniah provides no evidence that Zain has ever breached this condition. Umniah also again argue for CS/CPS. We have already explained why this is an inappropriate remedy for mobile markets.

Umniah also argues for the immediate implementation of the TSLRIC+ termination rate rather than continue with the glide path that ends in 2021. Zain disagrees with Umniah's proposal, even though the effect would be small given the glide path ends next year. Our objection to the proposal is that this move would create regulatory uncertainty. If the TRC is seen to change the implementation of the remedy part way through the time allowed, investors may be concerned that the TRC would do this again and would need to factor that risk of regulatory uncertainty into their cost of capital.

4 Reply to Jormall

Zain has read Jormall's response to the market review consultation. It appears that their main concern is to maintain the current B&K pricing for A2P SMS messaging and that they are concerned that any move from B&K would harm the interests of companies providing A2P services.

In our response to the TRC's consultation we explained why we think that it is now appropriate to move from B&K to termination rates for SMS messages. Zain is concerned that the current B&K arrangements will break down and that MNOs will then be able exploit their dominant position in SMS termination and charge the monopoly price for terminating SMS messages. Zain's view therefore is that it would be better to pre-empt any such behaviour by regulating SMS message termination in the same way as voice termination and for the TRC to set an SMS termination rate. Nothing in Jormall's response has changed our view on this matter.

The TRC does not need reminding that a market review should not be concerned with the interests of any individual competitor or group of competitors in the market. The market review process should ensure the market is effectively competitive in the interests of consumers. Jormall's response reads to us as if it is asking the TRC to protect its business model without reference to the interests of consumers. Jormall is also claiming that changing to a calling party pay approach rather than B&K will make mobile operators dominant.

Zain does not agree with this view. It is not an objective to protect any individual firm's business model. Whilst regulation should not pose an undue risk, no firm can expect regulations to be set in stone. Regulation must change with market conditions and if that damages one firm's business model, that firm cannot expect protection from justifiable regulatory changes.

It remains our view, therefore, that the TRC should introduce the regulations proposed in its market review, which we consider appropriate and proportionate.