DETERMINATION OF DOMINANCE IN SELECTED COMMUNICATIONS MARKETS IN NIGERIA

ISSUED BY

NIGERIAN COMMUNICATIONS COMMISSION

1 BACKGROUND AND INTRODUCTION

Consistent with the liberalization of the Nigerian telecommunications industry in year 2000, the Nigerian Communications Commission has facilitated market entry through its transparent processes in licensing various communications services. Today, Nigeria is the fastest growing telecommunications market in Africa, rising from a meagre 500,000 telephone subscribers in 2001 to over 108 million as at December 2012. It is noteworthy that the giant strides in the telecommunications industry over the last decade were the direct effects of enabling regulatory environment created by the Commission.

The exponential growth of the industry has led to the increased maturity and sophistication of individual networks and has also ushered in intense competition amongst the industry players. While the Commission recognizes that effective competition in the various communications markets in Nigeria will encourage sustainable investment, growth and innovation to the benefit of the entire Industry and its consumers, it also acknowledges that existing market conditions may preclude effective competition in certain market segments.

Hence in June 2012, the Nigerian Communications Commission in exercise of its regulatory function to "ensure fair competition in all sectors of the Nigerian communications industry" (Nigerian Communications Act 2003 (NCA 2003 - S.1e)) embarked on a Study of the Assessment of the Level of Competition in Nigerian Telecommunications Industry.

Prior to this, the Commission had carried out a Determination of Dominance in 2010 which considered two markets, namely the mobile telephony market and International Internet Connectivity (IIC) market. The purpose of the Consultation was to assist the Commission in determining whether certain telecommunications service providers were in a position of market dominance in selected telecommunications industry markets in Nigeria within the meaning of the Nigerian Communications Act 2003. Following the conclusion of the Study, the Commission determined that based on the available evidence and submissions of stakeholders, that no licensee held a position of market dominance in the Mobile Telephone Services market. The Commission also determined that no group of two or more licensees held a position of joint or collective dominance in that market. With respect to the International Internet Connectivity market, the Commission also determined that though this market had been traditionally dominated by NITEL, the proposed entrance of at least four players in this market indicated that the IIC market was becoming highly competitive and will remain so on a prospective basis. Thus, the Commission concluded that NITEL was not in a dominant position in the International Internet Connectivity market and that there was no conclusive evidence of collective dominance among NITEL and any or all of the new IIC market entrants.

Similar to the 2010 Determination, the specific objectives of carrying out the Study of the Assessment of the Level of Competition in Nigerian Telecommunications Industry include the following:

- Definition of the market structure including relevant market segments which may be subject to ex-ante regulation
- Review and assess the level of competition within each of the identified markets
- Determine the existence of dominance in one or more markets

- Review the conduct and performance of the identified markets in order to identify any anti-competitive practices
- Determine the markets which will be subject to revised and/or additional ex-ante regulations

This paper seeks the comments/views of Industry stakeholders on the 2012 Study of the Assessment of the Level of Competition in Nigerian Telecommunications and its conclusions. Chapter 2 presents the legal basis for conducting the Study industry snapshot and Chapter 3 provides a summary of the process adopted in carrying out the Study. Chapter 4 discusses the key findings/results from the Study. Chapter 5 summarises the key points for consultation.

2 LEGAL BASIS FOR CONDUCTING THE STUDY

The Commission's functions and duties are set out in the Nigerian Communications Act 2003 (the "Act"). Section 4 of the Act lists the Commission's functions, which include the facilitation of investments in and entry into the Nigerian market for the provision and supply of communications services, equipment and facilities (section 4(a)), the protection and promotion of the interests of consumers against unfair practices including but not limited to matters relating to tariffs and charges and the availability and quality of communications services, equipment and facilities (section 4(b)), and the promotion of fair competition in the communications industry and protection of communications services and facilities providers from the misuse of market power or anticompetitive and unfair practices by other service or facilities providers (section 4(d)).

Section 90 of the Act states that the Commission shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market.

