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## Client Alert

### Recent Regulatory Enforcement Updates in Nigeria: Advertising and Consumer Protection / Data Protection / Privacy

#### Advertising

##### Background

The Federal High Court sitting in Abuja on 19 July 2023 in suit no FHC/ABJ/CS/1701/2022 delivered a ruling on the N30,000,000,000 (Thirty Billion Naira) lawsuit brought by the Advertising Regulatory Council of Nigeria (**ARCON**) against Meta Platforms Incorporated ("**Meta**", the owners of Facebook, Instagram and WhatsApp platforms) and its agent AT3 Resources Limited.

For context, the Nigerian Code of Advertising Practice, Sales Promotion and Other Rights/Restriction on Practice (APCON Code) in line with section 54 of the Advertising Regulatory Council of Nigeria Act (ARCON Act 2022) requires 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.

On the above basis, ARCON had sued Meta in 2022 for publication and exposure of unvetted advertisements and marketing communications on various online/social media platforms. In defence, Meta raised a preliminary objection urging the court to strike out the suit for lack of jurisdiction on the basis that Meta is a foreign company registered in the United States of America who has not submitted to the court's jurisdiction.

## Court Ruling

At the proceedings which held on 19 July 2023, ARCON's counsel appears to have notified the court that it filed to discontinue the suit against Meta following which, the court struck out the matter.

## Impact

Although the motivation behind ARCON's filing for discontinuance is unclear, it could signal a suggestion of negotiations and other Alternative Dispute Resolution (ADR) efforts between the parties or a strategic move to reintroduce the case. The Federal

High Court struck out the matter – this means that the actual substance / merit of the matter was not considered by the court. Additionally, it is possible that ARCON may seek to reinstitute the case considering the matter was merely struck out (as compared to being dismissed on its merits).

While we will continue to monitor any further action or subsequent matter, it appears that for now, ARCON is not continuing this claim against Meta, and this may indicate that digital advertisers have more room for negotiation with the ARCON with respect to the onerous requirement of vetting ads prior to exposure to the Nigerian market.

Relatedly, there is currently an ARCON Act (Amendment) Bill which among other things proposes to amend section 9(5) of the ARCON Act. The proposed amendment indicates a legislative attempt to exclude digital advertising<sup>1</sup> from penalization under the ARCON Act. If the Bill is passed in its current form, it would mean that the vetting and approval requirements would not be applicable to digital advertisement and consequently, penalties for non-compliance would only be applicable to traditional advertisers. This could bring a definite conclusion to the issue of whether the digital advertisers would face sanctions for non-compliance with the ARCON Act.

## Data Protection / Privacy

### **The Federal Competition and Consumer Protection Commission Investigation into Meta and WhatsApp for Alleged Violations of the Federal Competition and Consumer Protection Act FCCPA (2018) and the Nigeria Data Protection Regulation 2019 (NDPR)**

The Federal Competition and Consumer Protection Commission (**FCCPC** or the "**Commission**") on 19 July 2024 issued a press release on the result of its investigation of Meta Platforms Inc and WhatsApp LLC over alleged violations of the Federal Competition and Consumer Protection Act (FCCPA) and the Nigeria Data Protection Regulation (NDPR) and other relevant laws.

The Commission had sometime in May 2021, issued administrative notices to WhatsApp LLC and Meta Platforms Inc (formerly called Facebook Inc.) jointly referred to as "**Meta Parties**". This action was based on a joint investigative report of the Commission and the Nigerian Data Protection Commission (**NDPC**) where it alleged that Meta Parties had violated the provisions of the Federal Competition and Consumer Protection Act

<sup>1</sup> It is currently unclear how wide or narrow the term 'digital advertisement' will be construed considering that neither the Bill, the ARCON Act or the Advertisement Code define the term. The hope is that this lacuna is identified and addressed prior to being passed by both legislative houses.

(FCCPA) and the Nigeria Data Protection Regulation (NDPR) (now replaced by the Nigerian Data Protection Act 2023 (NDPA)).

The FCCPA public release shows that between May 2021 and December 2023, Meta parties provided evidence in response to the Commission and had through its counsels met with investigators and analysts from the FCCPC and the NDPC as recently as 4 April 2024.

## Decision

According to the Commission, the totality of the investigation had concluded that Meta parties over a protracted time have engaged in conduct that constitutes multiple, operated and continuing infringements of the FCCPA and the NDPR, particularly but not limited to:

- abusive, invasive practices against data subjects/consumers in Nigeria by appropriating personal data or information without consent;
- discriminatory practices against Nigerian data subjects/consumers or disparate treatment of consumers/data subjects compared with other jurisdictions with similar regulatory frameworks; and
- abuse of dominant market position.

The final order identifies 5 (five) specific conducts of the Meta Parties which constitutes an infringement. These reportedly are;

1. Denying Nigerian data subjects the right to self-determine;
2. Unauthorized transfer and sharing of Nigerian data-subjects personal data including cross-border storage in violation of the then, and now prevailing law;
3. Discrimination and disparate treatment; and
4. Tying and bundling.

The Commission mandated the Meta Parties to take steps and actions to comply with prevailing law (the NDPA), cease the exploitation of Nigeria consumers, cease market abuse and desist from future and similar conducts or practices that do not meet the nationally applicable standards and undermine the rights of consumers.

Secondly, the final order imposed a monetary penalty of \$220,000,000 (Two Hundred and Twenty Million Dollars Only) in accordance with the Federal Competition and Consumer Protection (Administrative Penalties) Regulations 2020.

We understand from publicly available sources that Meta has disputed the FCCPC's order and indicated its intention to appeal the decision of the FCCPC.

## Impact

The FCCPC release and issuance of a penalty is a serious indication of the proactiveness of the Commission and the Nigerian Data Protection Commission in ensuring compliance with the extant laws and regulations of consumer protection and data protection respectively. It is also a powerful indication of attempted cross-border administrative enforcement of Nigerian consumer protection and data protection laws. Digital service providers must ensure compliance to avoid the possibility of major fines from the FCCPC or NDPC. We will continue to monitor this outcome of this case and any possible appeal by Meta.

*TEMPLARS is a licensed Data Protection Compliance Organisation, and we are available to assist your organisation with its data protection needs. Templars has a wide range of experience in advising national and international clients on compliance with advertising and consumer protection regulations in Nigeria. We provide a broad spectrum of data protection advisory and compliance services and will handhold your organization in navigating the evolving data protection, consumer protection and advertising landscape seamlessly.*