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Comments on NCC's Dominance Consultation

Ericsson would like to bring to the attention of the Nigerian Communications Commission (NCC) some salient issues that the Commission might wish to consider as it consults with the industry in respect of the matter of Dominance in the Nigerian Telecommunications market. We shall equally limit our comments to the issue of the existence of dominance in the mobile telephony market.

In general, we note that while Ericsson does not believe that any player in the Nigerian mobile telephony market can be considered dominant, it does appear that the consultation document is of the misconceived view that dominance in and of itself is negative and seems to erroneously construe dominance and the abuse of dominance as one and the same thing. We believe that embarking on such a crucial consultation exercise as this on such a misconceived premise has the potential to render the entire exercise nugatory and should be reconsidered by the Commission.

Identification of relevant markets

We note that the market definition exercise for Mobile Telephony Services is not well set out. The consultation document fails to explain why there is no call-origination market (retail) as distinct from a call termination market. We believe it is erroneous to think that both concepts can be captured in the one market, Mobile Telephony Services.

Importantly, it does not define a market for fixed telephony. Why not? We wonder why it is at all relevant that the fixed market is not as widespread as the mobile one. Equally, one wonders what about other potential markets, such as that for international calls that historically have been monopolised.

We take the view that the market definition exercise is critical, as it underlies the essence of the consultation exercise. Failing to properly address the key issues will raise questions as to the credibility of the entire exercise.

Definition of "mobile"

We wonder why the mobile market is restricted to only the GSM and 3G operators; why are the CDMA operators¹ not included?

¹ Visafone put on more new subscribers in the last quarter than any other operator.

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We believe the definition of “mobile” in reference to mobile Telephony services is unduly restrictive, does not accord with the global drive towards technology neutrality and is in stark contradiction with the Commission's own general terms and definitions. Since the commencement of the Unified Licensing scheme in 2006, the Commission has issued over ten operators with Universal licensees of which MTN, Zain, EMTS (Etisalat), Zoom, Starcomms, Visafone, Multilinks, etc. are presently providing mobile services.

The Commission's quarterly subscriber update readily recognises this fact. Any attempt to conduct a consultation on dominance in the mobile services sector without due regard to these service providers will only provide a skewed result and will discredit the Commission's attempt to provide a fair and balanced consultation as to the existence of dominance in the Mobile Telephony Services market.

Evaluation of individual dominance

At 5.2, the consultation document states that,

“The Commission has considerable flexibility in how it may examine and apply these criteria [for evaluating individual dominance]...”

With due regard to the Commission's statutory mandate, the subjective wording of its approach (“flexibility”) to addressing such a crucial issue gives cause for much concern. The proper application of competition law analysis is designed to remove flexibility; otherwise we get a subjective outcome.

It is our position that Competition law has two roles: first, it acts to protect the consumer from abusive behaviour by dominant firms; second, it protects market players from subjective and arbitrary intervention in their property rights by bodies such as the NCC. The offending sentence seems to miss this point entirely, accordingly we urge the Commission to expunge it from the consultation document.

Market share

This talks of MTN's market share and the presumption that MTN is dominant because it has over 40% of the market for mobile subscribers. We are however concerned with the comment expressed in the consultation document that the market may be "reaching a degree of balanced competition" as MTN's market share has been eroded. This raises the question – what exactly is "balanced competition"? We believe that by its very nature competition is dynamic and unstable. A balance suggests a cartel which we believe is anathema to the concept of a competitive market.

We believe it is also necessary for the Commission to recognise that market share for GSM operators can be adduced inter alia to, pent up demand for telecommunications services, limited number of operators with resources to provide national coverage (circa 2003) and operational efficiencies. This recognition is key as the consultation document seems to infer that by mere virtue of its market size, MTN attained this status by less than legal means.

Relative size

Like the operator's market share, size in and of itself should not be a determinant for an operator's dominance. What is necessary is a proper examination of why MTN is large. This may be as a result of;

- timing issues and the failure of the NCC to issue licensees earlier (we note the challenges and rescission of the license to CIL after the 2G auction of 2001)
- MTN's operational efficiencies in comparison to its competition

The inference seems to be MTN are in the wrong for being big and must have abused their position. Whereas the reality may just be that they provide a better overall service than their competitors.

