



**REPORT OF THE PUBLIC INQUIRY
ON THE TRANSFER OF LICENCE AND RESOURCES, INCLUDING 800MHz
SPECTRUM FROM VISAFONE COMMUNICATIONS LIMITED TO MTN NIGERIA
COMMUNICATIONS LIMITED**

1. INTRODUCTION

The Nigerian Communications Commission (the Commission) received an application from Visafone Communications Limited for the transfer of its licence and resources, including its spectrum in the 800MHz Band, to MTN Nigeria Communications Limited.

Pursuant to its powers under Section 57(2) of the Nigerian Communications Act 2003 (the Act), the Commission made a determination that the matter is of significant interest to relevant stakeholders in the industry, which would require it to hold a Public Inquiry in order to elicit comments from the general public, especially telecommunications operators.

Consequently, the Commission in line with the provisions of Section 58 of the Act, scheduled a Public Inquiry for June 25, 2018 and a Notice of the Public Inquiry was published in Daily Trust Newspapers and Guardian Newspapers of Monday June 4, 2018 as well as on the website of the Commission.

Further to this, the Commission received Four (4) submissions from the following stakeholders:

1. Airtel Networks Limited;
2. MTN Nigeria Communications Limited;
3. National Association of Telecommunications Subscribers (NATCOMS); and
4. Probitas Partners LLP.

2. THE PUBLIC INQUIRY

The Inquiry held as scheduled at the Conference Hall of the Commission. The forum commenced at 11.06am and was chaired by the Executive Vice Chairman (EVC), Professor Umar Garba Danbatta. Staff of the Commission and Eighty Two (82) persons made up of representatives of telecommunications companies, interested stakeholders and the media attended the forum.

The EVC welcomed participants to the forum. He explained that the Inquiry was consistent with the Commission's mandate of creating an enabling environment for effective competition in the

industry as well ensuring the provision of qualitative and efficient telecommunications services throughout the country. Whilst observing that the demand for Spectrum has increased due to emergence of disruptive innovations such Mobile Broadband, Web Applications, Cloud Computing (CC), Internet of Things (IoT) and the proliferation of smart devices, he stated that Commission had to embark on re-planning of some of its Frequency bands in order to reap the benefits of effective utilization of Spectrum as well as improve operational efficiency and regulatory excellence.

The EVC noted that in 2013, the Commission re-planned the use of 800MHz band to accommodate technology development in the telecom industry, and new Spectrum Assignments were conveyed to the Operators according to their spectrum holdings in the 800MHz band. He stated that subsequent to the replanning of the band, Visafone, one of the operators who had earlier been assigned 10MHz in the 800MHz band applied to the Commission for transfer of its licence and spectrum holding to MTN.

Consequent upon this and in the spirit of participatory regulation as well as the strategic objective of the Commission to hold regular consultation with the industry stakeholders, the Commission decided to hold the Public Inquiry to elicit inputs and comments from stakeholders before reaching a decision on the application by Visafone. The EVC therefore enjoined all participants to freely make their contributions and raise issues that would assist the Commission in concluding the matter amicably.

Thereafter, the Director, Spectrum Administration reiterated the reason for the Public Inquiry which is to elicit comments and observations from relevant stakeholders on the issue.

3. COMMENTS FROM OPERATORS

After the remarks, the Deputy Director, Legal & Regulatory Services requested operators to make comments on the issue.

A. 9Mobile: The Operator stated that it had a few comments to make in respect of the issue at hand which should be treated “without prejudice” to the pending matter it instituted in court (since 2016) to challenge MTN’s acquisition of 100% shareholding in Visafone. The Operator pointed out that MTN’s access to the 800MHz spectrum assigned to Visafone will substantially lessen competition in the industry. This is because if the transaction is allowed to scale through, no major competitor to MTN in Nigeria will have spectrum in the 800MHz band (a band which is good for deployment of LTE services in a cost effective manner). 9Mobile stated that though other operators may have spectrum in other frequency bands such as 700MHz, this cannot be compared with 800MHz due to device compatibility issues with other spectrum bands. It further stated that from recent auctions carried out by the Commission, other operators, to the exclusion of MTN are facing difficulties in making upfront payments for these spectrum due to non-availability of funds.

9Mobile further stated that under the Competition Practices Regulations 2007, one of the measures used in assessing whether competition is being lessened is the control of essential facilities that cannot be easily replicated by competitors. In the present case, MTN currently holds 38% of the total spectrum assigned in the telecommunications industry while the other active operators (about 10) jostle for the remaining 62%.

