



Zain Nigeria

Submission to the
Nigerian Communications Commission

CONSULTATION ON DOMINANCE
In the
Mobile Telephony
and International Internet Connectivity
Markets

30 November 2009

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Submission to the Nigerian Communications Commission (NCC)
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EXECUTIVE SUMMARY

1. This submission by Zain is made pursuant to consultation by the Nigerian Communications Commission (NCC) on the determination of dominance in the following communications markets in Nigeria: (i) mobile telephone services; and (ii) International Internet Connectivity.
2. We are concerned that the consultation process could compromise the exercise. It would be recalled that in response to a Questionnaire developed by McCarthy Tetrault, the Commission's Consultants, operators provided information to the NCC in May 2008. In the Questionnaire, the following markets were of interest: (a) leased lines and related facilities/services; (b) international IP connectivity; (c) interconnection related facilities and services; and (d) unbundled loops and other means of providing competing Internet services. No intention was given in relation to the Mobile Telephone (Voice) Market. Besides an April 2009 request for the same information earlier given in May 2008, no further interaction or industry engagement occurred until the Proceeding Notice served Zain in October 2009 of intention to determine dominance in the Mobile Voice and IIC Markets. It is pertinent to note that there is no indication from the NCC at this time of an intention in relation to the other markets mentioned in the Questionnaire. The apparent uncertainties about the markets intended for dominance determination raise concerns of regulatory transparency, predictability and certainty. The consequence of these on the quality of information and statistics at the disposal of the Commission to assist in-depth characterisation of the intended markets is noted. Indeed, the intervening period, about 1¹/₂ years between the data collection exercise in May 2008 and the Proceeding Notice in October 2009 yet raises concerns about the validity of the collected data. We would therefore strongly request full disclosure of information at the disposal of the NCC to operators in an appropriate forum for review like is being done with the Interconnect Cost study, to support the intended determination.
3. As agreed with the NCC in the course of the development of the Consultation Guidelines, a clear timeline of the components of any Consultation should be announced prior to commencement of the Consultation. This would assist better planning and engagement of resources, for instance, of relevant subject matter experts by stakeholders in accordance to the published schedule. Changes to the schedule should immediately be communicated so that stakeholders can align themselves properly. This would ensure greater regulatory certainty and the highest quality of contributions from stakeholders leading to more purposeful and acceptable regulatory intervention by the Commission.
4. Market delineation for the communications market, determined after an in-depth market review has been conducted, should be undertaken prior to any prospective determination of dominance in any of the relevant markets. This is to assure transparency, predictability and regulatory certainty based on thorough and well tested data using the 8 step internationally acknowledged process for this exercise. The absence of these fundamental elements will call into question any determinations and findings of the NCC relative to dominance or other related competition matters.
5. The Consultation Paper refers to the **Mobile Telephone Services Market** whereas the Proceeding Notice to Zain refers to the **Mobile Wireless Market**. We understand the former to mean the

Mobile Voice market in contrast to the latter which comprises the following markets: (i) Mobile Voice (ii) Mobile SMS; (iii) Mobile Data; and (iv) Mobile Broadband. We defer to the Consultation Paper and would appreciate confirmation from the NCC that the consultation is with respect to the **Mobile Voice Market**, otherwise, relevant amendments to the Consultation Paper and the entire consultation are warranted especially as information requested and collected by the NCC from Zain was with respect to the Mobile Voice Market.

6. Attention of the NCC is drawn to: (i) an omission of the CDMA Operators from the list of Mobile Telephone Licensees in Nigeria; and (ii) an indication that the three Mobile Operators, MTN, Zain and Glo Mobile control about 98% of the mobile telephone market. This is at variance with the factual position according to industry statistics on the Commission's website which posts a 90% market share for the five GSM Mobile Operators. Indeed, it is noted that the CDMA operators are providing mobile service – voice, data and broadband – at lower tariffs than the GSM operators. With the Mobile CDMA market share showing impressive performance – 1% in 2007 and 10% in 2009 with a projection of over 19% by 2013, the NCC is invited to address this significant omission in the Consultation Paper in order to avoid painting an incorrect representation of the market.
7. It is noteworthy that satellite provides alternative International Internet Connectivity (IIC) to Submarine Cable. The Commission should consider the entire bandwidth market rather than the Submarine Cable segment alone in order to ensure that each market is examined and considered in its entirety.
8. It is also important that opinions expressed or claims made by respondents in the course of this or any other dominance determination be duly investigated to establish fact. Details of such claims and investigations undertaken to establish fact ought to be published to meet with the requirements of regulatory transparency and credibility.
9. Zain considers that while market share and size confer market power on an entity, this cannot and should not be equated to a position of dominance, i.e. ***“a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.”*** We note that a determination of dominance outside this premise would only serve to penalize rather than encourage efficient operations and the transfer of efficiencies to customers.
10. Giving cognisance to the considerations of market share, relative size, control of essential facilities, technology changes, fast demand growth, etc, and subject to the full disclosure of information available to the Commission and review with the industry as discussed above, Zain considers that neither MTN individually nor MTN, Zain and Glo Mobile collectively are dominant or have conducted themselves in a manner so as to lessen competition in the Mobile Voice Market and we also consider that the NCC has failed to provide sufficient evidence or substantiation of same.
11. As dominance determination is concerned with long term rather than transitory effects, Zain considers that the IIC Submarine Cable market, though currently monopolized by NITEL, will become reasonably competitive over the next two years without the risk of individual or collective

dominance by the new entrants – Globacom (Glo 1), MTN (WACS) and Main Street Technologies (Main One), and possibly others. The following regulatory safeguards should however be considered to promote competitive service offerings by vertically integrated companies who also play in other retail markets: (i) accounting separation; (ii) price cap or tariff threshold prescription; as well as the publication of (iii) service level agreements; and (iv) a Reference Offer by the operators.

12. As provided in Section 18(2)(a) of the Competition Practices Regulations, 2007, the Commission is invited to give clarification as to whether market share or size shall be determined on the basis of revenues or subscriber numbers or otherwise.
13. The Commission is invited to adopt ex post regulation in order to deal with any abuse of market position.

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Submission to the Nigerian Communications Commission (NCC)
Consultation on Dominance
In the Mobile Telephony and International Internet Connectivity Markets

1. Introduction

The Nigerian Communications Commission (the Commission) in a Proceeding Notice dated 27 October 2009 notified Zain of the commencement of Public Consultation on Dominance in Selected Communications Markets.

The Commission in the above referenced letter indicated that it seeks comments as to whether certain companies are exercising dominant market power and whether such companies are engaging in practices that have the effect of substantially lessening competition in the following markets. The markets on which the Commission seeks comments are:

- a) The Mobile Telephone Services Market; and
- b) The international Internet Connectivity Market.

The Commission stated that no determination has been made at this time that Zain is in a dominant position, or is engaged in conduct that constitutes a substantial lessening of competition or any conduct that is otherwise contrary to the Regulations. The Commission however affirmed that it may make such determination in this consultation process, depending on the submission received from Zain and other stakeholders.

Zain and other stakeholders are accordingly invited to provide comment on the issues related to dominance in the selected telecommunications markets in accordance to the Consultation Paper published on the Commission's website. Zain's Submission is provided under the following considerations.

