



MTN NIGERIA COMMUNICATIONS LIMITED

REPLY TO STAKEHOLDER SUBMISSIONS REGARDING THE NIGERIAN
COMMUNICATIONS COMMISSION'S CONSULTATION PAPER

ON

DOMINANCE IN SELECTED COMMUNICATIONS MARKETS

DECEMBER 2009

**MTN'S REPLY TO STAKEHOLDERS' SUBMISSIONS REGARDING
THE NCC'S CONSULTATION PAPER ON DOMINANCE IN SELECTED
COMMUNICATIONS MARKETS.**

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1. INTRODUCTION.

In furtherance of the NCC's Consultation Process on Dominance in Selected Communications Markets, and in response to the issues raised in the Submissions made by industry stakeholders, MTN wishes to make the following response. The Stakeholder Submissions which we received and to which we now respond are the submissions made by the following operators:

- a. Celtel Nigeria Limited (trading as Zain) – ("Zain")
- b. Globacom Limited – ("Glo")
- c. Reliance Communications Limited (trading as Zoommobile) – ("Zoom")
- d. Smile Communications Nigeria Limited ("Smile")

As we have provided a detailed response to each of the Consultation Points in the Commission's Consultation Paper in our Submissions, no effort is made in this Reply to revisit those points in detail. We have only sought to address specific issues arising from the Submissions made by the operators detailed above, although appropriate reference is made to our earlier Submissions where relevant. We have also provided a collective response to the said Submissions, while making reference to specific portions of the respective Stakeholder Submissions where necessary.

Having duly and painstakingly considered the respective Stakeholder Submissions, our general conclusions remain the same, namely, that (1) both the Mobile Telephony and International Internet Connectivity markets are effectively competitive, (2) that no regulatory intervention in the form of imposition of *ex ante* obligations or penalisation of leading operators is necessary or justified, and (3) that such an imposition would be harmful to industry growth. We therefore again recommend to the Commission that

- A light handed/*ex post* approach to competition which will create a 'win-win' for *all* stakeholders and is consistent with the National Telecommunications Policy and the Nigerian Communications Act (NCA) should be adopted,
- The Commission should champion measures which attract the much-needed investment in critical telecommunications infrastructure, and
- The Commission should continue to adopt sound policy in its interventions, taking actions that advance the best interests of competition and ALL stakeholders, not a single operator or a set of operators.

2. MTN'S RESPONSE TO STAKEHOLDER SUBMISSIONS

We now proceed to deal with the respective issues raised in the respective Stakeholder Submissions.

2.1 ALLEGATIONS THAT MTN HAS ENGAGED IN "ANTI-COMPETITIVE" CONDUCT

As noted in our Submission, the present investigations will have far-reaching implications for the telecommunications sector in Nigeria. We are also mindful that in carrying out these investigations, the Commission is exercising its quasi-judicial and Administrative Law functions. With reference to allegations concerning "conduct that substantially lessens competition", MTN notes that the Consultation process is capable of being abused to make unfounded allegations which may damage the market reputation of competitors. We also wish to caution that the publication of such unfounded allegations may give rise to legal liabilities. We would therefore respectfully advise that the Commission should only permit the publication of, and rely upon, actionable allegations which were escalated through the processes established in the Commission's regulatory instruments pertaining to the subject matter. For instance, actionable allegations concerning refusal to interconnect should be only those that the Commission has been previously requested to, and has successfully intervened in, in accordance with the provisions of the Interconnect Regulations. Similarly, allegations pertaining to sharing and access should be those that were successfully escalated in accordance with the provisions of the Collocation and Infrastructure Sharing (C/IS) Guidelines.

MTN vigorously refutes any suggestion that it has engaged in conduct which substantially lessens competition (regardless of the Commission's finding on dominance). In our dealings with our customers, competitors and other stakeholders, we have held ourselves to the highest ethical standards and will continue to do so at all times. We are therefore particularly concerned by the allegation made by Smile to the effect that:

"Smile conceptually agrees with the view expressed by other operators 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". MTN does not necessarily readily interconnect with newer entrants to the market, and collocation on towers for example requires reciprocity. It is not conceivable for all new entrants to the market to be in a position to reciprocate with tower collocation, and once again, this practice constitutes a barrier to entry for the newer operators".

