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Advertising Law:

2022 Federal Legislation and Social Media



Introduction

In August 2022, the Advertising Regulatory Council of Nigeria Act, 2022 ("**ARCON Act**") was enacted after the signing of the bill into law by President Muhammadu Buhari. The Act repeals the Advertising Practitioners (Registration, etc.) Act, Cap. A7, Laws of the Federation of Nigeria, 2004 ("**APCON Act**") and replaces the Advertising Practitioners Council of Nigeria ("**APCON**") with the Advertising Regulatory Council of Nigeria ("**ARCON**").

Two topical recent changes in Nigerian advertising legislation are inconvenient, unnecessary and perhaps unconstitutional, and need to be re-thought without delay. First, one of the new changes insists that the publishing of a specific media advertisement now requires a prior permit. Second, advertisements published on social media abroad but accessible worldwide (including in Nigeria) appear to need pre-publication authorization in Nigeria to the extent that they are "*exposed or directed*" to the Nigerian market.

The APCON Act

The previous Nigerian legislation on advertising (APCON Act) applied only to members of the advertising profession and to specific items listed in section 1(d) of the APCON Act. The approval of the Minister of Health was needed where the advertisement relates to matters of foods, cosmetics, beverages and drugs.¹ This meant that online entrepreneurs and social media entities fell outside the regulatory purview of the APCON Act, and as such, did not need to follow the requirements of APCON for their advertisements to be proper and legal.



Initially, there were controversies as to whether APCON's regulatory powers were specific or general in view of section 1(d) of the APCON Act *vis-a-vis* the long title of the APCON Act, which provides that the APCON Act was enacted in part to "*make provisions for the control of the practice of the profession of advertising.*"

In the case of *APCON v. The Registered Trustees of International Covenant Ministerial Council et al.*², the Court of Appeal in considering the applicability of the provisions of the APCON Act to non-members of the advertising profession, held that the Respondents are not advertising practitioners as contemplated by the APCON Act and consequently, APCON cannot compel the Respondent to seek APCON's approval

¹ APCON Act, s. 1(d).

² (2010) LPELR (CA) 3630.

before placing an advertisement. Similarly in *MIC Royal Limited v. APCON*³, the Court of Appeal held that APCON's powers did not extend to persons, including MIC Royal Limited, who are not advertising practitioners.

The foregoing decisions meant that online entrepreneurs and social media entities advertising on their platforms as well as those directing advertisements/market communications to the Nigerian market were not subject to regulation under the APCON Act, and this prompted the enactment of the ARCON Act to address the apparent loophole. Unlike the previous Act, under the ARCON Act, ARCON has powers to determine, monitor and enforce compliance by persons and organizations on matters relating to advertising, advertisements and market communications in Nigeria and directed to the Nigerian market, whether of a general or specific nature.⁴

The ARCON Act (2022)

The ARCON Act establishes a regulatory framework for the Nigerian advertising, advertisement and marketing communications industry.⁵ The ARCON Act applies to all individuals, corporate bodies, governments, sponsors or persons who make or take the benefit of advertising services, advertisement and marketing communications.⁶ The expanded category of persons to which the ARCON Act applies is a key feature of the statute as distinguished from the APCON Act. Under the ARCON Act, ARCON is vested with extensive and general regulatory powers over advertising and communications in all aspects and ramifications, directed or exposed to the Nigerian Market.⁷ ARCON is saddled with the responsibility of ensuring that advertisements and market communications directed at the Nigerian market are legal, decent, honest, decent and devoid of any misinformation and disinformation.



Any person or organization seeking to practise or continue practising advertising or market communications business in the Nigerian market must register with ARCON.⁸ Also, the approval of the Standards Panel of ARCON is required before any advertisement or market communication can be exposed or directed to the Nigerian market and failure to obtain this approval constitutes an offence.⁹

³ Suit No. CA/L/1140/2016 - Judgment delivered on July 5, 2018

⁴ ARCON Act, s. 1(d).

⁵ ARCON Act, s. 2(1).

⁶ ARCON Act, s. 2(2).

⁷ ARCON Act, s. 8.

⁸ ARCON Act, s. 21(1).

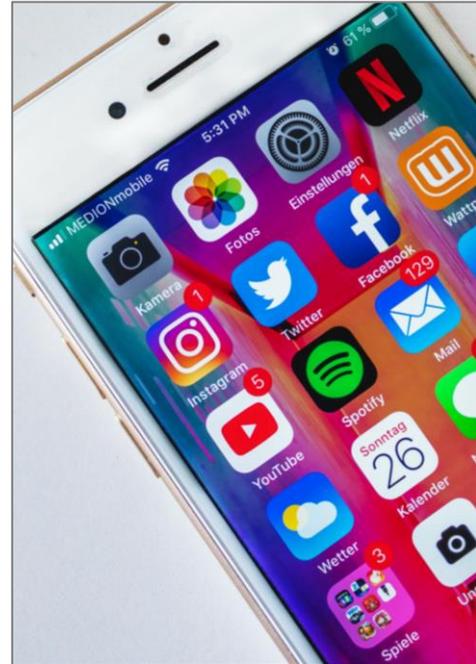
⁹ ARCON Act, s. 54.