- International best practice
- Review of the Consultation Paper on Dominance
- Zain's response to NCC's request for specific comments
- Further Discussions and Recommendations
- Conclusion

2. International Best Practice

We note that competition law and any regulation made in that regard are generally concerned with the existence of "power over the market". Therefore, understanding what is the "market" or "relevant market" becomes a fundamental necessity. In this regard, it is acknowledged that 'market

is a tool to identify and define the boundaries of competition between firms¹. It further acknowledged that market can be defined in two principal dimensions, namely;

a) Product/service market that identifies products regarded as substituted by users, given:

- i) Characteristics;
- ii) Price, and
- iii) Intended use

b) Geographic market, which is the area where competitive conditions are sufficiently similar and different from conditions in neighbouring areas.

Other dimensions that may be taken into account in this regard are:

- i) Value chain: wholesale/retail segments
- ii) Subscriber type: residential/commercial use.

2.1. Identification of Relevant Markets

The European Commission's Recommendation² clearly recognizes that the starting point for market definition is a characterization of the Retail Market over a given time horizon, taking into accounts the possibilities for demand and supply side substitution. The wholesale market is identified subsequent to this exercise being carried out in relation to the retail market. The market analysis is forward looking and markets are defined prospectively taking account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of next market review.

A step-by-step process for defining relevant markets is provided below³:

- i) Step 1 – identification of functional characteristics of products and services offered in the communications market. This includes the description of the functions provided by the services such as local voice telephony to and from a fixed location.
- ii) Step 2 – identification of the retail and wholesale products. Retail products are sold to end users directly by service providers or middlemen and wholesale products are sold by network and service providers to other network and service providers.

¹ Telecommunications Management Group (TMG): Zain Group Regulatory Conference, July 2009

² European Commission Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector, made pursuant to European Parliament Directive 2002/21/EC.

³ Telecommunications Management Group (TMG): Zain Group Regulatory Conference, July 2009

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- iii) Step 3 – For each identified product, there should be an application of the hypothetical Monopolist Test (HMT) in each geographic region where the conditions are similar. Conditions are considered to be similar where the prices offered are broadly the same.
 - iv) Step 4 – To perform the HMT, information on the demand and supply side of the market should be assessed, using the information and data assembled on demand to determine to what extent demand would fall in the event of any price increase.
 - v) Step 5 – Where the HMT shows that the price increase (Small but Significant and Non-transitory Increase in Price (SSNIP)) is not profitable, it is advisable for the market to be widened to include other products that constrain the Operator under consideration. For instance, fixed services may be constrained by mobile services and thus the market may need to include both.
 - vi) Step 6 – In the event that the price increase is found to be profitable, this will determine the candidate relevant market. It is regarded as a candidate relevant market because the process has not been concluded.
 - vii) Step 7 – The candidate relevant market is further assessed as to whether an Operator supplying similar products or services may easily switch production and compete with the monopolist. If the supply substitution is possible, this negates the power of the monopolist.
 - viii) Step 8 – The relevant market is identified at the point where both demand and supply substitution does not constrain the hypothetical monopolist.

In order to ensure regulatory certainty and predictability with regard to this exercise and thus ensure its credibility, we invite the Commission to publish relevant information relating to the application of the above internationally recognized process and tests it has undertaken to determine the relevant markets for which it now seeks to make a determination of dominance.

2.2. Market Segmentation

The European Commission Recommendation 2003/311/EC (pursuant to Directive 2002/21/EC of the European Parliament) has identified 18 relevant markets across the retail and wholesale space as detailed in **Attachment I** to this document.

The fine delineation of the relevant markets is especially noted as this seeks to appropriately recognise the distinct characteristics of the identified markets as discussed in 2.1.

3. Review of the Consultation Paper on Dominance

Zain has undertaken a review of the Consultation Paper as follows:

3.1. Clarification on the relevant Retail Mobile Market for Determination of Dominance

We note that the Consultation Paper identifies the **Mobile Telephone Services Market** as one of those in which the NCC intends to undertake dominance determination. On the contrary, the Proceeding Notice of 27 October 2009 that the NCC sent to Zain shows an intention to determine dominance in the **Mobile Wireless Market**. We would appreciate clarification of the NCC's intention as the **Mobile Telephone Services Market** refers to the **Mobile Voice Market**, whereas the **Mobile Wireless Market** refers to the entire **Mobile Telecommunications Market** comprising the following markets: (i) Mobile Voice; (ii) Mobile SMS; (iii) Mobile Data; and (iv) Mobile Broadband.

We have elected to defer to the provisions of the Consultation Paper, that is, the Mobile Telephone Services Market. For greater clarity, we have elected to use the term **Mobile Voice Market or Mobile Telephone (Voice) Market** throughout this Submission.

Zain would in particular, advise against the intent communicated in the Proceeding Notice. This is on grounds that the Mobile Wireless Market is a combination of several relevant markets with distinct attributes as indicated above and a monolithic consideration will negate the essence and defeat the objectives of the intended determination. The delineation of the Mobile Wireless markets are discussed in detail in 3.2.1.

3.2. Market Delineation

This section undertakes a review of the markets proposed by the NCC for determination of dominance.

We observe as discussed in 2.1 (International Best Practice on Identification of Relevant Markets) above, that a market is defined prospectively taking account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review, among others. We note that the Consultation Paper does not provide any indication of the steps taken by the Commission to delineate the market as prescribed by International Best Practice. We would like to point out that this is absolutely critical for the purpose of regulatory transparency and certainty because it would have enabled stakeholders to participate in the exercise to fully appreciate the said markets and their delineation, in order to be conversant with and committed to the delineation. Any misunderstandings would also have been cleared up, making for greater transparency and certainty. These critical elements are pertinent for the success of this exercise.

3.2.1. Mobile Telephone(Voice) Services Market

As earlier highlighted, the **Mobile Wireless Market** is a reference to the entire **Mobile Wireless Telecommunications Market** comprising the mobile voice, SMS, data and broadband markets. An attempt to determine dominance for this market presents a potential risk of over-generalization as issues that are applicable to one relevant market or segment as it were, would be extended to a broader market or other relevant markets where they do not necessarily apply. For instance, the Mobile Broadband Market is a more recent development than the Mobile Voice Market. It is pertinent to note that many customers in this market use data cards rather than mobile phones. Operators' market shares in the Mobile Voice and Mobile Broadband markets are different and an Operator (or Operators) that may have market power and possibly be dominant in one may not be in another. As such, a declaration of dominance in the Mobile Wireless Market as opposed to the individual markets of Mobile Voice and Mobile Broadband, could thus be misleading, especially as information about Mobile Broadband subscriptions in Nigeria may not have been readily distilled or distinguished from those for Mobile Voice. We believe therefore that more indepth study is required to better delineate these markets. A broad market delineation as opposed to a fine one, thus has the potential to negate the essence and defeat the objectives of the intended determination.

We opine that the objective of this exercise would be better served by finer market delineation as is obtainable in the European market delineation discussed above and has been addressed in many other jurisdictions. As observed in **Attachment I**, the fixed market, which is the predominant market in Europe, is divided into markets for residential and non-residential as well as between personal and public access. This takes cognizance of the fact that the non-residential market comprises business and corporate customers, some of which are not-for profit organizations and other corporate entities. This non-residential market is less sensitive to price changes than the residential market. Market delineation thus seeks to take those aspects into consideration in order to properly characterize the market and avoid misrepresentation that an overly broad market delineation would bring.

