THE HASHEMITE KINGDOM OF JORDAN

TELECOMMUNICATIONS REGULATORY COMMISSION

Explanatory Memorandum to the Regulatory Decision on the Fixed Narrowband Markets Review

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TABLE OF CONTENTS

Page

CHAPTER I: INTRODUCTION

The Explanatory Memorandum summarises and evaluates the comments of the various members of the telecommunications industry in Jordan to the Fixed Narrowband Markets Public Consultation Paper published by the TRC on 17 July 2010, including the additional comments made by operators made with respect to the initial comments lodged by respondents.

Formal responses to the *Public Consultation Paper* were received from Jordan Telecommunications Company (Orange Fixed), Umniah Mobile Company / Batelco Jordan (Umniah/BTJ) and Jordan Mobile Telephone Services Company (Zain). Further comments on the above responses were, in turn, received from Orange Fixed, Umniah/BTJ and Zain.

Chapter II of this Explanatory Memorandum provides an overview of the comments received by all operators, accompanied by the TRC's reasoned responses to those comments, broken down by reference to the:

1. Markets for Retail Fixed Telephony Services in the absence of any *ex ante* regulation;
2. Markets for Wholesale Fixed Call Termination;
3. Market for Wholesale Fixed Call Origination;
4. Market for Wholesale Transit;
5. Markets for Retail Telephony Services with *ex ante* wholesale regulation in place.

The TRC notes that the respondents, in relation to any given specific question, have also often commented on issues addressed in other questions. In the discussion which follows, the TRC has maintained the original sequence of questions, and provides its assessment of those responses that are directed to a specific question.

CHAPTER II: OVERVIEW OF COMMENTS BY THE INDUSTRY

Markets for Retail Fixed Telephony Services in the absence of any *ex ante* regulation

Q1: Do you agree with the TRC's preliminary conclusions regarding the relevant product and geographic market definitions for retail fixed telephony services in the absence of any* ex ante *regulation?

Q2 : Do you agree with the TRC's preliminary conclusion that, in the absence of any ex ante regulation, the three criteria are cumulatively fulfilled in relation to the relevant market for retail fixed telephony services?

Orange Fixed disagreed in general with the TRC's market definition and rejected any application of the three criteria test due to its overall concerns expressed in relation to the market definition exercise of the TRC. Orange Fixed only agreed with the specific conclusion that access to managed VoIP services and PSTN/ISDN telephony services form part of the same relevant product market.

Orange Fixed stated that the TRC did not provide an analysis of all the relevant market players, their market shares and their growth percentages over the past years. In addition, Orange Fixed argued that the TRC did not conduct a consumer survey to understand end users' behaviour and how it has been changing over the past few years. Accordingly, the TRC is said to only predict how end users' behaviour will change over the coming years. According to Orange Fixed, the TRC should at least provide a certain worldwide benchmark for adopting the market definition methodology and to prove that the same is appropriate for the enhancement and development of the Jordanian market.

Orange Fixed also argued that the TRC had failed to adopt any clear guidelines that identify the main elements that determine substitutability between services. As regards the issue of substitutability between Access and Voice Telephony services, Orange Fixed argued that they are not provided in bundles, while the essential characteristics of these services are different. In addition, Orange Fixed argued that the TRC did not examine or assess the take-up of other access products supplied on the market. In relation to PSTN and ISDN services, Orange Fixed stated that the price differences between those two services were not properly weighted by the TRC. It was also argued that the TRC did not study nor justify the fact that an operator providing each of these services would not easily be able to switch in providing the other service in the Jordanian market.

As regards the substitutability between fixed and mobile services, while these services might not be direct substitutes, it was argued that mobile services could still have a material impact on the scope of the overall market. In addition, Orange Fixed disagreed with the TRC that one of the functional differences between fixed and mobile services is the range of high speeds achieved by the various types of fixed networks. Orange Fixed also argued that the consumer survey results mentioned in the Consultation Paper relevant to the usage of fixed lines were not properly analysed and that they had not taken into consideration the forward-looking approach of the market. In addition, Orange Fixed stated, based on the TRC's consumer survey results, that nearly 74% of households do not have a fixed line telephone and the main reason behind this is that they use a mobile phone instead (63%). Orange Fixed also noted that 96% of users have stated clearly that they intend to substitute their fixed line with a mobile line. Orange Fixed expressed the view that the TRC, while comparing the fixed market to the mobile market in terms of substitutability, has wrongly focused on access to ADSL and not on the voice service provided to end users and to the substitutability available for such a service.

In relation to the substitutability between fixed local and national calls, Orange Fixed expressed the view that there are significant differences in competitive conditions in the respective local and long distance calls segments, resulting in local and long distance calls being situated in different product markets. They also argued that this approach reflects worldwide practice and has been adopted in the UK and most EU Member States. Orange Fixed argued that local and long distance calls should respectively fall within separate product markets. The same respondent also argued that fixed-to-mobile calls should fall within a separate product market from fixed-to-fixed calls. As regards domestic and international calls, Orange Fixed also argued that these should constitute separate respective markets. Orange Fixed believes that the following markets should therefore be defined: Local calls, Long Distance calls, Fixed calls to mobiles; Non-geographic calls; International calls. It proposed that the TRC republish its Consultation Paper to reflect these changes.

Umniah/BTJ agreed with the majority of the TRC's conclusions regarding the definition of the relevant product market, as well as the fact that three criteria had been fulfilled. However, Umniah/BTJ voiced concerns about the proposed combined treatment of residential and non-residential users, while they disagreed also with the treatment of Fixed Wireless Access. As regards the treatment of residential and non-residential customers, Umniah/BTJ argued that differentiated retail pricing exists while, due to the existing contractual terms for non-residential users, the purchase of cheaper services aimed at residential users is effectively prohibited.

In relation to FWA networks, Umniah/BTJ argued that FWA access networks are not substitutable for wireline networks. In addition, Umniah/BTJ, in its response to Orange Fixed, expressed the view that, to the best of its knowledge, there is no regulatory authority which has issued a decision to the effect that mobile services exercise sufficient indirect constraints on fixed services so as to justify adjustment of market definitions, conclusions as to the application of the three-criteria test, a changed dominance assessment, or a variation in remedies in relation to fixed narrowband markets. The same respondent argued that the deregulation of retail fixed markets in Europe was the result of many years of liberalisation at the wholesale level including the introduction of regulation for CS/CPS for all types of calls, local loop unbundling, wholesale broadband access and Wholesale Line Rental.

Umniah/BTJ also expressed the view that the TRC would be significantly departing from international precedent if it would accede to Orange Fixed's demands to let a dominant fixed operator retain the ability to exploit what is essentially a quasi-monopoly on the fixed network and fixed services, on the spurious grounds of alleged competition from mobile. Umniah/BTJ responded to Orange Fixed's claims by disagreeing with the view that the TRC had focused on access to ADSL. Umniah/BTJ expressed the view that "Voice over Broadband" calls should be included in the CS/CPS obligation imposed on Orange Fixed. In addition, Umniah/BTJ, in its response to Orange Fixed's comments, disagreed with the Orange Fixed view that access and calls should be considered separately under a "Greenfield" approach. Umniah/BTJ argued that even if alternative delineations were made on the basis of a Greenfield analysis, the Jordanian market situation for each conceivably separate fixed retail narrowband service is such that it would be extremely difficult to reach any conclusion other than these markets satisfy the three-criteria test, and that Orange Fixed holds a dominant position on those markets.

Zain agreed with the TRC's conclusions regarding the market definition process. However, in its evaluation of the response of Umniah/BTJ, Zain agreed with the point expressed by Umniah/BTJ that the TRC should not treat FWA operators in the same way as Orange Fixed. Zain argued that the provision of telephony services over FWA is negligible compared with its provision over other means. The TRC should therefore reconsider the fulfilment of the first and second criteria to take this into account.

Response of the TRC

As regards the concerns raised by Orange Fixed regarding the analysis of the market data, the TRC notes that all data available to the TRC relating to fixed narrowband markets have been analysed in the Consultation Paper, including the market shares of market players and their changes over the past years. The TRC notes that in those cases where the market share of Orange Fixed was extremely high (*i.e.*,in excess of 95%) the TRC believes that it was not necessary to present the market shares of each alternative operator, as their total market share was cumulatively no more than *de minimis*. Moreover, the discussion regarding market shares is more appropriate to the issue of determining whether there is lack of effective competition, rather than the scope of market definition.

