



MTN NIGERIA COMMUNICATIONS LIMITED

**SUBMISSIONS MADE IN RESPONSE TO THE NIGERIAN
COMMUNICATIONS COMMISSION'S CONSULTATION
PAPER**

ON

**DOMINANCE IN SELECTED COMMUNICATIONS
MARKETS**

NOVEMBER 2009

MTN SUBMISSION ON NCC CONSULTATION PAPER ON DOMINANCE IN SELECTED COMMUNICATIONS MARKETS

Table of Contents

Executive Summary	iv
Structure of this submission	iv
Preliminary Observations	1
Key Propositions In This Submission	5
2 Identification of Relevant Markets	9
2.1 Mobile Telephony market.....	9
2.2 International internet connectivity (iic) market	11
3 Determination of Dominance in the Mobile Telephony Market	13
3.1 Individual Dominance Evaluation	13
3.2 Joint/Collective Dominance Evaluation	28
3.3 Individual dominance factors	35
4. Determination of Dominance in the International Internet Connectivity Market	36
4.1 Individual Dominance Evaluation	36
4.2 joint/collective Dominance Evaluation in the iic market.....	37
5 Conclusion	39

EXECUTIVE SUMMARY

MTN welcomes the opportunity to respond to this important consultation on the question of dominance in the two markets identified by the NCC: the mobile market and the international internet connectivity market.

MTN considers that the significance of this consultation should not be underestimated, since the right, or the wrong, approach to the issues raised will have far-reaching implications for the telecoms sector in Nigeria; for competition and investment, for operators and residential and business end users, and for Nigerian economic growth.

We set out in this response our detailed and considered views on each of the issues raised in the NCC consultation. Broadly, we support the general direction of thinking discernible in the consultation, especially regarding the absence of dominance in what are effectively and increasingly competitive markets. However, MTN is concerned to ensure that the NCC continues to adopt sound policy on these issues. With that in mind, we provide in this response a range of economic evidence and argument, drawing on best practice experience, which demonstrate two essential points:

- Both the mobile telephony market and the market for international internet connectivity are effectively competitive in Nigeria; and, therefore,
- No regulatory intervention in the form of penalisation of the leading operators is necessary or justified, and indeed its imposition would be harmful.

We consider that, while the NCC should remain vigilant for evidence of concentration in the market, a light handed approach will give rise to a 'win-win' scenario for *all* industry stakeholders, and is in the best interests of competition and consumers in the Nigerian telecoms industry.

STRUCTURE OF THIS SUBMISSION

Our Submission is structured as follows:

- Section 1 provides some high level observations and summarises our key views and conclusions with respect to this consultation;
- Section 2 contains our views on the definition of the relevant markets;
- Section 3 is our response to the Commission's preliminary findings on individual and collective dominance in the mobile market;

- Section 4 is our response to the Commission’s preliminary findings on individual and collective dominance in the international internet connectivity market; and
- Section 5 provides our conclusions and recommendations.

PRELIMINARY OBSERVATIONS

We note that open and transparent stakeholder consultations are a critical component of the process for the consideration of any sound regulatory measure and we commend the Commission for seeking industry and stakeholder inputs on the subject of dominance. We particularly note that dominance investigations are a watershed event in the development of any market, regardless of its apparent stage of sophistication; as such investigations can have serious short and long term implications. Bearing in mind its unique characteristics, we believe that the outcome of this investigation could impact the stability and sustainability of the Nigerian telecommunications market.

MTN commends the efforts of the Commission towards accomplishing its stated goal of achieving a "market-driven telecommunications industry" within the ambit relevant statutory and regulatory provisions. The Nigerian telecommunications industry has evolved from a "backwater to a regional hub"¹ in less than a decade due to the positive interplay of competition and sound regulation, despite daunting environmental challenges faced by operators. The Commission's Executive Vice-chairman has provided an apt summary of the evolution thus far:

"The opening up of the market to competition in all segments of the industry has resulted in major drop in prices for telecommunications services. Pre-2001, the cost of subscription to MTEL's analogue mobile services was over N60,000 per line. In 2001, the GSM subscription started with a price of twenty thousand Naira (N20,000) per line and today, this figure has fallen to almost zero. The tariff for calls on the GSM network was as high as fifty Naira (N50.00) per minute. Today, a call on a GSM network can be made for lower than twenty five Naira (N25.00) per minute (mobile to mobile)... [The market has become] one of the major drivers of growth in the Nigerian economy...from its comatose state in the late 1990's, recorded a real GDP growth of 33.67 percent in the second quarter of 2009 compared to 33.44 percent recorded same period in 2008"²

MTN is proud of our role in growth and development of the Nigerian telecommunications industry and is committed to the deepening of competition in the industry. We showed uncommon faith in the potential of a liberalised telecommunications market in its early days, when very few international investors saw a positive future for the then nascent telecommunications industry. We believe that our initial investment of US\$285million for the acquisition of a digital mobile licence served as a one of the more prominent beacons which attracted the inflow of foreign direct investments into the telecommunications industry. The scope of investment in telecommunications, and the depth of competition that these investments have engendered, has made the communications sector the second largest destination for foreign direct investment in Nigeria, after the Oil and Gas sector. We are daily challenged by the high level of competition in the industry and are encouraged by the faith shown by the millions of Nigerians who trust our network and the services we provide.

We therefore see these ongoing consultations as a means of further strengthening the competitive capacity of the telecommunications industry and ensuring that the gains of its first competitive decade are not jeopardised.

¹ Ernest Ndukwe, From Telecoms backwaters to a regional hub: Tracking the role of the regulator in Nigeria's telecom. The Vanguard Monday, 05 January 2009
<http://www.vanguardngr.com/content/view/25590/88/>

² As above.

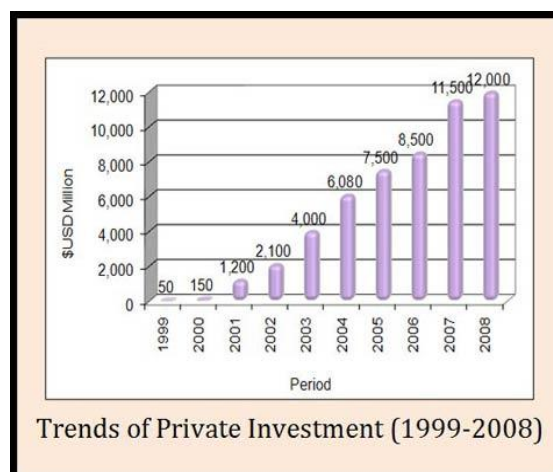
MTN notes that the dominance investigations have coincided with a critical phase in the evolution of the telecommunications industry in Nigeria, the Nigerian economy and indeed of the world economy on which it is dependent. We acknowledge the thoughtful analysis presented in the Consultation Paper, but wish to call attention to certain key developments in the Nigerian telecommunications industry which make the timing of the consultation particularly critical for the industry. These factors include:

- 1) **Declining Rate of growth in Telecommunications Investment:** Available data indicate that operators are reducing the level of their investments in the Nigerian telecommunications industry. Although total investments have continued to grow, percentage growth rate has not measured up to the rate of growth in previous years. (See diagram 1 below). This may be attributed to the global pressures on project financing worldwide. However, it is a particularly worrying development in view of the following factors:
 - the licensing of more operators (such as interconnect exchanges, infrastructure service providers, and a major telecommunications network operator) would have suggested a sustained growth of investment;
 - at this point in the product lifecycle existing operators should be investing heavily in network improvement, technology acquisition, equipment upgrades, marketing activities, etc; and
 - the Nigeria-specific challenges of the our operating environment demand a higher level of investment in telecommunications infrastructure.

On their own, each of these factors ought to lead to a substantially higher overall level of investment. However, the decline in annual investment growth since 2007 strongly suggests that some operators are cutting back on their investments in telecommunications infrastructure more than would be expected.

- 2) **High levels of indebtedness.** The growing levels of default in meeting interconnect and other obligations by some operators portend some danger for the industry. Interconnect obligations are meant to be a first charge on revenues, to be paid immediately when they fall due, but this is not often the case – a total sum of over ₦7Billion (Seven Billion Naira) is owed to MTN alone as at November 2009. It is also estimated that the level in the indebtedness in the industry is up to ₦12Billion (Twelve Billion Naira). This raises issues as to the long-term sustainability of many operators and indeed of the industry, and therefore requires an expedient resolution.

FIGURE 1: PRIVATE INVESTMENT IN NIGERIAN TELECOMMUNICATIONS, USD (Source: NCC)



- 3) **Growing incidence of downsizing:** the Commission is aware that many operators have recently taken the painful but necessary decision to trim their workforces. Whilst these decisions were apparently taken in the spirit of achieving higher levels of structural efficiency, they also portend a danger that the telecommunications sector may be entering a new phase of uncertainty and instability. This challenges the assumption that the hitherto healthy growth rate of the entire industry can be sustained
- 4) **Falling ARPU across all networks:** as a result of competitive pressures and consistent with global trends in an era of economic downturn, wholesale and retail tariffs are falling in real terms; average revenue per minute (ARPM) is therefore declining. At the same time, Minutes of Use per customer is also declining, which in combination with falling ARPM explains the declines in ARPU as shown in Figure 2.

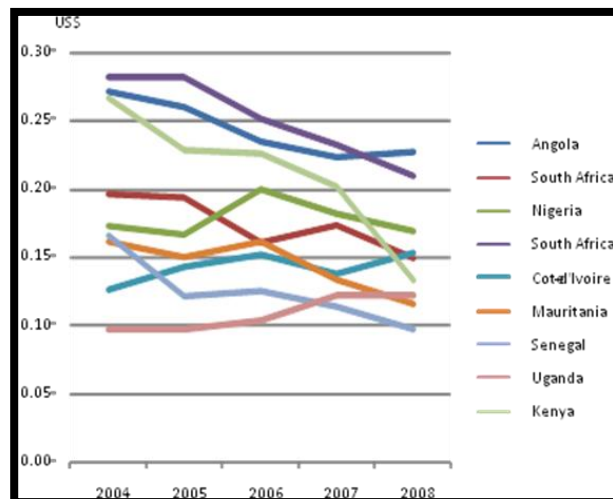


FIGURE 2: ARPU PER CUSTOMER IN SELECTED AFRICAN COUNTRIES, 2004-2008 (Source: "The Future Of African Mobile Profitability", Africa Next Research)

- 5) **Higher rates of churn.** Data available to us indicates a growing level of churn across all networks. A number of factors may be responsible for this, but the implication for all operators is that their revenue base could dwindle if their net additions do not match the loss of customers. Furthermore, it costs more to acquire additional customers, making further demands on OPEX. This would also translate to slower growth.