Accordingly, in view of the fact that mobile wireless is the predominant market in Nigeria, greater delineation of this market is considered necessary. This is because it comprises several markets with distinct characteristics of product portfolio, prices, suppliers and consumers, among others. Consequent to the above, Zain wishes to recommend the delineation of the mobile wireless market as follows:

- Mobile Voice (i.e., telephony).
- Mobile SMS and its related services
- Mobile Data
- Mobile Broadband Services

This is in view of the fact that among other considerations, the markets are quite distinct and the entities that may be dominant in one may not be in the others. In particular, it is notable that with their head start in the mobile data and broadband market, the CDMA operators have had greater share of this market as well as higher revenues per user than the GSM operators.

Detailed discussion of the relevant mobile wireless markets in Nigeria is given below:

Mobile Voice: This is the traditional mobile voice service that enables subscribers to communicate with one-another. This has been identified as a peculiar market that the Commission should study to determine which operator(s) is/are in a dominant position and whether such Operator(s) have engaged in any action aimed at lessening competition.

Mobile SMS and its related services: Short Message Service (SMS) is the most commonly used data application on mobile phones. It is estimated that 74% of all mobile phone users are active SMS users (over 2.4 billion out of 3.3 billion total subscribers at the end of 2007). SMS remains by far the largest component of non-voice service revenue, contributing in excess of USD232.2m (27.5%) of the total data market in the first quarter of 2009 (Source: Informa 2009). This is another market that the Commission is advised to evaluate in terms of determining dominance.

Mobile Data The other non-SMS data services used by mobile subscribers were worth 31 Billion dollars in 2007 worldwide, and were led by mobile music, downloadable logos and pictures, gaming and advertising (source: Informa 2007). This is another thriving segment of the mobile telecommunications market in Nigeria that is on the increase owing to huge demand by the youth segment. It is recommended for further analysis.

Mobile Broadband Services: This is another market projected to enjoy huge subscribers demand. It is wireless high-speed internet access through a portable modem, telephone or other device. Devices that provide mobile broadband include: PC data cards, USB modems, USB sticks, phones with data modems and portable devices with built-in support for Mobile Broadband (like notebooks and Mobile Internet Devices (MIDs)). It is imperative to state that the CDMA Operators were offering mobile broadband services prior to the auction of the 3G spectrum licence to the GSM Operators in 2007. This segment of the market is recommended for evaluation by the Commission to determine dominant operators and any action that may be aimed at lessening competition.

3.2.2. International Internet Connectivity Market

Another market proposed by the Commission for determining dominance is the International Internet Connectivity (IIC) Market. The Consultation Paper seems to equate this market with

the submarine cable market in Nigeria. We note that prior to the availability of SAT-3 (submarine cable) in Nigeria in 2003, international voice service was offered via satellite. Similarly, in the event of service disruptions on the SAT-3 cable managed by NITEL, stakeholders rely on satellite for delivery of International Internet Connectivity. It is therefore important to acknowledge it as another segment of the IIC market, i.e., a relevant market for the purpose of dominance determination side by side with the submarine cable market, both supplying International Internet Connectivity or international bandwidth.

3.3. Market Analysis for the Mobile Telephone (Voice) Market

The Commission in the Consultation Document indicated that there are five Operators licensed to provide mobile telephone services in Nigeria, namely:

- MTN Nigeria Communications Limited
- Celtel Nigeria Limited (Zain)
- Glo Mobile Nigeria Limited
- Nigerian Mobile Telecommunications Limited (M-tel)
- Emerging Markets Telecommunications Services Limited (Etisalat)

We would like to draw the attention of the NCC to the fact that the companies listed above are not the only ones that the NCC has licensed to provide mobile services. It is notable that the listed companies are those that adopted the Global Mobilecommunications System (GSM) as the underlying technology/standard for their service delivery. It should be recalled that upon the expiry of the five-year exclusivity period granted the Digital Mobile License (DML) Operators in 2006, the Commission introduced the Unified Access Licence regime which opened up the space for operators to provide mobile or fixed services on their existing spectrum in furtherance of the technology-neutrality policy of the Commission. The introduction of the Unified Licensing Regime in the Nigerian Telecommunications market in 2006 thus afforded non-GSM Operators the opportunity to secure Universal Access Service Licences to offer either or both fixed and mobile telecommunications services. The CDMA operators are providing mobile services – voice, SMS, data and broadband just like the GSM companies. We are concerned therefore that the Commission has restricted its market analysis to only the GSM Operators whereas the list of mobile operators in the country now includes other non-GSM operators, a list of which is provided below.

- Visafone Nigeria PLC
- Starcomms PLC
- Multilinks Telecommunications Nigeria Limited (Multilinks-Telkom)
- Reliance Telecommunication Limited (Zoom Mobile)
- Intercellular Nigeria Limited

Indeed, we note that the Commission, in its publication of industry statistics, classifies mobile operators as Mobile (GSM) and Mobile (CDMA), the latter representing mobile Operators using the Code Division Multiple Access (CDMA) standard/technology. A sample table of the industry subscriber statistics downloaded from the Commission's website is provided below:

Table 1: Subscriber Statistics

	Operator	2007	2008	Jun '09	Aug '09
Active Lines	Mobile (GSM)	40,011,296	56,935,985	59,194,972	60,908,488
	Mobile (CDMA)	384,315	6,052,507	7,223,039	6,933,897
	Fixed Wired/Wireless	1,579,664	1,307,625	1,435,279	1,323,124
	Total	41,975,275	64,296,117	67,853,290	69,165,509
Installed Capacity	Mobile (GSM)	76,545,308	95,291,096	114,785,526	114,785,526
	Mobile (CDMA)	1,540,000	10,611,867	13,713,668	14,318,690
	Fixed Wired/Wireless	6,578,303	6,830,245	9,230,882	9,231,744
	Total	84,663,611	112,733,208	137,730,076	138,335,960
	¹ Teledensity	29.98[3]	47.98	48.47	49.40

We are concerned about the omission of the CDMA Mobile Operators from the Consultation Paper as this would significantly distort market information about the proposed exercise by the NCC. This is due to the fact that, according to information on the NCC's website, the market share of the CDMA Mobile Operators has grown from below 1% in 2007 to 10% as of August, 2009. This market is expected to increase to more than 19% by 2013 according to research by Pyramid⁴ respectively. We consider, therefore, that the Commission would take action to correct this omission in order to ensure a fair market representation.

4. Zain's Response to the NCC's Request for Specific Comments

This section provides Zain's comments on specific issues in accordance to the request for comments by the NCC in the Consultation Paper.

4.1. Mobile Telephone Services Market (or Mobile Voice Market)

4.1.1. Market Share

The Commission seeks comment on the market share of the mobile operators, and of MTN in particular on whether market share data should cause the Commission to exercise its authority to determine that MTN is a dominant operator. The Commission also seeks comments in this regard in relation to MTN, Zain and Glo Mobile collectively.

