



CONSULTATION PAPER

ON

DOMINANCE

IN SELECTED COMMUNICATIONS MARKETS

OCTOBER 27TH, 2009

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1. The Purpose of this Consultation

This Consultation Paper is issued by the Nigerian Communications Commission (NCC), to initiate a public consultation pursuant to the Commission's responsibilities under the *Nigerian Communications Act, 2003* (the "*Communications Act*"). The Consultation commenced by this paper is intended to further the Commission's mission of supporting a market driven telecommunications industry.

The purpose of this Consultation is to assist the Commission to determine whether certain telecommunications service providers are in a position of market "dominance" in selected telecommunications industry markets in Nigeria within the meaning of the *Communications Act*.

It is the Commission's responsibility to determine whether certain telecommunications operators hold a position of dominance, and, if so whether they are abusing this position by acting in a manner that substantially lessens competition. Consequently, the Commission wished to examine whether certain telecommunications operators hold a position of dominance in certain telecommunications markets, and, if so, whether they are abusing their position of dominance, and engaging in conduct that substantially lessens competition in those markets.

In summary, the Commission is concerned that operators who hold positions of dominance in telecommunications markets do not act in a manner that is detrimental to the interests of consumers or otherwise act contrary to the *Communications Act*.

This Consultation examines the potential existence of dominance in two key markets:

- Mobile Telephone Services; and
- International Internet Connectivity (and related leased data line connectivity)

The Commission hereby invites submissions from the public, including all stakeholders in the Nigerian telecommunications industry and other segments of society on the existence of dominance in certain telecommunications markets.

This paper describes the legal and regulatory framework for making determinations of dominance and discusses the current and prospective state of competition in the two key markets under review. The paper also makes some preliminary findings relating to the state of competition, the existence of market dominance, and potential anti-competitive conduct. Throughout this paper, the Commission invites comments on its preliminary findings and analysis. The paper also invites comments and complaints on other issues related to the state of competition in the two key markets and related to potentially anti-competitive behaviour in those markets.

2. Consultation Process

This section describes the consultation process by which the Commission wishes to obtain input on the issues of dominance in the selected telecommunications markets.

The process is established in accordance with the Consultation Guidelines the Commission published in 2007.

The Commission invites **Comments** on the issues raised in this paper, in accordance with the following procedures:

Comments shall be submitted in writing and delivered by hand or filed electronically at the Commission's addresses indicated below:

Electronic delivery: dominancerpt@ncc.gov.ng

Hand delivery: Nigerian Communications Commission
Plot 423, Aguiyi-Ironsi Street
Maitama District
Abuja
Nigeria
Attention: Director, Legal Services

Comments shall be delivered (and actually received by the Commission) no later than **30th of November, 2009**.

As prescribed by section 21 of the Commission's Consultation Guidelines all Comments must contain the following information:

- (i) name of respondent,
- (ii) respondent's details and information,
- (iii) a statement that the response should or should not be published by the Commission for purposes of consultation,
- (iv) signature (provided that in the case of electronic submissions, an electronic signature should be used)
- (v) position or rank of the signatory
- (vi) The response should represent the view of the organization represented

The Commission shall publish all Comments received as part of this consultation by posting them on its web site as soon as possible after receipt, subject to any requests for non-publication made pursuant to paragraph (iii) above.

Reply Comments may be filed by any interested member of the public to respond to the issues raised in the Comments provided for above. Such Reply Comments shall be restricted to responses to the Comments, and shall not deal with new issues not raised in the Comments. Reply Comments may be filed at the Commission's addresses listed above, not later than **7th December, 2009**.

The Commission may submit written **Interrogatories** (questions) to certain licensees and other stakeholders, in order to obtain more information or seek clarification on issues related to this consultation. Such Commission Interrogatories shall specify the deadline by which responses are requested.

The Commission plans to hold a **Public Consultation** in the form of a public meeting. The purpose of the Public Consultation will be to obtain further information related to the issues in this consultation and to clarify questions related to the analysis in this Consultation Paper, in the Comments, Reply Comments and Interrogatories.

A Public Consultation will take place on the 16th of December, 2009 at the conference room, Nigerian Communications Commission head office, Plot 234 Aguiyi Ironsi Street, Maitama, Abuja, Nigeria.

The following licensees (the "subject licensees") are requested to attend the Public Consultation. They may make an opening presentation of up to 20 minutes on the issues raised in this Consultation Paper. Following that, representatives of the Commission will ask them questions on issues related to this consultation.

- MTN Nigeria
- Celtel Nigeria Ltd (Zain)
- Glomobile Nigeria Ltd (Glo mobile)
- Nigerian Telecommunications Limited (NITEL)

Other interested stakeholders may request an opportunity to make an oral presentation at the Public Consultation. Requests shall be submitted in writing at the time parties file their Comments and include a short statement of the reasons for the request. The Commission will advise such parties of their right to make an oral presentation at the meeting in its Consultation Procedures Notice.

The Commission will publish on its website a **Consultation Procedures Notice** before the Public Consultation. This notice will list the parties who will be appearing at the Public Consultation and their order of appearance. The notice may also describe any other procedural matters related to the conduct of the consultation.

The key steps in the process described in this section are set out in the following table:

(A) Written Comments Due	30 th November, 2009
(B) Reply Comments Due	7 th December, 2009
(C) Public Consultation	16TH December, 2009

The Commission may amend or supplement this consultation process by notice posted on its web site. Interested persons should monitor the web site to ensure they are aware of any changes in the process.

3. Legal and Regulatory Framework

Under the *Communications Act*, the Commission is empowered to “determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations . . . as it relates to the Nigerian communications market” (Sec. 90).

In this capacity, the Commission has the responsibility to determine whether any telecommunications licensees have dominant market power and, if so, are acting in a way that results in any “substantial lessening of competition” in a market. Licensees are specifically prohibited under the *Communications Act* from engaging in behaviour that may result in such lessening of competition.

The Commission is also empowered to publish guidelines or regulations which clarify the meaning of “substantial lessening of competition” in one or more communications markets.

The key provisions of the *Communications Act* and the Regulations promulgated under the Act, that relate to this consultation on market dominance, and substantial lessening of competition, are set out in the Appendix to this paper.

The analysis in this paper is based on the provisions of the *Communications Act* and Regulations set out in the Appendix. All members of the public who intend to file comments in response to this paper are encouraged to review the Appendix carefully, to ensure they understand the legal and regulatory framework within which the Commission must act.

The subsequent sections of this Consultation Paper address the practical questions surrounding the potential existence of dominance in two specific telecommunications markets in Nigeria, based upon the criteria set out in the Regulations. The Paper addresses the types of conduct or practices that may result in a substantial lessening of competition by licensees that are found to be in a dominant position.