By our records, Smile was licensed in July 2009 and has not yet rolled out services. The company requested interconnection from MTN by letter dated 21 October 2009 and we immediately responded by letter dated 23rd October 2009 requesting the standard information required to process the request in accordance with the provisions of the Interconnection Regulations¹. Smile has not responded to that request to date. We also wish to observe that even prior to the receipt of a formal request, MTN's Executive Leadership had granted Smile's officials audience as a demonstration of our warm accommodation and welcome to the new entrant. **We therefore find no justification for the above allegations by Smile and would strongly request that same be either substantiated or duly withdrawn.**

¹ Both letters are attached as Appendices to this Reply

We wish to state specifically that MTN regards the interconnection relationship as a partnership whose externalities benefit both interconnecting operators. Delays in implementing physical interconnection, in addressing interconnection issues, and particularly in making prompt payments for interconnection services are therefore not to be tolerated as these are neither in the interests of the interconnecting operators nor in the overall interest of their customers who have paid for these services. MTN is of the opinion that the NCC's Interconnect Regulations establish an appropriate regulatory framework which enables the achievement of these objectives, and which ensures the proper management of disagreements arising from the relationship. Recommendations for the improvement of the framework have been made to the Commission at other forums.

With further reference to the comments on the alleged "reciprocity" of sharing², MTN wishes to refute those allegations and to clarify that we have implemented site sharing with operators as disparate as Intercellular, Zain, Multilinks-Telkom, Emis, Visafone, Starcomms and Zoom on mutually agreed commercial terms. We are also currently involved in discussions with several other operators pursuant to the provisions of the Commission's Collocation and Infrastructure Sharing Guidelines (C/IS Guidelines). Furthermore, MTN employs the services of several licensed collocation service providers (such as Helios, HIS and Emporium) to provide service across the Federation. It is therefore unreasonable to suggest that MTN implements sharing otherwise than on commercial terms agreed with our respective partners.

Without prejudice to the foregoing, MTN wishes further to call attention to the submission by Glo to the effect that MTN "does not control the infrastructure as their number of BTS and OFC mileage are not up to 30% of the overall while the OFC laid is less than 30% of total"³. This means that requesting operators have a choice, and that they can approach competing providers of infrastructure if they are not satisfied with the access conditions offered by MTN or any other operator. As stated in our Submissions, there is no market failure regarding the sharing of sites or other mobile infrastructure in Nigeria. The provisions of the C/IS Guidelines which empower the Commission to intervene are sufficient to guard against unreasonable denial of access, if proven. Infrastructure sharing should therefore continue to be voluntary, concluded by commercial agreement, under the regulatory oversight of the Commission.

Finally, MTN wishes the opportunity of this reply to call attention, once again, to the action of operators who enjoy interconnection services and fail to make payment promptly and in accordance with interconnect agreements. In our view, this is an unjustifiable anti-competitive conduct bearing in mind that such conduct denies competing networks funds with which to sustain service and maintain acceptable quality of service. It also puts the creditor operators in the position of illegitimately subsidizing the operations of the debtor organizations.

2.2 COMPETITIVENESS OF INTERCONNECT RATES

MTN notes the arguments⁴ that interconnection rates be asymmetrically reviewed. We will defer comments in this regard in view of recent developments regarding Interconnect Rates Determination. It suffices here to restate our understanding that consistent with the provisions of the NCA and international best practice, interconnection and its costing is a

² See paragraph 3.3.1 of Smile's Submission and page 2 of Zoom's Submission

³ See page 4, last paragraph of Glo's Submission

⁴ See specifically paragraphs 3.3.4 of Smile's Submission and Page 3 of Zoom's Submission

statutory responsibility which must at all times be based on the principles of “neutrality, transparency, non-discrimination, fair competition, universal coverage, access to information, equality of access and equal terms and conditions”. The provisions of Section 97(1)(b) of the NCA are relevant in this regard. It is our view that the kind of asymmetry being requested would amount to unconstitutional expropriation if is not based on measurable differentials in cost elements.