Zain comments as follows:

Consistent with best practice on the subject matter, Zain considers that the abuse of market share by an entity is the concern in competition regulation rather than possession of market share by the entity in question. We therefore subscribe to the view that market power enjoyed by an entity does not automatically translate to market dominance by that entity according to the following ruling:

⁴ Pyramid Research. Communications Markets in Nigeria, March 2009

European Court of Justice (ECJ), United Brands Company v. Commission (1978, Case 27/76 ECR 207) determined dominance as “a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.”

In essence, Zain is of the view that where a company which has market power but has not prevented effective competition being maintained on a relevant market, it has simply earned market share through efficient operations and innovation. In such a case, the declaration of dominance on an operator or operators based on market share would serve to penalize efficient and innovative operators as opposed to encouraging them. Such an action would defeat the objective of the exercise which is aimed at encouraging efficiencies in service delivery that would be passed on to the customers.

Having considered the above, we observe that:

- The Consultation Paper acknowledges that “despite holding a market share slightly above 40%, the fact that this share has been declining suggests that competitive forces have been effectively working to check MTN’s market power”;
- Subscriber Statistics on the NCC website earlier discussed in 3.3 above shows significant loss of market share collectively by MTN, Zain and Glo Mobile in relation to an increasing market share by CDMA operators and the other GSM operators.

It is evident therefore that no individual operator or group of operators collectively is/are behaving or capable of behaving appreciably independently of their competitors, customers and ultimately of consumers in the mobile voice market place in Nigeria.

Zain therefore does not consider that (i) MTN individually; or (ii) MTN, Zain and Glo Mobile collectively, have a position of dominance or have conducted itself or themselves in a manner that is capable of lessening competition.

Notwithstanding the above, we like to point out that consistent with 2.1 (Best Practice on the Identification of Relevant Markets) above, any discussion of dominance in a market must be with respect to specified timeframes (i) when the market survey is undertaken; and (ii) when the determination shall subsist until the next review is undertaken. Unlike for the International Internet Connectivity (IIC) market in which the subsisting period of the determination is given as 1 – 2 years, the next market review for the Mobile Voice Market is unspecified. This fact alone makes the market definition highly uncertain. We would therefore respectfully request information about the next market review from the NCC to assist more informed discussions and a decision about market share and the determination

of dominance in relation to the Mobile Voice Market. Also, it is unclear, if the market share will be based on revenues or subscribers numbers or other parameter. This needs to be communicated as provided in Section 18(2) of the Competition Practices Regulations, 2007.

Finally, we like to point out an error in the Consultation Paper which suggests that MTN, Zain and Glo Mobile “currently control over 98% of the [Mobile] market”. This contradicts information published on the Commission’s website (which is reproduced in Table 1: Subscriber Statistics above). This gives the market share of the Mobile GSM Operators as a whole (i.e. MTN, Zain, Glo Mobile, Etisalat and M-tel) as 90%. The market share of the three (3) operators cannot therefore be 98%. The Commission is invited to correct this information.

4.1.2. Relative Size

The Commission seeks comment on the relative size of operations of MTN versus other mobile telephone operators in Nigeria, and whether MTN realizes significant cost advantages from its size and scale of operations.

Zain comments as follows:

There is a correlation between size and cost of operations, particularly if the organization is efficiently run. All over the world, organizations rely on their relative size to negotiate favourable terms of trade with their respective service providers and Nigeria cannot be an exception.

Similar to the discussion under Market Share above, relative size should become applicable where an entity has conducted itself in any other way as to lessen competition. Otherwise, we would be penalizing rather than encouraging economic efficiencies in operations and service delivery.

In particular, it is noted that the issue of relative size needs to be carefully investigated as relative size needs to be balanced against actual operating costs. In effect, the argument of cost economies from relative size needs to be carefully weighed against actual procurement costs to make an informed decision.

Zain therefore suggests that detailed investigation is required to support the extent to which relative size counts as a factor in determining dominance given that this is not a typical measurement. This is in addition to our previous indication that relative size should be a secondary consideration in dominance determination predicated on the establishment of other behaviour by an operator or group of operators that prevents effective competition being maintained on a relevant market, by affording it or them the power to behave to an appreciable extent independently of competitors, customers and ultimately of consumers.

4.1.3. Control of Essential Facilities

The Commission seeks comments on the extent of MTN individually or MTN, Zain and Glo Mobile collectively exercise exclusive control over essential mobile network infrastructure, including cell towers, backbone network, and other facilities that are required by competing operators. We particularly seek input on the degree to which the control of such infrastructure may be demonstrated to have lessened the growth of competition, either through lack of access or excessive pricing for access. We also seek comment on other difficulties that competitors have encountered.

Zain wishes to discuss the exclusive control of essential facilities from the following perspectives:

- I. Cell Sites: We like to point out that CDMA Operators' relative requirement of fewer cell sites (base stations/towers) compared to their GSM counterparts for coverage of a given land area should not be misconstrued as the control of this essential facility by the GSM Operators given that the technical parameters and requirements are quite distinct. Additionally, the rollout of cell sites has been adequately addressed with the licensing of co-location service providers. Indeed, Etisalat and Visafone have exploited this to great advantage in achieving fast rollout of service. The grant of a US\$230m facility by the International Finance Corporation to Helios Towers, a collocation licensee in Nigeria, to increase its base stations to 2,000 is indicative of the absence of control of this essential facility by any entity to the disadvantage of another. Indeed, the even greater requirement for many more cell sites for 3G coverage by a GSM Operator than a CDMA Operator indicates that the facility is more essential to the former than the latter. Besides being mandated by regulation, collocation is gaining ground among licensees. This removes any sort of unique control that an operator could have over sites.

Accordingly, the situation in Nigeria is not one in which (i) MTN individually; or (ii) MTN, Zain and Glo Mobile collectively exercise exclusive control of this essential facility.

- II. Backbone Network (Leased Circuits): While MTN, Zain and Globacom have built their own backbone infrastructures that were initially meant for own use, they are increasingly offering transmission services to other operators with the advent of the Unified Licensing regime. The following companies are also providing transmission services to Zain and other telecommunications operators:

- Phase 3 Telecommunications
- Sub Urban Telecommunications
- 21st Century Telecommunications

We are of the view that the market is not controlled by either MTN individually or MTN, Zain and Globacom collectively and as such, we do not subscribe to the proposition that

any entity has control of this essential facility to the disadvantage of any other. The NCC is, however, invited to undertake and publish studies required to review the supply and demand side of this market and to establish the possible control of facilities by the entities therein.

