



INDEPENDENT CONSUMER AND
COMPETITION COMMISSION

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Our Ref: 7003-9/ea

14th September, 2016

Mr. Charles. S. Punaha
Chief Executive Officer
National Information and
Communications Technology Authority (NICTA)
PO Box 8444
BOROKO
National Capital District

Dear Mr. Punaha,

**RE: PUBLIC CONSULTATION ON THE DRAFT MARKET GUIDELINE RELATING TO
MARKET ANALYSIS**

We refer to the above and your letter of 25th July, 2016, requesting the Independent Consumer and Competition Commission (ICCC) to provide its comments.

The ICCC's comments on the draft market guideline are summarized in the table below:

Clause	Comments
Clause 2 – Market analysis	<ul style="list-style-type: none">We note that the NICTA guideline uses the phrase Significant Market Power when referring to level of market power that an entity has. We recommend that NICTA use Substantial Market Power instead of Significant Market Power. This is because PNG's competition legislation, ICCC Act and other related legislation, uses and makes reference to Substantial Market Power, not Significant Market Power. It would make more sense that there is only one set of terminology when referring to market power in PNG as oppose to having different terms that may have different thresholds and creates confusion.We also recommend that the NICTA guideline consider some of those factors already set out in s.69 (5) of the ICCC Act. Although s.69(5) sets out the factors one must consider when determining whether an acquisition would result in a substantial lessening of competition, it provides important thresholds to use when trying to establish market power such as assessment of barriers to entry and countervailing power.

"Shaping our Market Economy and Protecting our Consumers"

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<p>Clause 3 – Why might a market analysis be necessary</p>	<ul style="list-style-type: none"> • We recommend to NICTA that in conducting its market analysis it should be mindful of the distinction between a competition market and an economic market when applying its “competition objective” and “efficiency objective” particularly in instances of mergers and acquisitions in the ICT Industry. A competition market, as distinct from an economic market, comprises of a market where close constraints exist in respect of the firm or firms operating in the market. • We would like to inform NICTA that the ICCC currently has two processes under the ICCC Act that look at the competition and efficiency outcomes of all mergers and acquisitions in the economy, including the ICT sector. These processes are known as Clearance and Authorization. We recommend NICTA to discuss with the ICCC further on this area of competition assessment.
<p>Clause 4 – Defining a market</p>	<ul style="list-style-type: none"> • We note that in defining a market, the NICTA guideline makes reference to Consumer Dimension, Product Dimension and Geographic Dimension. Market definition for the ICT industry most times are challenging compared to other industries given the variety of technologies and their continuous evolving nature. As a result there is a high likelihood of close substitution between products and services, even carriers, as well as the existence of Cluster markets in the ICT industry i.e. companies that are not in the same product market but supply complements of other products through tying or bundling. While we recommend that the guideline makes provisions for the Functional Dimension which looks at the level of competition along the vertical chain of a product or service, we also suggest for NICTA not to confine itself to these dimensions. • We also advise that the ICCC Act provides for Access regimes for those products or services where the market will only allow for a single provider. In such instances, the NICTA guideline will need to ensure that its provisions do not conflict with the processes and provisions of the ICCC Act when dealing with Access regimes. We recommend that NICTA discuss this further with the ICCC.
<p>Clause 5 – Is the market suitable for ex-ante regulatory intervention?</p>	<ul style="list-style-type: none"> • With regards to NICTA applying its 3CT, the ICCC would like to reiterate that NICTA should also consider the factors set out in s.69 (5) of the ICCC Act. • We advise that the ICCC has processes under the ICCC Act that enable the ICCC to have a particular entity or product/service be declared as a regulated entity or product/service. This applies to the ICT industry as well. In those instances the ICCC takes into account not only the provisions of the ICCC Act but also the <i>Prices Regulation Act Ch. 320</i>. We recommend that NICTA discuss further with the ICCC so that the guideline complements the provisions of the ICCC Act and the <i>Prices Regulation Act</i>.
<p>Clause 6 – Market analysis</p>	<ul style="list-style-type: none"> • We advise that the PNG competition law, the ICCC Act, does not prohibit monopolies or firms having market power, rather it prohibits the abuse of that the market power. We are of the view



	<p>that market power is the reward or incentives for companies being innovative and competitive. We recommend that NICTA should be mindful of this when applying its market analysis. Therefore, NICTA should try to incorporate particular provisions that deal with abuse of market power that are already set out in the ICCC Act such as s.58 which deals with taking advantage of market power.</p>
Collective Market Power	<ul style="list-style-type: none"> • This part of the NICTA guideline would most certainly be captured under s.50 of the ICCC Act which deals with those agreements or arrangements that have the effect of substantially lessening competition. As mentioned earlier, the ICCC has powers to permit such agreements or arrangements that fall within s.50 of the ICCC Act through the process of Authorization. Companies may submit either a clearance and authorization application to the ICCC to conduct a competition assessment if the agreement or arrangement is deemed anti-competitive. • ICCC uses its own competition assessment and guideline when reviewing clearance and authorization applications. We recommend NICTA to liaise directly with the ICCC in setting out appropriate guidelines for this provision in the NICTA guideline.
General Observations	<ul style="list-style-type: none"> • The draft guideline uses different jurisdictional interpretation of competition concepts from the EU (Dominance), Australia (Substantial Degree of Market Power) and US, and makes it confusing to comprehend which competition concept should be applied in PNG. As you may be aware, each jurisdiction interprets and applies its competition concepts differently than another jurisdiction. That is why we recommend that the proposed NICTA guideline only use and make reference to the competition concepts used in Australia which is similar to PNG's competition law. This is because both PNG and Australia apply the same legal system being the Common Law which also extends to case law precedents and legislative interpretation. Furthermore, PNG's only competition legislation, the ICCC Act, was modeled after Australia's former Trade Practices Act 1974 and still applies the same concepts, terms and principles provided under Australia's competition framework. • It has also come to our attention that the NICTA guideline fails to acknowledge or make reference to the interpretation of competition concepts provided in the ICCC Act such as the definition of competition (s.45(1)), market (s.45(2)) and what competition in a market refers to (s.45(3)). The ICCC Act is PNG's principle competition law, and therefore the NICTA guideline should reflect and complement the provisions of the ICCC Act. • We therefore propose that the ICCC meet with NICTA and its relevant officers to further discuss and develop its guideline.

It is noted that most of the provisions of the draft guideline overlaps with the roles and functions of the ICCC, therefore, the ICCC believes that it will be mutually beneficial for NICTA to work closely with the ICCC to ensure that there is no conflict between the provisions of the proposed draft guideline and the ICCC Act.



We advise that the ICCC Act is the principal competition legislation in PNG. Where there is a conflict between the provisions of draft guideline and the ICCC Act on competition issues, the ICCC Act will take precedence over the draft market guideline; and this we recommend that it be acknowledged by NICTA in this guideline.

Should you have any queries on our submission, please contact Mr. Steven Sugl of our Competitive Markets & Fair Trade Division on telephone 325 2144 or email: ssugl@iccc.gov.pg.

Yours sincerely,

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MR. PAULUS AIN

Commissioner and Chief Executive Officer