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SMILE'S RESPONSE TO THE CONSULTATION PAPER ON DOMINANCE IN SELECTED COMMUNICATIONS MARKETS PUBLISHED BY THE NIGERIAN COMMUNICATIONS COMMISSION ON 27 OCTOBER 2009

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1. Introduction

1.1. Smile Communications Nigeria Ltd ("Smile") is thankful to the Nigerian Communications Commission ("NCC") for the opportunity to provide its written comments on "*the Consultation Paper on Dominance in Selected Communications Market*" herein referred to as the "Consultation Paper" published on 27 October 2009.

1.2. Smile does approve the publication of its submission by the NCC for purposes of this public consultation.

1.3. Smile welcomes the NCC's initiative in conducting a market review on the effectiveness of competition in the Mobile Telephone Market and International Internet Connectivity markets. Smile believes that this approach is consistent with the trends followed by other National Regulatory Authorities (NRAs) across the world and in Africa i.e. Tanzania, Uganda, and South Africa to ensure that competition is effective in relevant markets and when there is lack of competition in those markets, appropriate, justified, and proportionate ex ante remedies are imposed upon operators identified as dominant..

1.4. There are many potential markets that can be considered. Smile is pleased that the NCC is considering these two markets which affect all Nigerian consumers either directly or indirectly-

- The Mobile Telephone Services market, has a direct impact on end users, including those that are underserved;
- The International Internet Connectivity market affects operators directly and indirectly impacts business consumers – the knock on effect of behaviour in this market will be felt on ordinary consumers as they will remain under-serviced.

1.5. Smile is a new entrant in the sector who intends to provide affordable communications services to Nigerian consumers who cannot currently afford telecommunication services. In order to provide affordable services, it is key that Smile's input costs are kept low and there ought to be an enabling regulatory environment for new entrants like Smile to compete effectively with the incumbents, and for prices to be reduced for the benefit of consumers. The lack of competition and presence of one or more dominant players in the Mobile Telephony Market contributes to the high costs of communication services.

1.6. In particular, Smile believes that the current rate for mobile call termination (N11.40) may be one of the reasons why the average tariffs for mobile services in Nigeria have increased slightly over the past several years as indicated in the Consultation Paper. Smile further notes that the mobile interconnection rate also constitutes a challenge for new entrants as they cannot compete with incumbent operators on the same level and provide affordable and innovative communications services to Nigerian consumers.

1.7. It is therefore critical that the NCC addresses this issue by reviewing the Mobile Telephony Market and, linked to that, the mobile interconnection rate in order to create an enabling environment for new entrants which will lead to a competitive mobile retail telephony market. The NCC should also consider the imposition of asymmetric interconnection rates as a manner of increasing competition, particularly for those operators who intend to provide services to the lower end of the market. This will contribute significantly to the increase of telecommunications penetration – a national objective of every developing country.

We respond in our submission below to some of the key questions contained in the Consultation Paper.

2. Comments on section 4 of the Consultation Paper on Identification of Relevant Markets

2.1. *"We invite comments on the identification of these two proposed relevant markets, for purposes of this dominance investigation. You are encouraged to provide arguments and evidence supporting, opposing or suggesting changes to the definition of each relevant market. You may also suggest other relevant markets in which the commission should consider evaluating potential dominance".*

2.1.1. Smile agrees with the NCC's identification of the two markets. With regard to the definition of the Mobile Telephone Services Market, we believe that a broad definition, such as the one proposed by the NCC allows it to consider competition problems across both the retail and wholesale markets. This can lead to an assessment that seeks to address a broad range of competition problems including excessive pricing (wholesale and retail), discrimination, and anti competitive cross subsidization. We believe that in terms of what the NCC has addressed in its Consultation Paper, using the market definition set out in paragraph 4(a) of the Mobile Telephone Services Market, the following retail markets will be analysed, and in that regard the impact of wholesale markets on such retail markets will be considered – call origination, termination and transit. Smile supports this holistic and comprehensive approach.