The TRC does not share the concerns raised by Orange Fixed in relation to consumer surveys. The TRC takes the view that it was not necessary, for market review purposes, to have conducted a consumer survey *prior* to the conduct of the market review. Given that the results of the consumer survey conducted in 2009 have been taken into account, in combination with the market data otherwise available to the TRC through its various information-gathering powers, the TRC has been provided with a very clear and complete picture of current and likely future consumer behaviour.

The TRC does not agree with the view expressed by Orange Fixed about confusion being created in the implementation of a market definition methodology. The TRC notes that the market definition methodology endorsed in the Consultation Paper was based on the *White Paper*, which in turn was based on a benchmarking exercise, and which has been the subject of a broad national public consultation to which Orange Fixed participated.

The TRC does not share the views of Orange Fixed in relation to the TRC's conclusions on substitutability between relevant fixed narrowband products / services contained on Chapter III of the Consultation Paper. The TRC confirms that its approach in Chapter III of the Consultation Paper on the analysis of substitutability is based on the assumption that there is no *ex ante* regulation whatsoever in place. If no *ex ante* regulation is in place (in particular, absent the wholesale obligations for CS/CPS and NTTO services), narrowband fixed access and calls services could have only been provided as bundled services. Moreover, the evidence available to the TRC in terms of both demand and supply-side dynamics, as well as the underlying competitive conditions under which services are provided indicate that the relevant retail product market should include both fixed telephony access and fixed voice telephony services.

As regards the arguments of Orange Fixed in relation to supply substitutability between PSTN and ISDN services, the TRC would like to point out that, as analysed in Chapter III.1.2 of Consultation Paper, an operator providing only PSTN services would also be able to provide

ISDN services by mainly upgrading its telephony switches. The investments required in order to update its telephony switches could not have been assumed to be an unaffordable investment, even for a new entrant.

In relation to Orange Fixed's arguments about the level of substitutability between fixed and mobile services, the TRC does not consider that there exists any evidence that would undermine its original conclusion that there is only one-way substitutability taking place between fixed and mobile services. Due to different functional and pricing characteristics, mobile and fixed services do not fall within the same relevant product market.

The TRC disagrees with the views expressed by Orange Fixed in relation to the conclusions drawn from the consumer survey results. It notes that the results of the consumer survey in relation to mobile and fixed penetration rates simply verify the quantitative data already contained in the Consultation Paper. As regards the percentage of end-users intending to substitute their fixed line with a mobile line, the TRC points out that the 92% of the respondents owning fixed lines do not intend to abandon their fixed lines within the next 12 months (85,8% of them do not intend to abandon their lines, while 1% has a very low possibility of abandoning them, and the remaining 4,8% has a low possibility of abandonment). On the other hand, the TRC would like to stress that, according to the results of the same consumer survey, the main reason for abandoning the fixed line is the high subscription price (54,5%) which of itself might indicate a lack of price competition in the fixed narrowband sector. Even more recent consumer survey results available to the TRC reconfirm the robust nature of these statistics.

In relation to Orange Fixed's arguments regarding the competitive dynamics between local and long distance calls, the TRC notes that the available data reflects no differences in the competitive supply-side constraints that exist between local and long distance national calls. In this regard, it should be noted that in both calls categories, the market shares of Orange Fixed for 2009 exceed 99%. As regards the international trend regarding the inclusion of local and long distance calls in the same relevant product market, the TRC notes that, in the majority of EU Member States, local and long distance calls form part of the same relevant product market (Austria, Belgium, Cyprus, Czech, Denmark, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden). This is based on the common competitive positions of the fixed incumbent and its competitors, the tendency of tariff plans to be provided as bundles, and the supply-side possibility of short term entry. In relation to Umniah/BTJ's arguments regarding the treatment of residential and non-residential end-users, the TRC maintains its view that, despite the existence of different contractual terms for these customer categories, <u>the elements of supply-side substitution</u> and the existence of similar competitive conditions indicate that residential and non-residential services should be considered to form part of the same relevant product market for *ex ante* purposes.

Three further observations can be made by the TRC in relation to the proposed segmentation argued by Orange Fixed. First, consistent with the approach outlined in its *Market Review White Paper*, the TRC reserves the right to investigate more narrowly defined product markets from a demand-side point of view, should the circumstances justify such an approach under its *ex post* powers. Second, as has been made clear in other market reviews (see Mobile Markets review; *cf. Market Review White Paper*), when determining the scope of a proportionate *ex ante* remedy to address a market failure, the TRC is at liberty to formulate remedies which target a segment of the relevant market (*e.g.*, residential or non-residential). Third, as is noted earlier, Orange Fixed´s overwhelmingly high market shares under all of its proposed market segmentation scenarios would not result in any material change to the TRC´s conclusions on the lack of effective competition in those markets or segments.

The TRC does not share the view expressed by Umniah/BTJ and Zain in relation to the exclusion from the relevant product market of telephony services provided through FWA from the relevant market. The TRC maintains the view that there are no relevant reasons (legal, economic, technical) which require differentiation between the provision of telephony services over FWA from the provision of telephony services through wired technologies. In this regard, the TRC also notes that the very low number of FWA telephony lines cannot justify the exclusion of FWA technology from the relevant product market. In this respect, the TRC's approach is also fully consistent with the application of the principle of technology neutrality (refer also to the *Market Review White Paper*).

In conclusion, the TRC maintains its view that, in the absence of any *ex ante* regulation, a single national retail market can be defined which is constituted by a cluster of fixed telephony access and calls services. This includes all types of telephony connections (PSTN, ISDN-BRA, ISDN-PRA and managed Broadband connections), all types of fixed telephony calls (local, long distance, fixed-to-mobile, international, and calls to service providers), whether provided to residential or for non-residential users.

In addition, the TRC maintains its view that, in the absence of any *ex ante* regulation being implemented at the wholesale and/or retail levels, the three criteria relied upon to justify *ex ante* regulatory intervention have been cumulatively fulfilled in relation to the markets for retail fixed telephony services.

Markets for Wholesale Fixed Voice Call Termination in the absence of any *ex ante* regulation

Q3: Do you agree with the TRC's preliminary conclusion regarding the relevant product and geographic market definitions for wholesale call termination?

Q4: Do you agree with the TRC's preliminary conclusion that, in the absence of any* ex ante *regulation, the three criteria are cumulatively fulfilled in relation to the markets for wholesale call termination on individual fixed networks, and that these markets are therefore susceptible to* ex ante *regulation?

Q5: Do you agree with the TRC's preliminary conclusion that Orange Fixed, all alternative FNO currently provide fixed termination services and all alternative FNOs that are going to provide fixed termination services within the lifetime of this review, each hold a dominant position in the markets for wholesale call termination on their own respective networks?

Q6: Do you agree with the TRC's preliminary conclusions about the potential competition problems related to the dominant position of each FNO in the market for wholesale call termination on its own network?

Orange Fixed disagreed in general with the preliminary conclusion reached by the TRC in relation to the definition of the markets for wholesale Fixed Voice Call Termination. The same respondent, while accepting that any operator would naturally be considered to be dominant over its own network with regard to call termination, does not see any legal or economic justification for the imposition of additional *ex ante* remedies on Orange Fixed on that relevant market.

Umniah/BTJ agreed in general with the TRC's conclusions regarding the market definition. However, Umniah/BTJ expressed its concerns about the inclusion of the "voice" concept in the market definition. In addition, Umniah/BTJ agreed with the TRC's conclusion that Orange Fixed holds a dominant position in its relevant termination market, but raised concerns whether alternative fixed operators have any market power on their respective relevant call termination markets. Umniah/BTJ argued that Orange Fixed does not necessarily have to buy wholesale termination services from fixed alternative operators, which have no or very few on-net customers. In addition, Umniah/BTJ agreed with the TRC's conclusions about the potential competition problems related to the dominant position of Orange Fixed. By contrast, Umniah/BTJ argued that the potential competition problems identified by the TRC in relation to the dominant position of fixed operators other than Orange Fixed did not reflect the economic reality.