Section 90 (1) of the Act empowers the Commission to determine whether a licensee is in a dominant position in any aspect of the Nigerian communications market. Subsection 90 (2-3) goes on to state that the Commission may publish guidelines and regulations which clarify how it shall apply the test of "dominant position" to licensees. These guidelines may specify the matters which the Commission may take into account in determining dominance, including -

a) the relevant economic market;

b) global technology and commercial trends affecting market power;

c) the market share of the licensee;

d) the licensee's power to make independent rate setting decisions;

e) the degree of product or service differentiation and sales promotion in the market; and

f) any other matters which the Commission is satisfied are relevant.

The Act, under section 92 (4) also authorises the Commission to direct a licensee in a dominant position in the communications market to cease a conduct in that market which has or may have the effect of substantially lessening competition in any communications market and to implement appropriate remedies.

In 2007, the NCC, as empowered by the Act, published its Regulations on Competition Practices (CPR (2)) which:

a) provide further guidance on the standards and procedures which the Commission will apply in determining whether particular conduct constitutes substantial lessening of competition for the purposes of the Act ;

b) clarify what agreements or practices the Commission will find to be anticompetitive, and so prohibited under the Act ;

c) provide further guidance on the standards and processes which the Commission will apply in determining whether a Licensee has a dominant position in one or more communications markets ;

d) clarify what conduct the Commission will find to be an abuse of dominance and subject to a "cease conduct" direction under the Act.

3 PROCESS ADOPTED

In June 2012, the Commission commenced the Study on the Assessment of the Level of Competition in the Industry.

3.1 Consultations and Data Collation

In line with its commitment to a policy of openness, transparency, fairness, and participatory regulation, the Commission informed stakeholders in September 2012 of its intent to conduct a study on the level of competition in the relevant markets of the Nigerian Telecommunications Industry. In September 2012, consultations were held with a cross section of Industry Operators in the form of one-on-one interactive sessions followed by an enlarged stakeholders' forum to sensitize the Industry and provide opportunities for constructive contribution on the trends in the telecommunications markets in Nigeria. Data required in conducting this study were also collated from the Operators during this period.

3.2 Market Segmentation

The Commission reviewed the telecommunications markets using certain segmentation variables such as technology, products and services, customer profiles and geographical locations. It also considered the demand and supply substitutability of the markets resulting from the use of these variables. The results of the evaluation favoured the use of products and service as the basis to segment the Nigerian Telecommunication Industry. Thus in the table below the following markets were identified for the purpose of the study:

Table 1: List of Communications Markets for Market Analysis

S/N	Market Segment	Sub-segment
1	Voice	• Mobile Telephony (includes messaging)

S/N	Market Segment	Sub-segment
		• Fixed Line Telephony
2	Data	• Fixed Data, Retail Data Transmission Services and Leased lines • Mobile Data (e.g. Dongles / Data Cards / Tablets, Internet through mobile phone connections e.g. 3G / GPRS / Edge)
3	Upstream Segments	• Spectrum • Tower Sites • Network Equipment • Wholesale Broadband/ Internet Access • Wholesale Leased Lines and Transmission Capacity
4	Downstream segments	• Handsets / Devices (Includes the Device Operating System) • Applications / Content (Includes M-commerce)

In defining the markets segment, the fact that the wholesale broadband and leased lines markets within the Industry are not distinct, separate (merchant) segments and are the result of vertically integrated firms which also provide the mainstream voice and data services was taken into consideration. Thus, it was not considered essential to segment the market into discrete wholesale or retail sub-segments[1]. However, for the objective of assessing effective competition within each segment, notional wholesale markets were defined with available data, where required.

The table below provides an outline of how the identified market segments were further divided into wholesale and retail sub-segments, where required:

Table 2: List of Retail and Wholesale Markets for Market Analysis

	Upstream Segment	Voice Segment	Data Segment	Downstream Segment
Services provided as wholesale by an operator to other operators	Whole sale broadband access	Wholesale voice termination on mobile networks		
	Wholesale leased lines and transmission capacity	Wholesale voice termination on fixed networks		
Services provided as		Retail voice access	Retail broadband/intern	Supply of applications,

[1] This is in line with the recommendation of the European Commission as documented in its European Commission Recommendation Brussels, C(2007) 5406 rev 1, 2007

	Upstream Segment	Voice Segment	Data Segment	Downstream Segment
retail by each individual operator to its consumers		on mobile networks	et access on mobile devices	content and devices
		Retail voice access on fixed networks	Retail broadband/internet access on mobile devices at fixed location	
			Retail leased Lines	