2.1.2. Smile notes that the NCC in its Consultation Paper states that in some other jurisdictions, the call origination and call termination markets as well as wholesale market access are distinguished. While this is one approach, we believe that this approach can be unnecessarily lengthy and is not appropriate for the Nigerian market – reaching the under-served consumers in the country is a priority and this process will not facilitate the rapid spread of service provision. Further, these laborious processes are often favoured by incumbents employing dilatory tactics to prevent the introduction of competition, and the NCC must be cautioned against this. Further, it is important to note that in economic terms call origination and call termination are in a vertical relationship where the provider of call origination takes as given the input price for termination, and then charges a mark up depending on the price elasticity of outgoing calls. A market analysis could therefore find that the retail market for call origination is competitive, but the input market for termination is monopolised (and vice versa). Thus the distinction between call origination at the retail level and call termination at the wholesale level is, to a large extent, fictitious and merely reflects common billing practices, rather than the underlying economic vertical relationship in the production of a (completed) telephone call.[1] The NCC's approach correctly recognises this vertical relationship and we commend the NCC in this regard.

2.1.3. Approaches to therefore narrow the market definition are generally based on law and not on economics, often used to favour the position of incumbents. The NCC's approach of starting with all of the products under consideration (the entire Mobile Telephone Services market), avoiding the exercise of market definition and directly

[1] http://www.idate.org/fic/revue_telech/605/CS61_VALLETTI.pdfaletti

delving into the economic problem at stake is thus logical as it is in line with the requirements of Nigerian law and the Competition Regulations.

2.1.4. Finally, Smile agrees that separate consideration must be given to the fixed and mobile (wireless) markets as these services are not substitutable. This is consistent with the findings in many countries. Importantly, in light of the prevalence of mobile in a country like Nigeria, where fixed penetration is relatively negligible with reference to mobile, it is entirely appropriate for the NCC to consider the mobile telephone services market as a priority.

2.1.5. The International Internet Connectivity market is another critical market. Smile is pleased that the NCC is considering this market which, unlike the mobile telephone market, has a direct impact on business consumers – the knock on effect will be felt on under-serviced consumers. The consumers of international internet connectivity purchase the connectivity from a limited number of suppliers who can be said to control essential facilities and services (undersea cables, landing stations, etc) and resell these services to Nigerian consumers. Thus the competitive and affordable provision of these services by the limited number of suppliers identified in the Consultation Paper is key.

2.1.6. Through the present analysis of the International Internet Connectivity Market and the Mobile Telephone Service Market, Smile believes that the NCC will address many competition problems through one consultation and in so doing open access to the market, reduce prices and increase competition.

2.1.7. The other relevant market that the NCC ought to investigate dominance in is that of collocation of sites and we provide further detail on this in point 3.3.2 of this submission.

3. Comments on section 5.2 of the Consultation Paper on Individual Dominance Evaluation

3.1. *"We seek comment on the market share of the mobile operators, and of MTN in particular. We also seek comment on whether market share data should cause the Commission to exercise its authority to determine that MTN is a dominant operator"*

3.1.1. Smile believes that the NCC in assessing MTN's market share should take into account the fact that MTN's market share with respect to subscribers which was previously 40.87% in June 2008 had increased to 46.19% in June 2009 as illustrated in the NCC's Quarterly Summary of Telephone Subscribers Report[2]. This is a clear evidence of MTN's sustained dominance in the Mobile Telephony Market.

3.1.2. It is interesting to note that market share can be determined using subscriber numbers, revenues or volume of traffic, as per the Consultation Paper. An operator such as MTN may therefore be dominant using several metrics – i.e. using subscriber numbers, as well as volumes.

3.1.3. In addition, we wish to indicate to the NCC that despite its findings that MTN's market share decrease is a sign that competitive forces have been effectively working, it is however important to note that this may not preclude a finding of dominance. Furthermore, in the beginning of a liberalisation process, the market share of the monopolist decrease does not mean that there is no dominance. This is the "natural effect of opening the market for competitors".