Response of the TRC

In relation to the arguments expressed by Orange Fixed, the TRC would like to point out that when an operator is designated as being dominant on a relevant market, appropriate remedies should be applied in order to address the identified competition problems. The TRC reiterates the view that, given the potential competition concerns identified by the TRC in the provision of fixed call termination services, a relatively comprehensive set of remedies is required to address those potential competition concerns.

As regards the concerns voiced by Umiah/BTJ in relation to the inclusion of the "*voice*" concept in the market definition, the TRC notes that, since only calls to end-users are included in the relevant product market, the relevant communications in question could only be voice calls.

The TRC does not share the views expressed by Umniah/BTJ in relation to the treatment of the dominant position of alternative operators. The TRC believes that the low number of on-net customers of alternative Fixed Network Operators ("FNOs") does not prevent them from acting independently from their competitors, clients and consumers, particularly by charging prices for termination services above their respective competitive levels. The TRC therefore takes the view that the imposition of appropriate remedies on the designated Licensees will prevent them from engaging in anti-competitive practices such as the charging of high wholesale termination rates. Indeed, it is consistent commercial practice that smaller operators are inclined to charge higher termination charges.

Consequently, the TRC maintains its view that the relevant market for the termination of fixed voice calls on individual fixed networks includes only voice calls to end-users. In addition, the TRC maintains its view that, in the absence of any *ex ante* regulation, the three criteria are cumulatively fulfilled in relation to the markets for wholesale call termination on individual fixed networks. In addition, the TRC maintains its view that Orange Fixed and all alternative FNOs each hold a dominant position in the respective markets for wholesale call termination over their respective networks. Furthermore, the TRC maintains its view about the potential competition problems related to the dominant position of each Licensee on the market for wholesale call termination over its network, in the absence of *ex ante* regulation.

Q7: Do you agree with the TRC's preliminary conclusions about the appropriate remedies that should be imposed on Orange Fixed to address the identified competition problems?

Q8: Do you agree with the TRC's preliminary conclusions about the appropriate remedies that should be imposed on alternative FNOs to address the identified competition problems?

Orange Fixed disagreed in general terms with the TRC's conclusions about the remedies that should be imposed on it in response to the identified competition problems relating to call termination. Orange Fixed disagreed with the imposition of local/single and double call termination, and expressed the view that a study of demand is required prior the imposition of such a remedy in order to ensure the feasibility of the required investment to ensure compliance. Orange Fixed also argued that since Orange Fixed and alternative licensed FNOs each hold a dominant position in the markets for wholesale call termination over their own respective networks, the relevant remedies should be imposed on all market players equally. The same respondent expressed the view that the TRC, in conducting its Mobile Market Review, did not impose the same level of regulation in relation to fixed termination market, despite the fact that the level of dominance in the fixed and mobile termination markets is nearly the same.

Umniah/BTJ agreed in general terms with the TRC's conclusions about the remedies that should be imposed on Orange Fixed and other licensed FNOs. However, Umniah/BTJ argued that there is no need to impose double call termination on Orange Fixed, given the current interconnection structure. In addition, Umniah/BTJ argued that the non-discrimination obligation applying to alternative FNOs should be restricted only on external non-discrimination, given that the current market shares of alternative FNOs suggest that there is no risk of anti-competitive practices by alternative FNOs within the foreseeable future.. As regards the proposed price control obligation, Umniah/BTJ argued that it should only be imposed on Orange Fixed. In relation to the proposed accounting separation obligation on Orange Fixed, Umniah/BTJ proposed the harmonization of the relevant accounting separation obligation with EU practice. Umniah/BTJ argued that the TRC should be more explicit in targeting any discrimination between the internal and external provisioning of call termination services by Orange Fixed, the vertical leveraging between of market power from the wholesale market into all downstream retail markets, and margin squeezes.

In addition, the same respondent argued that the TRC should adopt *ex ante* margin squeeze tests on Orange Fixed services relating to fixed markets. Umniah/BTJ also proposed that the TRC, within the context of this market review, should reconsider the regulatory obligations that currently apply to alternative FNOs. They argued that there are no objective grounds to maintain or to impose an obligation of cost-oriented, co-location and infrastructure sharing, nor the publication obligation regarding Key Performance Indicators on fixed alternative operators. Umniah/BTJ, in its response to Orange Fixed and Zain, disagreed with the imposition of symmetric remedies on Orange Fixed and alternative FNOs. Umniah/BTJ argued that the asymmetric Fixed Termination Rates reflect the need to correct for the extremely different scales of operation of the fixed incumbent compared to fixed alternative operators, and especially the need for the fixed alternative operators to build a critical mass of customers, using a variety of commercial strategies at the retail level, including – crucially – the ability to undercut the incumbent fixed operator's retail tariffs for all call types, taking commercial risks with flat-rate or semi-flat-rate offers, promotions, *etc*. In addition, Umniah/BTJ, in responding to Orange Fixed, argued that the TRC must enforce decisions resulting from a specific market review, without regard to the conclusions or status of another market review.

Zain disagreed with the TRC's conclusions that the remedies should also be imposed on alternative FNOs. In particular, Zain argued that obligations of reporting KPIs, cost accounting and the use of FW-LRIC are disproportionate to FNOs. Zain proposed that the TRC should only impose on alternative FNOs an obligation to charge for wholesale call termination which is no more than the relevant charge of Orange Fixed. In addition, Zain expressed the view that in relation to non-discrimination obligation the TRC should make explicit in the remedies that Orange Fixed must provide the same input internally and externally on the same conditions. Zain**,** in responding to Orange Fixed, expressly disagreed with the view that the level of dominance that exists in mobile and fixed markets is the same. Zain argued that the level of competition in the mobile market is very fierce while in fixed markets, the market analysis indicates a lack of dynamic trend towards competition. Zain also argued that the barriers to entry in the fixed market are higher than those in mobile. In addition, Zain argued that the possibility of leveraging dominance in the mobile market is almost non-existent, while in fixed markets the opportunity for leverage is substantial and is effectively practised by Orange Fixed.

Response of the TRC

The TRC does not share the views of Orange Fixed in relation to the obligation to provide call termination at local, single and double levels. The TRC notes that the options of local, single and double call termination allow the interconnected parties to choose the appropriate option for interconnection in order to avoid the payment of costs for services which are not essential. The alternative interconnection options will permit higher margins to exist between retail and wholesale prices, thereby promoting retail price competition. As regards the feasibility of the required investments, the TRC notes that such investments will be covered by the relevant wholesale interconnection charges, which will in turn be based on the real level of demand for the relevant wholesale services. However, the TRC, taking into account the comments made by all respondents, acknowledges that double call termination is not technically feasible at this point in time, taking into account the current network architecture of Orange Fixed. Nevertheless, Orange Fixed, under the more general obligation to satisfy reasonable requests for termination, shall also provide double call termination in the event that Orange Fixed decides to modify its current network architecture.

The TRC disagreed with Orange Fixed's arguments in relation to the symmetric regulation in the relevant wholesale call termination markets. The TRC reiterates its view, expressed originally in the Consultation Paper, that it would be disproportionate to impose symmetric remedies on all FNOs, mainly due to the different scale of operations between Orange Fixed and alternative fixed network operators in terms of their respective customer bases, network capacity and coverage.

The TRC does not share the views expressed by Orange Fixed in relation to the different levels of regulation between the fixed and mobile sectors. The TRC wishes to clarify that the level of regulation in each market depends exclusively on the findings in the market analysis. As explained in the relevant Consultation Papers, the findings of market analysis in the mobile sector differs from the findings in the narrowband fixed sector given the existence of many different factors such as the level of competition, the existence of entry barriers, and so forth.

The TRC also takes note of the comment made by Umniah/BTJ in relation to the harmonization of the accounting separation obligation that applies to Orange Fixed with EU practice. The TRC, while disagreeing with Umniah/BTJ´s comments in this respect, also notes that the accounting rules and reporting formats for services will be subject to a Public Consultation, as part of the implementation process.