In view of these developments and their potential implications on the industry as a whole, MTN takes the position that the Commission needs to focus regulatory policy on activities that tend to grow the market further. Adding regulatory burdens that can directly or indirectly discourage investment is not appropriate and can be particularly damaging at this time.

We wish to commend the Commission for adopting an *ex post* approach to dominance in its Competition Practices Regulations (CPR). For the avoidance of doubt, MTN acknowledges that it is within the statutory responsibilities of the Commission to assess dominance in any of the markets within the telecommunications industry that it has defined. However, the *ex post* approach enunciated in the Nigerian Communications Act and in the NCA requires that the Commission forbear from intervening in the operations of a competitive market except there is an actionable instance of abuse of significant market

power or the perpetration of conduct likely to lead to a substantial lessening of competition. The Consultation Paper has not given any instance of such conduct, nor are we aware of any such conduct in the market.

Furthermore, MTN has competed actively and fairly in the Nigerian telecommunications industry. Our leadership position has been earned in the absence of any singular favoured or preferential governmental or regulatory treatment (other than the pioneer status granted MTN and other deserving investors). MTN has invested over N400billion in the improvement of its network to provide better quality services to our esteemed customer. We have maintained a leadership position in the Nigerian Telecoms market by competing responsibly to provide Nigerian subscribers with a portfolio of innovative customer-driven services, delivered in accordance with international best practice and accepted standards. MTN was the first operator in the Nigerian market to fully segment its consumer products and services to our customer base according to their identified interests and needs. We were also the first to invest in and deliver a world-class microwave and fibre transmission network to provide seamless service to users of telecommunications services across Nigeria. MTN further differentiates itself by providing first class customer service. Our competitors have also grown their respective networks and thereby empowered millions of Nigerians both directly and indirectly, through active competition in the marketplace.

In view of the foregoing, it is our view that the Nigerian market, in its current state, will benefit more from regulatory measures that would help to deepen competition by improving the competitive capacity of **all** operators, rather than a policy to “assist” one entrant or a set of new entrants, relative to others.

KEY PROPOSITIONS IN THIS SUBMISSION

In this Submission, MTN has considered and addressed all of the consultation questions on each of the two markets identified. Our views on these questions are contained in the next section. However, in order to impart a greater sense of narrative, MTN wishes to distil and highlight here the following key propositions of this Submission:

- 1) The case for MTN having either individual or collective dominance in the mobile market (however defined) is very weak. Indeed, the market is effectively competitive, and increasingly so;
- 2) Even if MTN were to be found dominant (which would in our view be erroneous), it is worth restating that by virtue of the applicable regulatory instruments, no regulatory remedies can or should be imposed unless there is strong actionable evidence of anti-competitive conduct which substantially lessens competition;
- 3) Conversely, a (re)-focus on investment, and the conditions conducive to investment, and away from regulatory intervention, is vital, and has been shown to be far more effective in achieving policy goals, from both a theoretical and empirical perspective.

These points are substantiated within the body of this Submission in response to the specific questions raised in the Consultation Paper. The premises upon which these points are made are summarised below.

1.1.1 MOBILE MARKET IS COMPETITIVE – MTN IS NOT DOMINANT

The mobile market in Nigeria is effectively competitive, and MTN's position cannot be properly characterised as dominant. In the context of the Nigerian telephony market, MTN's market share of approximately 40% is not a sign of dominance (and under the existing regulatory framework, may at best only give rise to a rebuttable presumption of dominance). The mobile (origination) market is effectively competitive, with five GSM operators as well as several CDMA players, and there is vigorous and increasing competition amongst all players. Moreover, barriers to switching are very low (and will further reduce were Mobile Number Portability to be implemented).

In view of the competitiveness of the mobile market, MTN is incapable of imposing a sustained and profitable price rise and/or otherwise acting independently of other operators and consumers. This is clearly demonstrated in its pricing behaviour, which shows no sign of supra-competitive prices.

Equally, in respect of collective dominance, MTN is surprised at the suggestion that the vigorous competition for subscribers that exists between MTN, Zain and Glo might be characterised as collective dominance. The structural conditions and behavioural aspects in the market make coordinated activity extremely unlikely, and there is certainly no evidence of such activity.

On a forward-looking basis, which is the relevant perspective for *ex ante* regulation, the market is likely to become increasingly competitive. Industry experts in fact expect the CDMA operators to play increasingly pivotal roles in the development of the industry and

forecast³ their total share of the mobile segment to increase significantly in the next few years, opening a new vista of competition in the market. The table below further illustrates this position.

TABLE 1 - CAGR - NIGERIAN MOBILE OPERATORS - 2005-2009 (Source: Pyramid Research)

CAGR - 2005-2009	
Market	42%
MTN Nigeria	38%
Zain Nigeria	49%
GloMobile	36%
M-Tel	-31%
CDMA Operators	101%

1.1.2 DOMINANCE ASSESSMENT FOR INTERNATIONAL INTERNET CONNECTIVITY MARKET IS PREMATURE

There is no doubt that NITEL has held a monopoly over international transmission facilities, but given that 1) numerous operators have invested in facilities that will shortly come into operation and 2) dominance assessments should be forward looking, it would be inappropriate to regulate in that market at present. It is too early to say whether there will be any issues in the future.

1.1.3 NO REGULATORY REMEDIES CAN OR SHOULD BE IMPOSED IN ANY EVENT

It is worth recapping on what the implications of a finding of dominance would be, were MTN to be found dominant (although this finding would, as discussed, be erroneous). The legal framework in Nigeria appropriately recognises that regulatory intervention is only justified where dominant firms have been found to be abusing their dominant position through conduct which substantially lessens competition⁴. That is, in the absence of evidence of actual anti-competitive conduct, the regulatory regime does not support the imposition of regulatory remedies. The declaration of dominance should therefore be a necessary, but not sufficient condition. What must be shown before any remedies are considered is an abuse of that dominance, which is a high hurdle to be overcome before the imposition of any “corrective” or other measures.

The NCC acknowledged the relevant context when it rightly stated in the Consultation Paper that: “[i]t is the Commission’s responsibility to determine whether certain ... operators hold a position of dominance, and, if so whether they are abusing this position by acting in a manner that substantially lessens competition.”⁵

³ Pyramid Research, Africa & Middle East Intelligence Report Series, *Communications Markets in Nigeria* March 2009 Edition

⁴ See Section 92(4) of the NCA.

⁵ Consultation Paper, page 1.

This is not only correct as a matter of law, but it is appropriate as a matter of economics/policy. Operators in Nigeria have earned their market position through raising and allocating private capital within a risky environment. Arbitrarily penalising these operators for their investment and subsequent success in the market (through the imposition of “dominance obligations”) would increase regulatory risk, and have deleterious effects on investment incentives going forward (as explained further below).

Moreover, it should also be noted in this regard that putative first mover advantages are offset by significant first mover disadvantages and second mover advantages. This is because first movers, as opposed to later movers, must enter an untested market, with greater uncertainty on both the demand side and supply side. In addition, whilst they are motivated by private profit, first movers must also necessarily grow a discrete new market, and thus create externalities for the benefit of later entrants, for which the first movers are not compensated.

It is true that in the EU telecoms regulatory framework, it is not necessary to show evidence of anti-competitive conduct in order to impose ex ante regulatory remedies on dominant operators. However, this applies to the entirely different context of formerly state-owned monopoly incumbents. These operators did not become market leaders through taking risks with private capital, but rather are the legacy of publicly funded utilities.

Operators in a competitive context such as Nigeria should be encouraged to compete vigorously, but fairly. They should not be dissuaded from aspiring to reach high market shares, for fear of a dominance designation. Such an interventionist approach is likely to have insidious effects on incentives to innovate, which will lead to more drastic reductions in consumer welfare over time.

Moreover, it should also be noted that even within the context of the Nigerian telephony market, MTN is not an “incumbent” mobile operator in any event. MTN competed for, was granted a licence, and entered the market at the same time as two of the other Digital mobile licensees (Zain and Mtel). In this regard, it is interesting to note that Glo, which entered approximately two (2) years later, has achieved significant market share, without benefiting from any measures taken against “dominant” operators. That MTN has achieved some success in gaining subscribers and offering a range of services does not warrant intervention in order to artificially “equalise” the market.

It is our view that the Commission should pay an even greater focus on ensuring the availability of the required resources for entry (licence, numbering and spectrum) and a level playing field; and that it is not appropriate to compel taxpayers or other operators to subsidise inefficient entry through the imposition of “dominance obligations” on an otherwise highly efficient and competitive market .

The success of later entrants is, and should be, attributable to a range of factors, such as strategic astuteness, quality of service, level of investment and quality of management. Indeed, it could be argued that entrants are ultimately more successful in markets where they have to compete on an equal footing to the established players.

1.1.4 POLICY FOCUS SHOULD BE ON ENCOURAGING INVESTMENT

The NCC should carefully consider what might happen were it to saddle MTN with a dominance designation and attendant obligations. This could give rise to a raft of unintended consequences, chief amongst which is the corrosive effect on investment

incentives. As is well documented, investment in capacity is a major issue in the Nigerian market. The priority and focus of the NCC (and the government) should lie squarely on addressing the dearth of investment in telecommunications. The dearth of investments is undermining the prospects both of ensuring the availability of much needed capacity to serve the future growth of the industry, as well as sustainable competition in the long term.

The NCC must remain vigilant in its apparent acknowledgment in the Consultation Paper that investment is the key to long term competition and could not be anything but discouraged by a dominance determination. Thus MTN urges the NCC to refocus on the paramount issue of attracting investment and sustaining competition, rather than dominance.

In the body of our response, we consider more closely the question of what explains the low levels of infrastructure investment in Nigeria and why only one operator – MTN – appears not to have cut back on its material investment over time.

2 IDENTIFICATION OF RELEVANT MARKETS

NCC Question

"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"

MTN Response

NCC has identified and defined two markets for consideration in this consultation:

- The Mobile Market; and
- The International Internet Connectivity Market

In terms of whether the NCC has identified the appropriate candidate markets, MTN tends to agree that these markets are reasonable focus of attention for policy making. However, MTN would ask the NCC to provide more reasoning as to why these two markets stood out as priorities. In this regard, MTN is interested in whether the NCC considered other markets, and if so, why they were discountenanced for investigation.

Another general point is in respect of the analytical process adopted by the NCC in defining these markets. MTN notes that the NCC has not set out an approach to, nor disclosed if it adopted the standard market definition approach, e.g. by applying the Hypothetical Monopolist Test (HMT), the Small but Significant Non-Incremental Increase in Price (SSNIP) Test, or any other test.

We now deal with each of the identified markets in turn below.

2.1 MOBILE TELEPHONY MARKET

2.1.1 MARKET DEFINITION: GSM AND CDMA

MTN first comments on a question of ambiguity in the paper with respect to how it treats GSM and CDMA operators. The NCC's definition of the mobile telephony appears at times to include CDMA operators, which is entirely appropriate, given the functional similarity between GSM and CDMA. Similarly, the NCC's calculation of market shares implies the inclusion of CDMA subscribers, which, again, is entirely appropriate.