With reference to the suggestion that the NCC adopt benchmarking for the determination of interconnect rates, we wish to use this opportunity to confirm our understanding that the Nigerian market has reached a level of sophistication which precludes the application of rudimentary measures for the determination of interconnect rates. We also confirm our appreciation of the fact that the Nigerian market is a highly competitive one where new entrants have historically done very well in a short period with a good business case, sound management, and no asymmetric regulatory assistance. MTN is proud of its association with operators such as Starcomms, Glo and Visafone who have creditably demonstrated this fact. The operator claiming a “lack of competition in the mobile telephony market” as justification for asymmetric rates may therefore be invited to provide clarity for the basis of that belief.

2.3 ON-NET/OFF-NET PRICE DIFFERENTIATION.

In light of economic principle and legal precedents, MTN rejects the notion that on-net/off-net price structures are anti-competitive either in the case of its practice by MTN or generally by others in the market⁵. Such price differentiations are indeed reflective of cost structures of the different operators who apply them. In the case of MTN, on-net/off-net price differentiations permit us to pass on a proportion of the cost savings from our economies of scale to our esteemed customers by way of lower tariffs.

Indeed, the elimination of on-net/off-net price differentiations will essentially withdraw the right to choose from subscribers and punish hard-working Nigerians who have taken the enlightened decision to stay with operators who pursue principles of least-cost operations and who offer high quality services at lower retail tariffs. Elimination of the differentiation will also reward inefficiency since there would no longer be any incentive for high-cost operators to lower their costs and provide service to their customers at competitive rates. As a customer-centric operator, MTN strongly refutes any suggestion that retail tariffs be artificially increased and that customers pay more for services for the apparent reason of sustaining “new entrants” in businesses which would not otherwise thrive.

Finally, MTN notes that the Commission has adopted the internationally recognized principle of price-cap regulation for retail services, and cost-orientation for wholesale services. Suggestions for the abolition of on-net/off-net price differentiations will essentially require the Commission to regulate both wholesale and retail rates. This, in our considered opinion, is a retrogressive step which will erode all the laudable achievements recorded in the telecommunications industry in recent years, and we are confident that the Commission will not allow itself to be thus persuaded.

⁵ See the arguments presented by Zoom at page 3 of its submission.

2.4 SUGGESTIONS ON THE APPROPRIATENESS OF ASYMMETRIC REGULATION

It has been suggested that the Commission should impose asymmetric obligations on the so-called “dominant operators”. The basis of this argument is that new entrants require a regulatory “leg-up” in order to effectively compete against so-called “incumbents”. Proponents therefore call for a suite of favourable measures, including asymmetric mobile termination rates, an acceleration of mobile number portability, mandated site sharing and national roaming. Without prejudice to the appropriateness or otherwise of each of these measures⁶, we note that calls for asymmetric regulations are founded on a fundamental lack of appreciation of the current consultation process. In this regard, we wish to state for the avoidance of doubt that in the unlikely event that the Commission finds any operator (or set of operators) dominant at the end of these consultations, asymmetric obligations cannot be legitimately imposed on such operator(s) by the mere fact of dominance. The Commission is statutorily obliged to make specific findings of abuse, or of “conduct which substantially lessens competition” arising from such dominance. The Commission is thereafter obliged to make a determination of the corrective measures necessary to correct such conduct. The current consultation process merely addresses the first step.

Specifically MTN considers that heeding calls for asymmetry in regulation would be a fundamental error of policy, for the following reasons:

- 1) As stated in our Submissions, the Nigerian telecommunications industry is not immune from the challenges of the global environment and has indeed been affected more significantly than is readily apparent. As a matter of economic principle therefore, proactive discrimination in favour of new entrants is a flawed approach which will encourage inefficient entry and compromise productive efficiency for the sake of minimal gains in allocative efficiency, if any. In this regard, the appropriate regulatory approach is to institute measures which will encourage infrastructure investment by ALL operators, rather than compelling apparently successful operators to subsidise inefficient entry and thereby disincentivise investment.
- 2) We had earlier observed 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 later entrants for which they are not compensated”⁷. We will add that as a matter of fact, most recent entrants have already enjoyed a great benefit over existing mobile players in that they have not been subject to licence roll-out obligations that networks like MTN have had to bear, which entailed rollout into areas beyond what would be strictly commercially rational. Other asymmetric benefits enjoyed by such operators in this regard include the following:
 - a. Whilst mobile operators acquired 3G frequency licenses at the sum of US\$150m, the EVDO/CDMA players got 3G spectrum virtually free.
 - b. Since 2006, the Commission has in effect applied asymmetric interconnect rates for the benefit of non-GSM operators.

⁶ Please see 2.8 below for MTN’s position on Number Portability.

⁷ See MTN’s Submissions, page 7.

These measures were taken ostensibly to develop the competitiveness of the beneficiary operators. MTN invites the Commission to carry out a comprehensive evaluation of the benefits accruable to the Nigerian economy from these measures.

- 3) We note, as above, that the Nigerian market is a highly competitive one where new entrants historically do very well in a short period. We cite the examples of **Glomobile** which bridged two-year head start to become a top-three mobile operator; **Visafone** a recent entrant, which is now the fourth largest mobile operator in Nigeria, and **Starcomms** which recently recorded 60% growth in nine (9) months. These examples demonstrate that the success of later entrants is attributable to a range of factors, such as strategic astuteness, quality of service, level of investment and quality of management. Indeed, it may be observed that new entrants are ultimately more successful in markets where they have to compete on an equal footing to the established players. Moreover, new entrants have achieved success in relatively mature markets, where penetration is higher and hence where, necessarily, new entrants must rely on churn for the majority of their new custom. Penetration in Nigeria is relatively low, and lower than that at the point of entry of most later entrants in the case of EU markets. Asymmetric obligations are therefore not economically justifiable at this stage of the market's lifecycle.
- 4) MTN also considers that regulatory measures taken towards artificially favouring new or recent entrants and/or small players would be discriminatory and may therefore be illegitimate. To avoid this result, it is suggested that the Commission provide some clarity on its regulatory policy concerning entry into the Nigeria market. Such Policy would also need to be reconciled with the provisions of the NCA which mandates the Commission to act only for the protection of fair competition, and on the application of the principles of fairness and non-discrimination.
- 5) Without prejudice to the preceding paragraph, the benefits of favourable treatment of new entrants in Nigeria is highly questionable. International experience shows that entry and garnering of market share by later entrants has been successful, regardless of regulatory-led tilts in the playing field. The experience in the EU has shown that third and fourth mobile entrants generally achieve significant market share⁸ in a short interval. In our observation of the EU experience, third entrant Mobile National Operators (MNO) have experienced the most success in gaining market share, which is affected by a number of factors, including market penetration, level of competition already in market, GDP per capita, etc. The average market share of the entrant three (3) years post-launch is 23%. This is consistent with the study by mmC Group Strategy Consultants, who found that third entrants in the EU achieve an average of 20% growth.

For the avoidance of doubt, MTN does not object to the provision of general or targeted incentives (such as tax breaks, lower licence and spectrum fees, lower Annual Operating Levies) and such other measures which benefit the entire industry, while reducing the burden on new entrants. Our position is that ultimately, regulators should focus on protecting consumers. This means promoting competition, rather than supporting particular competitors. Efficient operators and technologies competing on a level playing field will survive and prosper in the best interests of the nation.

⁸ See <http://consultantvalueadded.com/2009/02/26/can-a-3rd-operator-overcome-market-saturation/>

2.5 SUGGESTIONS FOR DOMINANCE-BASED *EX ANTE* MANDATED SHARING

With particular reference to suggestions for mandated *ex ante* sharing, MTN strongly restates the arguments presented on pages 23 to 25 of our Submission and reiterate that mandated sharing is neither necessary nor cognizable under the present consultation framework. Indeed for the reasons stated in our Submission, *ex ante* mandated sharing will encourage inefficiency and disincentivise competition in the provision of telecommunications infrastructure. For the avoidance of doubt, the provisions of the C/IS Guidelines which preserve the Commission's powers to override unreasonable refusal for sharing are sufficient to achieve regulatory objectives for the efficient deployment of telecommunications infrastructure based on international best practice.