The TRC does not agree with the views expressed by Umniah/BTJ in relation to the suggestion that the TRC should impose *ex ante* margin squeeze review measures on *all* Orange Fixed services. The TRC believes that the full set of proposed *ex ante* obligations on Orange Fixed in the fixed sector, particularly the combination of obligations relating to cost accounting and no unreasonable bundling of services including retail telephony services, is capable of addressing the relevant competition problems arising from such a margin squeeze strategy. In any event, there is nothing to prevent the TRC exercising its *ex post* competition powers to address a margin squeeze situation.

In addition, the TRC disagrees with the arguments expressed by Umniah/BTJ and Zain in relation to the *ex ante* proposed obligations for alternative fixed network operators. The TRC takes the view that the proposed obligations should address the competition problems identified in the relevant product market. In particular, the cost orientation obligation will target the possibility of excessive prices being charged, while the obligation to provide collocation and other ancillary services will allow the interconnected party to use its own means to achieve the interconnection required. Furthermore, the TRC believes that the obligation to publish Key Performance Indicators will prevent alternative operators from being subject to discriminatory behavior.

The TRC takes due note of the arguments made by Umniah/BTJ and Zain in relation to the clarification of the non-discrimination obligation. It believes that the low market shares of alternative operators in terms of subscribers at the retail level do not prevent them from engaging in anti-competitive practices in relation to pricing and non-pricing matters at a wholesale level, such as the differentiation of Quality of Service parameters between the internal and external provisioning of the relevant services. In this respect, the TRC would like to point out that the non-discrimination obligation covers both internal and external provisioning in terms of pricing and non-pricing matters, and the vertical leveraging of market power from the wholesale market into retail markets.

<u>In conclusion, the TRC maintains its views expressed in the Public Consultation in relation to the types of obligations that should be imposed on Orange Fixed and in the various relevant</u>

wholesale call termination markets, notably, that Orange Fixed shall provide wholesale call termination on reasonable request, including double call termination, once its network infrastructure will allow such a service from a technical perspective.

In addition, the TRC maintains its views expressed in the Public Consultation in relation to the remedies that should be imposed on alternative licensed FNOs.

Markets for Wholesale Fixed Voice Call Origination with the *ex ante* regulation of Wholesale Fixed Call Termination Markets in place

Q9: Do you agree with the TRC's preliminary conclusion regarding the scope of the relevant product and geographic market definitions for wholesale fixed call origination?

Q10: Do you agree with the TRC's preliminary conclusion that, in the absence of any* ex ante *regulation, the three criteria are cumulatively fulfilled in relation to the market for wholesale fixed call origination, and that this market is therefore susceptible to* ex ante *regulation?

Q11: Do you agree with the TRC's preliminary conclusion that Orange Fixed has a dominant position in the market for wholesale fixed call origination?

Q12: Do you agree with the TRC's preliminary conclusions about the potential competition problems relating to the dominant position of Orange Fixed in the market for wholesale fixed call origination?

Orange Fixed disagreed with the TRC's conclusions with respect to origination markets. It disagreed with the methodology used for market definition purposes and argued that the TRC had concluded its market definitions without proper justification. In relation to the fulfillment of the three criteria test, Orange Fixed argued that the TRC had failed to analyze the competitive effects generated by mobile voice services. It also disagreed with the TRC's conclusions in relation to Orange Fixed's dominant position, and the potential competition problems related to that dominant position. In addition, Orange Fixed argued that the TRC did not take into effect the impact of the imposition of *ex ante* regulation in the wholesale termination market.

Umniah/BTJ fully agreed with the TRC's conclusions regarding market definitions, the cumulative fulfilment of the three criteria test for the wholesale fixed call origination market and the conclusion that Orange Fixed held a dominant position in relation to that relevant market.

Response of the TRC

The TRC does not agree with the arguments raised by Orange Fixed. The determination of the relevant product market by the TRC involved the examination of the substitutability of the relevant products/services in accordance with accepted principles of market definition and in accordance with international best practice. To this end, the TRC examined whether: all kinds of calls comprising the wholesale call origination function to end-users and to service providers offered fall within the same relevant product market; a relevant product market for wholesale call origination exists across all fixed networks or across each individual network; and whether the self-supply of call origination falls within the relevant product market for wholesale call origination. In addition, the TRC examined whether associated facilities and services fall within the relevant product market for wholesale call origination, and it also considered the geographic scope of the relevant market.

With respect to the fulfillment of the three criteria test, the TRC disagrees with Orange Fixed's arguments. The TRC would like to point out that even though there exists a certain degree of one-way substitution between mobile and fixed voice services, wholesale mobile call origination and fixed call origination services do not fall within the same relevant product market. The barriers to entry are high for any operator, even for an existing mobile network operator, considering the need to construct a new local access network capable of supporting the provision of wholesale fixed call origination services.

The TRC disagrees with Orange Fixed's arguments in relation to the existence of a dominant position by Orange Fixed. In the assessment of dominance in the wholesale fixed call origination market, the TRC examined market shares/size, barriers to entry, the existence of countervailing buyer power and potential competition in the market, as effected by issues such as the existence of essential facilities, economies of scope/scale, vertical integration, network effects, technological advantages, access to capital markets, the available distribution network, and bundling practices.

As regards the implications flowing from the *ex ante* regulation of wholesale termination markets, the TRC believes that there is no implication on the wholesale origination market. Each service is used by operators for different purposes: the origination service is used in order to enable an alternative operator to offer telephony services to end-users, whereas termination is used by an operator so as to ensure that its subscribers have the capability of making calls to end-users of interconnected operators. Due to the different structural characteristics of termination and origination services respectively, the TRC believes that the imposition of *ex ante* obligations on the wholesale call termination market has no necessary implication on the wholesale origination market.

<u>To conclude, the TRC maintains its views in relation to the market definition and the fulfilment of the three criteria test in relation to wholesale fixed call origination. In addition, it maintains its views with regard to the competition problems likely to arise and the position of market dominance enjoyed by Orange Fixed.</u>

Q13: Do you agree with the TRC's preliminary conclusions about the appropriate remedies that should be imposed on Orange Fixed to address the identified competition problems in the market for wholesale fixed call origination?

Orange Fixed disagreed with the TRC's conclusions in relation to the remedies proposed. It argued that the TRC had not analysed the implications of the proposed remedies by reference to the current market realities and had not justified any market failures on the relevant market. In addition, Orange Fixed argued that the remedies proposed to be imposed are inconsistent with the remedies imposed on the mobile call origination market. The same respondent argued that CS/CPS should only be available in relation to international calls, unless market demand justifies its wider introduction. As regards the imposition of a local/single and double origination obligation, the same respondent argued that, as its network has been designed on the basis of market demand at a single level, the provision of the local and double level requires investment by Orange Fixed, and the TRC should ensure that there will be a demand for single and double origination. Orange Fixed argued that the current remedies imposed by the TRC are sufficient at the current time.

Umniah/BTJ agreed in general terms with the TRC's conclusions about the appropriateness of remedies that should be imposed on Orange Fixed. Umniah/BTJ agreed with the provision of CS/CPS and NTTO, but did not see any need to impose the obligation on Orange Fixed to provide double origination services given the current interconnection architecture of alternative operators. In addition, Umniah/BTJ proposed that additional obligations be imposed on Orange Fixed to provide Flat Rate Internet Access Call Origination and/or capacity-based interconnection. The same respondent argued that the price control obligation proposed by the TRC should be based on FW-LRIC, and should be accompanied by an *ex ante* price squeeze test. In addition, Umniah/BTJ proposed to impose a WLR (Wholesale Line Rental) obligation on Orange Fixed. Umniah/BTJ argued that WLR will enable competition not only for calls but also for bundles of access and calls. The same respondent also expressed the view that the TRC should impose an obligation on Orange Fixed to provide full visibility in relation to its existing network architecture and on the planned evolution of its network to prevent erroneous investment signals being given to alternative operators that require access and interconnection. Umniah/BTJ, in responding to Orange Fixed, challenged the view that CS/CPS should only be imposed in relation to international calls, by referring to the other contradictory statements of Orange Fixed that the international market is that which is most exposed to competition.