3.2. "We seek comment on the relative size of operations of MTN versus other mobile telephone operators in Nigeria, and whether MTN realises significant cost advantages from its size and scale of operations"

3.2.1. Smile agrees with the NCC's findings that MTN does appear to be significantly larger than it two main competitors, ZAIN and GLO-MOBILE given its fixed asset base, significant achievement in terms of economies of scale, and the reduced number of employees.

3.2.2. We however believe that in evaluating the "*overall size of the licensee*" the NCC should also look at the "*finance element*" which comprises "*the easy or privileged access to capital/financial resources"*. Our view is based upon the fact that "*easy or privileged access to capital markets/financial resources"* may represent a barrier to entry as well as an advantage over existing competitors. Aside from internal sources (e.g. as indicated by the cash flow or revenue) the ability to procure outside capital, a firms capital structure and its ability to increase equity capital (e.g. structure of shareholders) might be considered. Further to this access to capital might be

[2] www.ncc.gov.ng

influenced if a firm has links with other companies (e.g. affiliated companies belonging to the same group) that are favourable for its activities in the market in question. This is the case for MTN which is part of a significant pan-African group with ‘deep pockets’ that recognise the strategic and financial importance of a market such as Nigeria and are thus willing to provide access to capital to support its subsidiary in Nigeria.

3.2.3. We further suggest that the assessment of the “*overall size of the licensee*” should also consider the “*network effects*” which derives from the increase of the network size of a licensee. In the absence of interconnection, a large network enjoying a large consumer base is likely to benefit from this strategic asset in enhancing its dominant position.

3.2.4. An assessment of **“***the overall size of the licensee***”** must also take into account a “*highly developed distribution and sales network*”. This is based upon the fact that well developed distribution and sales networks may be expensive or even not possible to replicate. This may represent a barrier to entry deterring new entrants, or could be an advantage over existing competitors[3].

3.3. “*We seek comment on the extent of MTN’s exclusive control over essential mobile network infrastructure, including cell towers, backbone network and other facilities that are required by competing operators. We particularly seek input on the degree to which MTN’s control of such infrastructure may be demonstrated to have lessened to growth of competition, either through lack of access or excessive pricing for access. We also seek comments on other difficulties that competitors have encountered*”.

3.3.1. 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.

[3] Telecommunications Regulatory Authority of Sultanate of Oman, “Consultation Paper on Criteria for Determination of Dominance in a Market”, 2009

3.3.2. Smile proposes that the problems of lack of access to interconnection and facilities, and high pricing of access and facilities that are a result of the insufficient competition in the relevant market should also be addressed by the NCC. This will result in open access to important facilities such as sites, towers, ducts and the like and access to interconnection. Such access will be provided on prices that are non-discriminatory, reasonable, and based on the actual costs incurred by the owner of the facility as set out in regulation 7(6) of the Guidelines on Collocation and Infrastructure Sharing[4].

3.3.3. As a new entrant in the sector, Smile believes that it is critical to have fair and robust competition in the mobile telephony market. Smile views the mobile interconnection rate and the rate for access to essential services and facilities as a key component in the provision of affordable communications service to the end-users in Nigeria and the achievement of universal service and access goals.

3.3.4. We believe that it is vital that the NCC addresses this issue based amongst others on regulation 6(3) of the Interconnection Regulations[5] which empowers it to determine or set the interconnection charges applicable to mobile call termination as well as fixed call termination. We further believe that such intervention will create an enabling environment for new entrants like Smile and promote the interests of consumers by offering them variety of communications services at affordable prices.