In each section below, we invite comments related to potential dominance in each of these market segments, and related to conduct or practices that may result in a substantial lessening of competition.

4. Identification of Relevant Markets

As described in Section 20 of the *Competition Practices Regulations, 2007* the Commission must first identify relevant markets before examining potential dominance in such markets. It lists three types of criteria for determining these relevant markets: (a) the products and services and geographic scope of the market; (b) demand-side substitutability within the market; and (c) supply-side substitutability.

For purposes of this Consultation, and based upon these criteria, the Commission has defined two specific telecommunications markets in Nigeria for which it seeks to investigate conditions of possible dominance. These markets, and the rationale for identifying them for this purpose, are as follows:

- (a) Mobile telephone services: This market includes the retail supply of wireless mobile telephony and related features by licensed operators who have been granted specific radio frequency authorizations subject to licence conditions unique to this market. This market is distinct from other (i.e., fixed) telephone service markets in a variety of ways, including service mobility, functions, and pricing. Although customers may utilize fixed-line and other services to place comparable voice telephone calls, such use is not sufficiently similar to the full package of mobile telephone services to qualify as effective demand-side substitution. In addition, fixed line services are not as widely available to the public in Nigeria as mobile services, and suppliers of fixed line or other alternatives cannot directly compete with mobile telephony on an equal basis. We therefore conclude that the mobile telephone service market is a unique and relevant market for purposes of evaluating potential dominance among its licensed operators. We note that, in some countries, distinctions have been made between the markets for mobile call origination and call termination, as well as for wholesale market access in the mobile sector. However, for purposes of this investigation, we conclude that the retail mobile market as a whole is appropriate for evaluating potential dominance.
- (b) International Internet Connectivity: This market consists of the connection of leased high-speed data circuits, including, predominantly, circuits connected to the Internet backbone. Such connections are essential for the provision of wholesale and retail Internet access to Nigerian customers, as the vast bulk of Internet traffic is international by nature, and hence must pass over such connections. This service market is thus a narrow but unique market providing a critical wholesale service to Internet Service Providers and other high-volume data users. There is no effective means for these users to obtain a comparable substitute to such connections, nor is there any way in which the service of global data connectivity can realistically be obtained, other than through such international leased data lines (by either cable or satellite technology), provided by operators licensed to serve that market in Nigeria. The market for international Internet connectivity provided by means

of leased data circuits, is therefore, a second unique and relevant market for purposes of evaluating potential dominance.

- **We invite comments on the identification of these two proposed relevant markets, for purposes of this dominance investigation. You are encouraged to provide arguments and evidence supporting, opposing or suggesting changes to the definition of each relevant market. You may also suggest other relevant markets in which the Commission should consider evaluating potential dominance.**

The following sections address the Commission's analysis of the two markets identified above with respect to potential dominance, according to the criteria and standards set forth in the Act and the Regulations.

5. Determination of Dominance in the Mobile Telephony Market

5.1. Market analysis

The mobile telephone service market in Nigeria has five licensed operators which provide subscription-based and pre-paid cellular mobile telephone service, including voice, sms/text, and data connections both domestically and internationally. The companies licensed to operate in this market are:

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

As a *prima facie* observation, it would be unusual for the Commission to declare a condition of Significant Market Power or Dominance in a market containing five active operators which generally provide service on a nationwide basis. Nevertheless, there may be conditions in the Nigerian mobile telephony market that warrant investigation of potential anti-competitive practices and market dominance, and the impact of these conditions upon customers.

First, it is at least theoretically possible that one operator could achieve a dominant position, with all others subordinate to and dependent upon this market leader. This could be the case if such an operator were found to control a disproportionate share of market revenues, underlying infrastructure, and other factors, allowing it to influence both competitor and customer costs and prices unilaterally.

In the Nigerian mobile market, the leading operator is MTN, which has held the largest market share and operated the most extensive network for several years. In this

consultation, therefore, we wish to address the question of whether MTN is a dominant operator in this market.

An alternative finding, however, which may be more likely in the mobile sector, could be a determination that this market exhibits conditions of “joint” or “collective” dominance among two or three leading operators together. [See Section 22 of the Regulations.] The concept of collective dominance in telecommunications has been discussed in relevant professional literature and regulatory proceedings.

The Commission wishes to consider the possibility that some form of joint dominance exists in the Nigerian mobile telephony market. In particular, the Commission wishes to explore whether there are any practical or theoretical indicators that there has been a substantial lessening of competition due to such joint dominance. We therefore also present an analysis of potential collective dominance among the three leading mobile telephone operators in Nigeria, based upon the approaches taken in the professional literature and other precedents for such an analysis.

5.2. Individual Dominance Evaluation

The basic criteria for evaluating individual dominance by a single operator in a service market are set forth in the Regulations. The Commission has considerable flexibility in how it may examine and apply these criteria, taking account of available data and specific conditions in each market. For purposes of this Consultation, as mentioned above, we consider whether MTN is a dominant operator within this market.

We set forth below each of the key criteria set out in the Regulations and the initial available evidence as it applies to MTN’s market position. We request further comment and input from stakeholders who may have additional information, insights, and opinions on each point:

(a) Market Share

“the market share of the Licensee, determined by reference to revenues, numbers of subscribers or volumes of sales”:

As of June, 2009 the Commission estimates that MTN’s market share of the Nigerian mobile telephony market was 41.2%. According to the standard of Regulation Section 21, by achieving a market share threshold above 40%, the Commission shall presume MTN to be a dominant operator in this market. However, MTN’s market share has decreased in recent years. It was greater than 50% in 2006. This suggests that MTN’s potentially dominant position has been eroding, and the market may be reaching a degree of balanced competition, at least among the top three operators MTN, Zain (Celtel) and Glo mobile). The market share of the smallest two operators (EMTS, M-Tel), however, has also shrunk, to less than 1% each.

- **We seek comment on the market share of the mobile operators, and of MTN in particular. We also seek comment on whether market share data should cause the Commission to exercise its authority to determine that MTN is a dominant operator.**

(b) Relative Size

“the overall size of the Licensee in comparison to competing Licensees, particularly any resulting economies of scale or scope that permit the larger Licensee to produce products or services at lower costs”:

According to available information, MTN does appear to be significantly larger than its two main competitors, Zain (CelTel) and Glo mobile. MTN's financial statements show a level of Fixed Assets that is nearly twice that of Celtel and almost three times as great as Glo mobile. At the same time, MTN employs about the same number, or even fewer, personnel than each of the other two major carriers, strongly suggesting that it may in fact have achieved significant economies of scale in its operations.