2.6 COLLECTIVE DOMINANCE

We particularly note the reference to the practice in the European Union⁹ and Smile's allusion to the factors to be considered in the determination of collective dominance. Bearing in mind the apparent misunderstanding of the practical application of these principles, we recommend a careful reading of the Judgment in *Airtours v. Commission*¹⁰, which is the *locus classicus* in the matter. We trust that the evaluation of the Judgment would put the matter in its proper perspectives for all concerned. Further elucidation is provided on pages 33 to 35 of our Submission.

Also, in consideration of the fact that the Irish market offers one of the rare examples of jurisdictions where a finding of collective dominance has been made, we have attached a brief comparison of the Nigerian and Irish markets. The comparison shows the implausibility of coordinated effects existing in the Nigerian mobile market.

2.7 SUGGESTIONS FOR THE STRICT REGULATION OF VERTICALLY INTEGRATED IIC-OPERATOR ENTITIES.

MTN notes the suggestion for the strict regulation (or, in other words, the imposition of *ex ante* obligations) on the operators of the emerging submarine cable infrastructure where they are perceived as being controlled by virtually integrated entities. We particularly note Zain's comments that *"the potential however exists for MTN or Globacom, each acting as a vertically integrated entity, in the event that it deploys a Submarine Cable, to leverage the control of this essential facility to hold a position of dominance in the Mobile Data and Broadband Markets. This potential needs to be investigated"*¹¹. Zain consequently recommends that

- a) Such operators be mandated *"to develop a standard Reference Offer and Service Level Agreement (SLA) that they must comply with going forward. In addition, a systematic procedure should be put in place for periodic review of the IIC pricing mechanism without discouraging innovation and further investments in the sector"*
- b) that the Commission *"put necessary measures such as pricing thresholds, mandatory provision of service to any requesting party, Reference Offers by the IIC and SLAs to minimize service disruptions"*.

⁹ See page 11, paragraph 4.1.2 of Smile's submission.

¹⁰ Case T-342/99, [2002] ECR II-2585

¹¹ Similar comments were made by Smile at page 10, paragraph 3.5.2, and page 14, paragraph 5.3.3; and Zoom at page 5 of its submission.

We note and commend Zain's reservations that the recommended measures must be implemented in such manner as not to discourage innovation and further investments in the sector. We however wish to observe that the above considerations are fairly standard requirements for wholesale services which must apply equally to the submarine cable infrastructure as to any other market, including the voice termination market to which every operator has a monopoly on their respective networks. Whilst we disagree with the apparent suggestion that the Commission should determine pricing, however remotely (tariff regulation is an unnecessary regulatory function in a competitive market), we agree with the position that pricing mechanisms must be fair, transparently determined, cost-oriented, and non-discriminatory, pursuant to the provisions of Section 108(4) of the NCA.

For the avoidance of doubt, it is our position that the stipulation of *ex ante* pricing and competition *principles* for any market in the industry is to be welcomed. It is however premature to draw any conclusions (and to therefore take preemptive regulatory action) regarding "vertical integration" vis-à-vis emerging submarine infrastructure and existing providers of retail services. The Commission rightly noted on page 17 of the Consultation Paper that MTN is merely one of the "main shareholders" in the WACS project. This correctly reflects the ownership of the WACS infrastructure, and the presumption that MTN Nigeria is thereby vertically integrated with WACS is therefore speculative. In view of this fact, considerations of dominance in the submarine infrastructure market are premature, and should abide the emergence of competition in the sector, which will only happen when the cables are in effective operation.

MTN nevertheless reaffirms the conclusion that the provisions of the NCA and particularly the NCC's C/IS Guidelines sufficiently guarantee open and non-discriminatory access to the emerging submarine cable infrastructure, regardless of their respective ownership.