Zain voiced concerns in relation to the proper application of the non-discrimination obligation. In particular, Zain proposed that the TRC should make it explicit in the remedies that Orange Fixed must provide the same inputs internally and externally on the same conditions in order to avoid Orange Fixed circumventing the non-discrimination obligation. In addition, **Zain,** in responding to **Umniah/BTJ,** agreed that WLR should be imposed on Orange Fixed especially in the light of long implementation periods set outs by the TRC with regard to fixed broadband remedies. However, it disagreed with the Umniah/BTJ position, that WLR should apply in tandem with the CPS remedy. In addition, Zain agreed with Umniah/BTJ in relation to the proposed full visibility of Orange Fixed's existing network architecture.

Response of the TRC

The TRC does not agree with the arguments of Orange Fixed. The TRC notes that in Section 4.3 - Chapter V of the Consultation Paper, each proposed remedy addresses potential competition problems identified in the wholesale fixed call origination market. As regards the imposition of call origination at local, single and double levels, the TRC took into account the comments made by all respondents, as well as the rationale referred to in Question 8 above, in acknowledging that double call origination is not applicable to the current network architecture of Orange Fixed. The TRC notes, however, that the obligation to provide double call termination is subject to it being a reasonable request. This means that Orange Fixed should provide such forms of origination only once they have become technically feasible on its network. As regards the feasibility of the required investments, the TRC notes that the required investments will be covered by the relevant wholesale interconnection charges, which will be based on real demand for wholesale call origination services.

TRC does not agree with the view of Orange Fixed that it had not justified the remedies by reference to any market failures on the relevant market. As laid out in the Consultation document, the market for retail access and telephone services – in the absence of *ex ante* regulation – is characterised by market failures and does not satisfy the three criteria test. Regulating wholesale fixed call termination alone, as proposed above, improves the situation but does not fully remedy the problems identified. It is the *additional* regulation of wholesale call origination combined with CS/CPS which improves the competition to an extent that allows considering the market for international telephone calls (at the retail level) to be no longer susceptible to *ex ante* regulation. The TRC reiterates that the latter finding is based on the *prior* introduction of wholesale call origination and CS/CPS. In contrast, the markets for fixed telephony access and domestic calls also require regulation at the retail level, as wholesale call origination and CS/CPS alone do not render the retail markets effectively competitive.

In the view of the TRC, the billing options for CS/CPS calls that should be available to other operators should be limited to independent billing. The TRC approach in this respect is the same as the one taken in the Mobile Markets review, where the TRC adopted an independent billing approach initially, with the possibility of also implementing a consolidated billing approach in the future. Thus Orange Fixed shall provide wholesale call origination to CS/CPS operators with independent billing, within a maximum period of three months from the publication of this Regulatory Decision. The TRC defers the implementation of wholesale call origination to CS/CPS operators with consolidated billing. In this respect, due consideration will be taken of the developments of competition in the fixed sector relative to the costs of implementing consolidated billing.

The TRC disagrees with the view expressed by Umniah/BTJ in relation to FRIACO obligation. In principle, Orange Fixed has to provide on reasonable request wholesale call origination for calls to service providers, including dial-up calls to Internet service providers. The TRC believes that FRIACO implementation requires, among others, significant investments in the local access network infrastructure of Orange Fixed, which should in principle be fully recovered by the relevant wholesale charges. The high expected wholesale charges for FRIACO, in combination with the TRC's expectations that within the next few years the broadband connections in Jordan will increase dramatically, would result in low demand both at the retail and wholesale levels for flat rate dial-up calls to the Internet. It should be noted that international best practices demonstrate that FRIACO was used before the increase in broadband fixed connections. Nevertheless, the TRC believes that the effective implementation of the prescribed wholesale obligations in broadband markets will allow alternative operators to offer competitive broadband Internet access services with a higher quality of service than wholesale FRIACO services.

The TRC does not share the views expressed by Umniah/BTJ in relation to the imposition of an *ex ante* price squeeze test and the WLR obligation. The TRC believes that the set of remedies proposed by it represents the necessary minimum set of remedies required to address the competition problems identified in the relevant product markets. As regards the proposed *ex ante* price squeeze test, the TRC notes that the obligation on Orange Fixed to not unreasonably bundle offers for retail fixed telephony access and domestic telephony services will result in the dominant operator not being able to bundle offers that lead to a margin squeeze which result in predatory pricing.

Moreover, it must be noted that this type of regulatory obligation merely complements the powers already available to the TRC to investigate tariff bundles involving a retail broadband Internet access product, as has been provided for in Article 2.3 of the TRC's Regulatory Decision on the Fixed Broadband Markets Review on 14 July 2010. In this regard, this provision and Article 4.1 of the TRC Decision on the Fixed Narrowband Markets Review should be seen as being identical in their legal scope, with the different language being used in relation to each of these respective provisions merely so as to justify the focus of the particular remedy in light of the identified competition problems and the functional levels of the market being addressed by each of the respective remedies.

As regards the proposal by Umniah/BTJ for WLR to be imposed on Orange Fixed, the TRC believes this is covered by the obligation it has already imposed on Orange Fixed. In particular, the TRC believes that the effective implementation of remedies imposed on Orange Fixed in relation to wholesale broadband markets, and especially the obligation to provide Local Loop Unbundling, will allow alternative operators to provide competitive bundled offers (access telephony, calls, and broadband Internet access).

The TRC takes note of the comments made by Umniah/BTJ in relation to the need for information provision with respect to changes in network architecture. The TRC reminds the industry that, as already contained in the proposed minimum set of conditions in a Reference Interconnection Offer, Orange Fixed will also be obliged to provide all relevant information to interconnecting parties, which they require to achieve access to interconnection services. This includes future relevant networking planning. In addition, the TRC would like to point out that the provision of that information could be subject to the signature of a confidentiality agreement between Orange Fixed and the interconnected parties in question.

The TRC takes note of the comments made by Zain in relation to the non-discrimination obligation. The TRC notes that the comments made by Zain will be taken into account during the practical application of the non-discrimination obligation.

As regards the imposition of NTTO obligation to all market players, the TRC notes that this obligation is designed to apply symmetrically with a view to ensuring end-to-end connectivity for all market players. As such, its application remains unaffected by the present market review.[1]

<u>In conclusion, the TRC maintains its view regarding the appropriate remedies proposed in the Consultation Paper that should be imposed on Orange Fixed to address the identified competition problems in the wholesale market for call origination. In this respect, given that</u>

[1] Such an approach is consistent with international best practice and the approach adopted by the TRC in relation to the equivalent obligation on Mobile Network Operators under the TRC's review of mobile markets (see TRC's Regulatory Decision on Mobile Markets Review).

<u>the satisfaction of the origination access request is expressed to be in response to a "reasonable request", the TRC includes wholesale double call origination within that request, but only insofar as it is technologically viable at the time of the access request.</u>

Markets for Wholesale Transit with ex ante regulation of Wholesale Fixed Call Termination and Wholesale Call Origination markets in place

Q14: Do you agree with the TRC's preliminary conclusion regarding the relevant product and geographic market definitions for wholesale transit?

Q15: Do you agree with the TRC's preliminary conclusion that, in the absence of any* ex ante *regulation, the three criteria are cumulatively fulfilled in relation to the market for wholesale transit and that this market is therefore susceptible to* ex ante *regulation?

Q16: Do you agree with the TRC's preliminary conclusion that Orange Fixed has a dominant position in the market for wholesale transit?

Orange Fixed argued that the TRC imposed excessive regulation on Orange Fixed, without any proof of market failure and without any projection of a forward-looking approach that reflects the future development of this market.

Umniah/BTJ agreed with the TRC's conclusions regarding the market definition for wholesale transit. However, Umniah/BTJ expressed concerns regarding the existing obligation on all Licensees controlling an international gateway to provide to other Licensees transport capacity and the allocation of space at international gateway facilities. Umniah/BTJ argued that this obligation should be imposed only on dominant operators. In addition, Umniah/BTJ agreed with the TRC's conclusions that, in the absence of any *ex ante* regulation, the three criteria are cumulatively fulfilled and that Orange Fixed has a dominant position in the relevant market.