- III. International Gateway/Access: The Commission has fully liberalized the international gateway in Nigeria with the introduction of the Unified License Service Regime. As such, all Operators are now competing favourably on that score and the suggestion that (i) MTN; or (ii) MTN, Zain and Glo Mobile collectively exercise exclusive control of this essential facility to the disadvantage of another is inaccurate and inappropriate.
- IV. Radio Spectrum: It is necessary to state that the CDMA Operators were granted 3G spectrum at relatively cheaper rates compared to their GSM counterparts who paid USD150million for similar spectrum. Additionally, the CDMA technology presents the advantage that a CDMA operator can deliver 3G services (throughput) on its existing spectrum, whereas this is not possible with GSM. As such, GSM Operators needed to acquire 2100MHz spectrum to be able to provide 3G services (throughput). This singular attribute gave the CDMA Operators a significant advantage over their GSM counterparts in the mobile data market and they have enjoyed a higher revenue share of this market in Nigeria. The Commission also grants spectrum on an ongoing basis for various services. The spectrum is issued through a competitive tender process and, as such, neither (i) MTN; nor MTN, Zain and Glo Mobile collectively have exclusive control of spectrum as an essential facility to the disadvantage of another.
- V. Interconnection: In compliance with statutory provisions, Zain is interconnected with other operators directly and indirectly through the Interconnect Clearing Houses. It is mandated that one connects and keep connection to other operators with a tight regime for disconnection. As such, no operator has exclusive control of this important resource.
- VI. International Internet Connectivity: The IIC Market is far more essential to Mobile Data and Broadband Markets than it is to the Mobile Voice and SMS Markets. The former relies extensively on international connectivity for the services of internet browsing, chat, and social networking, etc that are the drivers of that market. As such, potential control of this facility by a vertically integrated company, could lead to the lessening of competition in the Mobile Data and Broadband Markets. In our view, therefore, the control of essential facilities by an operator does not exist for the Mobile Voice and SMS markets. To that extent, MTN individually or MTN, Zain and Glo Mobile collectively neither have dominance nor can behave in a manner to lessen competition therein.

However, control of essential facilities could exist for the Mobile Data and Broadband Markets and could lead to the lessening of competition in this market. As such, further investigation is warranted to ascertain the extent to which the control of the IIC by a vertically integrated company such as MTN or Globacom could lessen competition in the said market.

4.1.4. Negotiating Position of Customers

The Commission seeks comments on the extent of customer switching among mobile carriers in recent years in Nigeria, and the degree to which a lack of number portability, roaming, or other factors may have inhibited customer choice and lessened competition to date. We also seek comment on how the introduction of number portability may affect the market in the future. The Commission additionally asks for any evidence that other factors may enable (i) MTN; or (ii) MTN, Zain and Glo Mobile collective; to sustain higher customer prices or other advantages due to customer reluctance or inability to switch carriers.

Zain comments as follows:

We note the Nigerian Mobile market is predominantly prepaid with high subscriber migration across the industry with even a slight price adjustment. Phones are generally not SIM-locked and there are no restrictions that tie post paid customers to a particular network for any period of time. A subscriber only needs to purchase a new SIM of his desired operator to switch service to that operator. It is estimated that 23% of Nigerian telephone subscribers have a minimum of two SIMs⁵. Churn rates are very high. It can therefore be concluded that the absence of number portability, roaming and other factors have not in any way inhibited customer choice nor lessened competition in this market.

4.1.5. Ease of Market Entry (Entry Barriers)

The Commission seeks any views as to whether the restrictions on market entry in the mobile sector favour (i) MTN; or (ii) MTN, Zain or Glo Mobile collectively; and places it or them in a position of dominance in this market.

Zain comments as follows:

The adoption of technology neutrality by the Commission and the introduction of the Unified Licensing Regime in Nigeria have further reduced any restrictions to market entry. As such, mobile wireless services can be readily offered on the CDMA and GSM standards. This is in contrast to other countries where restrictions exist on standards that may apply. Additionally, further to the recognition of the 2007 endorsement of WiMax as a 3G standard by the International Telecommunication Union (ITU), the Commission had proceeded to license 2.3 GHz spectrum, a candidate band for WiMax. Licensing of the 2.3 GHz band by the NCC is

⁵ Informa. Study on Nigeria, 2009.

expected in the short term and Operators will be able to offer mobile services beginning next year using the WiMax standard.

Also, the successful resale of NITEL may result in the emergence of two major mobile wireless operators through its GSM and CDMA infrastructures. These will add more mobile operators to the 11 currently operating. There are in effect few or no barriers to market entry into mobile service provision in Nigeria that could support or reinforce any argument of abuse of dominance or behaviour capable of lessening competition in therein by:

- (a) MTN individually; or
- (b) MTN, Zain or Glo Mobile collectively.

4.1.6. Rate of Technological Change

The Commission requests comments on the effect of 3G services in particular, and technological change in the mobile telephone market in general, upon

- (a) The position of MTN this market and its possible dominant position in this market; and
- (b) The position of MTN, Zain and Glo Mobile collectively and their collective dominant position in the market.

Zain comments as follows:

The uptake of 3G services all over the world, including Nigeria has been relatively slow. This is attributable to: (i) the cost of 3G (UMTS) spectrum; (ii) the relative cost of deployment given the higher requirement in terms of cell sites to realize coverage at 2100 MHz as opposed to the 900 and 1800 MHz for 2G; and (iii) the availability and cost of mobile equipment (iv) the total cost of ownership. As the availability and cost of mobile equipment improve, service uptake is expected to rise. However, with the level of 3G penetration in Nigeria, uptake is not anticipated to make a significant impact on the market, as a large number of the population will settle for traditional voice service. This is the reality for all Operators. As such, there is no imbalance of advantage between the established operators and new entrants in this regard.

With regard to 2G however, we note that Etisalat entered the market with an all-EDGE (2.75G) network as opposed to MTN, Zain and Glo Mobile that started out with an all-2G network. The former have had to upgrade their networks to effectively compete. Even so, some of their sites are still GPRS sites compared to EDGE by the newer operator. In this regard, technology change has rather been to the disadvantage of the incumbents – MTN, Zain and Glo Mobile.

Between CDMA and GSM operators, on the other hand, the former with their CDMA2000-1X and 1X-EV-DO) networks have had superior data capabilities to the 2G, GPRS and EDGE networks of the latter. The imbalance of advantage is in favour of the CDMA operator.

As such, the advantage of the rate of technological change rests with the new GSM operators and the CDMA operators as opposed to the incumbent GSM companies, MTN, Zain and Glo Mobile. Technological change is therefore not such a factor that should confer dominance on MTN; or MTN, Zain and Glo Mobile collectively.

4.1.7. Other Issues – Individual Dominance

Earnings, Unique Access to Financial Resources and Equipment or Technology

The Commission requests comments as to whether the relative size of MTN’s revenues or earnings to the overall market, superior or unique access to financial resources, equipment or technology may indicate that MTN or another operator possibly has a dominant position in the Mobile Wireless Market.

Zain comments as follows:

While MTN’s relative higher earnings, superior unique access to financial resources, equipment or technology may have facilitated MTN’s extensive deployment of services it however does not imply that it occupies a position of dominance or has engaged in conduct that serves to lessen competition.

4.1.8. Preliminary Findings – Dominance by MTN

The Commission seeks comments on its Preliminary Findings that MTN does not currently hold a position of individual market dominance. Stakeholders wish to confirm or refute the Commission’s preliminary determination on this issue, and to provide any supporting evidence or argument in their comments.

Zain comments as follows:

In view of the foregoing, we agree with the Commission’s Preliminary Findings that MTN does not hold a dominant position in the **Mobile Voice Market**.

4.1.9. Other Issues - Collective Dominance

Pricing, Quality of Service and Product Differentiation, etc.