9Mobile explained that spectrum re-farming presumes the use of spectrum that may not be best suited for a particular purpose to deliver that service. It therefore stated that though 9Mobile has re-farmed a part of its 1.8GHz spectrum, it must be pointed out that this particular spectrum is not the best suited one for deploying LTE services. It further stated that it was only able to re-farm 5MHz out of the total of 15MHz spectrum assigned to it in the 1.8GHz band to offer LTE services. In contrast, it explained that MTN currently has 30MHz in the 2.6GHz band, 10MHz in 700MHz band and 10MHz in 800MHz (if its request is granted) totalling about 50MHz, all of which are intended to be used to deploy LTE services.

The Operator alluded to case studies from other jurisdictions (such as South Africa and United Kingdom) where the respective telecoms regulators considered the amount of spectrum already held by an operator in deciding whether to allow such an operator access to additional spectrum. Having regard to this concern, it opined that access to the 800MHz spectrum should not be solely on the basis of acquisition of assets of one operator by another because spectrum is a critical and scarce national resource and should be treated as such. It however stated that if MTN is allowed to roll out LTE services nationwide (unchallenged) in this manner, this would effectively lessen competition in that segment of the market.

- B. Airtel:** The Operator enquired whether the Commission carried out a market impact assessment prior to holding the Public Inquiry, and what the outcome of the assessment, if done, was. It stated that the cost of rolling out LTE services on 800MHz is 25% more cost effective compared to 2.6GHz. This raises serious concern if MTN is allowed to deploy LTE services using 800MHz in view of its position as the operator with the largest revenue market share and dominant market player in both voice market segment and leased-line market segment. It further stated that there have been instances of abuse of dominance by MTN which may lead to a monopoly if not checked by the Commission. Airtel noted that in India, there is a cap on the amount of spectrum a single operator is allowed to own. It therefore stated that there is need for the Commission to consider adopting this practice in order to ensure that no single operator has monopoly over spectrum.

The Operator requested to know if the Commission has put measures in place to ensure that other operators have access to sub-1GHz spectrum for deployment of LTE services and are able to compete effectively with MTN. Airtel stated that it had earlier requested the Commission to consider granting it access to at least 10MHz on the sub-1GHz band to support its roll out of LTE services. This request has not been granted by the Commission and

the other option available which is 2.6GHz is not particularly cost effective to roll out LTE services on.

Airtel further suggested that the Commission should collaborate with the National Frequency Management Council (NFMC) and the National Broadcasting Commission (NBC) in order to develop a plan that would ensure that sub-1GHz spectrum is assigned in a non-discriminatory and fair manner to all operators in the country.

- C. **MTN:** The Operator stated that the concerns raised by the different operators are merely assumptions that have not been substantiated based on the fact that MTN cannot be said to have engaged/be engaging in any act(s) under the Nigerian Communications Act 2003 (the Act) or Competition Practices Regulations 2007 that constitute or may result in substantial lessening of competition. In explaining this point, MTN noted that access to spectrum is not prohibited under the Act or any of its subsidiary legislations. It further stated that other operators such as Smile Communications Limited and Intercellular Limited currently operate on different parts of the 800MHz spectrum and MTN is merely exploring the opportunity available to it to get access to this spectrum.

The Operator further alluded to the fact that the Commission in recent times has introduced several initiatives such as spectrum re-farming and spectrum trading to level the playing field for all operators. It stated that spectrum re-farming has now enabled operators like 9Mobile and Airtel to deploy LTE services on their 1.8GHz spectrum. MTN is however unable to re-farm its 1.8GHz spectrum in view of the negative impact this would have on its 2G services. Though MTN has 38% of the entire spectrum holding in the country, it stated that what constitutes the largest percentage of this is the 2.6GHz spectrum (about 10%) recently acquired by it which is still heavily encumbered. As such, MTN has been unable to deploy LTE services using the 2.6GHz spectrum. MTN also pointed out that the reason for it utilizing a larger amount of spectrum is due to its subscriber base and total traffic which is higher than that of any other operator.

MTN further stated that by virtue of the Spectrum Trading Guidelines recently published by the Commission, operators can now transfer, lease or share the spectrum assigned to them. There is therefore no basis for other operators to insinuate that MTN has exclusive access to the 800MHz spectrum.