Negotiating position of customers

It is inferred in this segment with reference to mobile number portability that

“...while the theoretical barrier to full customer choice is low, in practice this limitation has likely inhibited much of MTN's customer base from considering changing carriers.”

We believe that this statement is highly subjective and is unsubstantiated by empirical evidence. In addition an in-depth study of operator's churn rates over the past five years will show a gradual increase in churn across all market segments across the major operators. With cost of acquisition of a SIM card at an all time low, there is no major impediment to subscribers switching from one service provider to another.

Ease of Market entry

The question(s) raised after the initial analysis in this segment are rather baffling. The analysis notes that there is an absolute barrier to entry because only the NCC can issue licensees. It then asks whether MTN has benefited and refers only to GSM spectrum being fully assigned. Clearly this barrier is not one of MTN's making, as is stated spectrum allocation is solely within the NCC's purview. How that could or should be inferred to favour an operator is rather curious.

However if “mobile” is defined as provision of services from 2G upwards, the Commission is still in a position to reduce this entry barrier by issuing more licenses and finding more spectrum e.g. 3G or 1800 spectrum, 2.3GHz and 2.6GHz. It is not an issue for which MTN (or any other operator) should be held culpable.

Rate of technological change

The consultation document seems to treat 3G as a different market to 2G. It appears to regard 3G as either a value add, or an add-on to the 2G mobile service. We believe that this is inaccurate and the licensing of Al-heri, Hutchinson 3G, and other 3G mobile Greenfield operators discredits this line of thought. We believe it is only right to assume that 3G will affect the mobile market and base one's analyses accordingly.

Level of MTN's revenues

We believe that the introduction of this concept to an objective assessment as to whether there is any dominance in the mobile telephony market is without merit. We believe that in a serious consultation of this nature, the operator's earnings are only an issue if one can show that MTN have earned super-normal profits, being profits over and above margins earned by other players and not due to efficient operations. It is not clear from the consultation document that this has been the case.

By the same token the question as to whether an operator has "superior or unique access to financial resources, equipment or technology" is rather moot. We believe that all operators have access to the same pool of technology options as well as potential investors and financial resources. The choice of which business banks or investors will provide funds to will always be dependent on the structure of a business, it's ways of working, corporate governance issues, the return on investment and social imperatives (if any).

To single out one operator as having "superior or unique access to financial resources", by virtue of its operational efficiencies, seems punitive and condemnatory and appears to sound a grim warning to potential investors (local and foreign) in Nigerian businesses.

Collective dominance

For joint dominance to exist, it must be possible to show that an operator is individually dominant or is earning super-normal profits. The analysis would then go on to show that the dominant position is created through collusive action with another player or players within the market. In essence it is necessary to show the existence of a cartel.

In a multi-player market it is next to impossible to control a cartel and act collusively. While a two (2) player market may be ripe for signalling, a three (3) player market creates too many incentives for cheating and no obvious retaliation method against the cheater alone. It is equally odd that in the analysis on joint dominance no mention is made of the concept of "Retaliation" which is central to the concept of successful collusion.

Conclusion

We appreciate the efforts made by the Commission towards the full liberalisation of the Nigerian telecommunications market as typified by the growth of the mobile telephony market since 2001. We however wish to urge that the Commission ensure that it maintains its renowned sense of objectivity, balance and fairness and it gives due consideration to respondents comments to the consultation document.

We do not believe that there is a need for a consultation on dominance in the mobile telephony market at this time, in view of,

- the current number of licensees (both CDMA and GSM) playing in the sector;
- the level of competitiveness (in products and pricing available); and
- the innovative services on offer.

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We are therefore mindful of the signals such a message (especially if premised on the wrong plank) may send to potential investors seeking to capitalise on the growth achieved in the sector over the past few years. Accordingly, we urge the Commission to be so guided as it deliberates on the issues raised.

Thank you.