However, the Consultation Paper seems states that only MTN, Zain, Glo, Mtel and Etisalat are licensed to provide mobile telephony services⁶. This is not accurate. The technology-neutral basis of NCC licensing procedures and the Universal Service licensing framework has permitted more operators to offer mobile services than the five mentioned in the

⁶ See particularly Paragraph 5.1 at page 6 and item (d) at page 14 of the Consultation Paper

Consultation Paper, particularly CDMA operators. This is particularly important as experts expect the CDMA operators to play increasingly pivotal roles in the development of the industry and forecast⁷ their total share of the mobile segment to increase significantly in the next few years.

It is expected that Mobile operators on the GSM standard will face stiff competition for market share primarily from the CDMA operators, but also other players including new and recent entrants into the market⁸. Certain non-universal service licensees even offer mobile services.

The confusion over market definition and important of other mobile players underscores the need for a more painstaking market definition exercise. MTN therefore requests the NCC to confirm that CDMA and GSM products are considered part of the same relevant market.

2.1.2 MARKET DEFINITION: MOBILE AND FIXED

Notwithstanding the above issue of clarification, the NCC makes two broad preliminary conclusions that allow it to identify the mobile telephony as the relevant market for analysis: 1) mobile telephony services are in a different market from fixed telephony and 2) for the purposes of this consultation, it is not necessary to break down the mobile market further.

With respect to the first issue, we believe that there are areas where fixed access, or, more likely, calls from fixed lines are a substitute for mobile, especially in areas of coverage/rollout overlap. For instance, in the context of the SSNIP test, MTN would hypothesise that many fixed line subscribers would switch to using their mobile phones to make calls in response to a 10% rise in the price of fixed calls.

Another constraint on the price of fixed or mobile calls is that operators such as MTN maintain a national pricing policy. This represents a common pricing constraint on the price of mobile calls, whereby even where fixed and mobile coverage does not overlap, the competitiveness existing in overlap areas feeds through into national tariffs.

MTN recognises that the precise market definition requires detailed analysis, such as SSNIP test, consumer surveys, price correlation etc, in order to determine whether fixed or mobile access and/or calls are in the same market, and hence, the implications on market shares and market power. Nonetheless, MTN recognises that, given the relatively small size of the fixed sector, the assessment of dominance is not particularly sensitive to the precise product market definition adopted. Further, MTN considers that a dominance finding is erroneous under the narrower definition of mobile telephony (without fixed), and hence does not see great merit in an extensive market definition exercise (although notes that it should still be undertaken by the NCC in the interests of best practice).

⁷ Pyramid Research, Africa & Middle East Intelligence Report Series, Communications Markets in Nigeria March 2009 Edition

⁸ Ibid 3

2.1.3 MARKET DEFINITION: MOBILE MARKET VERTICALS

In respect of issue 2), the NCC states 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.”* MTN submits it is not clear what “mobile as a whole” means, or the NCC’s justification for adopting such a definition. However, we agree that for the purposes of this investigation the NCC could limit itself to the retail mobile market as a focus for its policy inquiry.

Most important is that the NCC must be consistent in its approach. The NCC makes comments on the retail and wholesale markets as though they were different. For example, it measures market power on a retail basis yet highlights potential issues in the wholesale market. We do not believe that it is methodologically correct to define a market in one way and attempt to assess dominance in another. We believe the NCC either has to a) accept its thesis that the retail mobile telephony market is adequate for the purpose of this investigation and make its assessment on that market accordingly or b) appropriately disaggregate its market definition analysis.

2.2 INTERNATIONAL INTERNET CONNECTIVITY (IIC) MARKET

In respect of the IIC market, MTN agrees with the NCC’s definition. Some greater explanation of the services/elements included and excluded could, however, serve to further clarify the boundaries of this market. We do not believe that it would change our view on dominance, but the NCC might be more confident in its determination to look at the components of the international internet connectivity market, for example access to international transmission facilities, transit of internet traffic, etc.

As a general background, it should be noted that market analysis concerning access to fibre links (marine or terrestrial) requires a comprehensive understanding of the factors in the Nigerian environment which gave rise to the “market” in the first place. To aid such understanding, MTN observes that to date, NITEL, and to a smaller extent, Suburban Telecoms (which is surprisingly not mentioned in the Consultation Paper) are the sole providers of international bandwidth via SAT3 cable connections in Nigeria. Suburban’s entry (through provision of capacity obtained from Benintel, operator of the Benin Republic leg of the SAT3 marine cable) is recent and small relative to NITEL. NITEL’s supply of satellite access has been so inadequate that other operators were compelled to invest in alternative access. With respect to MTN, the NITEL shortcomings are as follows:

- Its services negatively affected 75% of MTN’s international voice, data and internet services to its customers. Service levels on the facility are poor with several outages and extended downtimes, often due to either power failure at NITEL’s SAT3 Station or its Point of Interconnect (POI), submarine cable cuts or fire outbreaks at NITEL facilities. Other operators suffer a similar fate. For MTN and other operators, overcoming this poor service requires significant OPEX in back-up systems and the purchase of Satellite transmission capacity with its peculiar challenges. This directly impacts on revenues and substantially degrades customer experience.
- Conservatively, MTN’s current minimum capacity requirement to provide world

class international voice, data & internet services to its customers is 3 STM1 (i.e.189E1s), whereas MTN was only able to directly access 5E1 on NITEL's SAT3 facility.

- Regardless of its quality of service challenges, access to NITEL's SAT facility is provided at extremely uncompetitive rates, with cost of 1xE1 fixed at up to \$10,000, which capacity is available to operators in the US for \$1,000.

Thus, whilst MTN is fully aware of supply problems and market developments in international access, it is not clear why the NCC has focused on international internet connectivity. Clarification in that regard would be welcome.

3 DETERMINATION OF DOMINANCE IN THE MOBILE TELEPHONY MARKET

3.1 INDIVIDUAL DOMINANCE EVALUATION

We welcome the Commission's preliminary conclusion that MTN does not hold a position of individual market dominance. We believe our response to its queries on market size, control of the over mobile network infrastructure, ease of switching, market entry, etc. reinforces this view, as discussed below.

That said, MTN has some methodological concerns with the Commission's approach, which could potentially give rise to flawed conclusions by other respondents. In particular, the NCC appears to rely overly on rigidly following a checklist of indicators, somewhat at the expense of a richer and more holistic appreciation of the economic fundamentals that is required in the assessment of market power. MTN considers an assessment of market power should be made 'in the round' Market shares

3.1.1 MARKET SHARES

NCC Question

"We seek comments 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"

MTN Response

Our comments below cover the following issues in respect of market shares:

- the correct measurement of market shares in the Nigerian market; and
- the significance of market shares in the assessment of dominance.

3.1.1.1 MEASUREMENT OF MARKET SHARE

As MTN does not generate itself the kind of information that would enable it to assess definitively its own market share, we are reliant on NCC data as well as data from industry analysts for confirmation.

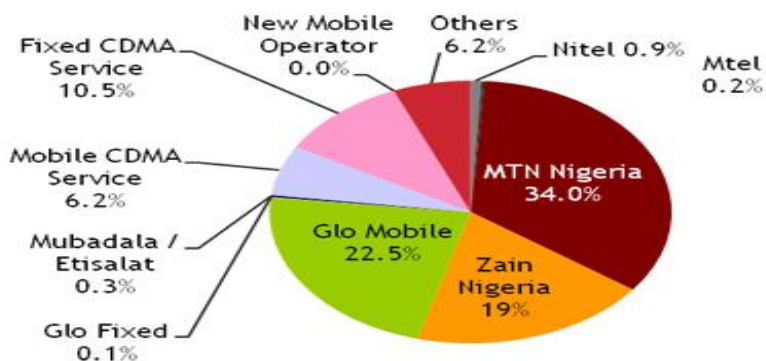
The NCC collects data from all the mobile operators, and has estimated MTN's market share of subscribers at 41% as of 30 June 2009. Reputable independent industry analysts put the market share at far less, however. In particular,

- according to Pyramid, market share of MTN was estimated to be 39% at end 2009, as shown below.

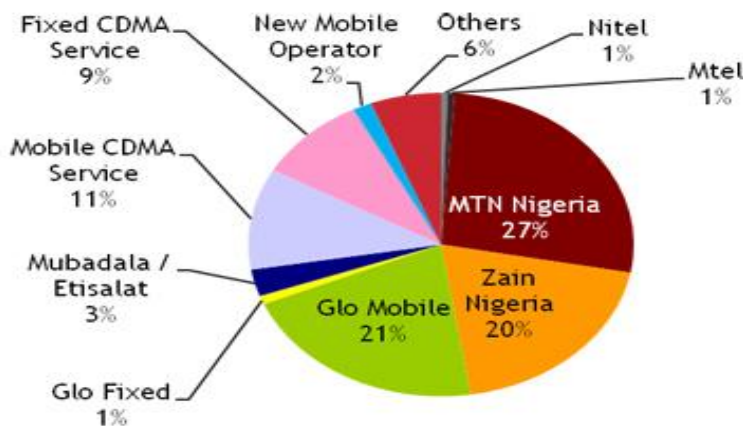
- Messrs Detecon Consulting states MTN’s market share to be 33.9%⁹

In view of these disparate figures, MTN requests the Commission to determine and report the most accurate data on active subscriber market shares.

Other measures of market share include revenues and volumes. We have not, however, been able to get independent quantification of mobile market share on a revenue or volume basis. However, we were able to find 2008 shares of the fixed and mobile markets together. The charts below give a graphic illustration of the market today and future projections.



MARKET SHARE AND REVENUE IN % FOR 2008 (Source: Pyramid Africa & Middle East Intelligence Report Series, Communications Markets in Nigeria, March 2009 Edition)



MARKET SHARE AND REVENUE IN % BY 2013 (Source: Pyramid Africa & Middle East Intelligence Report Series, Communications Markets In Nigeria March 2009 Edition)

⁹ Detecon Consulting, Presentation to Stakeholders on Data Interconnection Costing Results, November, 2009

We note that the above illustrates how imprecise any analysis based solely on the current positioning of the major players would be. It is therefore not surprising that Nigeria with five (5) active GSM operators and several CDMA operators providing mobile services remains one of the most competitive markets in Africa. Demand in the Nigerian market remains strong as operators continue to increase coverage in the rural areas. Many operators continue to target subscribers in unserved, low penetration areas and compete by offering low price plans and differentiated services¹⁰.

3.1.1.2 PRESUMPTION OF DOMINANCE: MARKET SHARE IS NO CAUSE FOR EXERCISING AUTHORITY TO DETERMINE DOMINANCE.

In view of the foregoing, the Commission should *not* take this market share data as justification for determining MTN's dominance in the mobile telephony market.

