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Advertising in Nigeria: A Synopsis of Recent Regulatory Developments

Introduction

Globally, there seems to be an increasing focus on the regulation of the marketing communications industry, and it isn't any different in Nigeria. With a projected revenue of US\$2 billion by 2025,¹ the Nigerian advertising and digital marketing industry is expected to grow exponentially.

On the other hand, the global digital advertising spend is also expected to reach \$753 billion in 2026, representing an over 85% growth from the projected \$407 billion spend in 2022.² As a result, it is not entirely surprising that regulators are beaming their spotlight on this rapidly evolving segment of the economy.

In Nigeria, the advertising industry is undergoing significant reforms by way of new regulation and policies aimed at optimizing local capacity, increasing revenue, and ultimately maximizing the post-Covid reality – which to an extent – has accelerated the adoption of the digital economy. There is also the content regulation and consumer protection dimension. However, the overall regulatory objective is geared towards creating a comprehensive legal framework that is wide enough to bring all forms of Ad businesses and channels under the regulatory umbrella of Nigeria's Ad regulator – the Advertising Regulatory Council of Nigeria (ARCON).

In this report, we provide insights on the regulation of Ad businesses in Nigeria *vis a vis* some of the most recent market developments and regulatory reforms within the Ad space.

¹ <<https://www.thecable.ng/lai-nigeria-to-earn-2bn-from-advertising-by-2025>> accessed 25 October 2022

² <<https://www.juniperresearch.com/press/digital-ad-spend-reach-753-bn>> accessed 2 November 2022

The State of Affairs Prior to the ARCON Act

The advertising industry in Nigeria is regulated by a cluster of primary and subsidiary legislation at both the state and federal government levels.

Prior to the passing of the Advertising Regulatory Council of Nigeria (ARCON) Act 2022 (the “**ARCON Act**” or “**Act**”), the Advertising Practitioners Council of Nigeria (“**APCON**”) established under the Advertising Practitioners (Registration etc.) Act 1988 (the “**APCON Act**”) was regarded as Nigeria’s advertising regulator. However, the scope of APCON’s regulatory powers and the applicability of the APCON Act and its accompanying regulations was largely limited to advertising practitioners as a result of the decision of the Court of Appeal in *MIC Royal Limited v. APCON* (“**MIC Royal**”)³ which reinforced its earlier decision in *APCON v. The Registered Trustees of International Covenant Ministerial Council & Ors.*⁴

In *MIC Royal*, the court considered the applicability of the APCON Act and the Nigerian Code of Advertising Practice & Sales Promotion (the “**APCON Code**”) to persons / companies that are not advertising practitioners and held that the APCON Act only applied to advertising practitioners – broadly interpreted to mean persons who are registered with the APCON as advertising practitioners.

The implication of *MIC Royal* was that APCON could only regulate advertising practitioners. This was a huge regulatory setback for APCON but a welcome development for Ad businesses which, prior to the decision, were required to submit all proposed adverts to the Advertising Standards Panel (ASP) for vetting and approval.

From a practical standpoint, the decision in *MIC Royal* meant that not all Ad businesses were subject to the regulatory purview of the APCON. Although they remained subject to the various sector specific guidelines and state laws on advertising including the Federal Competition and Consumer Protection Act (“**FCCPA**”), Ad businesses benefitted from the less degree of scrutiny with respect to vetting and approvals particularly at the federal level.

It was on this premise that the ARCON Act was introduced to repeal the APCON Act and effectively bring all Ad businesses under the regulatory purview of the ARCON.

A New Sheriff in Town

With the realization that its statutory authorizations did not have sufficient bite within the Nigerian Ad industry, particularly with the *MIC Royal* decision still hanging over its head, the APCON sought an upgrade – which resulted in the transition from APCON to ARCON.

At the core of ARCON’s mandate is the regulation of all forms of advertising, advertisements, and marketing communications in the Nigerian advertising industry. The ARCON also has certain new regulatory powers and functions including the unilateral discretion to regulate corporate entities of Nigerian or foreign origin engaged in the business of advertising, advertisements, and marketing communications in Nigeria.