- **We seek 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.**

(c) Control of Essential Facilities

“control of network facilities or other infrastructure, access to which is required by competing Licensees and that cannot, for commercial or technical reasons, be duplicated by competing Licensees”:

MTN does control a significant, but not necessarily dominant, portion of key network infrastructure in the national mobile telecommunications sector. Most other operators have indicated that they have encountered difficulties of one kind or another in obtaining adequate and timely interconnection with MTN, or shared access to needed facilities such as towers and backbone network transmission. In areas where MTN may have the only viable infrastructure, such problems can amount to a significant barrier to effective competition.

- **We seek comment on the extent of MTN's 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 MTN's 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.**

(d) *Negotiating Position of Customers*

“the absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers”:

Customers of mobile telephone operators, including MTN, can switch carriers quite easily, especially pre-paid customers who need only obtain a new SIM card from a competing carrier. However, in the absence of number portability, there is still a significant disincentive for customers to switch mobile providers, as they must change to a new telephone number. Thus, 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. The Commission is in the process of overseeing implementation of mobile number portability for Nigeria, which should reduce this barrier substantially.

Another key point in this area relates to the scope of network coverage, and the degree of roaming available across networks. Where no roaming agreements are in place, customers will be reluctant to purchase services that might not give them access to uninterrupted coverage in areas that they are likely to travel.

- **We seek comment 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. In addition, we ask for any evidence that other factors may enable MTN to sustain higher customer prices or other advantages due to customer reluctance or inability to switch carriers.**

(e) *Ease of Market Entry*

“ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices”:

Market entry in the mobile telephone market in Nigeria is not possible without a license from NCC. More significantly, all GSM spectrum suitable for mobile operators in Nigeria has been licensed, and none remains. Even among licensed operators, we have seen that obtaining a license is not necessarily sufficient to ensure successful competitive entry.

- **We seek any views as to whether the restrictions on market entry in the mobile sector favour MTN, and places it in a position of dominance in this market.**

(f) *Rate of Technological Change*

“the rate of technological or other change in the market, and related effects for market entry or the continuation of a dominant position”:

Technological change in the mobile telephone market worldwide remains rapid and significant. In Nigeria, the most important new development is the licensing of 3G services to all three of the major operators (MTN, Glo, and Zain (Celtel) as well as to a new entrant, Alheri). However, the market has been relatively slow to launch 3G operations, and it is unclear what impact this new technology will have upon the wider mobile telephony market.

- **We seek comment on the effect of 3G services in particular, and technological change in the mobile telephone market in general, upon the position of MTN in this market and its possible dominant position.**

In addition to the key criteria set out in the Regulations, the Commission invites input from stakeholders on other issues that may be relevant to determining whether MTN or another mobile operator holds a dominant position in the mobile telephony market and whether such an operator has abused such a position. For example, is it possible that the level of MTN's revenues or earnings relative to the overall size of the mobile telephony market is an indicator of market dominance? Could other factors, such as superior or unique access to financial resources, equipment or technology be such indicators? Parties who may have information, insights, and opinions on these or other issues are invited to include them in their Comments.

- **We seek comment on any other issues, including the relative size of MTN's revenues or earnings to the overall market, superior or unique access to financial resources, equipment or technology, which may indicate that MTN or another operator possibly has a dominant position in the mobile telephony market.**

Preliminary Findings: Based upon the initial available evidence and market information, the Commission's preliminary view is that MTN does not represent an individually dominant operator in the mobile telephone market, under the general criteria for such a determination. 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. In fact, it is quite possible that MTN was in a dominant position two or three years ago, when its market share was higher and competition was still developing. However, the measures that the Commission has previously taken to enhance competition have apparently succeeded in overcoming MTN's previous dominance.

On the other hand, MTN's relative size and control of network infrastructure remain issues, and it may yet be appropriate for the Commission to take action to prevent a lessening of competition by promoting greater access to shared infrastructure and completing the implementation of number portability to strengthen customer choice.

- **We seek comment on this tentative conclusion 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.

5.3. *Joint/Collective Dominance Evaluation*

The key principles and criteria for evaluating potential joint/collective dominance in the mobile telecommunications market have been developed in recent years through a number of professional articles as well as rulings by regulatory authorities, principally in the European Union. For example, the Commission for Communication Regulation (ComReg) in Ireland found in 2005 that the market for wholesale access and call origination on Public Mobile Telephony Networks warranted a finding of collective dominance¹. On the other hand, in 2004 the Anti-Monopoly Committee of the Ukraine investigated allegations of joint dominance in the mobile telecommunications sector, and ultimately found that the market was in fact sufficiently competitive.²

The main factors that tend to underlie the prospects for collective dominance in a market can be summarized as follows:³

- Collective dominance can arise in the form of “tacit collusion” among operators in a market, where no explicit agreement or collusion may exist, but conditions evolve such that certain patterns of collective behavior occur, based on the individual and combined interests of the operators;
- Such tacit collusion can take the form of a lack of price competition, where firms determine that the potential gains from price undercutting are small and the losses from a retaliatory price war may be high;
- Where firms focus more on longer-term profits and strategic plans, rather than short-term gains, they have more incentive to maintain the balanced structure of a tacit collusion on prices, as the short-term gains are likely to be small, while longer-term losses could be large;
- Implicit price collusion can also extend to other aspects of service provision, such as quality of service improvements, product differentiation, and capital investments, where firms may have less incentive to attempt to improve their market position via such expenditures, recognizing that their competitors will not take similar initiatives;

According to the literature and regulatory precedents, key factors that contribute to creating the conditions in which tacit collusion and collective dominance may emerge including the following:

¹ ComReg Decision No. D04/05, 22 February 2005.

² World Competition: Law and Economics Review, Vol. 30, No. 2, 2007

³ Rey, Patrick, “Collective Dominance and the telecommunications industry,” University of Toulouse, 2002

- (a) Entry barriers: Relatively high entry barriers are a necessary condition for dominance or collusion in any market, as easy entry tends to ensure that any non-market-based pricing or behaviour will be corrected by new entrants.
- (b) Frequent interaction among firms: Tacit collusion is more possible when firms are required by the nature of the industry to interact directly on a regular basis, as they will be more aware of each others' information and strategies, and the impact of one firm's actions will be more immediately felt by the others.
- (c) Low levels of innovation: Collective dominance is more likely where innovation in the sector is relatively low; rapidly changing technology and business practices make it difficult for firms to remain on the same path simultaneously.
- (d) Few market participants: Tacit collusion is only possible when there is a relatively small number of market participants, as coordinated behaviour among many players becomes increasingly impractical.
- (e) Symmetry among providers: Collective dominance is more likely when there is symmetry among providers, in terms of the structure and scope of their operations, the nature of products and services, and the general business model. This also implies that there are no significant "maverick" firms in the market, which are inclined to take independent, aggressive actions to promote their position.
- (f) Structural links and cooperation agreements among firms: As with direct interaction, where there may be more concrete structural links and cooperation agreements among firms, there is a greater likelihood of tacit collusion arising from such close relationships.
- (g) Fast demand growth: Collective dominance can be fostered in a market where demand is growing fast, as firms may have a greater incentive to concentrate on increasing their scope of operations and customer base through expansion, rather than through direct competition with other providers.