It is not clear whether advertisements exposed to the Nigerian Market by foreign organizations can be effectively regulated and this might pose an implementation challenge. ARCON Act has not specified what “*exposed or directed*” are, and in any case, enforcing the ARCON Act against organizations outside Nigeria with platforms or servers that can be accessed by Nigerians, irrespective of ‘worldwide advertisements’ in such servers or platforms, appears to be challenging and impracticable.

The Implication of the ARCON Act for Social Media Platforms

Social media platforms engage in advertising and marketing communications through Ads (“Ads”). An Ad is a public communication that promotes a service, brand or event *etc.* By Ads, social media platforms promote products and services through publications or ads of text, image or video. The Ads are marketing channels widely used by companies (including Nigerian companies) considering the large audience that social media platforms are capable of reaching. The Ads are capable of limiting its audience geographically *i.e.* to the Nigerian audience. Social media platforms take the benefits of the Ads through payment it receives for advertisements on their platforms.

With the advent of the ARCON Act, social media platforms are obligated to obtain the approval of the Standards Panel of ARCON before exposure of its Ads to the Nigerian market or audience on its platforms. Hence, by the provisions of the ARCON Act, for every unique Ad directed at the Nigerian audience, ARCON’s approval shall be obtained.



The new rules in the ARCON Act are burdensome and unnecessary. To the extent that advertisements are properly calculated to raise government revenue by way of prior permit fees, the law should at most impose a tax without criminalizing the failure to get a prior permit.

To the extent that the rules are calculated to ensure that publishing dishonest or immoral statements is discouraged or stopped, it is sufficient to create offences against publishing dishonest or immoral statements and reserve a power in the government to block out such statements electronically.

It is unnecessary to insist on having a “prior restraint” on free speech as the new legislation does. The need for specific permits on an *ad hoc* basis is constitutionally suspected as a challenge to the freedom of speech.¹⁰ A classic example here is the prohibition of prior restraint in countries such as the United States of America (“U.S.”). Prior restraint is a form of censorship that allows the government to review the content of printed materials and prevent their publication.¹¹

In numerous cases, the U.S. Supreme Court indicated that the American Constitution establishes a strong presumption against such prior restraints.¹² In the landmark decision in *Near v. Minnesota*,¹³ the U.S.

¹⁰ Section 39 of The Constitution of the Federal Republic of Nigeria, 1999 guarantees free of expression/speech, including “freedom to hold opinions and to receive and impart ideas and information without interference,

¹¹ Daniel Barackay “Prior Restraint” [https://www.mtsu.edu/first-amendment/article/1009/prior-restraint#:~:text=the%20Associated%20Press\),Prior%20restraint%20is%20a%20form%20of%20censorship%20that%20allows%20the,the%20restriction%20of%20prior%20restraints.](https://www.mtsu.edu/first-amendment/article/1009/prior-restraint#:~:text=the%20Associated%20Press),Prior%20restraint%20is%20a%20form%20of%20censorship%20that%20allows%20the,the%20restriction%20of%20prior%20restraints.) (Accessed November 19, 2022)

¹² *Ibid.*

¹³ (1931) 283 U.S. 697

Supreme Court struck down the Minnesota Public Nuisance Abatement Law that barred the publication of malicious or defamatory materials. In that case, Court established as a constitutional principle the doctrine that the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a criminal or other proceeding.

Further, the ARCON Act is impractical. It makes no sense to insist that foreign advertisers from all over the world should seek Nigerian regulatory prior approval to their worldwide advertisements if they are not to exclude Nigeria from such censorship.

It is certainly far from obvious that the Nigerian regulator has the technical and human capacity to process and do justice in a timely fashion to the potentially overwhelming universe of foreign advertisements that will need to be considered.

Conclusion

Unlike the APCON Act, the ARCON Act regulates advertising in general and advertisements and market communications of all sort, concentrated at the Nigerian audience, thereby bringing online entrepreneurs and social media entities within its purview and subject to the authority of ARCON. Albeit the provisions of the ARCON Act seem to be straightforward, implementation of the same might pose a challenge to ARCON as it is not clear how ARCON may vet and approve advertisements requests timeously from different persons and entities in Nigeria as well as online entrepreneurs outside Nigeria directing advertisements to the Nigerian market.



The ARCON Act also places a prior restraint on free speech. In our view, the right to freedom of speech and expression as guaranteed by the Nigerian Constitution establishes a strong presumption against such prior restraint provisions in the ARCON Act. Hence, the ARCON Act may be viewed as unconstitutional in that light.

ARCON should in its policies/guidelines make clear stipulations on procedures for implementation and set out timeframes for approval of advertisement applications. This is in view of the fact that time is of the essence in product and business advertising. Lastly, ARCON should, perhaps adopt a narrow approach in implementing the provisions of the ARCON Act, particularly in view of 'worldwide advertisement' and especially against organizations outside of Nigeria.

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