2.8 RESTATEMENT OF MTN'S POSITION ON NUMBER PORTABILITY

With particular reference to comments on the negotiating power of customers and how the absence of Number Portability is a significant barrier which supposedly favours MTN, we wish to clarify as follows:

- a) MTN fully supports the implementation of full Number Portability and looks forward to the early conclusion of the regulatory and technical measures necessary for its implementation. We have canvassed such support at several forums and it is our position that its implementation will further deepen competition in the telecommunications sector for the benefit of our esteemed customers.
- b) It was submitted that "*while number portability is laudable, it is important to also state that it may not readily favour CDMA mobile operators because the CDMA technology operates on a so called "closed-model" as against the "open-model" of GSM. The CDMA close-model makes it impossible right now for their subscribers to switch between networks as one operator's "RUIM" card may not readily work on another until this issue is decisively resolved*". We disagree with the notion that CDMA technology is inherently disadvantaged or excusable from the implementation of Number Portability. The implementation of Number Portability requires the transfer of the customers' MSISDN, not their handsets. In that case, the underlying technology of service provisioning is of no consequence whatsoever as it is the customers' *number* that will be provisioned on the receiving network. GSM subscribers porting their numbers to a CDMA network would need to acquire CDMA handsets and RUIM cards, while CDMA customers wishing to port their numbers to a GSM network would need to acquire GSM Handsets and SIMs.

- c) In line with the technology neutrality basis of the NCC's regulatory policy, MTN supports the full implementation of number portability regardless of the underlying technology of service provisioning.
- d) Pending the implementation of number portability, MTN takes the position that the relevance of "switching" as a barrier to effective competition is over exaggerated. We refer to the comment that "*subscribers may be tied to the network by fidelity formulas and contracts*" and question the relevance of "fidelity formulas and contracts" in a market that is about 98% prepaid, where it costs almost N0.00 to acquire a new connection (assuming the customer already has a handset) and where customers often utilize free minutes provided by their new network to notify their contacts of a change in their number. This feature has arguably sustained the primacy of the GSM technology whilst deepening inter-standard competition.

MTN thanks the Commission for the opportunity to make this reply and trusts that the comments made herein will further assist the Commission in reaching decisions which will sustain the growth and development of the telecommunications industry.

II. CASE STUDY OF COLLECTIVE DOMINANCE IN MOBILE: THE IRISH REGULATOR'S DECISION

In 2005, the Irish NRA, ComReg, made a finding of collective (joint) dominance in the mobile market, designating two operators, O2 and Vodafone, as having joint dominance. It is useful to highlight the main features identified by ComReg which led to its finding and compare and contrast these features to those prevailing in the Nigerian market. This is shown in the table below.

Table 2 - Comparison between Irish and Nigerian mobile markets - structural conditions for collective dominance

Market feature	Irish mobile market	Nigerian mobile market
Market concentration (oligopoly)	High and stable combined market shares of the 2 JD players (Vodafone and O2)	Combined market shares of MTN, Zain and Glo have declined from 98% in 2007 to 86% in 2009, forecast to continue falling
Pricing	Relatively high and parallel	Data available suggests falling prices
Incentive to coordinate (common interest) – number of firms	Few firms = 4: means that deviation is not as profitable, since not as much extra market to capture	Several firms = 9 or more: incentive to deviate is stronger
Incentive to coordinate - symmetry	Similarity in market shares of Vodafone and O2	MTN, Zain, Glo are not symmetric
Ability to coordinate – converge on focal point – price	Found similarity of tariffs	Tariffs heterogeneous and diverse
Ability to coordinate – converge on focal point – wholesale access	Denial of wholesale access	MTN offers sharing/collocation commercially. No demand from MVNOs
Ability to detect cheating – price deviations	Found price movements are readily observable	Complexity and diversity of tariffs hinders detection by competitors
Enforceability - Retaliatory mechanisms	High prices led to inference that operator would retaliate by swift reduction in price	Falling prices do not give rise to same inference
Actual/potential market constraints	Few and ineffective fringe competitors	Numerous, successful and growing maverick competitors outside MTN, Zain and Glo. Further entry possible in future

The evidence in this table further highlights the implausibility of coordinated effects existing in the Nigerian mobile market. (It is also worth noting that ComReg’s decision has never been formally upheld.)