The NCC is interested in evaluating these factors in the context of the Nigerian mobile telecommunications market. In addition to considering the criteria for individual dominance, the Commission wishes to determine whether the above-noted factors suggest the possibility of collective dominance in the mobile telephony market. Specifically, we are interested in determining whether the three large operators – MTN, Glo mobile and Zain (Celtel) – are collectively dominant in this market and have conducted their business in such a way as to lessen competition from the smaller licensees.

We consider each of these factors related to collective dominance below and describe available evidence on their application to the mobile telephony market, and then request comment and further input from interested stakeholders on each point:

Collective dominance factors

As indicated in the discussion above, one of the most basic effects of tacit collusion or collective dominance in a market is a lack of competitive movement in prices.

Secondary effects can also include declining quality of service as the market expands, and lack of product and service differentiation. The Commission notes that, to some degree, all of these conditions may be observed in the Nigerian mobile telephone service market.

According to the Commission's estimates, average peak period tariffs for mobile services in Nigeria have not decreased, and have even increased slightly over the past several years, despite the entry of new competitors and expansion of established operators' market share relative to MTN. There have also been widespread complaints about quality of service problems throughout the market. These conditions are contrary to what has been experienced in some other countries' mobile telephony markets and to what should typically be found in actively competitive markets.

- **We seek comment on the above analysis, including specific data or evidence regarding trends in pricing and quality of service. We also invite parties to submit any evidence related to the extent of competitive or collusive activity among the three major mobile service operators.**

Beyond these observations, the theoretical framework discussed above identifies some of the general factors that support the emergence of collective dominance in a market. We review these factors below in relation to the mobile telephone market, to determine whether the conditions exist for a possible finding of collective dominance:

- (a) Entry barriers: As discussed previously, there are fundamental entry barriers into the mobile telephone market, such that no new firms may realistically enter this market at this time.
- (b) Frequent interaction among firms: The cellular mobile industry, and the telecommunications industry in general, are characterised by frequent and necessary interaction among all firms in the market, as they must interconnect their networks and typically purchase services from each other in order to serve their own customers.
- (c) Low levels of innovation: As mentioned previously, there is a high degree of innovation in the mobile telephone industry generally. However, the most significant effect of innovation recently is the arrival of Third Generation (3G) advanced networks and services which have required operators to obtain entirely new licenses. The impact of the new 3G licenses and services on the traditional (2G) mobile market has not yet been determined, but such innovation does not directly affect the prospect of tacit collusion within the larger traditional mobile market, *per se*. Innovation within that traditional market has been less prevalent, as firms generally seek to offer the most basic degree of calling services to the

widest customer base possible. In fact, it is possible that the arrival of 3G services could lead the major mobile operators to decrease any efforts at innovation within the 2G market, in order to encourage customers to upgrade their service instead.

- (d) Few market participants: There are only five licensed mobile operators, and the three under scrutiny are by far the most significant.
- (e) Symmetry among providers: For the most part, the cellular mobile operators in the Nigerian market are relatively similar in structure. The major difference is the partial deployment of CDMA technology by some, as opposed to the prevailing GSM platform, but this difference does not appear to suggest any significant advantage or disadvantage by itself. The two smaller operators have not succeeded in differentiating themselves from the three leaders in a manner sufficient to develop or sustain a significant market presence.
- (f) Structural links and cooperation agreements among firms: As mentioned above, the nature of the cellular mobile industry requires direct cooperation among all firms, in the form of interconnection agreements. While these agreements do not necessarily lead to tacit collusion, they may create an environment in which such collusion can be readily established.
- (g) Fast demand growth: Demand has grown fast in the Nigerian mobile sector, even faster than in many other mobile telephone markets in the world. This high demand growth has been captured most recently by the three major operators almost exclusively. It is possible, according to the theories of collective dominance, that their interests in growing along with the market could have diminished their incentives to compete directly, while increasing tacit collusion to exclude the smaller operators from the fruits of the growing market.

➤ **We seek comment on each of the above observations regarding the conditions in the Nigerian mobile market in relation to the prospects for tacit collusion and collective dominance. Commenters are encouraged to provide evidence and arguments supporting or refuting any of the analysis of these conditions, or presenting additional considerations that the Commission should take into account in assessing market conditions in this context.**

Individual dominance factors

In addition to assessing the conditions that might lead to collective dominance, we must also review the same factors established in the Regulation which are the basis for determining dominance among individual operators, and apply these to the collective operations of the three major mobile telephone firms.

We therefore seek comment on each of the following issues in relation to the question

of possible collective dominance in the mobile telephone market:

- (a) Market share: Combined, the three main firms currently control over 98% of the market, as the two smaller operators are limited to less than 1% each. In strict terms, there is no question that the three major operators are, as a group, “dominant” in this sense. There appears to be a prospect that the market may even shrink to only those three, without some change in recent trends. It is less clear, however, if this combined market success also indicates tacit collusion, which has implicitly divided the market among the three operators, at the expense of their other two competitors.
- (b) Licensee size: The three licensees together are much larger than the remaining two operators, although MTN, as mentioned above, is significantly larger than the next two operators. Combined, the three large operators clearly have dramatically more resources and a much greater potential to achieve scale economies than any individual competitor. It is not clear, however, that any significant increase in scale economies could arise from the tacit interactions of the firms, as they do not generally share operations, other than through network and facility sharing (see below).
- (c) Control of network facilities or other infrastructure: Collectively, the three major operators control nearly the entire cellular mobile network infrastructure in Nigeria, with additional reliance on NITEL for certain backbone network connections. There have been many complaints concerning problems with interconnection by the smaller operators (and also among the larger operators), suggesting that at least some degree of inefficiency, if not overt anti-competitive behaviour, exists in the deployment and provision of essential facilities.
- (d) Absence of buying power or negotiating position by customers: As in the case of MTN individually, there may be barriers to customers switching from any of the major operators to one of the smaller competitors, due to lack of number portability, and possibly other factors. To the extent carriers are not present in certain parts of the country, this also contributes to reducing consumer buying power relative to the larger operators.
- (e) Ease of market entry: As mentioned previously, new market entry is generally not possible in the mobile telephone market in Nigeria at this time.
- (f) Rate of technological change: See discussion above relative to innovation, technology change, and the arrival of 3G licenses.

- **We seek comment on each of the above 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.**

Preliminary Findings: 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. There are significant indications which suggest collective dominance and tacit collusion may exist among the three operators, with the effect of constraining competitive price reductions, diminishing overall industry quality of service, and inhibiting the growth of further competition from other licensees. However, such conditions may be due to other factors that do not rise to the level of collective dominance and tacit abuse of that dominance.

