

REGULATORY FRAMEWORK FOR PRIVATISATION OF NIGERIAN TELECOMMUNICATIONS LIMITED

Privatisation policy

Recently, the National Council on Privatisation [**"NCP"**] advertised for Legal and Regulatory Consultants in regard to the privatization of public utilities, notably electric power and telecommunications services. This is obviously pursuant to the Federal Government's publicly declared determination to privatize the country's utility services. This determination, it would appear, constitutes one of the cornerstones of the present Government's economic policy and programmes. To this end, the Government reconstituted the NCP very early in its tenure, with the Vice President, Alhaji Atiku Abubakar as the Chairman and several eminent public and private sector individuals as members. The Bureau of Public Enterprises [**"BPE"**] which predates the creation of NCP, acts as the NCP's Secretariat and vehicle for the actualization of the privatization project.

Companies for Privatisation and Privatisation Terms Generally

Government's interest in telecommunications industries is basically limited to two organizations: Nigerian Telecommunications Limited [**"NITEL"**] and Nigerian Mobile Telecommunications Limited [**"M-Tel"**] both of which are wholly owned by the Federal Government. Previous Governments have consistently indicated their intention to divest a total of 60% of its equity in NITEL and sell 40% thereof to a core investor who would have responsibility for the management of the Company and the 20% balance to the Nigerian public. There has been no similar public indication on the privatization of M-Tel. For reasons of clarity and transparency, it is important that the present Government publicly state its position in this regard. In particular, the investing public needs to know exactly what percentage shares the present Federal Government would be divesting in these companies and the terms and conditions thereof.

Regulatory framework

The NCP advertisement expressly states that the Consultants are required pursuant to the Federal Government's decision to carry out "in-depth legal regulatory reform studies concerning the . . . electric power and telecommunications" sub-sectors. The Consultants would therefore be required *inter alia* "to review existing legal and regulatory framework, design new regulatory frameworks dealing with competition, price and tariff controls, third party access and public supply obligations."

In specific regard to the telecommunications sub-sector, the Nigerian Communications Commission Decree No. 75 of 1992 (**"NCC Decree"** or **"the Decree"**) has already established a regulatory framework for the industry. The Decree establishes the Nigerian Communications Commission (**"NCC"**) and vests it *inter alia* with licensing and regulatory powers over the industry.

Exercising its powers under the Decree, NCC has over the years licensed several service providers and equipment vendors in the different undertakings specified by the Decree. However, the Nigerian PTT, NITEL, which is wholly owned by the Federal Government of

Nigeria, remains the dominant operator. Government obviously intends to modify and strengthen the existing regulatory framework in order to accommodate the privatisation of NITEL.

By interpretation of the NCC Decree, NITEL is independent of the licensing and regulatory control of the NCC. Media and official pronouncements have tended to suggest that all that is required to institute the regulatory framework for privatisation of NITEL is a modification of the Decree to permit the licensing and regulation of NITEL by NCC. Undoubtedly, this constitutes a necessary component but not the only requirement or process for the preparation of the regulatory framework for the privatisation of NITEL.

There are several other equally crucial aspects of the regulatory and licensing framework that ought to be addressed simultaneously with the modification of the NCC Decree as aforementioned. This paper would, in summary form, address some of these crucial outstanding regulatory and licensing issues and processes. Other issues that go beyond regulatory issues and which require equally urgent attention would be addressed in a separate paper.

Objective of the Regulatory framework

The primary objective of the regulatory framework ought to be the promotion of competition, particularly in service promotion, in the industry. In other words, the privatisation of NITEL may be the immediate goal of strengthening and/or modifying the regulatory framework but it must not be the end by itself. The ultimate objective of the policy makers should be to strengthen the liberalisation processes and give confidence to investors and telecommunications stakeholders generally.

In this regard, it is important to note that globally, industry regulators are primarily engaged in and concerned with the control of anti-competition and monopolistic practices by the service providers. The greatest emphasis is placed on the transparency of the licensing and regulatory processes. These must be the guiding and guarding lights of the Government's current efforts at the strengthening of the telecommunications regulatory framework.