3.3 *Assessment of Competition using the Competition Assessment Model*

The assessment of competition in the defined markets of the Telecoms Industry shall be based on the Structure-Conduct-Performance (SCP) model. The SCP model postulates that the structure of a market determines to large extent the conduct of the participants in the market, which in turn, influences the performance of the firms within the market with respect to profitability and efficiency. This model, or its close substitutes, has been used in assessing competition within the telecoms industry in a wide range of countries including the United Kingdom, the United States of America, and Kenya. The reliance on this model is considered relevant especially in the context of forward-looking ex-ante regulation, since conduct detrimental to competition must be anticipated primarily on the basis of the structural characteristics of the market[2].

Table 3 summarizes the market evaluation criteria for competition assessment using the SCP model:

Table 3: Overview of Criteria to Assess Effective Competition using the SCP Model

Category	Indicators	Parameters
• Market Structure	• Market share trends	• Volume based – number of subscribers/ number of call minutes • Capacity-based – number of lines installed/active

[2] Notification of the Commission’s Intention to Declare Regulated Services, Communications Commission Kenya

Category	Indicators	Parameters
		• Value-based – revenues • Market concentration measured by Herfindahl Hirschman Index (HHI)
	• Structural barriers to entry	• Absolute Barriers – number of firms, regulatory restrictions, control of essential facilities, extent of economies of scale and scope • Strategic barriers – intensity of advertising and capital investments • Vertical integration
• Conduct (Suppliers)	• Pricing strategies	• Pricing trends • Extent of reaction to a price change • Existence of price leadership, exploitative pricing, exclusionary pricing etc
	• Non-pricing behaviour	• Level of marketing and advertising costs
	• Provision of innovative services	• Product/service diversification
	• Market transparency	• Quality of website for information • Availability of product/service information via print, radio and TV advertisements
• Conduct (Consumers)	• Countervailing power	• Number of consumer groups • Consumer satisfaction with the quality and price of services
	• Costs and barriers to switching suppliers	• Extent and substance of barriers to switching suppliers
• Performance	• Geographic coverage	• Network coverage and penetration
	• Financial Performance	• Profitability, efficiency etc

4 RESULTS OF COMPETITION ASSESSMENT IN RELEVANT MARKET SEGMENTS

The criteria defined in the Commission's Competition Practices Regulations (CPR) for determining the existence of a dominant firm in a defined market segment were used as the bases for the conclusions arrived at in the Study. These are outlined below:

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

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

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

d) The absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers, ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices ;

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

Additionally CPR Section 20 states that "subject to any other determination of the Commission under this Part, or to any demonstration by a Licensee in the specific circumstances that the presumption should not apply, the Commission will presume that any Licensee whose gross revenues in a specific communications market exceed forty per cent (40%) of the total gross revenues of all Licensees in that market, is in a dominant position in that market.

The key findings for each market segment are outlined below:

4.1 Key Findings in the Mobile Voice Market:

The mobile voice market is not effectively competitive and is still highly concentrated with an HHI of 3063. MTN has a 44% market share of subscribers within this market. There is also a wide differential (of about 300%) between on-net and off-net calls and this is indicative of the likely establishment of a calling club for MTN subscribers.

4.2 Key Findings in the Fixed Voice Market:

Though Starcomms (with about 33% market share of subscribers) has the highest market share within the fixed voice market, it is not considered to have significant market power in this market as it has consistently lost market share over the past three years. The fixed voice market has been in decline since 2008 and has lost 70% of its market over that period.

4.3 Key Findings in the Mobile Data Market:

The mobile data market segment has grown significantly in the last five years and accounts for about 99% of the total data market. The GSM Operators lead this market segment. The major competition concern is that the wholesale providers of bulk bandwidth also play in the retail mobile data market and potentially stifle competition in this market. The study, however, concluded that no operator is dominant within the mobile data market.

4.4 Key Findings in the Fixed Data Market:

Fixed line broadband access is severely limited and accounts for about 1% of the total data subscription. Before the advent of mobile internet services, the available Internet Service Providers (ISPs) utilised the fixed wireless data solutions but such ISPs are fast going out of business due to their inability to compete directly with the suppliers of wholesale data access. The study concludes that it is doubtful that the segment will achieve effective competition with the current issues encountered in the upstream supply segment.