The Commission therefore intends to review the comments and inputs provided in response to this Consultation before drawing a final conclusion regarding the question of collective dominance in this market. We encourage stakeholders to provide as extensive and persuasive evidence as they may have to assist the Commission in this analysis.

- **We seek comment on this tentative conclusion, based upon the evidence discussed above and any other factors and considerations that stakeholders may present to propose a more conclusive determination on this issue.**

5.4. Other Concerns Related to Dominance or Substantial Lessening of Competition

As part of this consultation process, the Commission invites stakeholders and the general public to draw to its attention any other concerns related to dominance or conduct that may have the effect of substantially lessening competition in the mobile telephony market. Comments need not be restricted to the specific issues of dominance which are discussed in the foregoing sections of this Consultation Paper.

- **We seek comments on any other concerns related to dominance or conduct that may have the effect of substantially lessening competition in the mobile telephony market. The Commission invites members of the public to submit any specific complaints about dominance and abuse of dominance by licensees in this market. Such complaints should be accompanied by supporting data or other evidence, wherever possible.**

6. Determination of Dominance in the International Internet Connectivity Market

This section considers the issues related to market dominance in the Nigerian market for international Internet connectivity, that is, the market for the provision of wholesale access to the international Internet backbone. The term “International Internet Connectivity” (IIC) is used in this section to refer to this market.

IIC is primarily provided in Nigeria by means of submarine telecommunications cable links and to a much lesser extent by satellite and terrestrial links. These same links also provide international connectivity for other telecommunications data services. However, by far the main service provided over such data links is IIC. Therefore, for convenience, we will refer to the entire international data circuit connectivity market as the IIC market.

6.1. Market analysis

The Nigerian IIC market has been changing significantly over the past few months. Until last year, NITEL was the monopoly provider of optic fibre IIC via submarine cable, as it had been since 2001. Over the course of the past few years local operators have added some limited extra capacity of their own, mostly via satellite links and limited terrestrial links. Nigerian operators, such as MTN, have also enhanced their national backbone capacity, in some cases, substantially.

The Nigerian IIC backbone market is in the midst of significant and rapid changes, as four major new optic fibre submarine cables are brought into service in the coming years.

The major current and planned players in the Nigerian IIC market (including the developments coming in the next two years) include the following:

- The SAT3/WASC cable of which NITEL has a significant 8.39% shareholding. NITEL has been the sole provider of services over this cable in Nigeria since it became operational in 2001.
- The GLO-1 (Globacom) cable, operational from September 2009 offering 1.28-Tbit/s capacity.
- The Main One cable, to be operational from May 2010, to offer additional 1.28-Tbit/s capacity to Europe, South Africa and the Americas.
- The WACS cable, with MTN as one of its main shareholders, to be operational starting in 2011, will offer 3.84 Tbits/s of capacity into Europe and Southern Africa.
- The ACE cable, to become operational in 2011 with a minimum capacity of 1.92 Tbits/s, led by France Telecom-Orange to connect over 20 countries within the West African coastal region with France.
- The SEACOM (Gateway), with expanded pan-African capacity

Additional capacity that is complementary to the above, includes:

- The SAFE (connected to the SAT3 in South Africa since 2001)

6.2. Individual Dominance Evaluation

We will consider the possibility of an individual dominance determination in this market first, and then the prospect of joint or collective dominance. There is thus some overlap in the analysis in this and the next section, dealing with individual and joint dominance.

We will use the same approaches to analysis of individual dominance (relying on the criteria set out in the Regulation. The key criteria are discussed below:

Criteria for determining individual dominance in the IIC backbone market

- (a) “the market share of the Licensee, determined by reference to revenues, numbers of subscribers or volumes of sales”:

The market share of NITEL will likely change quickly. In the past, it has enjoyed a position as the dominant provider of IIC by virtue of being the sole provider of IIC via a fibre submarine cable. However, it has started to face significant new entrants in this market. The degree of dominance that NITEL has enjoyed in the past has already been eroded somewhat since 2003. Over the past years, newer operators responded to the high pricing and the relatively low quality of service on the SAT3/WASC, and built their own backbone infrastructure.

NITEL’s market position will now be challenged significantly by the landing of a new higher capacity fibre optic cable in Nigeria: the GLO-1, which is about to become operational. Three other large capacity cables will become operational over the coming two years: Main One, to be operational in 2010, and the WACS and ACE cables, in 2011. At the same time, 75% of NITEL is being divested and re-privatised from Transcorp and the Government of Nigeria. This will likely be an operational distraction to NITEL.

As a bottleneck provider of service on the only submarine cable, NITEL appears to have been in a position of IIC market dominance since 2001. It has charged prices estimated up to 50 times that of competitive markets. A detailed assessment of the criteria for individual dominance (based on revenues, numbers, subscribers or volume of sales) of the market share of NITEL is under the circumstances difficult to make, due to quickly changing market circumstances and insufficient access to reliable data. Our preliminary assessment of NITEL’s dominance in this market is, therefore, more subjective in character, based on interviews with several operators and on external data.

- **We seek comment 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). We also seek comment on any abuse of dominance or substantial lessening of competition in this market, both currently, and in the near future.**

- (b) “the overall size of the Licensee in comparison to competing Licensees, particularly any resulting economies of scale or scope that permit the larger Licensee to produce products or services at lower costs”:

The relative size of NITEL’s current presence in the IIC market has been large, compared to other players. In addition, NITEL retains sizable related business units, especially the SAT3 and MTEL (with 1.2 million mobile subscribers).

However, Globacom with its fully owned GLO-1 cable may quickly take a significant market share from NITEL in the Nigerian IIC market. This may be greater than envisaged at the inception of the GLO-1 project, given NITEL’s current operational difficulties and privatization distractions. The introduction of GLO-1 has raised expectations of greater competition in this market; ISPs and other operators have hoped that IIC prices could be cut as much as 90%; however, in the hypothetical case that Globacom were to acquire NITEL’s SAT3/WASC, the new market landscape raises new concerns over individual dominance, in that case by Globacom. Given that the re-privatisation of NITEL is a top political priority, the terms of any acquisition should obviously include IIC market dominance and other competition policy considerations.

Turning to MTN, there may be individual dominance considerations, should MTN acquire an interest in the SAT3/WASC. However, MTN is one of several shareholders in the WACS (compared to Globacom, which is the sole owner of the GLO cable). Historically, MTN has built a very solid backbone and there are reports that it has been reluctant to share its backbone infrastructure. This raises the question as to MTN’s approach regarding access to the WACS once it becomes operational. Should MTN acquire the SAT3/WASC, it could possibly also be in a position of potential IIC market dominance by 2011.