While noting that Airtel is the 3rd largest operator in the world, MTN stated that there is need for all operators to encourage more investments in order to achieve the common goal of contributing to the overall growth of the Nigerian economy. It noted that studies have shown that a 10% leap in broadband access can lead to 1.3% growth in GDP of a country. MTN stated that the desire to ensure that the Nigerian consumers have access to affordable broadband services, irrespective of their location (urban, semi-urban or rural) is its main driver in requesting for access to the 800MHz spectrum which can be used to deploy LTE services,

even to rural areas at lower costs. MTN stated that it has observed that many operators are shutting down their sites in rural areas due to the high cost of deploying services there and this is detrimental to one of the objectives under the Act of ensuring that telecommunications services are available to unserved and underserved parts of the country.

In its bid to ensure that the set target of at least 30% broadband penetration is achieved in Nigeria by the end of 2018 in line with the Nigerian National Broadband Plan, MTN stated that if granted access to the 800MHz, it intends to roll out broadband services in at least 18 states across the country, covering both urban and rural areas. It therefore stated that competition should not form the only basis for assessing the request of Visafone to transfer its licence and spectrum to it, but the benefits of broadband access to the consumers must also be taken into consideration.

4. SUMMARY OF WRITTEN SUBMISSIONS RECEIVED

A summary of the written submissions received by the Commission is as follows:

A. Airtel: The Operator raised concerns on the proposed transfer of the licence and spectrum resources (including the 800MHz) of Visafone to MTN, stating that this arrangement will not only increase MTN's market power but will substantially lessen competition in the Mobile Voice Market and Mobile Data Market segments of the industry, which could lead to MTN becoming a monopoly.

Further to this, Airtel requested the Commission to (i) withhold the approval of the application by Visafone until other top players in the industry have assignment in the sub-1GHz band for LTE deployments; (ii) conduct an assessment on the impact of the proposed transfer of the licence and resources including the 800MHz spectrum from Visafone and MTN on the industry; and (iii) commence the process of reallocating the 800MHz Spectrum Band by enforcing the terms and conditions of the 800MHz Spectrum licence assigned to LTE Operators particularly with regards to the "Use It or Lose It" and "failure to meet roll-out obligations". The Operator also opined that the recently published Spectrum Trading Guidelines should not be applicable in the regularisation of the instant transaction (which pre-existed its issuance).

B. Probitas Partners LLP: The Law Firm submitted that the application from Visafone for the transfer of its licence and 800MHz Spectrum to MTN should be disallowed by the Commission on the grounds that the proposed transaction will inhibit competition, create monopoly, monopsony and will ultimately be detrimental to the interest of consumers and other network providers. The Law Firm stated that in the event that Visafone no longer has need of the 800MHz Spectrum, a tender process may be initiated where all interested network providers can express their interest in the acquisition of the Spectrum.

In the opinion of the Law Firm, MTN and Visafone are amongst the top five players in Nigeria's telecommunications industry; as such, the transaction, if approved, will clearly cause significant harm to competition, increase prices of products and services and reduce consumer choice. Examples from the United States of America and United Kingdom were cited in justifying the request by the Law Firm for the Commission to reject the application of Visafone.

Furthermore, the Law Firm requested the Commission to reverse the approval given in 2016 for MTN to acquire Visafone in view of the fact that the acquisition was not carried out in the interest of consumers who were forcefully migrated from the CDMA technology of Visafone to the GSM network of MTN. In addition, the Law Firm requested that the Commission should mandate the reversal of the mandatory migration of Visafone subscribers from CDMA to GSM.

- C. 9Mobile:** In its submission, the operator urged the Commission to decline Visafone's application for the transfer of its 800MHz spectrum to MTN. 9Mobile posited that if the transfer is effected, it will not only increase MTN's spectrum dominance in terms of its overall spectrum holdings, but will also result in an unmatched concentration of 4G spectrum with an already dominant operator.

The Operator stated that the proposed transaction would allow MTN have a total of 50MHz of 4G spectrum (which is 10 times the spectrum available to EMTS and Airtel for the provision of 4G services) and be the only operator with spectrum in 2.6GHz and 800MHz spectrum bands. In the opinion of 9Mobile, this arrangement will enable MTN provide nationwide 4G services without effective competition, thereby conferring on it a competitive advantage which none of its competitors will be in a position to challenge currently, or in the near future. 9Mobile highlighted the fact that it is currently seeking a judicial review of the Commission's decision to approve MTN's acquisition in 2015 of 100% shareholding in Visafone. It therefore raised concerns on why the Commission decided to conduct a Public Inquiry without consideration of the ongoing judicial process.