The NCC stated in the Consultation Paper that, "*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.*" Evidence presented above demonstrates that taking this statement at face value would be an incomplete reading of the law, a disregard of international precedent, and a misunderstanding of the underlying economics pertaining to market shares.

Paragraph 20 of the Competition Practices Regulation (CPR) states that this presumption is "*subject to ... any demonstration by a Licensee in the specific circumstances that the presumption should not apply.*" We believe that actual circumstances in the market amply demonstrate that the 40% market share (even if present), does not give MTN dominance.

In terms of precedent, we also note that, consistent with EU practice, market shares of 40% should merely give rise to the possibility of dominance. The European Regulators Group common position on the concept of significant market power¹¹ appropriately contextualises market shares in stating that:

"Market shares, important as they may be, are as any other criterion – not conclusive on their own. The economic relevance of market shares as an indicator for the assessment of single dominance derives from economic theory and empirical evidence on the relation between market shares and profitability (in terms of price-cost margins). Although theory and empirics indicate that there is a positive correlation between market shares and individual price cost margin, there is no clear-cut relation between a certain market share and the existence of dominance. According to the EC's competition law practise, suppliers with market shares below 25% are not likely to enjoy single dominance. According to case law a market share over 50% would lead to a rebuttable presumption of dominance. In the European Commission's decision-making practice, single dominance concerns normally arise where an undertaking has at least 40% market share."

In terms of specific precedent on individual dominance in mobile markets, its rarity is noteworthy. To our knowledge, only one mobile operator has been designated as individually dominant (thee leading MNO in Cyprus¹²). Within the African region, notably,

¹⁰ Ibid 3

¹¹ http://erg.ec.europa.eu/doc/publications/public_hearing_concept_smp/erg_03_09rev3_smp_common_concept.pdf

¹² <http://register.consilium.europa.eu/pdf/en/07/st08/st08089-ad01.en07.pdf>

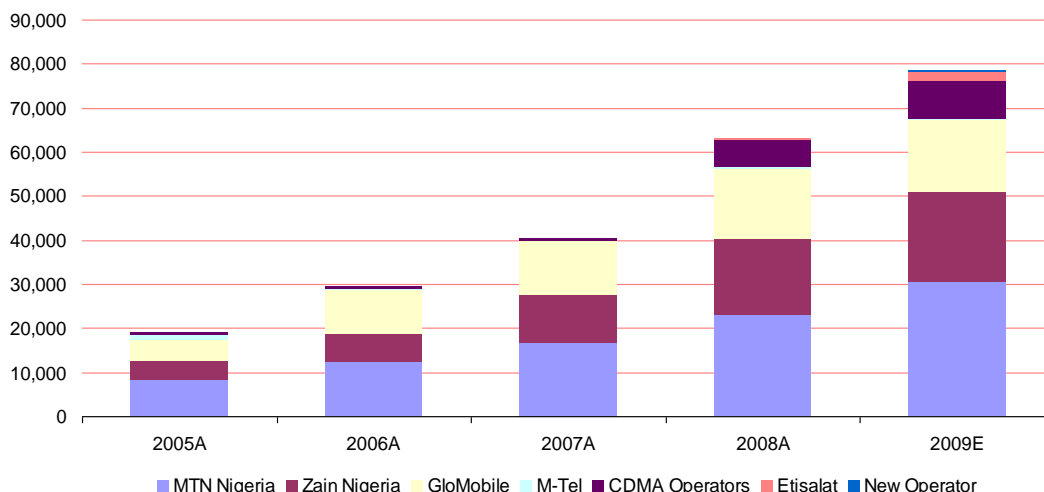
in its recent consultation¹³, the Uganda Communications Commission considered this question and found that the leading operator, MTN Uganda is not dominant, despite a market share of approximately 40%.

Another interesting case to cite is the recent consultation by the regulator in Jersey, the JCRA¹⁴, which looked at whether the incumbent mobile operator, JT, remained dominant, in light of market developments since it was pronounced as such in 2004. The JCRA states that:

“The mobile market now has active competition from three operators which ensures that consumers can now select an operator based on a number of factors including cost, service or innovative offers. The current market shares are as shown and as can be seen JT still has the largest share of the market [71%]. However, although JT still holds this largest share it is now no longer able to be a price leader and consequently price competition now exists in the market. The market competitiveness was further augmented in 2008 with the introduction of Mobile Number Portability. This enables consumers not only to change provider but to do so seamlessly.”

Second, as noted by the NCC in the context of its preliminary conclusion that MTN is not individually dominant, notably, MTN’s market share, at least up until 2009, has been steadily declining. This is shown in the figure and table below, on the basis of available information.

FIGURE 3 - MARKET SHARE - 2005 - 2009 (Source: Pyramid Research)



¹³ <http://www.ucc.co.ug/interconnect.php>

¹⁴ <http://www.jcra.je/pdf/091127%20Telecommunications%20Market%20Review%20consultation%20t-3.pdf>



TABLE 2 - MARKET SHARE - 2005-2009 (Source: Pyramid Research)

Market Share by Operator	2005A	2006A	2007A	2008A	2009E
MTN Nigeria	44.0%	41.8%	40.9%	36.6%	39.0%
Zain Nigeria	21.5%	21.8%	27.5%	27.3%	25.9%
GloMobile	25.5%	34.0%	30.3%	25.4%	20.9%
M-Tel	6.3%	0.6%	0.4%	0.4%	0.3%
CDMA Operators	2.7%	1.8%	1.0%	9.6%	10.9%
Mubadala / Etisalat	0.0%	0.0%	0.0%	0.6%	2.5%
New Operator	0.0%	0.0%	0.0%	0.0%	0.4%

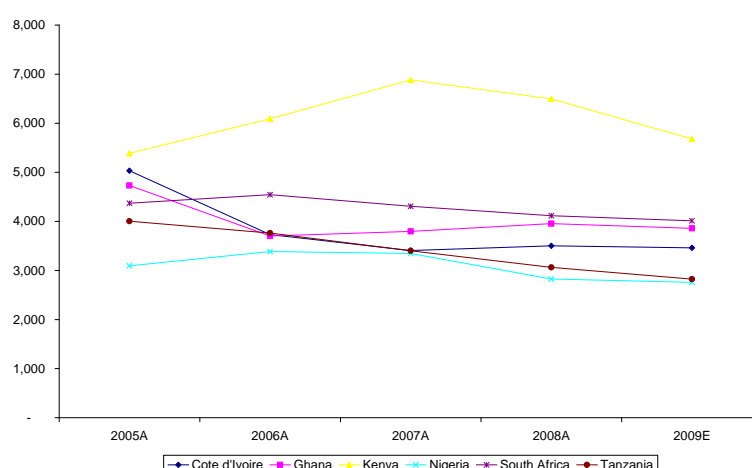
In addition, we highlight that the major growth in market share has been that of the CDMA operators, who went from 1.0% of the market in 2007 to a current share of 10-11%. This growth is reflected in their high rate of compound growth, shown in the table below.

TABLE 3 - CAGR - 2005-2009 (Source: Pyramid Research)

CAGR - 2005-2009	
Market	42%
MTN Nigeria	38%
Zain Nigeria	49%
GloMobile	36%
M-Tel	-31%
CDMA Operators	101%

These developments are reflected in the decreased concentration of the sector, as captured by the Herfindahl-Hirschmann (HHI) index of market concentration¹⁵, shown in the figures below. Declining concentration is evident in throughout Africa. The inroads made by new entrants are reflected in reductions in concentration experienced in several sub-Saharan countries, as shown in this figure below.

FIGURE 4 - COMPARATIVE HHI - SELECTED SUB-SAHARAN AFRICAN COUNTRIES (Source: Pyramid, MTN analysis)



¹⁵ The HHI index a measure of the size of firms in relation to the industry and an indicator of the amount of competition among them and is defined as the sum of the squares of the market shares of the firms in the market.

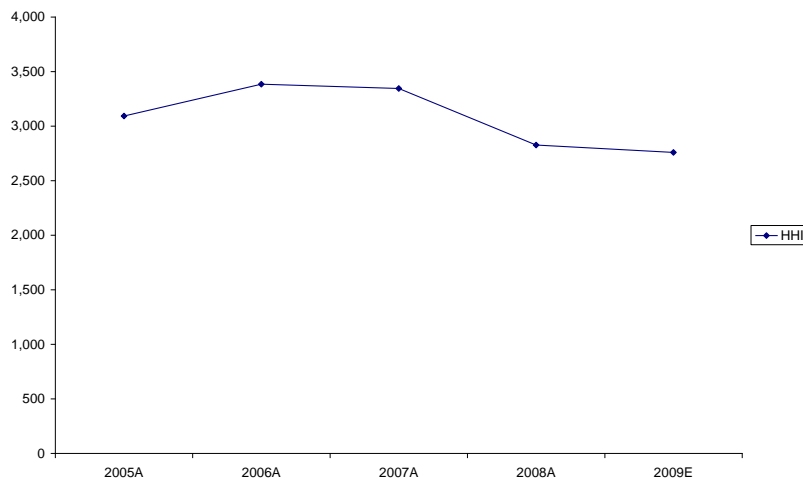


Competition is also expected to increase, which, along with churn and market growth, will continue to equalise market shares over time. Pyramid research describes the market in the following terms

“The Nigerian market will remain fragmented and competitive, as new entrants, attracted by the potential of the market, try to put pressure on established operators. Most of the tough competition, however, will come from small CDMA operators with big ambitions and an influx of foreign cash. Increased competition will result in an initial fast growth period fuelled by unmet demand followed by an even more competitive environment as operators try to target each others’ subscribers in order to support growth trends”.¹⁶

Analysis by Pyramid Research and Business Monitor International (BMI) indicates that there is an expectation in the industry that MTN will lose market share as CDMA-based mobile and fixed-wireless regional operators and Etisalat increase their market share.

FIGURE 5 - HHI – NIGERIAN MOBILE MARKET (Source: Pyramid, MTN analysis)



Third, and fundamentally, as demonstrated further below, the mobile market in Nigeria is effectively competitive, and MTN’s position cannot in any way be characterised as dominant. With five (5) GSM operators as well as several CDMA players, and low barriers to switching, there is vigorous and increasing competition amongst all players.

3.1.2 RELATIVE SIZE

NCC Question

“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.”

¹⁶ Pyramid Research, Communications Market in Nigeria, March 2009, p. 3

MTN Response

MTN, Zain and Etisalat share the important similarity that they are members of international telecommunications groups, and are thus able to take advantage of any economies of scale arising from group membership. Glo is also growing into other African markets and its ownership and shareholding affiliations confer similar advantages on it. In the same manner, other operators have exploited available international synergies to improve their competitive position in the local market (Starcomms/Actis, Visafone/Zenithbank, Intercellular/Sudatel, Multilinks/Telkom are some examples). The relative size of MTN's operations does not therefore confer any special cost advantage on MTN which is not available to other operators in one way or the other, to a slightly higher or slightly lesser degree.