3.3.5. Smile suggests that given the lack of competition in the mobile telephony market, the NCC in determining the rate for mobile call termination should make use of the benchmarking methodology given that undertaking full forward-looking cost modeling is challenging, expensive, and time-consuming, and often the detailed information required is not made available by operators. The use of the benchmarking method has proven its success in determining the level of interconnection rate in countries such as Namibia and Uganda where the regulators have significantly reduced interconnection rates, within a short period of time (approximately 9 – 10 months) by establishing a glide path over 3-4 years. In addition, the European Commission recently through recommendation suggested *the use of the benchmarking method for*

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[7] Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services

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NRAs with limited resources and time where it is able to be demonstrated that outcomes consistent with those in a competitive market can be generated[6]. We have provided examples of competitive interconnection rates in other African countries in Annexure 1 of this submission.

3.3.6. Mobile interconnection rates in particular prove to be a barrier to the provision of affordable communications services. Among developing countries, Nigeria has been at the forefront of establishing a converged licensed framework. Interconnection is a key element in introducing competition and reducing prices. Lower mobile interconnection rates will support other measures in place in Nigeria to bring affordable and accessible communications to end-users. Smile is of the view that the introduction of a glide path to regulate the decrease in mobile interconnection rate over the next 4 years would be in line with and further entrench the NCC's position as a pioneer in the field of universal service and access in a developing country context.

3.3.7. Smile further believes that the NCC should also consider a review of the fixed interconnection rate as part of a separate process based on supporting data

3.4. "We seek any views as to whether the restrictions on market entry in the mobile sector favour MTN, and places it in a position of dominance in this market".

3.4.1. Factors frequently considered in determining whether an operator is dominant include:

- Market Share;
- Barriers to Market Entry;
- Pricing Behaviour;
- Profitability;
- Vertical Integration

3.4.2. Smile believes that the barriers to market entry in the mobile sector may be an element which affect the competitiveness of a market and assist to place MTN in a position of dominance. It is a well known fact that the extent to which established suppliers are constrained by the prospect of new market entry is a key factor in whether the established suppliers have market power or are dominant. Natural

[7] Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services

barriers such as availability of scarce natural resources like spectrum in this market are important to note and clearly as one of a limited number of holders of GSM and 3G spectrum, MTN is in a position of privileged access to the market in question.

3.4.3. Further to this, we believe that the assessment of criteria such as market share, related size of the licensee, profitability, vertical integration and negotiating position of customer will enable the NCC to come to the conclusion that MTN is dominant in the Mobile Telephony Market.

3.5. "We seek comment on any other issues, including the relative size of MTN's revenues or earnings to the overall market, superior or unique access to financial resources, equipment or technology, which may indicate that MTN or another operator possibly has a dominant position in the mobile telephony market"

3.5.1. We refer the NCC to our comments in point 3.2.2, 3.2.3, and 3.2.4 of this submission.

3.5.2. Additionally, vertical integration is a key factor to consider in assessing whether or not MTN is dominant, particularly in light of the broad mobile telephony services market definition. Vertical integration is relevant to an assessment of whether an operator that enjoys market power in one market is able to extend its power into upstream or downstream markets. Operators like MTN that are vertically integrated (e.g. that provide wholesale and retail services, as well as a broad cross section of voice and data services) can often use their market power in one sub-market to competitive advantage in another sub-markets. They may abuse their dominance, for example, by inflating prices (including interconnection prices) and using the surplus revenues to subsidise other services in an anti-competitive manner.

3.6. "We seek comments on this tentative conclusion that MTN does not currently hold a position of individual market dominance. Stakeholders wish to confirm or refute the NCC's preliminary determination on this issue, and to provide any supporting evidence or argument in their comments"

3.6.1. Smile does not agree with the NCC's findings that MTN is not dominant in the Mobile Telephony Market. Smile believes that if the NCC gives sufficient considerations to its comments regarding the criteria on market share, relative size of the licensee, vertical integration, negotiating position of the customers, and rate of technological change, it may come to the conclusion that MTN is a dominant operator in that market.