The implication of the foregoing is that, unlike the APCON Act which largely applied to traditional means of advertising and advertising practitioners, the ARCON Act, which is much broader in scope, would apply to all forms of Ad businesses including digital advertising.

³ (2018) LCN/11854(CA)

Below are some of the key provisions of the ARCON Act:

Scope of Applicability

The ARCON Act applies to any individual, organization, body corporate or agency of the federal state, or local government that engages in, regulates, sponsors, or takes benefit of advertising services, advertisements, and marketing communications services.

It also applies to any person who sponsors or takes benefit of any advertisement, or marketing communications services.

What is significant from the foregoing paragraphs is that the ARCON Act – unlike its predecessor – now applies to an individual or an entity, even when such individual or entity is not directly engaged in the practice of advertising as was previously the case under the APCON Act.

Requirement to Register with the ARCON

The Act requires persons or organizations who intend to practice or continue to practice advertising and marketing communications in the Nigerian advertising market or commence operations or operate as an advertising or marketing communications business or profession, to be registered with ARCON.

In relation to the above, “practice” is defined as any act, conduct, ideation, design or conceptualization that leads to the development, creation, co-creation, production or delivery of an advertisement. This could potentially mean that an entity that delivers even a single advertisement directed at the Nigerian market would be required to register, although how practicable this would be in terms of implementation is presently unclear considering that different avenues for advertisements have grown exponentially.

That said, an important point to note is that the requirement to register is only applicable to entities or persons seeking to practice advertising. It would therefore not apply to persons or entities who benefit from or commission the advert but are not practicing advertising.

Foreign Participation

Section 21(3) of the Act provides that the level of foreign participation in an agency or organization incorporated in Nigeria would determine whether the proposed advertising firm is to carry on business directed at the Nigerian market as foreign or national agency or organization.

The foregoing provision suggests that the percentage of foreign shareholding in an entity seeking to carry on advertising business in Nigeria could impact on the operational scope of such entity although it is not entirely clear if the intention is to prevent companies with significant foreign shareholding from offering Ads directly.

Ads Vetting

Generally, there is the requirement under the APCON Code for all advertisements (except those for public service announcements, goodwill messages, obituaries, and vacancies) to be presented for vetting and approval by the Advertising Standards Panel (ASP) before exposure to the Nigerian market.

Although the Act does not directly provide for this vetting requirement, same could be inferred from certain provisions of the Act. For example, section 54 of the Act provides that, any person including a sponsor or beneficiary of an advertisement, body

Section 54 of the ARCON Act

any person or beneficiary of an advertisement that creates or places for publication or exposure of an advertisement in any medium targeting the Nigerian market without the prior approval of the ASP commits an offence and is liable to a fine as prescribed under the ARCON Code.

⁴ (2010) LPELR (CA) 3630

corporate, organization or agency that creates or places for publication or exposure of an advertisement in any medium directed at or targeting the Nigerian market without the prior approval of the ASP commits an offence and is liable to a fine as prescribed under the APCON Code.

Relatedly, the ARCON has the power to monitor and enforce sanctions on any person or organisation that sponsors, exposes or causes to be exposed in Nigeria, any advertising, advertisement and marketing communications materials without prior approval of the ASP.

Flowing from the above, the obligation to ensure adherence to the vetting requirement appears to be placed on not just the registered advertising practitioner, but on any person (including a sponsor or beneficiary of an advertisement, body corporate, organisation, or agency) which creates or places for publication or exposure of an advertisement, in any medium directed at or targeting the Nigerian market.

Investigating Panel

The Act also established an investigating panel that will be responsible for the preliminary investigation of alleged cases of professional misconduct of advertising practitioners.

The Local Content Dimension

In order to promote Nigerian content, the ARCON, on the 22 August 2022, issued a notice (the "**Notice**") requiring advertisements and marketing communications materials to only use Nigerian models or artists.

The Act provides for the promotion of local and indigenous content as an important element in advertising and marketing communications services in Nigeria but does not expressly require or mandate 100% local content. There are clearly significant practical challenges with this new requirement especially in relation to foreign digital ads that are not materially localized or necessarily targeted at the Nigerian market but are exposed to or accessible to Nigerians through various digital platforms.