Suggested Improvements on the Regulatory and Licensing Framework

Amendment of the NCC Decree

We would address two crucial areas of the Decree that in our opinion require modification for the privatisation and liberalisation processes:

- **Licensing and Regulation of NITEL and Carrier Organisations generally**

A major pre-requisite of the telecommunications liberalisation process is the institution of a level-playing field for all the service providers. Globally, privatisation of national carriers is usually a part of the confidence-building processes for the liberalisation of the industry. The exercise gives investors the assurance that they could and will compete on a level field, bound by the same rules and regulations, with the national carrier and dominant operator. To that extent, it is desirable to modify the NCC Decree in order to bring NITEL under the regulatory and licensing regime of the NCC.

However, the amendment must be sufficiently generic to allow for the licensing of national carriers generally, particularly considering Government's determination to grant licenses to additional carrier organizations. A starting point would be a proper definition of a carrier organization in the Decree and the capabilities and obligations that go with a carrier license. The NCC Decree does not currently have a proper definition of a carrier organization neither does it specify the rights, service capabilities and obligations of a carrier. In fact, the licensing of a carrier organization is not one of the undertakings in Schedule 2 of the Decree for which the NCC is empowered under Section 15 of the Decree to license Operators.

- **Review of NCC Regulations**

The NCC Decree does not provide for the review of the Commission's Regulations by an appellate body or Court at the instance of an aggrieved person. The NCC, like any other institution, is subject to human and inadvertent errors and omissions and the Decree should provide a redress process for any aggrieved person(s), particularly in regard to the NCC's licensing and regulatory duties. Such a provision would give confidence to the industry's stakeholders generally and in particular to potential investors.

The most trusted arbiter in such instances has always been the Courts of the land. In the United States of America, decisions of the Federal Communications Commission ("**FCC**"), the industry regulator, are subject to judicial review and pronouncements at the instance of aggrieved parties. This is the practice in several other countries with transparent regulatory processes.

In strengthening the existing regulatory framework, we need to borrow this practice from these other countries. Specific provisions ought to be made in the NCC Decree expressly empowering any and all aggrieved persons to challenge NCC Regulations or any portion thereof and matters connected thereto and therewith at the Federal High Courts.

Codification and Publication of Regulations

It is absolutely imperative that NCC Regulations should be codified, published and made available to the general public, particularly the industry stakeholders. NCC does not, *strictu sensu*, as at date have any Regulations. Service providers and potential investors, need to know, for example, in written form, what constitutes anti-competition and monopolistic practices and the penalties they attract. They also need to know the circumstances and how NCC may intervene in the fixing of service providers' individual tariffs and rates including but not limited to retail, wholesale and even interconnection charges.

Such codified and published Regulations promote certainty and transparency in the regulatory processes and enhance the moral stature and authority of NCC. In the absence of such codified and published Regulations, NCC would regulate on the basis of *ad hoc* and arbitrary rules and regulations. That negative scenario also leaves room, perhaps inadvertently, for favoritism and unfair practices on the part of NCC in the exercise of its regulatory functions. These would act as disincentives to potential investors and create confusion and uncertainty in the industry.

In the Nigerian situation, such codified and published Regulations are made even more imperative and important by the absence of general application laws on Competition and Fair Trading. In the United Kingdom, for example, there are general application laws on competition and fair trading - Fair Trading Act 1973, Competition Act 1980 and

Restrictive Trade Practices Act 1976. These laws apply generally to British industries including the telecommunications sub-sector.

Nigeria does not have such laws of general application and it is crucial that NCC Regulations be developed, codified and published in this regard for the telecommunications industry. Perhaps, competition and fair trading laws of general application may subsequently be developed from these NCC Regulations.

Universal Services Obligations

By definition, Universal Services Obligations [“USO”] acknowledges the rights of citizens to basic telecommunications services and seeks to impose certain obligations on service providers towards the provision of these basic telecommunications services. These obligations may be contained in a country’s Communications legislation [e.g. Malaysia and United States of America] and/or in the operators’ License documents [e.g. United Kingdom] and they may vary from the requirements of expanding networks in urban and non-economic locations to making financial contributions to USO Funds.

Imposition of these obligations is standard practice in almost all administrations. Unfortunately, the Nigerian licensing regime and the NCC Decree have absolutely no USO requirements for Operators. In fact, USO is currently only effected as a social and political contract of some sort between the Nigerian Government and the citizens through NITEL and that explains the acknowledged social and political imperative which requires NITEL to spread and locate its exchanges in different geo-political sections of the country. NCC does not of course license NITEL and so this obligation is not contractually contained in any license document.