4. Comments on section 5.3 of the Consultation Paper on Joint/Collective Dominance evaluation"

4.1. "*We seek comment on each of the above observations regarding the conditions in the Nigerian Mobile Market in relation to the prospects for tacit collusion and collective dominance. Commenters are encouraged to provide evidence and arguments supporting or refuting any of the analysis of these conditions, or presenting additional considerations that the NCC should take into account in assessing market conditions in this context"*

4.1.1. Smile fully agrees with the NCC's observations regarding the conditions in the Nigerian Mobile Market in relation to the prospects for tacit collusion and collective dominance.

4.1.2. We however believe that the NCC should add other factors in its list of criteria as this will enable it to properly evaluate joint or collective dominance in the Mobile Telephony Market. We therefore suggest that the NCC complements its list of factors with that of the European Commission by adding the following: lack of transparency, stagnant or moderate growth on the demand side, low elasticity of demand, homogenous product, and absence of excess capacity, retaliatory mechanisms, and lack of competition, lack or reduced scope for price competition[7].

4.2. "*We seek comment on this tentative conclusion about joint or collective dominance, based upon the evidence discussed above and any other factors and considerations that stakeholders may present to propose a more conclusive determination on this issue"*

4.2.1. We reiterate our comments in point 4.2.2 of this submission that if the NCC makes use of other factors like those from the European Commission it may come to the

[7] Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services

conclusion that there is presence of collective or joint dominance in the Mobile Telephony Market.

5. Comments on section 6.2 of the Consultation Paper on Individual Dominance Evaluation in the International Internet Connectivity (IIC) Market

5.1. "*We seek comment from ICT industry service providers and the general public on the extent to which NITEL is currently dominant in the IIC market and to the extent it is likely to be dominant in the near future (1-2 years). We also seek comment on any abuse of dominance or substantial lessening of competition in this market, both currently, and in the near future.*"

5.1.1. In assessing whether or not NITEL's market share gives it a position of dominance in the IIC market, we strongly suggest that the NCC should focus more on the outgoing bandwidth revenues i.e. what carrier spends on a monthly/year basis as a result of using the SAT3/WASC submarine cable.

5.1.2. We further believe that the landing of GLO-1 submarine cable may not necessarily lead to a decrease in NITEL's market share in the next 2 years given that some operators are locked into long term agreements with NITEL and have made considerable investment in equipment necessary for services which do not allow them to switch quickly to another service provider. In addition, the liberalisation of the IIC market does not mean automatically that a dramatic change will occur in the market structure as competitors have to convince their consumers about their value propositions.

5.2. "*We seek comment on whether NITEL's related size in the IIC market indicates market dominance, and the extent to which current and prospective near term entry of new cables to serve the IIC market will reduce any such dominance. We also seek comment on any concerns that the relative size of some new entrants, such as GLOBACOM and the GLO-1 and MTN and the WACS, could lead to an abuse of dominance or lessening of future competition in the IIC market.*"

5.2.1. Smile fully supports the NCC's view that NITEL's current presence in the IIC market has been significant, compared to other operators due largely to the fact that it retains sizable related business units, especially the SAT3 and MTEL (with 1.2 million mobile subscribers).

5.2.2. However, we do not agree with the NCC's view that the launching of GLO-1 will necessarily mean that it will take a significant market share from NITEL in the Nigerian IIC market. We refer the NCC to our comments in point 5.1.2 of this submission.

5.2.3. Smile believes that the introduction of GLO-1 in the market will not automatically lead to a slash of 90% of the IIC prices given that the NCC's evaluation of the Mobile Telephone Services Market has shown that despite the presence of five mobile operators, the price of communications services has increased slightly in the market.

5.2.4. We further believe that in the case where GLOBACOM or MTN acquire NITEL, the terms of any acquisition should obviously include consideration of the impact of IIC market dominance and other competition policy considerations.

5.2.5. Smile further proposes that in evaluating NITEL's dominance based on its overall size, the NCC must also consider factors such as "*high developed distribution and sales network*" as well as "*easy or privileged access to capital markets/ financial resources*".