Any perceived advantage to MTN arising from its relative size is easily countervailed by the following, amongst other factors:

- a) Full adherence to statutory and license obligations which prohibit the cross-subsidization of operations,
- b) the fact that all operators deal with virtually the same equipment suppliers who apply standard international pricing,
- c) The major operators control virtually the same amount of infrastructure, within the same (national) geographic market, and at relatively similar tariffs.

Other countervailing factors are discussed the next section, concerning collective dominance.

If there are any cost advantages to MTN, they have arisen from efficient utilisation of resources; MTN cannot be penalised for providing value to its customers and enabling its stakeholders to derive maximum value for their investments.

Furthermore, the statement that in the Consultation document *"the market share of the smallest two operators (EMTS, M-Tel), however, has also shrunk, to less than 1% each¹⁷"* is misleading for the following reasons:

- Since it commenced operations in 2008, EMTS/Etisalat has in fact been recording a spurt of growth.
- MTEL has, along with NITEL, been arguably losing market share for internal structural (ownership and management) reasons, rather than due to activities of competition. Its market loss is due to its own unfortunate internal circumstances. Any conclusions based on the joint total market share of both EMTS/Etisalat and MTEL would therefore be unfair to MTEL and may be prejudicial to an otherwise healthily competitive Etisalat.
- Other non-GSM operators in the mobile market have been recording exponential growth rates. For example, Starcomms recently reported a 60% growth in just nine months¹⁸. This is a factor which should be taken into consideration of market share and growth. Furthermore, The NCC website shows that the subscriber base of the "CDMA" operators has grown from 600,321 customers in 2001 to 7,223,039 in 2009.
- With the end of exclusivity, the Unified Access Service License (UASL) has permitted all UASL licensees to provide mobile services across technical standards.

¹⁷ Page 7 of the Consultation Paper

¹⁸ See *the Guardian* Newspaper of 11 November 2009, at page 31.

3.1.3 CONTROL OVER ESSENTIAL MOBILE NETWORK INFRASTRUCTURE

NCC Question

"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"

MTN Response

MTN does not have "exclusive" control over essential mobile network infrastructure. Any suggestion of this is not an accurate reflection of the market situation. Both Zain and Glomobile have substantial network infrastructure in their respective coverage areas, which is not disproportionately low when compared to MTN's infrastructure. Multilinks Limited also has control over a significantly large national fibre/duct infrastructure.

The realities of the Nigerian market demonstrate that regulatory and commercial considerations have removed network infrastructure from being a significant barrier to entry. In particular we note the following developments in this regard:

- 1) The Commission has enacted detailed Regulations on Interconnection, as well as Guidelines on Collocation and Infrastructure Sharing (C/IS Guidelines), which have detailed procedures pertaining to dispute resolution and which further permit the Commission to intervene and compel interconnection or facility sharing as the case may be. No operator can therefore wrongfully refuse access to passive network facilities under the framework currently applicable in Nigeria; and the relevant provisions have proved sufficient to overcome any unjustified reluctance to share infrastructure or site facilities. These provisions should be enforced without any need for dominance investigations or declarations.
- 2) In 2008, the Commission licensed infrastructure and collocation services providers, many of who have access to requisite funding and are rolling out passive telecommunications infrastructure for all operators to share. We highlight here the recent financing arrangement whereby the International Finance Corporation invested US\$100 million in Helios Towers to boost the latter's capacity to enhance the availability of telecoms infrastructure and increase access in Nigeria. The arrangement is part of an overall capital injection of US\$250 million to enable Helios increase its sites to 2,000 sites.¹⁹ These infrastructure service providers may be expected to provide shared facilities more efficiently and at lower costs than those provided by operators, since this is their area of core competence.
- 3) Similarly, operators are implementing outsourcing projects, under terms which divest them of direct control of their non-core facilities, and which may permit outsourcing partners to allow usage of such facilities by other operators. In this regard, control of infrastructure by MTN or any single operator has ceased to be a barrier to entry.

¹⁹ http://www.businessdayonline.com/index.php?option=com_content&view=article&id=5826:world-banks-ifc-invests-100m-in-helios&catid=1:latest-news&Itemid=18

- 4) The control of infrastructure by any operator in Nigeria (other than NITEL) has arisen from normal market activity. Unlike most of the other markets where dominance (vis-à-vis control of essential network/infrastructural facilities) has been an issue, MTN has not enjoyed any preferential access to public and/or private land or other facilities. Other active operators have similarly gained control of infrastructure from competitive acquisitions and commercial arrangements. Any imposition of obligations on the premise of control of infrastructure (other than those general and mutual obligations in the C/IS Guidelines and Interconnect Regulations) would therefore be inappropriate and may be seen as a penalty for the success of operators who have successfully rolled out services in spite of the well-known continuing challenges of the operating environment in Nigeria.
- 5) More fundamentally, the characterisation of this infrastructure as “essential” completely contradicts the established economic and legal understanding of this concept. Essentiality entails a situation where a facility is a bottleneck that is uneconomic to duplicate. It is self-evident that mobile network infrastructure such as mobile sites and towers do not fall under this category.
- 6) Furthermore, MTN strongly contends that any measures to mandate forms of infrastructure access/sharing would not only contravene the letter and spirit of the present consultation framework (due to an absence of both dominance and the abuse thereof), but would also be economically indefensible and ultimately contrary to the goals of competition policy in telecommunications. It would also undermine the long-term sustainability of the sector.

In summary, MTN does not accept that there is any market failure regarding the sharing of sites or other mobile infrastructure in Nigeria. (Indeed, the provision of access to sites and masts is not even considered a relevant market in other jurisdictions, such as the EU.) Furthermore as the NCC would be aware, MTN currently offers collocation at a large number of its sites to other fixed and mobile operators, some of who also reciprocate. On the occasions where there has been cause to deny access, this has been purely due to engineering issues of site capacity and load. As such, we strongly recommend that Infrastructure (such as site) sharing should continue to be voluntary, struck by commercial agreement, under the regulatory oversight of the NCC. This would recognise that there are already many strategic drivers for operators to share sites.

With specific reference to the statement in item (c) of page 8 of the Consultation Paper to the effect that “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”, we cannot find any evidence for this sweeping assertion, neither has such an issue been brought to our attention. The fact that the Commission has not had cause to intervene to compel MTN to share any of its infrastructure provides sufficient proof, if any is needed, as to the inaccuracy of this statement and the success of the current framework.

On a general note, we do recognise that, in theory, there may be strategic²⁰ reasons why operators, particularly incumbents, may not wish to share infrastructure. Incumbents with a large, costly network may not want to share their assets, thereby creating a temporary barrier to entry. However, the benefits of mandating site sharing need to be traded-off against the adverse impact on incentives to build viable alternative network in the long-term, which we speak to in the next section.

²⁰ As well as non-strategic factors, such as space and load capacity at a given site.

In any event, the analytical link between site sharing and a firm's market power in retail mobile markets is at best strenuous and contrived, and its basis does not appear to have been adequately reasoned in the Consultation Paper. Sound regulatory theory and practice calls for a detailed assessment (market definition and dominance) of the relevant upstream markets, in order to determine whether there was significant market power, and a case for remedies.

Conversely, far from enhancing competition, mandated *ex ante* infrastructure sharing carries some risk of potentially *raising* competition issues in two distinct ways. First, sharing of infrastructure can tend to dull the intensity of competition between sharing networks. In particular, it can lead to homogenous network footprints and undermine service differentiation, and can, in the extreme, facilitate collusion. Second, when mandated *ex ante*, it can undermine investment by both incumbent and new entrants in much-needed infrastructure, which is ultimately the source of long term sustainable competition, as explained below.

A market-led approach is also supported by international experience, where there is, to our knowledge, very limited precedent for mandatory site sharing, with only Cyprus and Norway offering known examples²¹. In these jurisdictions, the mandated measures were applied in a very limited way and for very specific circumstances that do not exist in Nigeria. For example, in Cyprus it was suggested²² that the lack of availability of passive infrastructure, and in particular sites and masts had held up or slowed entry and progress of the second mobile competitor. However, this had been attributed to the fact that the legal framework for the erection of masts and sites was unclear, planning permission hard to obtain, and the fact that both entrant and the incumbent faced a situation where many masts and sites were built illegally due to the slow planning process.

3.1.4 SWITCHING

NCC Question

"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".

MTN Response

The extent of switching in a market is a function of several variables, e.g., consumer awareness of alternatives, search costs, monetary costs of switching, and other factors (such as MNP) which exert influence on consumer inertia or readiness to switch.

²¹ GSMA report available at http://www.gsmworld.com/our-work/public-policy/regulatory-affairs/investment-and-competition/infrastructure_sharing.htm

²² Commission Staff Working Document: Annex to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions European Electronic Communications Regulation and Markets 2006 (12th Report). Available at <http://register.consilium.europa.eu/pdf/en/07/st08/st08089-ad01.en07.pdf>

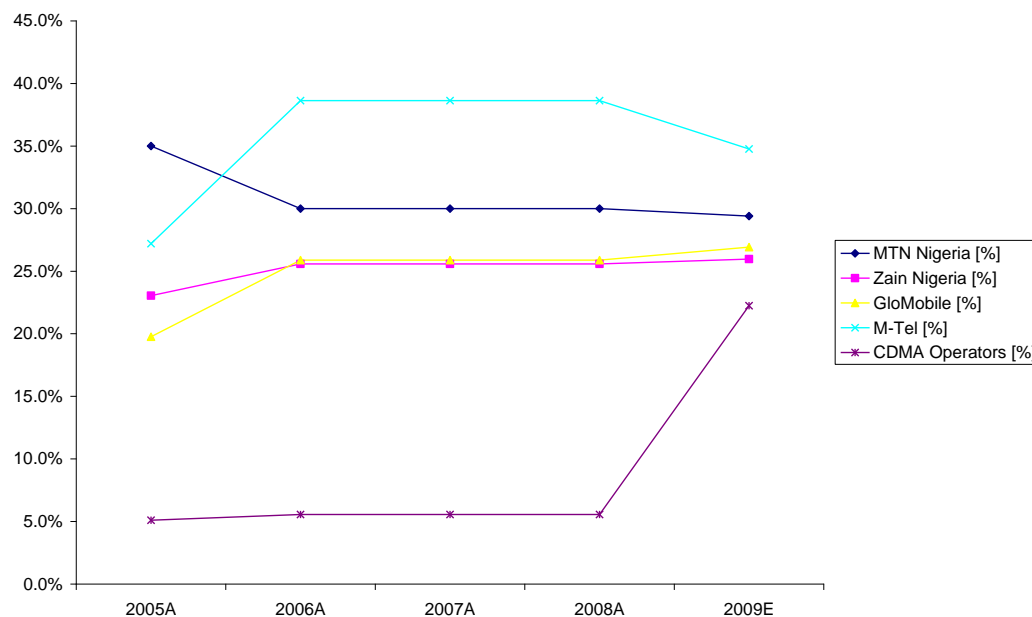
In respect of the first factor, awareness of alternatives, clearly in Nigeria consumers are very aware of their options. In fact, this factor is usually only an issue in newly liberalised utility industries, where a once-monopoly incumbent, and its consumers, are being exposed to competition for the first time.