Response of the TRC

The TRC does not share the views of Orange Fixed expressed above. In its analysis, the TRC examined the presence of high and persistent barriers to entry, the lack of a dynamic trend toward competition and the insufficiency of *ex post* intervention. The TRC concluded that the three criteria are cumulatively fulfilled for the market of wholesale transit. In addition, the TRC assessed dominance by considering a number of factors such as: the market shares/size, the existence of barriers to entry and potential competition in the market, and the existence of countervailing buyer power.

As regards the Umniah/BTJ arguments relating to the removal of the symmetric obligation on all Licensees controlling an international gateway to provide transport capacity and allocation space, the TRC takes note of this argument. Taking into account the limited implemented infrastructure relevant to the provision of international gateway facilities, the TRC has decided to maintain the current symmetrically imposed obligation regarding transport capacity.

<u>In conclusion, the TRC maintains its views in relation to the issue of market definition and to the issue of the cumulative fulfilment of the three criteria in the wholesale transit market. In addition, the TRC maintains its view regarding the dominant position of Orange Fixed in the relevant wholesale transit market.</u>

Q17: Do you agree with the TRC's preliminary conclusions about the potential competition problems related to the dominant position of Orange Fixed in the market for wholesale transit?

Q18: Do you agree with the TRC's preliminary conclusions about the appropriate remedies that should be imposed on Orange Fixed to address the identified competition problems?

Orange Fixed disagreed with the TRC's conclusions regarding the identified competition problems. It disagreed with the proposed obligation on it to provide both a *single* and a double transit service. Orange Fixed argued that the provision of single and double transit requires the redesigning of its network. As regards the obligation to implement a WCRM system, Orange Fixed argued that the implementation of such a system requires significant investment and should be studied carefully due to market conditions that are adversely impacting upon the profitability of the relevant market each year. In addition, the same respondent argued that the proposed price control obligation should be subject to a separate public consultation procedure to identify the actual requirements needed for the proper implementation of such an obligation.

Umniah/BTJ agreed in general with the TRC's conclusions about the appropriate remedies that should be imposed on Orange Fixed. However, Umniah/BTJ voiced concerns regarding the proposed obligation of double transit. In particular, Umniah/BTJ took the view that it is not necessary to impose the provision of double transit on Orange Fixed. Further, Umniah/BTJ argued that the obligation of amending RIO should be strengthened, thereby allowing the TRC to mandate unilaterally (after consultation) deletions and additions to the RIO and its associated contractual and technical documentation. In addition, the same respondent argued that the price control should be based on FW-LRIC basis.

Response of the TRC

With regard to the arguments of Orange Fixed in relation to single and double call transit, the TRC acknowledges that double call transit is currently not applicable for the current network architecture of Orange Fixed. The TRC, however, stresses that Orange Fixed has a general obligation to provide transit on reasonable request between two networks at the points of interconnection. This will involve providing the appropriate type of transit, including the provision of double transit if Orange Fixed, in the future, changes the architecture of its network.

In relation to the required investments for the implementation of WCRM, the TRC notes that the required investments will be covered by the relevant wholesale interconnection charges, which will be based on the level of real demand for the relevant wholesale services. The TRC also notes that the benefits of a WCRM in terms of efficiency of ordering and provisioning procedures, transparency and non-discrimination, and ultimately in terms of fostering competition, clearly outweigh its costs.

With regard to the arguments expressed by Orange Fixed in relation to the public consultation on the price control obligation, the full specifications of the obligation to use cost-based prices have already been developed recently in the LRIC model for fixed operators' interconnection services. The need for the remedy has been established as part of the market review exercise. Therefore, a further public Consultation is not required.

In relation to the views expressed by Umniah/BTJ regarding the procedures for the amendments to the RIO, the TRC reiterates its view that changes to the RIO will be the subject of a Public Consultation, and ultimately amendments to the RIO will also need to be approved by the TRC.

<u>In conclusion, the TRC maintains its view regarding the provision of wholesale transit on Orange Fixed proposed in the Consultation Paper to address the identified competition problems in the wholesale transit market.</u>

Markets for Retail Telephony Services with ex-ante regulation of Wholesale Interconnection Services in place

Q19: Do you agree with the TRC's preliminary conclusions regarding the relevant product and geographic market definitions for retail fixed telephony access services?

Q20 Do you agree with the TRC's preliminary conclusions regarding the relevant product and geographic market definitions for retail fixed domestic telephony calls services?

Q21: Do you agree with the TRC's preliminary conclusions regarding the relevant product and geographic market definitions for retail fixed international telephony calls services?

Orange Fixed agreed with the TRC's conclusion that access and telephony services fall within different relevant product markets and that domestic calls and international calls do not fall within the same relevant product market. On the other hand, **Orange Fixed** disagreed with the TRC's conclusions in relation to market definition for retail fixed telephony calls services. Orange Fixed argued that the TRC did not adopt the proper market definition approach, which is used in the UK and a number of the EU Member States, that defines separate markets for access, local calls, long distance, fixed to mobile, international, calls to service providers, and for both residential and business (non-residential) users.. The same respondent argued that the TRC adopted a generic approach that included all sub-markets in one main market and did not include any assessment or provide any numbers for different market shares owned by operators in these markets. Finally, Orange Fixed agreed that pre-paid and post-paid calls form part of the same relevant product market.

Umniah/BTJ broadly agreed with the TRC's conclusions in relation to the retail market definition. However, Umniah/BTJ voiced some concerns regarding the characterization of markets such as "telephony" if that meant that non-voice narrowband services would fall outside the relevant product market and hence escape regulation.

Response of the TRC

The TRC does not agree with the views expressed by Orange Fixed in relation to market definition for retail fixed telephony call services. As regards the different types of telephony access, the TRC examined the substitutability of different types of telephony access and concluded that access to managed VoIP services and PSTN/ISDN telephony services are part of the same relevant product market. In relation to fixed telephony calls, the TRC examined the substitutability between the different types of telephony calls (both in terms of demand and supply), as well as the competition dynamics available for the provision of the different types of telephony calls. The data available to the TRC shows no differences in competitive constraints between the different types of telephony calls proposed by the TRC to be included in the same relevant retail telephony market. Moreover, the market shares of Orange Fixed in each sub-category of type of calls included in the relevant product market varies from 94,7% to 99,9% for the year 2009, while the market share of Orange Fixed for all types of calls is well in excess of 99% for the year 2009.

Although the TRC believes that its conclusions in relation to the market definition should be mainly based on the national circumstances of Jordan, international benchmarking also supports such a view. For example, the EU trends in relation to market definition also demonstrate that, in many EU countries (Austria, Cyprus, Denmark, Greece, *etc.*) all types of calls originated by fixed locations can legitimately form part of the same relevant product market.

In relation to the arguments expressed by Umniah/BTJ regarding the characterization of markets as "telephony markets", the TRC is not aware of any narrowband service which is a non-telephony service.

<u>In conclusion, the TRC maintains its view in relation to the market definition originally proposed for retail fixed telephony access and calls markets in the absence of *ex ante* regulation.</u>

Q22: Do you agree with the TRC's preliminary conclusion that, with* ex ante *wholesale interconnection regulation in place, the three criteria are cumulatively fulfilled in relation to the market for retail fixed telephony access, and that this market is therefore susceptible to* ex ante *regulation?

Q23: Do you agree with the TRC's preliminary conclusion that, with* ex ante *wholesale interconnection regulation in place, the three criteria are cumulatively fulfilled in relation to the market for retail fixed domestic telephony calls, and that this market is therefore susceptible to* ex ante *regulation?

Q24: Do you agree with the TRC's preliminary conclusion that, with* ex ante *wholesale interconnection regulation in place, the three criteria are not cumulatively fulfilled in relation to the market for retail fixed international telephony calls, and that this market is therefore not susceptible to* ex ante *regulation?

Orange Fixed disagreed with the TRC's conclusion that the three criteria are cumulatively fulfilled both for markets for retail telephony access and for retail fixed domestic telephony calls. Orange Fixed believed that the TRC based its conclusions on pure market expectations that were not supported by any market share analysis of all market players, and which did not apply the forward-looking approach in projecting the future for market developments. Orange Fixed also argued that the TRC did not provide an analysis of Calling Card operations. In addition, the same respondent argued that the TRC did not provide any economic or legal justification throughout the Consultation Paper, which supports the conclusion reached that *ex post* intervention alone is insufficient to address the competition concerns.