4.5 Key Findings in the Upstream Market:

MTN and Glo jointly control about 62% of the public terrestrial transmission infrastructure which is a bottleneck resource in the provision of voice and data services. There are concerns that Operators playing in the wholesale and retail sub-segments of these markets have the leverage to “squeeze” the margins of their competitors who are also their customers.

5 CONSIDERATION OF SUBMISSIONS MADE BY OPERATORS

The purpose of this section is to provide an overview of the comments received as well as the responses of the Commission to these comments. The comments received have been summarised and grouped by subject area. The names of the operators making the individual comments have not been included.

5.1 Comments on the Role of the Regulator in Assessing Competition

Most of the Operators largely acknowledged that the NCC is empowered to assess competition and determine dominance in relevant markets through the Nigerian Communications Act 2003 and the Competition Practices Regulation (CPR) 2007

Response from NCC

Nigerian Communication Commission has been empowered by the Nigerian Communications Act 2003 to assess competition and determine dominance in the Nigerian telecommunications industry. The NCC has also been empowered to identify acts which could constitute significant lessoning of competition in the market and take steps to address these acts

5.2 Comments on Market Definition/Delineation

- A number of Operators stressed the importance of conducting a comprehensive market definition prior to conducting an assessment of competition in the industry
- One of the Operators stated that in defining the relevant markets, the following should be taken into consideration in line with the provisions of the CPR 2007:
    - Analysis of the products or services that make up a specific market, as well as the geographic scope of that market;
    - Assessment of demand-side substitutability
    - Assessment of supply-side substitutability
- One Operator was of the opinion that the NCC should adopt a methodology similar to the one used in the Determination of Dominance in selected Communications markets in Nigeria in 2010 (2010 Determination). The Operator stressed that a clearly defined methodology assures transparency, predictability and regulatory certainty. The Operator also suggested that the Commission review the market definition published by the EU as a guide for market delineation in Nigeria
- Another Operator stated that the 2010 Determination did not define relevant markets, products and services and did not consider the geographical extent of the market. The Operator suggested that market definitions are dependent on the level of maturity of the industry and provided the list of markets defined by a number of countries in the United Arab Emirates
- One Operator also stated that the market definition should incorporate both wholesale and retail markets

Response from NCC

A comprehensive review and analysis of the relevant markets in the Nigerian telecommunications industry was conducted. The objective of this analysis was to identify the distinct segments in the Nigerian telecoms industry and clearly define the constituent elements and boundaries of each segment. This analysis also expatiates on the products and services, dynamics and value drivers within each market segment.

A set of common variables were used in the definition of industry/market segments. These are outlined below:

- Technology/medium e.g. Copper, Fibre, Microwave, Satellite, GSM, CDMA etc
- Product/service e.g. Voice, Data, Fixed (including FWA), mobile data, fixed data etc
- Geographical e.g. National/regional/state/city, urban/semi-urban/rural etc
- Customer/User profile e.g. Socio-economic class, customer behaviour/usage patterns, purpose of use etc

The variables outlined above were analysed to determine if they meet the criteria which define an ideal market segment i.e. Measurability, Relevance, Stability, Clarity, Homogeneity and Substitutability

On the basis of the analysis, it was decided that industry segmentation based on product/service definitions best suits the Nigerian market at the current level of maturity.

Using the Product/ Services, the Nigerian telecoms market has been segmented according to markets in **Table 2** of this determination.

Market segmentation from other jurisdictions was also considered during this evaluation and the market delineation which suits Nigeria in its current level of maturity was selected.

5.3 Comments on the Framework for Assessing Competition

- Two Operators noted that the key considerations for determining dominance are documented in the CPR 2007 (s 18) and should be utilised by the Commission in carrying out the Study. One of these Operators also proposed the use of the Herfindahl Hirschman Index (HHI) in analysing market concentration
- Another Operator noted the unavailability of a Process document with clearly defined deliverables and milestones for the Competition study. The Operator was of the opinion that the publication of a Process document would assist better planning and engagement of resources. This would ensure greater regulatory certainty and encourage qualitative contributions from Stakeholders.
- One Operator stated that the ‘Structure-Conduct-Performance” framework utilized by the Commission to assess competition focused on overall industry performance and provided no examination of individual market player behaviour

- Another Operator noted that the assessment of competition/dominance in each market should differentiate natural advantages of economies of scale and scope from anti-competitive practices

Response from NCC

The assessment of competition in the defined market segments of the Telecoms Industry was conducted based on the Structure-Conduct-Performance (SCP) model.

