Dedicated Capacity Market Review

Zain Reply to Responses from Orange

20 Feb 2020

1 Introduction

Zain has read with interest Orange's and Umniah's responses to the Dedicated Capacity (DC) Market Review consultation document issued by the TRC. We consider that Orange's response is disconnected from the realities of the market and seems to consider that the TRC has got more or less everything wrong in its analysis of the market. It appears that Orange has taken a deliberate strategy to undermine all of the excellent research and analysis conducted by the TRC in a bid to delay implementation of the pro-competitive remedies proposed by the TRC that will help strengthen the very under-developed DC markets in Jordan.

Orange is employing a quite deliberate strategy, deployed by dominant operators around the world, of seeking to delay implementation of *ex* ante remedies that promote competition, help develop the market and, most importantly, enhance consumer experience and welfare. We therefore urge the TRC to ignore Orange's plea in paragraph 18 of their response to put the 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.

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

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[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."

[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.*"

2 Reply to Orange

As we do not agree with Orange's description of the market and consider that Orange has consistently behaved in a manner that demonstrates its dominance, we shall not comment on Orange's views of the remedies proposed by the TRC.

We expressed our view in our response to the Fixed Markets Review that the TRC should consider the separation of Orange if its proposed remedies are not implemented by Orange or do not deliver an effectively competitive market working in the interests of consumers. Our suggestion is equally valid in DC markets.

In para. 71, Orange makes the claim that it is not a single economic entity and that "Orange Fixed and Orange Data are separate legal entities". Orange is wrong in making this claim. The single economic entity doctrine does not even require two (or more) firms to be economically connected if they act as a single unit. As Moisejevas and Urbonas explain:

> *The concept of an undertaking designates an economic unit (single economic entity) for the subject-matter of the agreement in question, even if in law the unit consists of several persons, natural or legal. […] Subsidiaries usually are not treated as separate undertakings in relation to the parent company.*[3]

On this basis, even if Orange Fixed and Orange Data are separate subsidiaries of the same parent company, they form a single economic entity and should be treated as such for the purpose of *ex ante* regulation and competition law.

For the sake of clarity, we do not see an immediate need for the TRC to impose vertical separation as a remedy, beyond accounting separation. There are several countries around the world where a vibrant competitive market exists with a fully vertically integrated dominant operator. However, if Orange persists with its previous behaviour and fails to implement the TRC's proposal properly, or if those remedies are not effective, then the TRC should give serious consideration to the vertical separation of Orange to create the competitive market needed in Jordan.

[3] Moisejevas, R., & Urbonas, D. (2017). *Problems Related to Determining of a Single Economic Entity under Competition Law.* Yearbook of Antitrust and Regulatory Studies (YARS), 2017, 10.

2.1 Geographic Retail Market Definition

Orange claims that the TRC has not conducted sufficiently detailed analysis to determine whether there are sub-national geographic markets.

Zain completely disagrees with Orange on this matter. It is Zain's view that the market conditions in Jordan mean that the TRC is correct to find that there are no sub-national geographic markets.

The European Commission SMP guidelines[4] explain how competitive conditions in geographic areas lead to different geographic markets:

> *"…the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different."* (para. 48)

Orange makes vague generalisations about competitive conditions in Amman (see for example para. 34) implying that market conditions in Amman would constitute a separate market.

Amman is large city of some four million people. Other operators' infrastructure to support DC is not available across the whole city, whereas the Orange network is ubiquitous. If the TRC took Orange's advice of examining competitive conditions in Amman it would find that the area where there are sufficient alternative networks to create a competitive market is so small that it would inevitably find Orange to be dominant across the city. The same analysis in other governorates would find the same results and so support the TRC's finding that there is a single national market and that any alternative DC networks are too small to create separate geographic markets.

In addition, Orange states in para. 36 of its response that the TRC sees the fact that alternative networks as still being rolled out as an obstacle to finding geographic markets and goes on to say that it disagrees with the TRC on this point as this has not been found to be problem elsewhere. However, the European Commission's SMP Guidelines quoted above, also state that geographic markets should have "*have clear and stable boundaries over time"* (para. 49). Such boundaries cannot be clear and stable when networks are still being rolled out.

It is Zain's view, therefore, that Orange is wrong to say that the dedicated capacity market in Jordan could be sub-national rather than national. We therefore support the TRC's findings on this matter.

[4] "*Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services"* 2018

2.2 Geographic Wholesale Market Definition

We note that Orange has made no comment on the TRC's finding that the wholesale market for all types of leased lines is national. We assume, therefore, that Orange agrees with the TRC on this point but find it confusing that Orange believes there are sub-national markets at retail level but not wholesale level.

2.3 Susceptibility to Ex Ante Regulation – wholesale markets TI

Orange claims that the wholesale markets for TI lines do not meet the conditions of the Three Criteria Test and therefore are not susceptible to *ex ante* regulation. Zain disagrees with this view. We consider that the markets fulfil all three criteria. In fact, we also think that the TRC has understated the competitive problems in the MI market.

2.3.1 High and Enduring Barriers to Entry

As we have also pointed out in our replies to other operators' responses to the Fixed Telecoms Market Review, it is well known that building a network is primarily a civil engineering project and that 70% - 80% of the costs of building a network are related to building the physical infrastructure (ducts and poles) that carry the fibre optic cables or other cables. These costs represent a major barrier to entry that make it uneconomic to build networks on the same scale as Orange's. Costs may vary from one part of the country to another, for example costs are lower in west Amman due to the street pattern, allowing some building of alternative networks. However, in other areas, street patterns make it very expensive to build a network and so precludes the possibility of competitive entry.