Umniah/BTJ agreed with the TRC's conclusions that the three criteria are cumulatively fulfilled both for the relevant markets of retail telephony access and for retail fixed domestic telephony calls.

Zain responded to Orange Fixed by arguing that it is not acceptable to tolerate *ex post* regulations in favour of *ex ante* ones. In doing so, Zain argued that *ex post* intervention (such as dispute resolutions) is costly and time-consuming.

Response of the TRC

The TRC does not agree with the arguments raised by Orange Fixed in relation to the examination of the fulfillment of the three criteria. The TRC notes that its conclusions in relation to the fulfillment of the three criteria are based on the circumstances presented by national relevant markets. In particular, the TRC has taken into account, among others, the nation-wide telephony network of Orange Fixed, the absence of alternative nation-wide telephony network infrastructure in Jordan, the Jordanian regulatory framework in relation to retail and wholesale fixed narrowband markets and the time-frame required for the effective implementation of the proposed wholesale remedies for wholesale interconnection markets. In addition, the TRC has particularly taken into account the extremely high market shares (above 94% in each sub-category and above 99% in total) of Orange Fixed in the relevant markets (as well as the extremely high market shares of Orange Fixed in all type of calls / services) in concluding that, within the lifetime of this market review, it is unlikely that the competitors of Orange Fixed will increase their market shares to such levels as to generate effective competition in an unregulated market.

As regards the provision of telephony services through Calling Cards services, the TRC examined whether the provision of fixed telephony calls made by pre-paid customers and fixed calls made by post-paid customers should be included in the same relevant product market, and concluded that with *ex ante* wholesale interconnection in place both fixed calls made by pre-paid customers and calls made by post-paid customers should constitute parts of the same relevant product market. As such, the market shares stated in the Consultation Paper and its response to Questions 23 and 24 above, the TRC notes that the market shares of Calling Cards operators are included in the analysis.

<u>In conclusion, the TRC maintains its view that, with *ex ante* wholesale regulation in place, both the retail fixed telephony access market and the retail fixed domestic telephony calls market respectively fulfil the three criteria test. In turn, the market for retail fixed international calls does not satisfy the three criteria.</u>

Q25: Do you agree with the TRC's preliminary conclusion that Orange Fixed has a dominant position in the fixed telephony access market?

Q26: Do you agree with the TRC's preliminary conclusion that Orange Fixed has a dominant position in the fixed domestic telephony (calls) market?

Orange Fixed did not agree with the TRC in relation to its views regarding the existence of a dominant position for Orange Fixed in the provision of fixed telephony access and fixed domestic telephony calls. Orange Fixed agreed with the TRC's conclusions in relation to fixed international telephony calls and believed that competition for such services already exists.

Umniah/BTJ agreed with the TRC in relation to the finding of a dominant position for Orange Fixed on the fixed telephony access and fixed domestic telephony calls markets. On the other hand, Umniah/BTJ voiced concerns in relation to fulfilment of the three criteria for retail fixed international calls. Umniah/BTJ argued that Orange Fixed is in a position to affect or frustrate existing competition by, for example, raising the interconnection rates for calling cards services and by bundling narrowband and/or broadband services with international calls. The same respondent proposed that Orange Fixed has a dominant position in the relevant market and that the TRC should impose appropriate remedies on Orange Fixed in order to prevent it from unreasonably bundling international calls with other offerings in a manner that leverages its market position on access and other calls onto the international calls market.

Response of the TRC

The TRC does not share the views expressed by Umniah/BTJ. The TRC notes that, based on the existing regulatory framework, the interconnection rates charged by Orange Fixed should be cost-based and subject to the approval of the TRC. Based on the TRC's conclusions in relation to the *ex ante* regulation of wholesale interconnection markets, those obligations will continue to be imposed at the wholesale level, thereby sustaining the current competitive dynamic in the retail fixed market for international calls. In relation to bundled offers, the TRC notes that in the relevant retail telephony markets, Orange Fixed is obliged to not unreasonably bundle offers involving retail fixed telephony access and/or domestic telephony calls. These obligations will prevent Orange Fixed from unreasonably bundling fixed telephony access and/or domestic telephony calls with other services, including international calls, in such a manner that leverages its market position from access and domestic calls.

In conclusion, the TRC maintains its view in relation to the dominant position of Orange Fixed in the respective fixed telephony access and fixed domestic telephony calls markets. In addition, the TRC maintains its view that, with *ex ante* wholesale interconnection regulation in place, the three criteria are not cumulatively fulfilled in relation to the market for retail fixed international telephony calls.

Q27: Do you agree with the TRC's preliminary conclusion about the potential competition problems related to the dominant position of Orange Fixed in the retail fixed telephony access market and in the retail fixed domestic telephony calls market?

Q28: Do you agree with the TRC's preliminary conclusions about the appropriate remedies to be imposed on Orange Fixed to address the competition problems identified in the market of retail fixed telephony access?

Q29: Do you agree with the TRC's preliminary conclusions about the appropriate remedies to be imposed on Orange Fixed to address the competition problems identified in the market of retail fixed domestic telephony calls?

Orange Fixed disagreed with the TRC's conclusion about the appropriate remedies to be imposed on Orange Fixed, arguing that the TRC had not justified the imposition of the proposed remedies stated in the Consultation Paper. In addition, Orange Fixed argued that it has been the international trend to start the process by imposing remedies at the wholesale level and to test their efficiency for a significant period of time. Finally, Orange Fixed believed that the approach followed by the TRC contradicts the EU approach.

Orange Fixed noted that retail markets for local and / or national calls have been excluded from the list of the markets susceptible to *ex ante* regulation when the European Commission (EC) replaced the first version of its Recommendation on relevant markets susceptible to *ex ante* regulation in 2007, after four years of experience, with the revised Recommendation not including retail markets for local and/or national calls any longer. The same respondent argued that the implementation of *ex ante* remedies both at the wholesale and the retail levels at the same time is unreasonable and unfair. In addition, Orange Fixed argued that the TRC had not adopted the same approach in its Mobile Market Review, where the TRC stated that the proposed *ex ante* remedies should be tested and exhausted at the wholesale level before imposing *ex ante* remedies at the retail level.

Orange Fixed argued that the TRC had not justified why there is a need for additional regulatory intervention. It also argued that the TRC should not consider Orange Fixed and its retail arm as one economic entity when reviewing the market, since there is a clear legal and regulatory separation between Orange Fixed and its subsidiaries. In addition, Orange Fixed disagreed with the proposed review mechanism for bundled offers under the non-discrimination obligation, and proposed a separate public consultation for all proposed remedies. Finally, Orange Fixed argued that, with the proposed regulation, Orange Fixed will not be able to compete or to provide innovative services and this will affect its current and future investments in the market.

Umniah/BTJ agreed with the TRC's conclusions about the potential competition problems related to the dominant position of Orange Fixed in the relevant retail fixed telephony access and calls markets. However, Umniah/BTJ voiced concerns about the appropriate remedies to be imposed on Orange Fixed. In particular, Umniah/BTJ argued that the remedies proposed by the TRC remedies are too focused on the retail level, and that wholesale level remedies should also be imposed, particularly Wholesale Line Rental and Flat-Rate Call Origination and/or capacity-based interconnection. In addition, Umniah/BTJ argued that the restrictions on anti-competitive bundling should explicitly cover items such as bundled international calls, bundled terminal equipment, and bundles with other services, such as broadband and television. The same respondent proposed that the power for the TRC to monitor a bundle that has already been put on the market, should not be restricted to one month from the date of the service launch. Umniah/BTJ argued that the period of one month is far too short to prevent potentially devastating effects, and that the redress of anti-competitive offers/bundles should not be restricted in time at all.

In relation to the price control obligation, Umniah/BTJ argued that the focus of the TRC should be to prevent Orange Fixed from anti-competitive pricing, and therefore they did not agree with the proposed price cap obligations. Umniah/BTJ therefore proposed that WLR and FRIACO be imposed at the wholesale level. Umniah/BTJ, in its response to Orange Fixed in relation to retail regulation, expressed the view that the EU regulatory authorities, such as those in the UK and France, have implemented and enforced over many years a combination of CS/CPS for all calls, local loop unbundling, wholesale broadband access, and Wholesale Line Rental. In addition, Umniah/BTJ argued that the retail level deregulation in the UK and France (with all wholesale remedies remaining in place) occured only after 10 years of effective regulation in combination with a reduction of the incumbent's market shares in the relevant retail markets.