5.2.6. Our view is based upon the fact that NITEL's monopoly in the IIC market may have helped it to develop its own distribution and sales networks which may be expensive or difficult to replicate by its competitors. This may represent a barrier to entry as well as an advantage over existing competitors.

5.2.7. We are also of the view that NITEL may have "*easy or privileged access to capital markets/ financial resources"* considering that it is a state entity. In this regard, we suggest that the NCC's assesses carefully NITEL's ability to procure outside capital and to increase equity capital in light of its previous acquisition by TRANSCORP and its future privatisation.

5.3. *"We seek comment on the extent to which control of network facilities and other infrastructure may lessen competition of access to IIC. We also invite comment on the extent to which such control will be reduced in the next two years. In addition, we seek comments on regulatory practices that may be adopted to ensure access to IIC* *and on improvements to the current model for collocation of IIC related equipment and facilities"*

5.3.1. Smile is of the view that NITEL's control over SAT3/WASC had undoubtedly placed it in a dominant position in the past as other operators did not have the choice to select another backbone provider who will offer them IIC services.

5.3.2. We believe that the licensing of GLO-1 and other IIC backbone providers (Main One, WACS, and ACE) will bring much choice to end-users as they can now select other backbone providers who can provide them with IIC services.

5.3.3. However, Smile is of view that given the critical role of the submarine cable in the provision of IIC services and the necessity for new entrants to have access to such infrastructure, it is important that it is provided on a mandatory basis, non-discrimination and based on actual costs incurred by the owner of the submarine cable. This will enable new entrants to provide quality and innovative communications services at affordable price to their customers.

5.4. *"We seek comment on the extent to which the ICT licensees and operators in Nigeria have been affected by lack of negotiating options in the past and present. We also seek comments on how the new market conditions will impact on the buying power or negotiating conditions of customers".*

5.4.1. Smile believes that the lack of negotiating options has affected licensees in the past and present as they did not have the choice to select another backbone provider and were subject to NITEL's excessive price in the IIC market.

5.4.2. However, we believe that the new market conditions in the IIC market may not lead directly to customers switching immediately from NITEL to other backbone providers. We refer the NCC to our comments in point 5.1.2 of this submission.

5.5. *"We seek comments on the prospects that new IIC market entry will reduce any potential dominance or abuse of dominance in the IIC market."*

5.5.1. Smile believes that new IIC market entry will reduce any potential dominance or abuse of dominance if access to submarine cable is provided on mandatory basis, in line with open access principles. Access must be reasonable and based on actual costs incurred by the owner of that infrastructure.

5.6. *We seek comments on the issues related to technology change and other market changes and related effects that may increase competition and/or lessen competition in the IIC market."*

5.6.1. Smile is of the view that the technological changes and capacity increases that may be available in the new submarine cables must enable operators to have access to sufficient bandwidth in order to provide quality and innovative communications services to their end-users.

6. Conclusion

6.1. Smile is thankful to the NCC for affording it the opportunity to submit its written comments on the Consultation Paper on Dominance in Selected Communications Markets. We are available to discuss the content of our submission with the NCC at any time.

ANNEXURE[8]

Countries	Mobile Termination Rate (MTR)
Uganda	Effective from 1 September 2009 USH 91 equivalent of Naira 6.90
	Effective from 1 September 2010 USH 91 equivalent of Naira 6.90
	Effective from 1 September 2011 USH 89 equivalent of Naira 6.75
Namibia	Effective from 1 July 2009 N$ 0.60 Cents equivalent of Naira 11.28
	Effective from 1 January 2010 N$ 0.50 Cents equivalent of Naira 9.40
	Effective from 1 July 2010 N$ 0.40 Cents equivalent of Naira 7.52
	Effective from 1 July 2011 N$ 0.30 Cents equivalent of Naira 5.64

8 http://www.oanda.com/currency/converter/