The Commission requires comments on whether MTN, Zain and Glo Mobile are in tacit collusion or collective dominance through provision of specific data or evidence regarding trends in pricing and quality of service. The Commission also seeks comment on observations, as well as any additional evidence or information concerning the possible existence of collective dominance or tacit collusion among the three large mobile telephone operators in Nigeria.

Zain comments as follows:

The mobile telecommunications industry in Nigeria is very competitive. This is ostensibly responsible for the drop in MTN's market share from over 50% in 2007 to 40% in 2009 as acknowledged by the NCC in the Consultation Paper. The landscape has become even more competitive with the onset of the Unified Licensing Regime, with CDMA operators increasingly taking up a larger market share as discussed in 3.3 above and with very positive projections for further uptake of market share. This is quite in contrast to the global trends where CDMA is losing grounds to GSM. This does not support the proposition of tacit collusion or collective dominance by MTN, Zain and Glo Mobile.

It is notable that Zain has made substantial investment in network enhancement and improvements targeted at providing world class quality of service and attracting additional subscribers. Zain prides itself as the first operator to offer a uniform tariff plan across the networks in Nigeria through its Simply Special Tariff Plan. Zain has differentiated itself as a customer-centric company. The above initiatives have deepened competition and contributed to the growth of Zain's strong subscriber base over the years. Zain is therefore not in tacit collusion with any operator.

We observe that the other operators, MTN and Glo Mobile have similarly competed effectively through innovation, pricing and investment in network enhancement and improvements targeted at providing enhanced services. Indeed, several others among those indicated below, the industry has been very competitive without any single entity or group of entities behaving reasonably independent of the market:

- MTN and Zain had responded swiftly to the to the introduction of Per Second Billing (PSB) by the new entrant Glo Mobile by offering same, in response to market demands;
- MTN and Glo Mobile had responded in tandem to the reduction of international tariffs by Zain;
- Zain and Glo Mobile had responded in tandem to the introduction of manned informal payphone in the market by MTN.

Regarding pricing, we note that tariffs have reduced significantly and progressively since 2001. While they may have flattened out, this is a natural tendency in most markets. That they have not dropped further despite inflationary pressures, the sliding value of the national currency (Naira), increase in energy and other costs of doing business, shows that the mobile tariffs have in real terms gone down. It also shows that the industry is very competitive.

We therefore submit that we do not have any evidence of tacit collusion by MTN and Glo Mobile. We also comment that MTN, Zain and Glo Mobile do not enjoy collective dominance nor have they behaved in a manner as to lessen competition in the **Mobile Voice market**.

Few Market Participants

The Commission indicates that there are only five licensed mobile operators, and the three under scrutiny are by far the most significant. We invite the NCC to correct this statement as there are about 11 mobile operators in the market currently; about five Mobile GSM Operators and six Mobile CDMA Operators. Please refer to 3.3 for detailed discussions in this regard. The existence of 11 mobile operators cannot be construed to be few operators (indeed this is a significantly higher number of mobile operators than in most countries) and the NCC is invited to correct the erroneous information presented in the Consultation Paper. Additionally, while MTN, Zain and Glo Mobile constitute a significant share of the market, it is notable according to statistics published by the NCC (refer to Table 1: Subscriber Statistics) that they are rapidly losing market share to other operators, especially CDMA operators who have grown from less than 1% in 2007 to about 10% in 2009. The trend represents significant growth capability of the CDMA technology to compete favourably with the GSM Technology especially when favoured with much lower start up costs due to the difference in initial licence costs. This pattern of growth does not therefore support the dominance proposition, nor that the MTN, Zain and Glo Mobile have acted to lessen competition in the market.

Other actions capable of lessening competition

The Commission requires comments or any other concerns related to dominance or conduct that may have the effect of substantially lessening competition in the mobile telephony market.

Zain comments as follows:

We are concerned that some Operators have continually reneged on their interconnection obligations as at when due. This is capable of substantially lessening competition if not addressed and rectified in the short to medium term. This is because the beneficiary network (net receiver) is denied access to resources that could have been used for its network enhancement and improvement initiatives, thus curtailing its growth compromising quality of services while the debtor operator uses such retained funds for its own network expansion and improvement giving it undue advantage in the long run. This is especially true in the present economic situation of limited external borrowing sources and windows. The Commission is therefore required to take concrete action to conclusively to correct this disquieting trend in order to reduce the lessening of competition that it constitutes.

4.1.10. Preliminary Findings – Collective Dominance by MTN, Zain and Glo Mobile

The Commission seeks comments on its Preliminary Findings to the effect that on the basis of the available evidence, the Commission is not at this time prepared to take a position as

to the presence or absence of collective dominance among the three major mobile telephone operators in Nigeria. Based upon the evidence discussed and any other factors and considerations that stakeholders may present to propose a more conclusive determination on this issue.

Zain comments as follows:

In view of the foregoing, we consider that MTN, Zain and Glo Mobile do not hold a dominant position in the **Mobile Voice Market**.

The potential however exists for MTN or Globacom, each acting as a vertically integrated entity, in the event that it deploys a Submarine Cable, to leverage the control of this essential facility to hold a position of dominance in the Mobile Data and Broadband Markets. This potential needs to be investigated.

4.2. International Internet Connectivity Market

4.2.1. Market Share

The Commission seeks comments from ICT Industry service providers and the general public on the extent to which NITEL is currently dominant in the IIC market and to the extent it is likely to be dominant in the near future (1-2 years). The Commission further seeks comments on any abuse of dominance or substantial lessening of competition in the IIC market, both currently, and in the near future.

Zain comments as follows:

As discussed earlier, the following are relevant markets in this regard:

- The IIC Satellite market; and
- The IIC Submarine (or Undersea) Cable market.

Given the players involved and other characterizations of the market in the Consultation Paper, this Consultation is apparently with respect to the IIC Submarine Cable Market as opposed to the IIC market as a whole.

In view of the one to two year timeline expressed in the Consultation Paper at which expiry the next market review would ostensibly be undertaken, Zain wishes to acknowledge that NITEL's current position of dominance is likely to cease shortly, as Glo-1 is expected to launch before the end of 2009. It is further anticipated that the additional undersea cables being deployed within the next two years will provide competition and impact positively on both pricing and the quality of service.

Regarding comments on any abuse of dominance or substantial lessening of competition in the IIC Submarine Cable market, Zain wishes to state that NITEL being the existing sole undersea cable service provider in Nigeria has consistently failed to accept and execute any Service Level Agreements (SLA) with requesting operators. This has resulted in arbitrary severance of links and downtime for several days, adversely impacting on the services of the requesting operators. This is a prime example of abuse of a dominant position.

4.2.2. Relative Size

The Commission seeks comments on whether NITEL's relative size in the IIC (Submarine Cable) market indicates market dominance, and the extent to which current and prospective near term entry of new cables to serve the IIC market will reduce any such dominance. It also seeks comment on any concerns that the relative size of some new entrants such as Globacom and the GLO-1 and the MTN and the WACS, could lead to an abuse of dominance or lessening of future competition in the IIC market.

Zain comments as follows:

NITEL is presently the only undersea cable service provider in Nigeria and as such should be regarded as being in a dominant position. However, as mentioned above, this is expected to change as there are indications that Glo-1 will be launched before the end of 2009. The relative size of future entrants such as the GIO-1, MTN and the WACS should initially bring competition to this market. However, given the limited number of companies in the market, competition may not be fully enhanced if the entities offer their services at different rates to subsidiaries and other business segments than they offer to competition.