Similarly, search costs are very low in Nigeria, due to the wide availability of channels to obtain a subscription.

In terms of the direct costs of switching, in the context of the Nigerian market, which is effectively all prepaid and where handsets and SIMs are widely available for very low or notional prices, switching costs are particularly low. For example, it now costs less than 74 cents to acquire a subscription, and it is effectively free when you account for the inclusive call minutes. The effect of this is that consumers who are contemplating switching are faced with a very low direct hurdle to doing so.

With regards to the observed degree of switching behaviour in the market, information from external sources²³ shows that absolute churn is currently and has been historically *higher* on MTN than most, if not all other operators, suggesting that customers may be switching away from MTN in event greater proportions than from other operators. Although this is easily explained by the fact that MTN hosts a larger percentage of subscribers and would naturally have a relatively higher level of churn, it does reflect the low barriers to switching that exist in the market. This is shown in the figure below.

FIGURE 6 - ANNUAL CHURN - NIGERIAN MOBILE MARKET (Source, Pyramid Research)



This data is especially significant in the context of a dominance assessment, and puts into perspective the conceptual status of market shares as an indicator of dominance. With conditions so conducive to switching, and high observed levels thereof, a putatively dominant operator is simply rendered unable to sustain higher prices than its competitors.

²³ Pyramid Research, Africa & Middle East Operator Details 2Q



In the context of both a growing overall market (where it can be assumed new subscribers are roughly equally likely to subscribe to each network) and high levels of churn away from MTN, it is easy to see that market shares will tend to equalise over time. In any case, equal market shares should not be a goal *in themselves*. Asymmetric market shares, even on a long term basis, can be consistent with a competitive market. For example, superiority in management/costs/marketing can be sustained, meaning that higher market shares can be expected and tolerated.

As discussed, market analysis for the purposes of assessing dominance should be conducted on a forward-looking basis, taking into account foreseeable developments that impact, either way, on the likely state of competition over the short-medium term. In this regard, it is necessary for the NCC to take into account the imminent introduction of MNP in the mobile market in Nigeria. It is well established that MNP will only serve to further lower remaining barriers to switching, thus intensifying already vigorous competition between all the players in the market.

In regard to roaming, MTN notes there has been no demand for it. As with mandatory sharing, roaming may also disincentivise investment and rollout, and can dull innovation and service differentiation. It is therefore adverse to the main goal of encouraging investment and rollout. It is particularly relevant in the case of roaming, since MTN is only just building up the capacity to handle its own traffic let alone accommodate others' traffic, and bearing in mind the Quality of Service challenges just now being overcome by existing operators. Again, investment (particularly in infrastructure) must become the focus of the Commission, as shown in its comments in respect of the IIC market. MTN is, however, prepared to engage in commercial negotiations on roaming, to the extent that it is mutually beneficial and commercially sensible.

3.1.5 EASE OF MARKET ENTRY

NCC Question

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.

MTN Response

We have a number of points to make in respect to this question. First, the premise on which the Consultation Paper suggests that there may be market entry restrictions is that *"all GSM spectrum suitable for mobile operators in Nigeria has been licensed"*. Whilst partly true, this assertion is imprecise because mobile services are being successfully provided on frequencies other than the GSM Spectrum by operators such as Starcomms, Zoommobile, Multilinks-Telkom, etc. This point further illustrates the confusion over market definition that we raised above.

Furthermore, whilst it is therefore true that all available GSM frequencies have been assigned, entry opportunities for the provision of mobile services are still available through other frequencies which permit the use of technologies such as CDMA and WIMAX. The expected "digital dividend" is projected to free up more frequencies for mobile services, which were previously used for broadcasting, as well.

Thirdly, barriers to entry are almost an irrelevance with already five (5) GSM and other

CDMA operators already entered.. It is thus safe to conclude that in a market as active as Nigeria, the only question is whether the licensees are at the right number to guarantee sustainability – not whether restriction on market access can limit, or has limited competition.

Fourthly, the allocation of operating and other frequency spectrum is not within the control of MTN – in as much as frequencies are a scarce resource internationally, and in as much as the NCC has adopted licensing frameworks which permit it to obtain the highest possible rents for the resource.

Finally, MTN is subject to the same rules, and acquired its operating frequency and other frequencies after an open auction in the same competitive manner as other operators (with the exception of MTEL and Etisalat). MTN has therefore not benefited from any restrictions on entry that might be said to confer any advantage upon it.

3.1.6 3G/TECH CHANGE

NCC Question

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.

MTN Response

MTN is not clear how 3G services may impact the position of MTN, vis-à-vis its competitors. We view it as another aspect of service competition, not as a factor that increases or decreases competition per se. However, we do believe that other technological change will in fact lead to a reduction of market concentration. We have already mentioned the digital dividend releasing more spectrum. This in turn will increase opportunities for others to enter the market.

With regard to the provision of data services, the position of MTN is no different from other operators in Nigeria providing similar services. Further, the advent of 3G services is still at its nascent stages. It is therefore premature to comment exclusively on it.

3.1.7 ADDITIONAL CONSIDERATIONS

NCC Question

"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".

MTN Response

In this section, we make two points, which address both the subject of existence of dominance, and the implications of a dominance finding. Firstly, we do not believe there are additional aspects of the market that gives MTN any additional market power. We do not believe that relative size based on revenues or earnings, even if we were to have the

data, would change the conclusion that MTN is not dominant. We have already indicated that a number of MTN's competitors have access to equally substantial financial resources as MTN. There is nothing about our equipment or technology that is particularly different from the other GSM operators. MTN's current relative size is the result of our commitment to good corporate governance and high service standards for our customers.

Secondly, we believe that the NCC's policy focus at the moment ought to be squarely on investment and how to encourage it. We detail more about this in the section below.

3.1.7.1 ENCOURAGEMENT OF INFRASTRUCTURE INVESTMENT FOR TRUE LONG TERM COMPETITION

As noted above, a dominance designation (on MTN or any other operator) would saddle the designated operator with attendant obligations, and this would give rise to a raft of unintended consequences, chief amongst which is a corrosive effect on investment incentives. We mentioned some of the other unintended consequences in paragraph 1.1.4 above. In further support of our position that the appropriate regulatory focus should be on encouraging infrastructural investments by ALL operators rather than providing entry incentives for a single operator on short-term considerations, we wish to call attention to the following.

The GSMA recently published a report²⁴ on mobile regulation highlighted the points that

- encouraging investment, rather than regulatory initiatives, yields the greatest benefits in terms of more subscribers, revenues, externalities, and
- intervening when no market failure exists increases regulatory risk – not just for issue of network sites, but for the market in general as it sends a signal that *any* investment carries risk of regulator inappropriate regulatory intervention.

The GSMA conducted an analysis of operators' investment policies and determined a number of very relevant facts with respect to Regulation, some of which are that:

- A best practice regulatory environment could increase mobile investment by approximately 25%. This additional investment could lead to an increase in mobile subscribers of up to 20%²⁵;
- In terms of investment directed at increasing capacity, mobile networks in Sub-Saharan Africa are often highly congested and higher levels of investment could significantly increase quality of service by reducing blocking rates and increasing the quality and clarity of calls. Higher levels of investment in a lower risk environment would also be associated with the deployment of more efficient and longer lasting equipment²⁶;
- The operators also revealed that there was scope for a significant reduction in these risk premia if the regulatory environment could be improved. Several operators mentioned in the report noted that regulation represented the main element of sector-specific risk in their country;

²⁴ GSMA, Regulation and the Digital Divide (GSMA Report). Available at http://gsmworld.com/documents/regulation_and_digital_divide_v3.pdf

²⁵ GSMA Report, Page 61,

²⁶ GSMA Report, page 64.

- To this end, focusing on reducing risk and committing to a stable and predictable regulatory environment is key²⁷; and
- In order to enhance competition, regulators in certain markets have introduced facilities-access regulations (facilities leasing). These regulations are aimed at resolving competition constraints around “essential facilities”. These are parts of the telecommunications network that cannot be technically or economically duplicated (for example the local loop of a fixed-line incumbent). However, where a Regulator extends the obligation to provide access to all such facilities this can undermine the incentive for infrastructure investment, particularly if such access must be granted at cost-based rates²⁸. The impact of this is to dampen enthusiasm to invest, translating into low capital investment.

3.1.8 PRELIMINARY FINDING: NO SINGLE DOMINANCE

NCC Question

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.

MTN Response

We believe that the NCC tentative conclusion that MTN is non-dominant in mobile telephony is the correct view. We believe that all the evidence presented above confirms this.

However, we believe that the NCC should be cognizant of other factors that relevant to a consideration of dominance. In addition to the factors canvassed above, the NCC should also bear in mind

- the degree of asymmetric regulation already present in the market - particularly regarding the proposed asymmetric mobile termination rate now being considered by the Commission in favour of “new entrants”, and
- the need to encourage investment in the sector (which we discussed in the previous section).

²⁷ GSMA Report, page 73

²⁸ GSMA Report, page 48

3.2 JOINT/COLLECTIVE DOMINANCE EVALUATION

3.2.1 OVERALL VIEW

Before addressing the specific questions raised in the consultation on collective dominance factors, MTN wishes to raise a more fundamental point. We are very much concerned with the Consultation Paper's approach to this matter which has led to the suggestion that MTN, Zain, and Glo collectively may have a position of dominance in the mobile market. Specifically, in the view of MTN, the Commission has evidently addressed the issue of collective dominance as follows: First, in the absence of evidence or complaints, it hypothesises that MTN, Zain, and Glo are collectively dominant. Second, it seeks evidence for this hypothesis from two basic perspectives: a) it considers whether observed outcomes, particularly pricing, are consistent with the hypothesis, and b) it outlines a range of structural factors and asserts that their nature in the Nigerian context is consistent with the hypothesis that MTN, Zain and Glo are collectively dominant.

MTN considers that such a presumptive approach is not only inappropriate but can give rise to flawed conclusions and dangerously lead to harmful policy. The flaw in the approach can be exposed by recognising that any market with relatively few players could, under the approach presented in the Consultation Paper, be characterised as a collusive oligopoly. Theory and practice has shown, however, that markets can be effectively competitive without the classic structural conditions of perfect competition. As demonstrated above and further below, a far safer and more reasonable hypothesis is that the mobile market in Nigeria is effectively competitive, and there is no evidence of tacit collusion among any of the players in the market.