- **We seek comment on whether NITEL’s relative size in the IIC 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. We also seek comment on any concerns that the relative size of some new entrants, such as Globacom and the GLO-1 and MTN and the WACS, could lead to an abuse of dominance or lessening of future competition in the IIC market.**

- (c) “control of network facilities or other infrastructure, access to which is required by competing Licensees and that cannot, for commercial or technical reasons, be duplicated by competing Licensees”

To date, the infrastructure of the IIC backbone, namely the SAT3/WASC cable has been controlled by NITEL. Starting late this year, the new GLO-1 will provide a second major option for IIC access. In 2010, the Main One cable will be added and in 2011 the WACS and the ACE cables.

Now that the GLO-1 is about to become operational, it remains to be seen how access to its facilities and infrastructure will be provided. It may be provided in a manner that permits Globacom as the 2nd submarine cable operator to extract duopoly rents from its facility.

However, the installation of three other submarine fibre cable systems in 2010 and 2011 should create a sufficiently competitive market to deal with any concerns about the undue lessening of competition through collusive control over bottleneck facilities. It is nevertheless possible that there may be mergers and acquisitions among the four operators or other activities that lessen the expected increase in competition in the IIC market.

The current NCC sharing and collocation guidelines identify infrastructure that may be shared (largely passive elements) and that may not be shared (mostly active elements). The guidelines address: procedures for negotiating collocation and infrastructure sharing; general rules for collocation and infrastructure sharing; allocation of capacity; legitimate reasons for refusing access; separation; dispute resolution; and the contents of a Reference Offer for Collocation or Infrastructure Sharing. Since the current model for collocation in Nigeria includes “optional sharing” it may be worth considering whether “mandatory sharing” should be required to the passive elements of the backbone as well.

- **We seek comment on the extent to which control of network facilities and other infrastructure may lessen competition for access to IIC. We also invite comment 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.**

- (d) “the absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers”:

In the recent past switching to another IIC backbone providers has been practically impossible because of NITEL’s provision of the sole IIC cable facility. The only alternatives were satellite or other relatively lower quality IIC links, either leased or proprietary. The introduction of GLO-1 should make it possible for many licensees to switch from NITEL, and when the new cable systems land

in Nigeria, the choice will be greater. The current situation indicates that the limited negotiating options of customers will soon be significantly expanded.

- **We seek comment 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. We also seek comments on how the new market conditions will impact on the buying power or negotiating conditions of customers.**

- (e) “ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices”:

Entry into the Nigerian IIC market is capital intensive. It has traditionally not been a market that is easy to enter. However, NITEL’s high prices and limited alternative supply options have encouraged multiple new players to enter the market, as detailed above.

Africa still lags behind the world in submarine fibre investment, with the largest investments being in Asia at the moment. So while there has been investment in the right direction, bandwidth is a competitive game globally and still more investment is needed. As the most populous country in Africa, Nigeria will soon have a more competitive IIC market than any other country in Africa. This should effect a reduction in the price of bandwidth, making it more affordable, increase internet-based availability of products and services and increasing demand for quality of service.

- **We seek comment on the prospects that new IIC market entry will reduce any potential dominance or abuse of dominance in the IIC market.**

- (f) “the rate of technological or other change in the market, and related effects for market entry or the continuation of a dominant position”:

Due to technological change, it has become considerably less costly to install high-capacity submarine telecommunications cables. This results in relatively easier market entry. As discussed, Nigeria will have four major submarine fibre cable systems operational within two years. Yet, the Commission remains concerned about whether the technological advances and capacity increases that may be available in the new cables will be sufficient to deal with all concerns of individual or joint dominance in the IIC market. Nigeria is currently ranked 167th in bandwidth density according to world development indicators, and today development requires becoming much more competitive internationally.

- **We seek comment on the issues related to technology change and other market changes and related effects that may increase competition and/or lessen competition in the IIC market.**

6.3. *Joint or Collective Dominance Evaluation*

General issues related to the existence of joint or collective dominance have already been discussed in section 5.3. This section will discuss, and seek comments on, the potential for joint or collective dominance in the IIC market today and in the future. This section deals only with considerations about joint or collective dominance that may be of most concern in the IIC market in Nigeria today.

Criteria for joint or collective dominance in the IIC backbone market

(a) Entry barriers

The introduction of the GLO-1 submarine cable should mark the end to effective market dominance by NITEL in the IIC market. Other factors are improving the economics of deploying submarine cables, including better economics in the pricing of submarine cable systems worldwide, new technologies for deployment, higher capacities of cables and a much lower price per unit of bandwidth. In the past, such in the case of the SAT3/WASC cable, a large number of investors have typically combined to mitigate the substantial capital risk. Today the need and practice of such risk mitigation is not as great. It is much easier to enter the IIC market today.

- **We seek comment on concerns that remaining entry barriers could continue to constrain the level of competition in the IIC market.**

(b) Frequent interaction among firms

Frequent interaction among firms may lead to anti-competitive behaviour. There are other industries where even tacit indirect contact between firms has been sufficient to provide incentives for collusion or joint dominance. The nature of the Nigerian IIC market is likely to lead to frequent opportunities for contact between submarine cable operators, which could lead to collusion to take advantage of the currently high IIC prices, or other conduct that would unduly lessen competition.

- **We seek comment on any regulatory action that may be required to remedy collective action among IIC market providers that unduly lessens competition.**

(c) Few market participants

Despite the arrival of new entrants in the IIC market, it is unlikely that there will be a large number of market participants, due to the high capital costs and other barriers to entry.

The literature of competition economics suggests a strong incentive to collusion where there are only two market participants. The presence of a third competitor makes collusion more difficult, as the incentive to cheat and obtain short term gains is quite high. The presence of four competitors, as it maybe the case in the Nigerian IIC market in 2011, should offer a robustly competitive field.

- **We seek comment 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.**

(d) *Symmetry among providers*

Symmetry between operators can facilitate collusion and anti-competitive behaviour between operators. However, in the current market dynamics of Nigeria for the IIC backbone, there appears to be significant asymmetry between IIC providers.

If we consider the two current major IIC networks, SAT3/WASC and GLO-1, two factors of asymmetry are particularly important: asymmetry of costs and of market share. In relation to the first, the SAT3/WASC cost structure is based on an increasingly depreciated asset compared to a brand new GLO-1 cable. The assets are also very asymmetric in terms of capacity and management levels. These contribute to another asymmetry, that of costs which, if they remain under separate ownership, will make it difficult for anti-competitive behaviour. The time gap between GLO-1, the WACS and ACE may also contribute to future network asymmetries, although perhaps less pronounced in terms of cost and depreciation.