To some degree, the barriers to entry may be lowered by the use of other infrastructure providers' physical networks, for example electricity networks. However, electricity infrastructure is not a perfect substitute for telecoms infrastructure and so has limitations when used for building telecoms networks. In particular, the cost of having to pay rent to the electricity company means that Zain cannot mimic the Orange model of low cost roll-out of network on its own infrastructure.

In its review of the Physical Infrastructure Access Markets, Ofcom specifically considered whether non-telecoms infrastructure is a direct substitute for telecoms infrastructure[5]. They concluded that it was not for seven reasons, summarised below. Zain has experienced many of these same problems, which are noted against each of the relevant points highlighted by Ofcom.

[5] Ofcom (2019) '*Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets' Vol. 1: Section 3.*

i) *Lack of access points:* There are generally fewer access points to a non-telecoms network than to a telecoms network;

ii) *Restrictive rules of access:* Health and safety requirements make it difficult for telecoms to share networks and, in the event of a failure, the telecoms network will have a lower priority. Zain has found that the electricity company will not allow telecoms technicians to approach the electricity poles to fix any telecom faults in the event of a short circuit;

iii) *Construction incompatibilities:* The network designed for electricity, gas or water may not be compatible with fibre-optic cables. An example Zain has experienced is that electricity poles are not always on a continuous path as they were designed to serve electricity needs, while fibre optics design varies and need a continuous path from the central office to the customer premises;

iv) *Co-existence incompatibilities:* The environment for other infrastructure may be hostile to telecoms cables. Zain has found this to be the case with electricity cables;

v) *Lack of suitable sites for hosting technical facilities:* Non-telecoms physical infrastructure may not offer sites for hosting technical facilities which are sufficiently practical and cost-effective. By contrast, the physical infrastructure owned by Orange has such hosting facilities in every area of the country.

vi) *Contractual complexities:* Complex contractual arrangements may be needed for access to non-telecoms infrastructure. Zain has found that electricity companies' contracts include harsh technical and financial conditions that have to be abided by; and

vii) *Civil works required to make ready for use:* additional work may be required to make the non-telecoms infrastructure ready for use by telecoms networks. For example, Zain has found that electricity cables often need to be rearranged to free up space for fibre optic cables.

In addition to these points highlighted by Ofcom, Zain's experience in Jordan is that the electricity company requires Zain to pre-arrange with them on every pole installation and requires that a supervisor must be present at each pole installation. Zain's telecom technicians also need to be certified by the electricity company to ensure they abide by electricity regulations and safety instructions.

All of these issues mean that the use of electricity and other infrastructure is very much a second best and an imperfect substitute for a physical network built for telecoms specifically. We do not consider, therefore, that the use of other infrastructure networks lower barriers to entry. There remain high barriers to entry for building perfectly substitutable alternative networks.

2.3.2 Not trending towards effective competition

In para. 56 of its response Orange says that in 2017 its market share was 50% "and is likely to be lower now". Without hard data we do not know what its market share is and therefore whether the wholesale market is trending towards effective competition. However, the TRC does have such data and has come to the conclusion that the market is not trending towards being competitive. We have no reason to doubt the TRC and therefore that the TI Dedicated Capacity markets fulfils the second criterion for being susceptible to *ex ante* regulation.

2.3.3 Effectiveness of Competition Law

No country that has examined this market has found competition law alone to be an effective means of constraining the dominant operator. Competition law is generally too slow and cumbersome to ensure adequate wholesale access to the dominant operator's network to create a vibrant competitive market.

The market therefore fulfils the third and final criterion for being susceptible to *ex ante* regulation.

In summary, Orange has not proven that the Three Criteria Test is not met and therefore we continue to agree with the TRC's conclusion that the wholesale fixed markets are susceptible to *ex ante* regulation.

2.4 Orange is the Dominant Operator

Orange's comments (paras. 65 – 71) on the TRC's finding that it enjoys a position of SMP only refers to the retail market and not to the wholesale market. It is quite feasible that Orange is the third largest supplier of retail leased lines whilst being dominant at the wholesale level as other retailers could be acquiring wholesale lines to sell in the retail market.

In contrast to Orange, the TRC set out clear and conclusive evidence of Orange's SMP in the market in its consultation document. In the absence of an effective counter argument from Orange, supported by hard evidence, Zain believes that the TRC should stick to its initial finding that Orange has SMP in the TI markets.

3 Reply to Umniah

Below we make some specific comments in reply to Umniah's comments on certain of the TRC's questions.

Question 1. We agree with Umniah's request that that TRC should make it clear what contention ratio is required for capacity to be "dedicated". Like Umniah we assume this would be 1:1 and agree that more clarity is needed.

Question 2. We also agree that wholesale DC markets need to encompass any type of use of a DC circuit, including self-supply.

Question 4. Again, we agree with Umniah's answer to this question. DC circuits are subject to economies of scale and scope that create a structural barrier to entry. As we explained in our comments on Orange's response, the use of alternative physical infrastructure is an imperfect substitute that does not fully address these economies.

Question 5, 6 & 7. We support Umniah's view that Orange has SMP in TI markets for the reasons we have set out above.

Questions 8 & 9. Umniah rightly points out that an accounting separation obligation is essential and that the proposal made by the TRC is not sufficient to make price discrimination visible.