In the sections below, we address more specifically the two areas of NCC analysis identified above; i.e.

- Pricing outcomes, and
- Structural and behavioural conditions for collective dominance

3.2.1.1 PRICING OUTCOMES ARE NOT CONSISTENT WITH COLLECTIVE DOMINANCE

The Consultation Paper asserts that, according to its 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.

Disappointingly, the Consultation Paper did not provide the supporting evidence for this claim. However, the claim is also misleading. It is impossible to say anything about what a customer is paying overall for his service by looking at a narrow set of rates. We have already introduced data, in the figure 2 above, which indicates (according to external

estimates of ARPM) that the average subscriber is paying less overall than before. While not conclusive of lower rates (lower average demand will have an influence as well), these data suggest that the Commission does not have the whole picture on rates.

The Consultation Paper also notes that 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. MTN considers this at best irrelevant. The QoS challenges that still persist are generally caused by environmental factors which cut across networks and which similarly affect operators and reflect the need for increased investment in the sector more than anything else.

3.2.1.2 CONDITIONS ARE NOT PRESENT FOR THE EXISTENCE AND MAINTENANCE OF COLLECTIVE DOMINANCE

The absence of evidence of collective dominance in terms of pricing is reflected in the fact that, fundamentally, the conditions required for the existence and collective dominance are not present in the market. Before addressing each of the criteria raised in the Consultation Paper, we wish to raise a more general point that the analysis presented in the Consultation Paper appears to insufficiently appreciate the underlying economic theory of collective dominance, and what this theory tells us about the conditions required for collective dominance to exist. Instead, the Consultation Paper dives right in to a set of criteria, and presents seriously flawed reasoning which in fact suggests conditions that *undermine* a collusive equilibrium. As shown below, the economic conditions for the facilitation of tacit collusion, or collective dominance, are not only rare, but onerous. The Nigerian market is certainly not characterised by these conditions.

In order to provide the conceptual context, it is worth briefly recapping the basic theory of tacit collusion, which derives from game theory. The basic insight is that when firms within a market interact repeatedly and for a sufficiently long time, it is possible for them to coordinate behaviour. This happens when the incentive and ability to cheat is outweighed by the expected long run gains from colluding.

The application of this theory to competition policy led to the articulation of basic conditions required for the maintenance of collusion. These conditions were ultimately captured under concept of collective (or joint) dominance. The current legal interpretation of the concept of collective (or joint) dominance stems from the Court of First Instance's (CFI) judgement in the *Airtours/First Choice* merger case²⁹. In this case the CFI overturned the Commission's findings about a 4-to-3 merger in the travel industry and outlined certain criteria that must be given to determine undertakings as collectively dominant.

The CFI's judgment defines collective dominance as a situation in which it is economically rational and preferable for firms to adopt, on a lasting basis, a common policy in the market with the aim of selling at above competitive prices. In the judgment the CFI set out three necessary conditions for a collective dominance position:

i) **Transparency:** Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are

²⁹ Case T-342/99 Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 6 June 2002, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999A0342:EN:HTML>

adopting the common strategy. It is therefore necessary for sufficient transparency for all firms in the oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other firms' market conduct is evolving.

ii) **Retaliatory Mechanism:** Any tacit co-ordination must be sustainable over time. Implicit in this is the view that a retaliatory mechanism of some kind is necessary, so that any firm that deviates from the co-ordinated practice would be met by competitive reactions (not necessarily only addressing the cheating firm) by other firms. In essence, a punishment mechanism is effective if it increases the present value of future losses above the short term gains of deviation.

iii) **No Prospect of Entry:** It is necessary that existing and future competitors, as well as customers, do not undermine the results expected from the common policy. Particularly relevant in this context is whether there are fringe competitors and, if they are able to counteract a collective dominant position.

In failing to address both the underlying theory and the economic and legal conditions pertaining to collective dominance, the analysis in the Consultation Paper is seriously flawed, and has therefore not led to the to the appropriate conclusion that collective dominance is absent in this market. The fundamental reason why mobile markets are generally not conducive to tacit collusion is their very heterogeneity. Indeed, operators are constantly seeking to differentiate their services from one another, ironically in an effort to attain a measure of market power via horizontal differentiation. Such a market structure may potentially give rise to a form of non-collusive oligopoly, or unilateral effects. But this is a fundamentally different phenomenon to collective dominance, which relies on a tacitly collusive equilibrium.

An assessment against each of the three Airtours criteria shows in any case the implausibility of collective dominance in the case of the Nigerian mobile market.

i) Transparency

As emphasised in the underlying theory, detection of cheating is pivotal to the facilitation of a collusive arrangement. A high degree of transparency will typically result where firms' products and associated pricing are relatively homogenous. Mobile markets in general are known for the variety, complexity and even opacity of the various tariff plans. Such a differentiated suite of service offerings serves to lower the level of transparency in the market, thus rendering observation of competitor strategies very difficult. This aptly characterises the market in Nigeria.

ii) Retaliatory mechanism

Even if all other factors would be present, the absence of this factor will spell the end for a tacitly collusive equilibrium, since it will avail a firm the opportunity to act on its incentive to deviate whilst facing no prospect of subsequent punishment (even if detected). Such a punishment mechanism must also be *credible*, in the sense that it is evidently ex ante rational for the punisher to impose punitive action on the deviator, in light of the consequential adverse effect on the present value of the former's profits. Moreover, observation of the market strongly suggests the absence of key conditions potentially conducive to the existence of retaliatory mechanisms. For example, regarding homogeneity, where product offerings are homogenous, if one firm deviates, it would know that punishment would be swift, since consumers will readily switch back to the punisher's products. As shown in this response, there is a high degree of heterogeneity in Nigerian mobile market, in terms of offerings and tariff plans. This would

make punishment less effective. The Consultation Paper has not presented any evidence whatsoever on this crucial ingredient of tacit collusion.

iii) No Prospect of Entry to Unsettle Collusive Outcome

Perhaps the most surprising omission in the analysis of collective dominance presented in the Consultation Paper was that the Nigerian mobile market is a classic case where any attempts by the leading three operators to adopt a common policy on the market would be swiftly undermined not only by new entry but by existing and established entrants. That is, operators such as Etisalat and the CDMA operators are, as shown in the previous section, making significant inroads into market share, and are acting as “maverick” operators.

3.2.2 ENTRY BARRIERS

NCC Question

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.

MTN Response

As already discussed, MTN is deeply concerned by the analysis presented in the Consultation Paper on this point, as it overlooks the obvious point that “entrants” have already entered and are operating in the relevant market. Operators such as Etisalat and the CDMA operators can and will disrupt any incipient collusive equilibrium (if at all possible) by the three leading operators.

In any case, the conclusion that “no new firms may realistically enter the market” is only partly true to the extent that the GSM frequencies have been fully allotted. There are other entry opportunities through other technologies such as CDMA, WiMAX, which are being utilised for the provision of mobile services. There are also expected to be a new set of frequencies (the “digital dividend”) upon which new entrants could capitalise to provide mobile services.

3.2.3 FREQUENT INTERACTION AMONG FIRMS

NCC Question

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. They must interconnect their networks and typically purchase services from each other in order to serve their own customers.

MTN Response

The suggestion that “direct cooperation among all firms, in the form of interconnection agreements” would somehow create “an environment in which...collusion can be readily established” is unfair. Operators will continue to explore synergies. Licence and statutory provisions preserve the right of the NCC to pre-approve any ownership change or “structural links” that may compromise existence of operators as independently managed entities. We are concerned that the Consultation Paper cites “frequent interaction among firms” as a possible threat to competition. Operators cannot exist in isolation and the suggestion that any interaction amongst them should be viewed with suspicion is unfortunate. Regular interaction between operators has (through institutions such as the GSMA, the CDMA Group, the ITU and other international bodies aided the institution of technology standards of worldwide application. They also offer invaluable avenues for the amicable resolution of disputes and knowledge sharing. Such interaction must be encouraged for the benefits that it delivers to stakeholders, when applicable rules of engagement are duly observed.

We should also add that in the Nigerian telecommunications industry, the main forum of interaction between operators is the Association of Licenced Telecommunications Operators of Nigeria (ALTON) where all fixed and mobile operators, whether big or small have single, equal votes.

More fundamentally, the analysis presented in the Consultation Paper misunderstands the nature of interaction that is relevant to the forging of collusion. To recap, collusion is only possible if firms interact frequently, due to the detection and punishment of cheating of rivals; a collusive outcome can only be sustained if deviation can be punished almost instantly. An operator deviating from the collusive outcome would enjoy the possibility of higher profits for a longer time to the extent that moments between interaction are long, since retaliation will take place a later moment in time in the future.

3.2.4 LOW LEVELS OF INNOVATION

NCC Question

(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.

MTN Response

The Consultation Paper surmises that “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”. This conclusion is an improper characterisation of the Nigerian market for the following reasons:

In the Nigerian market, there are no variations in tariffs for services offered on 2G or 3G networks. There is therefore no incentive for “decreasing any efforts at innovation within the 2G market”. Access to either network is dependent on the terminals used by subscribers and coverage areas of each network

As noted above, the GSM technology based on the 2G platform has reached its peak and

operators are now moving to newer standards 3GPP, LTE etc. Any operator that wishes to remain competitive in the Nigerian market must similarly move. The suggestion that operators will collude to decelerate innovation for short-term gains therefore misrepresents the market and does not give Nigerian operators sufficient credit. Business cases/competition require operators to meet the needs of their customers at the most efficient pricing possible; Nigerian telecommunications users have reached a high level of sophistication such that they demand cutting-edge service and are less interested in the technology by which service is delivered.

In summary, MTN is not clear on the point being made in the Consultation Paper, and is surprised at the attempt to characterise the market as one with low levels of innovation. We agree that much investment in *capacity* is needed in the market. However, the market is certainly innovating continually. Without a doubt, this undermines the possibility of collusion.

3.2.5 FEW MARKET PARTICIPANTS

NCC Question

(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.

MTN Response

The fact of there being a few market participants is merely a necessary condition. As noted in our submissions on individual dominance evaluation, the statement that “*there are only five licensed mobile operators*” is surprisingly inaccurate and illustrates the pitfalls of an imprecise market definition. There are indeed five GSM licensees, but the fourth and fifth largest mobile operators in Nigeria today are CDMA operators. In the technology-neutral licensing framework, all 13 (thirteen) Unified Service licensees can provide mobile services. There are therefore much more than five mobile operators, and potential new entrants are able to emerge at short notice, given the frequency issues discussed in item 3.2.2 of this section.