It is unclear how ARCON would enforce the Notice and if an exception would be made for such ads that do not necessarily qualify as "targeted at the Nigerian market", but in the absence of any legal challenge, ARCON may use its takedown powers under the Act to request for the removal of advertisements that do not comply with the Notice or as has been seen in the past with the Twitter ban, block access to sites that are seen to be non-compliant.

More recently, ARCON also issued another notice on the implementation of a policy (the "**Policy**") to mandate a minimum of 75% (seventy-five percent) cumulative local content of all advertising, advertisement, and marketing communication materials, with effect from 1 January 2023.

This Policy will be applicable to all advertising, advertisement and marketing communications which are directed at the Nigerian market, i.e., the target market related to those advertising services consists primarily of consumers in Nigeria or is sponsored by a company doing business in Nigeria.

The Notice provides for the following compliance requirements:

- all model and voice over artists shall be Nigerian citizens.
- production of advertising, advertisement and marketing communications materials must be done in Nigeria.

100% local content

The Act provides for the promotion of local and indigenous content as an important element in advertising and marketing communications services in Nigeria but does not expressly require 100% local content.

- ambience in such materials should reflect Nigeria as much as possible.
- production crews may include foreigners; however, Nigerians and Nigerian organisations must take part in production.
- post-production may be done at any location (within or outside Nigeria).

Although the objectives of the Policy are to enable Nigerians to benefit from the advertising industry both in terms of job creation and attraction of foreign investment, the Policy could also impact on Ad businesses with respect to existing contracts and commercial preferences.

For example, it is expected that Ad businesses with pre-existing contracts with foreign models would be allowed to run the term of those contracts. Thereafter, they would have to reconsider such contracts following their expiration in the light of the Policy. From a practical standpoint, advertising channels would also need to adjust their content to comply with the Policy by ensuring that only Ads that meet the local content requirements are published on their platforms.

Enforcement

In recent times, the practicality of commencing enforcement actions against offshore Ad businesses – whose services are largely offered over the top – is considered to be one of the major limitations of the regulatory landscape in Nigeria.

Whilst advertising practitioners are still coming to terms with the new realities in the advertising space as a result of the Act, we are aware based on publicly available information, that the ARCON has commenced enforcement of the vetting requirements.

For example, it has been reported that the ARCON has instituted an action at the Federal High Court (FHC) against Meta Corporations (owners of Facebook, Instagram and WhatsApp) in relation to the vetting of Ads in Nigeria.⁵

Among other things, ARCON is seeking a declaration that the continued publication and exposure of various advertisements directed at the Nigerian market through the Facebook and Instagram platforms by Meta Platforms Incorporated (Meta), without ensuring that same is vetted and approved before exposure, is illegal, unlawful and a violation of the Act.

The foregoing is a demonstration of the ARCON's approach to ensuring compliance with the ARCON Act. Therefore, it is advised that individuals and organizations engaged in the business of advertising, advertisements, and marketing communications in Nigeria, ensure compliance with the provisions of the Act, as it relates to advertising, to avoid the attendant penalties / fines that may be imposed for non-compliance.

The Act gives ARCON a wide range of enforcement powers including giving takedown orders and undertaking dawn raids. It also provides for a strong financial penalty regime that could be exercised by the ARCON discretionally with limited recourse to the courts.

These rather radical powers given to the ARCON under the Act, raises serious enforcement concerns and infers that the intent of the regulator is to actively monitor and control the advertising space, with an increased focus on digital or foreign advertisement platforms.

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Conclusion

The reignited drive to regulate the advertising space in Nigeria could be attributed to several factors including the need to promote local content, curb the display of unvetted advertisements and overall, develop a robust regulatory framework for advertising and advertising business in Nigeria.

The ARCON has done well in providing a good degree of certainty around otherwise debated provisions under APCON. However, it may need to reassess a few of its policies in view of some of the largely impractical obligations imposed on advertisers, such as the requirement to vet every single advertisement, including advertisements on digital platforms. In exercising its oversight functions, the policies and regulations issued further to the Act should be clear and assessments done in determining enforcement must be transparent.