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30th September 2016

Mr. Charles Punaha
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SUBJECT: NICTA PUBLIC CONSULTATION – MARKET ANALYSIS GUIDELINES

Telikom PNG Limited welcomes NICTA's efforts in putting forth this public consultation on its Draft Guidelines on Market Analysis, dated 25th July 2016. Telikom appreciates NICTA's efforts in initiating discussion with the ICT industry in PNG on these proposed guidelines.

Telikom would like to express that in the interest of meeting NICTA's set deadline, we have put together our initial thoughts on the subject matter in this covering letter and attachment. However, we have yet to get responses from senior management sufficient so we may make further comments.

The draft guidelines do not yet provide a clear indication of how NICTA will approach market analysis in the future. It would help clarify interpretation in the future if the new guidelines comment on how they are informed by and may differ from NICTA's previous analyses (e.g. for the MRSD and the declaration of submarine cable facilities).

Wisely, the draft explains how the proposed guidelines follow best practice in other jurisdictions. In particular, the European Commission has dealt with many cases that are well documented and can supplement PNG's more limited experience with guidance.

Section 1:

Section 1.1 seems to anticipate circumstances when NICTA's guidelines may be inadequate. What occasions is NICTA contemplating? It is proposed that the last few sentences be deleted.

Section 1.2 lists three examples of where market analysis may be required. There are two others, where the second is properly a matter for the ICCC:

- Part XII of the Act, which deals with public inquiries and investigations
- Mergers and acquisitions where ICCC would probably seek NICTA's advice on whether a proposal would lead to a substantial lessening of competition in ICT markets.

On M&A, the ICC Act says that “In deciding if an acquisition is caught by the ICC Act the following matters must be taken into account:

1. actual and potential level of import competition in the market;
2. nature and effect of barriers to entry in the market;
3. the number of buyers and sellers in the market;
4. the degree of countervailing power in the market;
5. the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
6. the extent to which substitutes are available, or are likely to be available in the market;
7. the dynamic characteristics of the market including growth, innovation and product differentiation;
8. the likelihood that the acquisition would result in the removal from the market of a sustainable, vigorous and effective competitor;
9. the extent of vertical integration in the market.

NICTA’s advice should be sought in relation to the points identified in the ICC Act because of its special knowledge of the ICT sector. The first point above may not be relevant to the ICT sector; unless OTT services constrain the actions of domestic providers of communications services. The last point does not mention horizontal integration which can also substantially lessen competition; e.g. at what point does consolidation of ISPs become an issue?

Section 2:

A large part of this section is about SMP which should be deferred to section 6 where it is discussed. The outline of the paper lends itself to four sequential steps which we suggest could be presented as the components of a market analysis:

- Market definition (section 4)
- 3CT (the 3 criteria test discussed in section 5)
- Effective competition (discussed in section 5) then excepting Part VI declaration inquiries
- Market power (significant market power is discussed in section 6)

It is suggested that section 6 is called “market power” because it deals with SMP and it seems that market analysis is not just about market power, but also the other elements identified above. Hence, Figure 1 (international definitions of SMP) belongs to section 6. The table below summarizes the 5 objectives of Market analysis, the involved steps or tools in analysis and regulatory remedies.

Note that we have added 3 more scenarios where we think these tools of market analysis could be used. Further, it is not clear that every tool may be required for every scenario and NICTA may fill that table accordingly as it sees the requirement to. The comments section is intended to show examples or note caveats. Telikom would like to revisit this particular section with additional comments in a supplementary submission that will follow this initial submission.

		OBECTIVE 1	OBECTIVE 2	OBECTIVE 3	OBECTIVE 4	OBECTIVE 5	Comments
		1. PART VI of the Act. The potential declaration of wholesale services	2. Part VII of the Act. The potential introduction, or continuation of a retail service determination	3. Section 52 of the Act, on giving consent to the transfer of an operator license	4. Part XII of the Act. Investigations.	5. Mergers and Acquisitions (ICCC)	
STEPS OF ANALYSIS	Market Definition	✓	✓	✓	✓	✓	
	3CT - Three criteria test	✓	✓		✓		
	Effective Competition	✓	✓	✓	✓	✓	
	Market Power		✓	✓	✓	✓	Does not necessarily apply to declaration of wholesale services
Remedies	Declaration of Wholesale Service	Retail Service Determination	Written consent must be sought from NICTA. NICTA's consent may be subject to terms and conditions imposed by NICTA	NICTA reports its findings in its Public Registry	ICCC may or may not grant authorization.		

Section 3:

This section is clear. But there are two definitions of effective competition: one where the US accepts potential entrants as a market constraint and another where the Australian definition does not. NICTA has not made a choice and that seems wise as opinions are divided. See <http://www.australiancompetitionlaw.org/law/economics/competition.html>

Section 4:

As this section notes in the opening paragraph, substitutability in supply and/or demand is a key concept in defining the boundaries of markets.

A large section (4.7 to 4.15) is spent on the SSNIP test which is complex and could only be applied qualitatively in PNG. The draft notes that elasticities are not known. An alternative method for applying the SSNIP test where demand elasticities cannot be estimated, involves estimating the "critical loss." The critical loss is defined as the maximum sales loss that could be sustained as a result of the price increase without making the price increase unprofitable. Where the likely loss of sales to the hypothetical monopolist is less than the Critical Loss, then a 5% price increase would be profitable and the market is defined. To

illustrate: <http://www.tcd.ie/Economics/staff/masseyp/term1lecture4.htm>

- Critical loss (y) defined as the maximum loss in sales resulting from a price increase that would still make the price increase profitable.
- $y = t/(m+t)$
- m is the price cost margin and t is the minimum price increase considered significant.
- Assume a price cost margin of 40% and ask if 5% price increase profitable.
- $y = .05/(.4+.05) = 11.1$
- That is, the firm could suffer drop in sales volumes of up to 11.1% as a result of 5% price increase and still increase its profits.
- How likely does that seem compared with actual experience?

That may help. But, the draft also mentions the cellophane fallacy; which says that the SSNIP test of an increase in price cannot be applied if the price level is already too high. From the price comparisons that have been reported for PNG and its peers, that is likely.

In the last paragraph of this section, NICTA says it intends to "review its market definitions (and the conclusions based on them) regularly". It is important for market participants to have certainty. The current regime provides for reviews of declarations, which is good. But, there should not be any reviews outside of these unless there is just cause.

Section 5:

The adoption of the 3CT test as part of NICTA's best-practice regulatory tool-kit is welcomed. So too is the suggestion that it would work closely with the ICCC to determine whether ex-ante (NICTA) or ex-post (ICCC) intervention (or both) is appropriate.

The most important discipline for any regulator is to "Do No Harm". Markets work best. The consideration of the relative cost of Type I and II errors will be another useful discipline.

Section 6:

The identification of SMP is a critical part of market analysis. The end tables look familiar and have served NICTA well.

Sincerely



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Mr. ~~David~~ Kulu **CHRYSZANE WANMA**

ACTING Company Secretary

Telikom PNG Limited