4.2.3. Control of Essential Facilities and Other Infrastructures

The Commission seeks comments on the extent to which control of network facilities and other infrastructure may lessen competition for access to IIC. Also, the Commission requires comments on the extent to which such control will be reduced in the next two years. In addition, we seek comments on regulatory practices that may be adopted to ensure access to IIC and on improvements to the current model for collocation of IIC-related equipment and facilities.

Zain comments as follows:

Control of network facilities and other infrastructure may lessen competition for access to IIC, if appropriate remedies such as mandatory provision of services to any requesting party is not specified by the Commission (similar to S.96 of the NCA) to adequately protect the niche operators.

To guard against substantial lessening of competition and abuse, particularly by such Operators with vertical integration through engagement in other segments of the

telecommunications markets that require IIC services, the entities should be compelled to offer services in accordance to the following standards developed and published by the Commission:

- A standard Reference Offer (RO);
- Service Level Agreements (SLA); and
- Pricing thresholds (Price Cap).

Also, consistent with the principles of accounting separation to be contained in their licences, service providers in this market should be mandated to separate their financials for this service/market from others in order to encourage tariff transparency and prevent cross subsidization between the different services.

4.2.4. Negotiating Position by Customers

The Commission further seeks comments on the extent to which the ICT licensees and Operators in Nigeria have been affected by lack of negotiating options in the past and present. Also stakeholders comment are required on how the new market conditions will impact on the buying power of negotiating conditions of customers.

Zain comments as follows:

In the past, ICT Licensees and Operators in Nigeria were adversely affected by lack of negotiating options, as there were limited alternatives. The negotiating powers of the customers were constrained, as it was a “take it or leave it” scenario. Going forward, this is expected to change substantially as there will be options that ICT Licensees and Operators can select. The major differentials will become pricing and quality of services of the undersea cable service providers.

4.2.5. Ease of Market Entry

The Commission wants comments on the prospects that new IIC market entry will reduce any potential dominance or abuse of dominance in the IIC market.

Zain comments as follows:

We anticipate that the prospects of new IIC market entry will reduce potential dominance or abuse of dominance in the IIC market, as the competitive landscape will improve greatly.

Notwithstanding the prospects that additional undersea cables will be terminated in Nigeria, it is however necessary to highlight that the additional capacity may fall short of the country’s requirements as it is yet unclear what the pent up demand in the country is. Going forward, it

is anticipated that the entry barriers in terms of funding and cumbersome approval process, particularly securing approvals of other countries regulatory agencies, may constrain further investments and level of competition.

4.2.6. Rate of Technological Change

The Commission wants comments on issues related to technology change and other market changes and related effects that may increase competition and/or lessen competition in the IIC market.

Zain comments as follows:

Ordinarily, technology changes impact positively on capacity and pricing and invariably enhance availability of service. We expect the entry of more operators to increase competition, particularly MTN, WACS that shall represent 45% of the market capacity at launch, pending further investments in the market between now and 2011.

4.2.7. Frequent Interaction Among Firms

The Commission further seeks comments on any regulatory action that may be required to remedy collective action among IIC market providers that unduly lessens competition.

Zain comments as follows:

The Commission should explore the option of mandating the IIC Providers to develop a standard Reference Offer and Service Level Agreement (SLA) that they must comply with going forward. In addition, a systematic procedure should be put in place for periodic review of the IIC pricing mechanism without discouraging innovation and further investments in the sector.

4.2.8. Few Market Participants

The Commission seeks comments on whether the level of current and anticipated competitors in the IIC market will be sufficient to ensure a robustly competitive market, and to limit any concerns about substantial lessening of IIC market competition.

Zain comments as follows:

Drawing from experiences in the Nigerian mobile telephony market, Zain states that a market of five competitors will be a very competitive market. The Commission is, however, required to put necessary measures such as pricing thresholds, mandatory provision of service to any requesting party, Reference Offers by the IIC and SLAs to minimize service disruptions. It is hoped that this will create a very competitive landscape in the industry.

4.2.9. Symmetry Among Providers

The Commission seeks comments on whether there is or is likely to be collusive behaviour or joint dominance among the present and future providers of IIC based on considerations related to the symmetries or asymmetries in their operations.

Zain comments as follows:

The different entry intervals of the IIC Operators and the substantial capacity of late entrants will discourage any form of collusion, as the late entrants would put in place necessary measures to attract subscription and ensure quick return on investments, which may not be realized through collusive behaviour or joint dominance initiatives.

4.2.10. Structural Links and Co-operation agreements among Firms

The Commission seeks comments on whether existing or future structural links between IIC market operators result or could result in dominance or substantial lessening of competition.

Zain comments as follows:

The absence of appropriate regulatory prescriptions (such as standard RO, SLA), existing or future structural links between IIC market operators could result in dominance or substantial lessening of competition.

4.2.11. Fast Demand Growth

The Commission further requires comments on whether fast demand growth and the potential for concentration on economies of scope in larger vertically integrated firms could lead to collective dominance or a lessening of competition in the IIC market.

Zain comments as follows:

To discourage vertically integrated firms from engaging in acts capable of lessening competition, the Commission should ensure that there is an RO and SLA in respect of IIC markets. Also, vertically integrated firms should be compelled to separate their two distinctive firms from each other, through accounting separation and competitive pricing of services.

5. Further Discussions and Recommendations

Specific discussions and recommendations in accordance to the Consultation Paper were undertaken in section **Error! Reference source not found.** above. This section dwells on other pertinent issues of the consultation on dominance.

5.1. Issues with the Consultation on Dominance

We recount the following in relation to consultation on dominance undertaken by the NCC:

- Following communications of NCC's intent to undertake a dominance determination in selected markets, Questionnaires developed by McCarthy Tetrault (NCC's Consultants) were circulated to operators in May 2008 requesting information for the exercise. The following indication was given on the Questionnaire: "Though the Commission is interested in the submissions of stakeholders regarding any specific communications markets of concern, the Commission has identified the following markets as being of particular interest - (a) leased lines and related facilities/services; (b) international IP connectivity; (c) interconnection related facilities and services; and (d) unbundled loops and other means of providing competing Internet services. With these objectives in mind," questions were directed to the following stakeholders (i) Nitel; (ii) Cellular Operators; and (iii) competing fixed line telephone operators.
- Zain responded in the same month (May 2008) with the requested information and held meetings with the NCC and the Consultants shortly after.
- There was no further interaction with the NCC or its Consultants except an April 2009 request from the NCC of the same information already provided by Zain in May 2008. The information was promptly re-sent.
- There was no delineation of the Communications Markets as was anticipated until the Proceeding Notice served Zain by the NCC in October 2009, which communicates an intention to undertake determination of dominance on the Mobile Voice Market.