M-Tel is licensed by NCC but it is equally compelled by political considerations to provide mobile cellular services, in a very loose sense, to the three geo-political regions of Nigeria from its head and zonal offices in Abuja, Lagos, Enugu and Jos. In other words, even though NCC has issued it with a license for the provision and operation of mobile cellular services, there are no USO terms in the said license document.

It is the absence of the USO terms that largely explains the concentration of the private network operators in urban and commercially viable locations like Lagos, Port Harcourt and Aba. That lacunae also explains the limited aggregate number of lines that have generally been added to the national network by the private operators.

It is imperative that USO terms be developed and incorporated into the NCC licenses and the proposed Communications laws and regulations generally and immediately for several reasons. First, without these obligations, privatized and commercialized NITEL and M-Tel would have absolutely no contractual or legal obligation to expand their network and provide services in non-economic areas and zones. Second, without USO terms, it would be impossible generally to expand the national network and provide services to the rural and non-economic parts of the country.

Licensing and Regulatory Processes

The modified regulatory framework must be imbued with absolute transparency, particularly in regard to the licensing and regulatory processes. This constitutes the bedrock for the success of the privatisation process and indeed the entire liberalisation of the industry. Some of these crucial areas of transparency have been addressed by us in previous write-ups but they bear repeating here:

- **Public hearings and comments**

In developing its Regulations and issuing specific operational directives, NCC and its supervisory Ministry, the Ministry of Communications (“**MOC**”) should invite and publicly welcome ideas, inputs, suggestions and opinion from stakeholders in the industry. The diversity of inputs helps in refining and enriching such Regulations and directives. As a starting process, the opinion and inputs of stakeholders could be invited and considered in regard to the proposed amendments to the NCC Decree.

Unfortunately this is not a common practice in Nigeria. It is however commonplace in other countries with established and transparent regulatory processes.

Such a transparent and public process does not in any way or manner diminish the law and regulatory making authority or capacity of MOC and NCC. The ultimate aim of these regulations and laws, it must be remembered, is to serve the public interest and good and passing it through such public scrutiny and crucible helps immeasurably to ascertain the efficacy and staying capacity of the laws and regulations.

The processes for such public contributions must itself be transparent and devoid of any remote control. The stakeholders must have simultaneous notices of NCC and MOC requirements and they must be afforded reasonable time to produce reasoned, written positions and submissions in regard to any proposed Regulation, Law, directives or the modifications thereof.

In stating its final positions in regard to any proposed Law, Regulation and/or directive, the MOC and NCC must themselves publicly present reasoned and logical arguments in support of these positions. All of these processes give confidence to investors and stakeholders in the industry.

- **Uniformity in processes**

It is important that NCC applies uniform standards in licensing and regulating service providers and operators in the industry. Confidence is destroyed when and if licensees, on the same footing and for the same services, inexplicably and without any justification whatsoever have different licensing provisions. In regulating the industry, uniform standards must also be applied and if for any reasons exceptions are in any circumstance made, these must be proactively and publicly explained by NCC, logically and with reasoned arguments.

In granting operating licenses, NCC may be constrained by shortage of resources, notably radio frequencies, for certain services. In the United States of America and United Kingdom, licenses that are restricted by such scarce resources are publicly auctioned and granted to the highest bidder who must also as a qualification for the bid, show its capacity to utilise the license if it is granted to it. This practice gives confidence to the licensing process. MOC and NCC may wish to study this process and adopt it in similar circumstances.

- **Searches**

It should be standard practice for any interested person, for a fee, to conduct a search at NCC Registry and obtain information and documents – including license documents – in regard to all licensees. This is standard practice in FCC in the United States of America and Department of Trade and Industry (“**DTI**”) and Office of Telecommunications in the United Kingdom. For a fee, for example, the operating

license of the British Telecommunications plc can be obtained from the DTI, the British licensing authority.

By keeping such open doors, NCC would openly attest to its transparency and credibility.

Conclusion

The modifications and practices recommended in this write-up are not at all exhaustive. They would however help considerably in strengthening the telecommunications regulatory framework and investing the privatization processes with transparency and further giving confidence to the industry stakeholders and investors.