Furthermore, 9Mobile stated that while spectrum leasing and sharing ideally provide cost-effective access to spectrum, the absence of an up-to-date NCC-issued spectrum allocation table has severely inhibited spectrum trading as operators are unclear as to the identity of all spectrum assignees and the amount of spectrum held by the respective assignees. It also stated that spectrum sharing and leasing cannot be treated as direct substitutes for spectrum ownership due to the fact that these arrangements only allow access to a portion of the spectrum assignment in the licensed area or all of the spectrum assignment in a portion of the licensed area (in contrast to spectrum ownership which provides access to the entire spectrum assignment in the entire licensed area).

9Mobile also requested the Commission to use a similar transaction in South Africa as regulatory precedent in making a decision on this matter. It stated that in that case, MTN successfully challenged an attempt by Vodacom of South Africa to acquire Neotel, a small operator with 800MHz spectrum assignment on the basis that the proposed deal will make Vodacom extend its dominance in the industry, thereby lessening competition.

Based on the above, 9Mobile recommended that Visafone's 800MHz spectrum should be retrieved by the Commission and made available to all non-dominant operators under fair and cost-effective terms. It also stated that the Commission should explore measures to provide cost-effective access to spectrum in view of the fact that most operators (with the exception of MTN) lack the financial resources to outrightly purchase much needed spectrum.

D. National Association of Telecommunications Subscribers (NATCOMS): In its submission, NATCOMS stated that the Commission should approve the proposed transfer of the licence and spectrum of Visafone to MTN in the interest of the telecommunications industry and consumers in Nigeria. In the opinion of NATCOMS, MTN has shown its willingness and capacity to continue investing in the industry (where other operators have not had any significant injection of investment in recent times) and this goes a long way in ensuring that the country attains the 30% broadband penetration target for 2018 as set out in the Nigerian National Broadband Plan (2013 - 2018). NATCOMS also highlighted similar transactions in the past where the Commission had approved transfer of spectrum from one operator to another. It therefore opined that the Commission should approve the proposed transfer in order to be seen as setting a level playing field and standards of predictability on matters relating to acquisitions in the industry.

Whilst acknowledging the fear that the acquisition of Visafone by MTN could further entrench MTN as a dominant operator in the industry, NATCOMS stated that the Competition Practices Regulations 2007 and other international standards and best practices allow for the imposition of additional obligations on operators with significant market power in order to prevent any possible abuse/manipulation of the market by virtue of their position. NATCOMS further stated that the chances of MTN having monopoly over spectrum has been addressed through the recently introduced Spectrum Trading Guidelines that allows any operator desiring spectrum to approach another operator to lease, share or buy such spectrum through commercial negotiation.

E. MTN: In its submission, MTN stated that the proposed transfer of the licence and spectrum resources of Visafone to MTN will neither have any negative impact on the commercial opportunity of other operators as opportunities still abound in the market for others, nor will it adversely impact the growth and development of the market as similar spectrum resources are available either through trading or outright purchase from the Commission. It stated that the study carried out by the Commission in 2013 which resulted in MTN being declared a dominant operator in the Mobile Voice Market and Wholesale Leased Line and Transmission

Capacity sub-segment is in no way related to the Mobile Data Market (which as at 2013 was found to be sufficiently competitive). As such, the determination of MTN's dominance should not be assumed to extend to the Retail Mobile Data Market without cogent evidence to support such a conclusion.

MTN further stated that if granted approval to utilize Visafone's 800MHz spectrum, it would implement a cost-effective means of broadband service deployment which in turn should result in quicker roll-out rate and a wider coverage at a shorter time frame compared to rolling out on a higher spectrum band. In buttressing this point, the Operator stated that the 800MHz spectrum would allow it roll-out LTE services within three (3) months in twenty-two (22) towns spanning across ten (10) additional states, which would have significant positive impact on the overall economy of the country and broadband penetration.

The Operator therefore requested that the application by Visafone for the transfer of its licence and spectrum resources (including the 800MHz spectrum) should be approved by the Commission as the transfer will send a clear signal to current and potential investors that the Commission's primary consideration in all matters is the overall interest of the consumer and the Nigerian economy.

5. CLOSING REMARKS

The Deputy Director, Legal & Regulatory Services stated that the Public Inquiry is a part of the process the Commission follows in arriving at its decision on critical issues. He therefore stated that the Commission will consider all contributions made by the various stakeholders in making a decision on the matter.

The Public Inquiry ended at 11.50am.

Dated this 25th day of June 2018

**Professor Umar Garba Danbatta, *FRAES, FNSE*
Executive Vice Chairman/CEO,
Nigerian Communications Commission**