The SCP model postulates that the structure of a market determines to large extent the conduct of the participants in the market, which in turn, influences the performance of the firms within the market with respect to profitability and efficiency. This model, or its close substitutes, has been used in assessing competition within the telecoms industry in a wide range of countries including the United Kingdom, the United States of America, and Kenya.

The parameters that were evaluated using this Model are outlined in the Table 3 of this determination.

5.4 Comments on Actions/Conducts which are perceived to Substantially Lessen Competition in the Industry

- One Operator noted that some CDMA operators do not comply with the terms of the Interconnect Agreements and owe substantial amounts to GSM Operators as interconnect debts
- It was also mentioned that customers are solicited via SMS and phone calls by rival operators
- Another Operator stated that the pricing of transmission cables to provide last mile data service is un-economical. The Operator also stated that it had been subject to predatory pricing and a refusal to share infrastructure from other Operators. The Operator acknowledged that practices likely to cause substantial lessening of competition are often difficult to prove because an intention to eliminate the competition must be proven
- Another Operator also stated that excessive pricing of wholesale leased lines, onerous contractual terms, refusal to supply any wholesale capacity on certain routes, refusal to offer dark fibre access and refusal to provide access to duct sharing services are some of the practices likely to substantially lessen competition it has faced in the industry.

Response from NCC

As part of the process for assessing the level of competition in the Nigerian telecommunications industry, the NCC held one-on-one consultation meetings with several key stakeholders including all the major operators in the industry. Several complaints and issues as well as allegations were leveled by several companies as acts which are likely to substantially lessen competition. The acts that had empirical data and information supporting these behaviors were taken into consideration while determining acts which constitute practices likely to substantially lessen competition.

6 DETERMINATION

Based on the results of the study, the Commission hereby determines the following:

Table 4: Determination of Dominance in one or more Telecommunications Markets

S/N	Relevant Market Segment	Status of Competition	Designation of Dominant Operator
1	Mobile Voice	Not effectively competitive	**MTN** is designated a dominant Operator in this segment
2	Fixed Voice	Market is in a decline	No dominant Operator identified in this market
3	Fixed Data	Nascent market	No dominant Operator identified in this market
4	Mobile data	Effectively competitive	No dominant Operator identified in this market
5	Upstream Segment	Not effectively competitive	**GLO** and **MTN** designated as joint dominant Operators in the Wholesale leased lines and transmission capacity sub-segment of this market
6	Downstream Segment	Nascent market	No dominant Operator identified in this market

6.1 As a result of the determination outlined above, the Commission has resolved that the **Dominant Operator in the Mobile Voice market** shall be required to adhere to the following obligations:

a) Accounting Separation: The Commission will immediately enforce and implement Accounting Separation on the dominant operator

b) Collapse of On-net and Off-net Retail Tariffs: The differential between the on–net and off net retail tariffs will be immediately collapsed. The tariff for on-net and off-net will be the same, and subject to periodic review.

c) Submission of Required Details: The Commission may require the dominant operator to submit details on specific aspects of its operations from time to time as the need arises.

6.2 The Commission shall make a determination of pricing principle to address the rates charged for on-net and off-net voice calls for all other Operators.

6.3 The **Dominant Operators in the Wholesale Leased Lines & Transmission Capacity market** shall be required to adhere to the following obligations:

a) Price Cap/Price Floor: The Commission will come up with a price cap for wholesale services and price floor for retail services, and subject to periodic review.

b) Accounting Separation: The Commission will immediately enforce and implement Accounting Separation on the joint dominant operators.

c) Submission of Required Details: The Commission may require any of the joint dominant operators to submit details on specific aspects of its operations from time to time as the need arises.

This Determination shall take effect from 1st of May 2013 and remain valid and binding on Licensees for the services specified in relevant market segments of this Section, until further reviewed by the Commission.

Dated this 25th day of April, 2013.

Dr. Eugene Juwah
Executive Vice-Chairman

Nigerian Communications Commission
Abuja – Nigeria.