Zain argued that the TRC should impose a number portability obligation in order to facilitate the more effective entry of alternative operators based on Wimax and other technologies. In addition, the same respondent, in response to Umniah/BTJ's comments on unbundling, agreed that the proposed one month period after the service launch is insufficient to prevent harm to competition. Zain proposed that the relevant assessment should not be limited in time. In addition, Zain responded to Orange Fixed by disagreeing with the view that the TRC had introduced an excessive level of regulatory intervention in narrowband markets. Zain argued that the state of competition in narrowband markets indicates a clear market failure. Zain also argued that the existing regulations have been imposed for quite enough time to allow the TRC to realize that they are insufficient to address the competition problems which exist in narrowband markets. The same respondent agreed with the TRC that wholesale regulation alone does not rectify the competition problems that exist at the retail level.

Response of the TRC

The TRC believes that, while the market analysis should be based on national circumstances, the international trend in the fixed narrowband markets (ex-monopolised markets by fixed incumbent operators) indicates that, at the first stage of market regulation, the regulatory authorities impose a combination of wholesale and retail *ex ante* remedies in the relevant fixed narrowband markets. If, indeed, there is an increase in the competitiveness of retail telephony markets, measured by several factors such as number of market players, market shares, the presence of alternative network infrastructure, and the existence and effective implementation of *ex ante* obligations in relevant markets such as broadband markets, the regulatory authorities such as the TRC would be entitled to deregulate the retail segment. As regards the EU approach in relation to retail market exclusion from the EU Relevant Markets Recommendation, the TRC would like to point out that for many years the EU regulatory authorities enforced a combination of retail and wholesale *ex ante* regulation. The TRC agrees with Orange Fixed that the implementation of relevant wholesale remedies such as CS and CPS should reduce the entry barriers in the relevant retail market, but the TRC also believes that, mainly due to the very high market shares of Orange Fixed in the relevant retail markets, as well as the time required for the effective implementation of the wholesale remedies, such as CS and CPS for all types of calls, *ex ante* retail obligations are also required in order to address the identified competition problems at the retail level.

In relation to the comments made by Orange Fixed regarding a different approach allegedly taken by the TRC in its market analysis of relevant mobile markets, the TRC wishes to point out that, as stated also in the TRC's responses to Questions 7 and 8 above, the level of regulation in each market depends on the relevant market analysis findings. In turn, the findings on market analysis indicate that the two markets differ with respect to many factors such as the competitive dynamics and entry barriers.

With regard to the arguments expressed by Orange Fixed that the TRC did not justify the imposition of the proposed remedies, the TRC believes that the remedies imposed in the relevant wholesale and retail markets represent the necessary minimum set required to address the competition problems identified in those relevant markets. In addition, as stated in the Consultation Paper, each proposed remedy was designed to address a specific competition problem.

The TRC disagrees with the arguments expressed by Orange Fixed in relation to the holding of separate public consultations for the proposed remedies. The TRC believes that the market players throughout the current market analysis consultation have had the ability and the opportunity to comment, among others, on the proposed obligations proposed by the TRC. A new round of consultation would only be required for those remedies in relation to which further specifics are required, and *not* for examination of the need or/and the appropriateness of obligations imposed through the market analysis consultation procedure.

In relation to the comments made by Orange Fixed regarding the treatment of Orange Fixed as one economic and legal entity, the TRC would like to point out that substance should prevail over form, especially when one is engaged in a market review process. Accordingly, the TRC has adopted the universally acknowledged concept of the "Single Economic Entity" in order to determine the identity of parties that will be subject to the regulatory obligations in question. That doctrine is relied upon both in the European Union and in the United States, and is used across both the *ex ante* and the *ex post* legal disciplines. The utilization of that concept is necessary because, without recourse to it, nearly all manner of regulation could be circumvented by otherwise regulated operators by them simply forming other corporate entities with whom they can deal so as to avoid the reach of obligations such as those relating to non-discrimination. There are no legal or public policy grounds why the application of the doctrine should not extend to Jordan. The doctrine even has its counterpart in traditional corporate and tax law regimes around the world, under the "piercing the corporate veil" doctrine. Accordingly, through the use of the “Single Economic Entity” doctrine, it is clear that regulatory obligations imposed upon a particular entity would apply with *equal force* to its affiliated entities, regardless of which functional level of the market on which they operate, (*i.e.*, wholesale or retail). The application of the Single Economic Entity concept has already been adopted by the TRC in its Decision relating to Broadband Markets (Decision of 14 July 2010).

With regards to the comments made by Orange Fixed and Umniah/BTJ in relation to price cap obligation, the TRC notes that, as stated in the Consultation Paper, the lack of competitive conditions (quasi-monopoly market shares of Orange Fixed) in the retail narrowband telephony access and domestic calls markets require the imposition of a set of retail remedies on Orange Fixed which includes the obligation of a price cap. As stated in the Consultation Paper, Orange Fixed might offer retail fixed telephony access and fixed telephony calls services at excessive prices, thus exploiting the overall lack of alternative offerings available to customers, the TRC therefore confirms its proposal to impose a price cap obligation, consistent with the terms of the price cap mechanism currently in place. In determining the range of services to be included in any given price cap, and the period over which the price cap is to be imposed, the TRC reserves the right to adopt a flexible approach in its specification of such price caps, including the customer segments to which they should apply. Any such segmentation of the price cap remedy shall be governed by the principle of proportionality. For the avoidance of doubt, the present price ceiling on dial-up connections to Internet Service Providers is maintained.

In relation to comments expressed by Orange Fixed regarding service innovation and future investments, the TRC believes that the proposed set of *ex ante* remedies will increase competition between operators, which in turn will give incentives to operators, including Orange Fixed, to invest and to offer new innovative services.

In relation to the comments made by Umniah/BTJ regarding the imposition of WLR and FRIACO, the TRC does not agree and believes that the proposed remedies are appropriate to address the identified competition problems (see also TRC’s response to Question 13). As regards the concerns raised by Umniah/BTJ in relation to the expansion of the one month monitoring period for bundled offers, the TRC would like to clarify that the proposed period of review does not restrict the *ex post* powers of the TRC to examine the effects of bundled offers at any relevant time.

With regard to the comments made by Zain in relation to imposition of number portability, the TRC would like to point out that this is a symmetric obligation that should be imposed equally on all operators and not only on the dominant operator. Nevertheless, the TRC takes note of the suggestion by Zain in this regard and will examine in the near future the imposition of number portability in all market sectors in Jordan.

<u>In conclusion, the TRC maintains its view in relation to the potential competition problems related to the dominant position of Orange Fixed. In addition, the TRC maintains its view in</u>

relation to the remedies that should be imposed on Orange Fixed in the markets for retail fixed telephony access and retail fixed domestic telephony calls.

General Comments

Zain voiced concerns in relation to Orange's ability to leverage its dominance in one market into closely related markets. It states that the TRC should consider whether links between horizontal markets provide an advantage to Orange which can affect competition adversely in those markets.

Response of the TRC

The TRC notes that the Orange group is *ex ante* regulated in many material respects by the TRC. In particular, Orange Fixed (and by necessary implication, any affiliates through which it operates consistent with the application of the Single Economic Entity concept)) has been designated as a dominant operator in the Fixed Broadband, Dedicated Capacity and Fixed Narrowband markets, while Orange Mobile has been designated as a dominant operator in the wholesale Mobile Termination market over its own network. This level of *ex ante* regulation in relation to different relevant markets lessens the threat posed by the potential anti-competitive practices related to leveraged dominance by the various members of the Orange group.

Moreover, the availability of *ex post* competition rules could be utilised by the TRC to address the various types of anti-competitive practices likely to arise from the potential cross-platform bundling identified by Zain. Accordingly, the concerns expressed with respect to leveraged dominance should be capable of being addressed by a combination of the proposed *ex ante* measures and the case-by-case application of *ex post* competition rules.