In the context of tacit collusion, this is relatively a large number of players

3.2.6 SYMMETRY AMONG PROVIDERS

NCC Question

(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.

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

MTN Response

This criterion clearly not applicable here – i.e. this point is in favour of no dominance. There is clear asymmetry amongst the operators in terms of, market share, for instance.

The Consultation Paper states that cellular mobile operators are relatively similar in structure and that the major difference is the partial deployment of CDMA technology by some. This would appear to contradict the preceding paragraph where it is stated that “there are only five licensed mobile operators”, as none of the five GSM providers analysed in both paragraphs utilize the CDMA standard. The Commission is invited to clarify this point.

In any event, MTN submits that on the key variables of market share, product offerings, coverage, and capacity, there is relatively high asymmetry in the market.

3.2.7 STRUCTURAL LINKS AND COOPERATION AGREEMENTS AMONG FIRMS

NCC Question

(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.

MTN Response

In relation to structural links, please see our comments in 3.2.3 above. We submit that there are no structural links of any relevance in this market.

3.2.8 FAST DEMAND GROWTH

NCC Question

(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. 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

MTN Response

MTN is again very much concerned at the way in which this criterion has been evaluated in the Consultation Paper. The proposition that fast demand growth works in favour of collusion runs completely contrary to the orthodox theory of collusion, which requires stable and mature demand in order for firms to effectively monitor the market conduct of rivals. Not only does the availability of information contribute to transparency, but so does market stability.

The argument that the “high demand growth” recently witnessed in the market “has been captured most recently by the three major operators almost exclusively”, and that this could have “diminished their incentive to compete directly, while increasing tacit collusion to exclude the smaller operators from the fruits of the growing market” is inaccurate. The following points are relevant:

- CDMA operations have indeed enjoyed a remarkable growth rate. As noted earlier, Starcomms reported a growth rate of 60% over a nine-month period. Similarly, Visafone, which is arguably the fourth largest **mobile** operator in Nigeria today, is also a CDMA operator.
- On page 10 of the Consultation Document, it is noted that MTN’s market share has in fact receded in relative terms. This statement of fact contradicts the analysis presented in this consultation point.

3.3 INDIVIDUAL DOMINANCE FACTORS

NCC Question

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

MTN Response

We are not entirely clear on the Consultation Paper requires here. We nevertheless request the Commission to consider our comments above as a response. We would also add that with particular reference to Paragraph 21 of the CPR which empowers the Commission to declare joint dominance, the matter is at the discretion of the Commission and no factors are therein listed. We have sufficiently demonstrated above that that discretion cannot be properly or legitimately exercised given the current state of the Nigerian market.

4. DETERMINATION OF DOMINANCE IN THE INTERNATIONAL INTERNET CONNECTIVITY MARKET

4.1 INDIVIDUAL DOMINANCE EVALUATION

NCC Questions

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.

We seek comment on whether NITEL's relative size in the ICC 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 Globalcom 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.

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.

We seek comment on the extent to which the ICT licensees and operators in Nigeria have been affected by the 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.

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

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.

MTN Response

We wish to reiterate the comments in 2.2 above, and particularly the fact that dominance investigations are premature in respect of cable infrastructure that are yet to commence operations.

We also wish to state further that although reduction in NITEL's exorbitant rates and the improvement in the quality of its services would be highly desirable, we suspect that any action on this front will be too late to have any impact on the market. Major alternative

operators have begun investing in international access which will dramatically change the market.

Another point is that, methodologically speaking, an assessment of dominance in the context of *ex ante* regulation must be forward-looking. In the near future, there will be competing cables. Thus, it would be highly inappropriate and speculative to investigate dominance in the market at this stage. There is a strong need to see how the market develops first.

With respect to other operators, it is clearly too early to consider who may or may not be dominant in the market. It is also too uncertain what the vertical structure of the industry will look like, e.g., the relationship of the eventual owners of the several cables with downstream internet providers. Hence an analysis of any discriminatory problems arising from vertical integration would be premature.

In our view, the Commission would be best advised to conclude that a dominance designation and attendant obligations is premature. It can rely on *ex post* competition law in case of abuse, such as excessive prices, constructive refusal to supply, etc. Furthermore, the provisions of the NCC's Collocation and Infrastructure Sharing (C/IS) Guidelines are sufficient to provide an appropriate safeguard against abuse of market power, if any. This should be undertaken on an *ex post* basis.

Notably, the Consultation Paper admits that the analysis in this section is subjective. It is also speculative. With particular reference to MTN and its terrestrial links mentioned in paragraph 6.1 of the Consultation Paper, it is further noted that Zain, Glomobile and Multilinks-Telkom have also implemented extensive transmission networks. This is mainly due to the unreliability of the transmission network offered by the incumbent. The Paper has not demonstrated evidence of the "reluctance" of MTN to share its backbone infrastructure, and there is no justification for speculating that MTN will not make access to the WACS infrastructure available to competition. The WACS project is an investment compelled by circumstances of NITEL's monopoly, and it is clear that MTN (and the other submarine cable operators) will explore all avenues to recoup its investments, as any commercially minded operator will.

4.2 JOINT/COLLECTIVE DOMINANCE EVALUATION IN THE IIC MARKET

NCC Questions

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

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

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.

We seek comment on whether there is or 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.

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

We seek comment on whether fast demand growth and the potential for concentration on economies of scope in large vertically integrated firms could lead to collective dominance or a lessening of competition in the IIC market.

MTN Response

Our comments here are similar to those in our individual dominance response above. In our view, it is simply too early to take a view on whether structural conditions are such that collective dominance exists. We also take the view that consistent with international best practice, competition law can be relied on to deal with any unforeseen problems.

MTN agrees with the point of analysis that *"(r)egulatory monitoring will therefore be important to deter potential joint or collective dominance"*. We however fault the premise that a major acquisition would in itself lead to substantial lessening of competition. As with other developed and developing markets where mergers and acquisitions are encouraged to reduce costs and create efficiencies of scale, operators will continue to explore available synergies. It is important to point out in this regard that licence and statutory provisions preserve the right of the NCC to pre-approve any ownership change or "structural links" that may compromise the existence of operators as independently managed competitive entities.

Finally, as earlier discussed, Zain, Glomobile and Multilinks-Telkom have also implemented extensive transmission networks, in addition to MTN. The fact that such a "duplication" exists is clear evidence of the absence of collusion, market share or such other anti-competitive practice.

Given the potential structure of the emerging IIC market, what is required is the adherence to a uniform, non-discriminatory, *ex post* regulatory regime which will serve to attract more investment and create competition in the market.

5 CONCLUSION

In conclusion, MTN commends the Commission for its avowed commitment to the achievement of a market-driven telecommunications market. We are confident in asserting that the gains recorded over the last decade have been driven by competition in the market and reiterate our commitment to assisting the Commission in the implementation of measures which will further strengthen competition in the industry.

MTN is also proud of the leadership role it has played in the deepening of competition in the Nigerian telecommunications industry; investments in telecommunications services by MTN and its competitors has had a major impact in uplifting the Nigeria economy and improving the lives of its people. The much acclaimed gains in the Nigerian telecommunications industry has been brought about by many factors, chief of which are

- a) The promotion of a fair, stable and predictive regulatory environment.
- b) Active competition amongst operating companies.

The importance of this consultation should not be underestimated. We have set out in this response our views and analysis on each of the issues raised in the consultation. Broadly, we support the preliminary thinking emerging in the Consultation Paper, especially regarding the absence of dominance in the effectively and increasingly competitive markets of mobile and international internet connectivity.

We have taken the opportunity in this Submission to further buttress the NCC's apparent thinking on these issues. The economic evidence and argument we have adduced in this response has demonstrated two essential points:

- Both the mobile telephony market and the market for international internet connectivity are effectively competitive in Nigeria; and, therefore,
- No regulatory intervention in the form of penalisation of the leading operators is necessary or justified, and indeed its imposition would be harmful.

More specifically, we have advanced (and substantiated with evidence) the following key propositions in this Submission:

- MTN is not dominant in the mobile market, either individually or collectively with its competitors, Zain and Glo. The market is effectively competitive, and increasingly so, as shown in critical factors such as decreasing concentration, ease of switching and the absence of key conditions (e.g. lack transparency and retaliation mechanisms) required for the sustainability of tacitly coordinated behaviour;
- There is similarly no dominant position in the international internet connectivity market, particularly if a forward-looking perspective is appropriately adopted. In the near future, competing cables will come on-stream and compete with NITEL, which is currently in a position akin to a monopoly in the market;
- Even if a service provider were to be found dominant (which would in our view be erroneous), no regulatory remedies can or should be imposed unless there is strong actionable evidence of anti-competitive conduct which substantially lessens competition;
- Strengthening market conditions conducive to investment, as opposed to increased

regulatory intervention, is vital, and a far more effective in achieving both the policy goals of promoting meaningful competition and encouraging efficient investment in infrastructure that is capable of meeting future demand for services.

In view of the analyses presented in this Submission, MTN further takes the position that a finding of dominance (and the imposition of attendant obligations) on MTN or any operator will disincentivise further investments in much-needed telecommunications infrastructure and would probably also have an irreversible negative effect on the growth of the industry. We therefore conclude that rather than focusing on incentivizing “entry” in an otherwise highly competitive market, the Commission should focus on the implementation of measures which further incentivises investments by ALL operators.

In this regard, MTN would encourage the Commission to consider the following measures in the near term:

- a) The relaxation of regulatory obligations (such as the 2.5% Annual Operating Levies on revenues, annual number renewal fees, and spectrum fees). Particularly with reference to numbering and spectrum fees, MTN recommends a cost-recovery framework which, whilst guaranteeing value to the country for scarce national resources, would also ensure that operators are able to apply these resources with greater economic efficiency, and that they can pass on cost savings from a reduction in regulatory fees to their customers through competitive pricing and investment in innovative technology;
- b) The provision of regulatory recognition to operators who have demonstrably contributed more to the growth of the industry and the advancement of the telecommunications sector;
- c) The reconsideration of the implementation framework and timelines of regulatory initiatives which would require significant OPEX outflows and which may also have serious implications on the stability of the market. Projects such as the implementation of MNP, and Prepaid SIM Registration should be considered in this light; and
- d) The assumption of leadership in assisting operators to overcome the challenges of the operating environment, particularly the issues of multiple regulation, high level of interconnect indebtedness and similar concerns.

We also take the position that whilst the Commission should continue to remain vigilant in the exercise of its statutory obligations, it is in the best interests of competition and consumers in the Nigerian telecoms industry to adopt measures which encourage investments in telecommunications infrastructure by all operators. This would create a win-win situation for all stakeholders, and is to be preferred in the national interest.

We thank the Commission for its kind consideration of our Submission.

MTN NIGERIA COMMUNICATIONS LIMITED
November 2009.