There are also significant asymmetries in terms of overall capacity. In principle, this should provide a deterrent against collusion or joint dominance. The following table 6.1. shows specific capacity asymmetries:

Table 6.1. Capacity of Nigeria Submarine Fibre Cable Systems

Submarine Fibre Cable System	Year Operational	Capacity
The SAT3/WASC	2001	120-Gbit/s
The GLO-1	2009	1.28-Tbit/s
The Main One	2010	1.28-Tbit/s
The WACS	2011	3.84-Tbit/s

- **We seek comment 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.**

(e) *Structural links and co-operation agreements among firms*

The nature of the Internet and its hierarchical topology, by definition, requires certain structural links and co-operation among participating firms. In some cases, the opposite may be a problem, and has been in Nigeria in the past when a firm has refused to interconnect other(s) (therefore breaking the “structural links”) often times as a result of unpaid fees.

It is important to differentiate between structural links that are the result of necessary operational and commercial activities between the firms in the market, and other links that could potentially lessen competition. Structural links and co-operation among firms can lead to anti-competitive behaviour. In the IIC market, the entry of new players and the significant asymmetries in the operations of the different players should reduce any concerns about anti-competitive behaviour.

However, there are latent risks for joint or collective dominance related to tacit or explicit collusion. In addition, a significant merger or acquisition, such as Globacom or MTN acquiring the SAT3/WASC could result in a lessening of competition. Regulatory monitoring will therefore be important to deter potential joint or collective dominance.

- **We seek comment on whether existing or future structural links between IIC market operators result or could result in dominance or substantial lessening of competition.**

(f) *Fast demand growth*

Nigeria’s demand for IIC services is largely unsatisfied despite its huge growth over the past decade. Based on international comparisons Nigeria is still in the lower levels compared to other emergent and developed economies and because of its demographics it is to be assumed that Nigeria will see continued high demand for broadband access generally, and thus IIC over the next decade.

As indicated in this paper, there has recently been substantial investment in Nigerian IIC backbone supply. Given the level of pent-up demand, this should lead to more growth in demand for access to the Internet, for bandwidth capacity and for better quality of service in the IIC market. The introduction of new IIC

backbone networks will affect the business model of several operators and it will spur new ones and create new niche markets for downstream providers. All of these should further increase demand for services in the IIC market.

As a result, there may be an incentive for collusive or collective conduct among major IIC providers. For example, they may each seek to provide low cost services only to their own retail ISP customers, and not provide reasonably priced wholesale IIC access to competitive retail ISPs. This may undermine other smaller providers, or providers that do not enjoy the same degree of vertical integration.

- **We seek comment 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.**

Conclusions for the IIC backbone market

NITEL has, for a number of years held a position of dominance over access to IIC by Nigerian ISPs. As a result, it seems to have charged prices far higher than in other comparable markets. NITEL has had few incentives to offer competitive prices or quality of service. However, this situation should change dramatically as the industry is reconfigured, with four major new cables coming into the IIC market from now through 2011.

The relative level of deregulation and thus inexperience with the IIC market on the part of many telecommunications regulators calls for caution in taking any proactive (or *ex ante*) regulatory action.

International experience suggests that the best approach to ensuring robust IIC competition is through monitoring and *ex-post* regulation and penalties, rather than proactive or *ex ante* regulations that may impede investment. The experience in the Nigerian IIC market appears to demonstrate that a market dominated by a high priced incumbent service provider will eventually attract new entrants who should reduce any abuse of dominance by the incumbent.

The Nigerian IIC market seems to be on the cusp of becoming a textbook case on how markets produce more supply to meet unsatisfied or poorly satisfied demand. However, the Commission will continue to monitor the IIC market carefully to ensure the IIC market does not become dominated by specific firms, or that there is no other conduct that has the effect of significantly lessening competition in the market.

6.4. *Other Concerns Related to Dominance or Substantial Lessening of Competition*

As part of this consultation process, the Commission invites stakeholders and the general public to draw to its attention any other concerns related to dominance or conduct that may have the effect of substantially lessening competition in the international Internet connectivity market. Comments need not be restricted to the specific issues of dominance which are discussed in the foregoing sections of this Consultation Paper.

- **We seek comments on any other concerns related to dominance or conduct that may have the effect of substantially lessening competition in the international Internet connectivity market. The Commission invites members of the public to submit any specific complaints about dominance and abuse of dominance by licensees in this market. Such complaints should be accompanied by supporting data or other evidence, wherever possible.**

Appendix – The Legal and Regulatory Framework

Key provisions of the *Communications Act, 2003* and the Regulations promulgated under the Act, that establish the framework and rules for this consultation on market dominance and substantial lessening of competition are set out below:

Key Provisions of the Communications Act, 2003

90. Notwithstanding the provisions of any other written law, the Commission shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market.

91. (1) A licensee shall not engage in any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market.

(2) The Commission may from time to time publish guidelines or regulations which clarify the meaning of “substantial lessening of competition” in the Nigerian communications market and such guidelines or regulations may include references to

- (a) the relevant economic market;
- (b) global trends in the relevant market;
- (c) the impact of the conduct on the number of competitors in a market and their market shares;
- (d) the impact of the conduct on barriers to entry into the market;
- (e) the impact of the conduct on the range of services in the market;
- (f) the impact of the conduct on the cost and profit structures in the market; and
- (g) any other matters which the Commission is satisfied are relevant.

(3) A licensee shall not enter into any understanding, agreement or arrangement, whether legally enforceable or not, which provides for -

- (a) rate fixing;
- (b) market sharing;
- (c) boycott of another competitor;
- (d) boycott of a supplier of apparatus or equipment; or
- (e) boycott of any other licensee.

(4) A licensee shall not, at any time or in any circumstance, make it a condition for the provision or supply of a product or service in a communications market that the person acquiring such product or service in the communications market is also required to acquire or not to acquire any other product or service either from himself or from another person.”

The Commission responsibilities

A condition that may lead to anti-competitive conduct can occur if one or more licensees achieves a position of “dominance” in a relevant communications market. The Commission is therefore authorized under the Act to evaluate and determine where market dominance exists, assess the consequences of such dominance, and take action to remedy conduct that has or may have the effect of substantially lessening competition in the relevant markets. This role is set forth in the Act as follows:

“92. –(1) The Commission may determine that a licensee is in a dominant position in any aspect of the Nigerian communications market.

(2) The Commission may publish guidelines and regulations which clarify how it shall apply the test of “dominant position” to licensees.

(3) The guidelines and regulations in subsection (2) of this section may specify the matters which the Commission may take into account, including -

- (a) the relevant economic market;
- (b) global technology and commercial trends affecting market power;
- (c) the market share of the licensee;
- (d) the licensee’s power to make independent rate setting decisions;
- (e) the degree of product or service differentiation and sales promotion in the market; and
- (f) any other matters which the Commission is satisfied are relevant.