As it were, 18 months have elapsed since the request for information in May 2009 till the Proceeding Notice of October 2009 with very little interaction between the NCC and the industry in terms of market delineation. Additionally, an intention to undertake a determination of dominance on the Mobile Voice Market which was not contemplated at the onset, has now been notified. The situation is of great concern to Zain as it introduces very high levels of unpredictability and uncertainty with the consultation on dominance. This is quite disturbing as the Commission seems to be acting quite apart from the market which it seeks to undertake a determination. We note in particular, the regret in the Consultation Paper of the inadequacy of information in relation to the International Internet Connectivity Market. We assert that should there have been greater interaction with the industry, this would not have been the case. Indeed, as discussed in 3.2.1 above, we are concerned that data available to the Commission may no longer be accurate or valid. For instance, the number of mobile subscriptions may be a total for the Mobile Voice/SMS and Mobile Data/Broadband markets, rather than the total for the Mobile Voice Market alone. The importance of such accurate

information to the determination of dominance in the Mobile Voice Market cannot be understated.

We therefore request the following from the NCC:

- Full disclosure and review of collected information and claims.
- Market Delineation of relevant Communications Markets in Nigeria
- Improvements to the Consultation Process going forward.

These are discussed in detail below.

5.2. Full Disclosure of Information and Review of Collected Information and Claims

Full disclosure of information available to the Commission in a forum with operators is called for as is being done with the Interconnect Cost Study. This would assist to review and validate information collected by the NCC from whatever source, for the exercise in relation to the Mobile Voice Market and the International Internet Connectivity Markets.

It will also provide an opportunity for the NCC to disclose allegations and claims that have been made by operators in relation to the determination of dominance and the investigations conducted by the NCC to validate or refute them.

5.3. Market Delineation (of Relevant Communications Markets in Nigeria)

For clarity, transparency and regulatory certainty and in accordance with international best practice, the Commission should endeavour to identify and delineate in consultation with the industry, all the relevant communications markets in Nigeria, both wholesale and retail, prior to engaging in an exercise to determine dominance in any of the identified relevant markets. The Commission should thereafter proceed to publish schedules for the determination of dominance in the identified markets, as well as obligations that may be required to be imposed on dominant operators. This would ensure that all stakeholders are duly involved in the process from the outset, and not 'taken by surprise' as it were.

5.4. Consultation Process

Pursuant to the determination of dominance in each relevant market identified in consultation with the industry thereafter, we would respectfully like to restate suggestions made by Zain (in the course of the development of the Consultation Guidelines) which the Commission had accepted, thus:

The Commission should publish a timetable for the Consultation indicating the schedule for various stages of the Consultation from commencement to conclusion. Any changes in the scheduling should be communicated to stakeholders for necessary information. This will assist

stakeholders to plan better. For instance, they can determine when, and what type of research will be required at what stage of the Consultation, among others. They can therefore better schedule their work with respect to engaging resources such as consultants or other subject matter experts for relevant contributions. This will assist more active and constructive participation in the consultation process to the improvement of the quality of contributions. This will cascade to the overall quality and usefulness of the eventual Regulations or intervention by the Commission. It will thus ensure a predictable, informative and more constructive process rather than what currently exists.

5.5. Ex Post or Ex Ante Regulation

Once the market review and market delineation exercises are conducted, the NCC will also need to assess whether ex ante or ex post regulation is required to deal with questions of abuse or possible abuse of dominance. Given the current dynamics of the Nigerian market and the behaviour of the operators, Zain does not see a compelling need for ex ante regulation in most markets as long as the enforcement approach and procedures for ex post regulation are clearly articulated and followed.

6. Conclusion

Zain commends the efforts of the Commission as it seeks to further deepen the competitive landscape in the Nigerian Communications Industry. We wish to suggest recourse to international best practices to achieve best results, especially with regards to the identification, analysis and delineation of relevant markets.

We believe that the Commission needs to delineate communications markets prior to any competitive determinations to assure transparency and regulatory certainty. Also, timelines ought to be specified for the validity of determination of dominance till the next determination; as well as the period of market review or study prior to the determination.

We are deeply concerned about the uncertainties surrounding the overall conduct of the exercise given that the dominance determination which was not contemplated for the Mobile Voice Market at the onset of the exercise is now under consideration, whereas other markets that were contemplated at the onset of the exercise are no longer being considered. The NCC is invited to provide clarification to assure transparency and regulatory certainty.

Differences between the Consultation Paper and the Proceeding Notice sent to Zain need to be resolved. We deferred to the Consultation Paper and focused on the Mobile Telephone Services Market as opposed to the Mobile Wireless Market referred to in the Proceeding Notice. The Mobile Wireless Market comprises several relevant markets, the Mobile Voice, Mobile SMS, Mobile Data and Mobile Broadband Markets that ought to be reviewed individually if any meaningful determination of dominance is to be made. The omission of the Mobile CDMA segment from the Mobile Voice Market is lamented as it is a vibrant and upcoming segment of the market with a 10%

mobile market share currently which is projected at over 19% by 2013. Correction of this significant omission is urgently requested in order not to give a wrong picture of the market.

The Commission is invited to consider the entire bandwidth market for International Internet Connectivity (IIC) including the IIC Satellite as opposed to just the IIC Submarine Cable Market as proposed in the Consultation Paper.

Zain considers that the possession of market power by an operator or group of operators does not imply dominance, i.e. ***“a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.”*** We note that determining dominance outside the above consideration would essentially serve to penalize rather than encourage operators with market power, a situation that will discourage the transfer of efficiencies by such operators to customers.

Giving cognisance to the considerations market share, relative size, control of essential facilities, technology change, fast demand growth, etc, and subject to full disclosure by the NCC of information at its disposal, Zain considers that neither MTN individually nor MTN, Zain and Glo Mobile collectively are dominant or have conducted themselves in a manner as to lessen competition in the Mobile Voice Market.

Similarly, Zain considers that the IIC Submarine Cable market though currently monopolized by NITEL, will become reasonably competitive over next two years without the risk of individual or collective dominance by the new entrants. Some regulatory safeguards to improve competition should be instituted, including accounting separation for different business units; price cap regulation; publication of reference offer and service level agreements.

End.

**Delineation of Electronic Communication Markets in Europe.
The European Commission Recommendation 2003/311/EC made pursuant to
European Parliament Directive 2002/21/EC**

Under the European Commission Recommendations, the telecommunications market is divided into eighteen distinctive markets as listed below:

Retail Level

- i. Access to the public telephone network at a fixed location of residential customers.
- ii. Access to the public telephone network at a fixed location for non-residential customers.
- iii. Publicly available local and/or national telephone services provided at a fixed location for residential customers.
- iv. Publicly available international telephone services provided at a fixed location for residential customers.
- v. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.
- vi. Publicly available international telephone services provided at a fixed location for non-residential customers.
- vii. The minimum set of leased lines (which comprises the specified types of leased lines up to and including 2Mb/sec as referenced in Article 18 and Annex VII of the Universal Service Directive of the European Union).

Wholesale Level

- i. Call origination on the public telephone network provided at a fixed location.
- ii. Call termination on individual public telephone networks provided at a fixed location.
- iii. Transit services in the fixed public telephone network.
- iv. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.
- v. Wholesale broadband access.
- vi. Wholesale terminating segments of leased lines
- vii. Wholesale trunk segments of leased lines
- viii. Access and call origination on public mobile telephone networks
- ix. Voice call termination on individual mobile networks
- x. The wholesale national market for international roaming on public mobile networks.
- xi. Broadcasting transmission services to deliver broadcast content to end users.