(4) The Commission may direct a licensee in a dominant position in the communications market to cease a conduct in that market which has or may have the effect of substantially lessening competition in any communications market and to implement appropriate remedies.”

In 2007, the Commission issued *Competition Practices Regulations* to clarify the standards, procedures and criteria for implementing its responsibilities under the Act. Part IV of these Regulations defined the standards and criteria by which the Commission may determine dominance in a telecommunications market in Nigeria, while Part V addressed abuse of such dominance:

Part IV Determinations of Dominant Position

17. Section 92(1) of the Act empowers the Commission to make determinations that a Licensee is in a dominant position in one or more communications markets in Nigeria. Section 92(2) permits the Commission to publish guidelines or regulations clarifying how it will apply the test of dominant position to Licensees, and Section 92(3) identifies matters which the Commission may take into account in connection with such guidelines or regulations.

18. The purpose of this Part of the Regulation is to provide further guidance regarding the standards and processes to be used by the Commission to determine whether a Licensee has a dominant position in one or more communication markets.

19. The Commission shall apply the standards and processes described in this Part with the objective of identifying those Licensees that have a position of economic strength in one or more specifically defined communications markets such that they have the ability to unilaterally restrict output, raise prices, reduce quality or otherwise act independently of competitors or consumers. In determining whether a Licensee is in a dominant position, the Commission may consider a range of market circumstances or criteria, but shall consider one or more of the following:

(a) the market share of the Licensee, determined by reference to revenues, numbers of subscribers or volumes of sales;

(b) the overall size of the Licensee in comparison to competing Licensees, particularly any resulting economies of scale or scope that permit the larger Licensee to produce products or services at lower costs;

(c) control of network facilities or other infrastructure, access to which is required by competing Licensees and that cannot, for commercial or technical reasons, be duplicated by competing Licensees;

(d) the absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers;

(e) ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices;

(f) the rate of technological or other change in the market, and related effects for market entry or the continuation of a dominant position.

20. The evaluation of dominant position shall begin with the definition of the relevant communications market or markets. In its assessment and definition of relevant communications markets, the Commission shall take account of the following circumstances and criteria:

(a) markets shall be determined by analyzing the products or services that make up a specific market, as well as the geographic scope of that market;

(b) the Commission will assess demand-side substitutability in order to measure the extent to which consumers are prepared or able to substitute other products or services for the products or services supplied by the Licensee in question;

(c) the Commission will also assess supply-side substitutability to determine the extent to which suppliers other than the Licensee in question are able to supply products or services that provide a competitive alternative to consumers.

21. Subject to any other determination of the Commission under this Part, or to any demonstration by a Licensee in the specific circumstances that the presumption should not apply, the Commission will presume that any Licensee whose gross revenues in a specific communications market exceed forty per cent (40%) of the total gross revenues of all Licensees in that market is in a dominant position in that market.

22. In addition to determining that an individual Licensee is in a dominant position, the Commission may also determine that two or more Licensees, acting jointly or collectively, are in a

dominant position including where the Licensees have no common ownership, are not parties to any formal agreement or operate in different markets.

23. The procedures to be applied by the Commission in making any determination of dominant position are described in Schedule 1 to these Regulations.

Part V Abuse of Dominance

24. Section 92(4) of the Act empowers the Commission to direct a Licensee in a dominant position to cease conduct which has or may have the effect of substantially lessening competition in one or more communications markets, and to implement appropriate remedies.

25. In determining whether any particular conduct engaged in by a Licensee, which the Commission has identified as being in a dominant position, constitutes substantial lessening of competition, the Commission shall apply the standards and procedures described in Part II of these Regulations.

26. Where the Commission determines that the conduct of a Licensee in a dominant position has or may have the effect of substantially lessening competition, the Commission may issue directions to the Licensee pursuant to Regulation 35.

Practices Deemed to Substantially Lessen Competition

The *Competition Practices Regulations, 2007*, also provide guidance on the types of conduct or practices that are deemed to result in a substantial lessening of competition by licensees that are found to be in a dominant position. The relevant provisions of these Regulations are set out below:

Licensees found to be in a dominant position which may be found to constitute substantial lessening of competition.

8. Subject to a Licensee demonstrating otherwise in the course of any inquiry or other procedure conducted by the Commission, or in the course of an application pursuant to Section 93 of the Act, the following conduct or practice shall be deemed to result in a substantial lessening of competition:

(a) failing to supply interconnection or other essential facilities to a competing Licensee, in accordance with any interconnection agreement between the parties or any direction, rule or order issued by the Commission, pursuant to the Act or the Interconnection Regulations, except under circumstances that are objectively justified based on supply conditions, such as failure to supply, based on a shortage of available facilities;

(b) discriminating in the provision of interconnection or other communications services or facilities to competing Licensees, except under circumstances that are objectively justified based on supply conditions, such as discrimination based on differences in the costs of supply;

(c) bundling of communications services, whereby the Licensee in question requires, as a condition of supplying a service to a competing Licensee, that the competing Licensee acquire another service that it does not require;

- (d) offering a competing Licensee more favourable terms or conditions that are not justified by cost differences, if it acquires another service that it does not require;
- (e) pre-emptively acquiring or securing scarce facilities or resources, including rights of way, required by another Licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other service provider;
- (f) supplying communications services, at prices below long run average incremental costs or such other cost standard, as is adopted by the Commission;
- (g) using revenues or the allocation of costs from one communications service to cross-subsidize another communications service, except where such cross subsidy is specifically approved by the Commission, including approval of tariffs or charges for the relevant communications services;
- (h) failing to comply with interconnection or facilities access obligations, including the Telecommunications Networks Interconnection Regulations 2007, any other interconnection or access terms specified or approved by the Commission, or any interconnection or access related decisions, directions or guidelines of the Commission;
- (i) performing any of the following actions, where such actions have the effect of impeding or preventing a competing Licensee's entry into, or expansion in, a communications market:
- (i) deliberately reducing the margin of profit available to a competing Licensee that requires wholesale communications services from the Licensee in question, by increasing the prices for the wholesale communications services required by that competing Licensee, or decreasing the prices of communications services in retail markets where they compete, or both;
 - (ii) requiring or inducing a supplier to refrain from selling to a competing Licensee;
 - (iii) adopting technical specifications for networks or systems to deliberately prevent interconnection or interoperability with a network or system of a competing Licensee;
 - (iv) failing to make available to competing Licensees on a timely basis, technical specifications, information about essential facilities, or other commercially relevant information which is required by such competing Licensees to provide communications services and which is not available from other sources; and
 - (v) using information obtained from competing Licensees, for purposes related to interconnection or the supply of communications facilities or services by the Licensee in question, to compete with such competing Licensees; and
- (j) any failure by a Licensee to comply with any decision, rule, direction or guideline issued by the Commission, regarding either prohibited or required competitive practices.
-