



<< PRESS RELEASE >>

RE: ADVAN'S REASON FOR SUIT AGAINST ARCON

The attention of the Advertising Regulatory Council of Nigeria (ARCON) has been drawn to a recent press release by the Advertisers Association of Nigeria (ADVAN) on the reason why it is instituting legal action against the National Assembly, the Attorney General of the Federation and Honourable Minister of Justice, the Honourable Minister of Information and National Orientation, and ARCON to seek clarification on certain sections of the Advertising Regulatory Council of Nigeria Act.

ARCON would like to clarify as follows in response to the press release;

1. Remit of the Law ADVAN'S Position

The above section of the ARCON law essentially states that ARCON can override any other legislation or regulation as it pertains to advertising and marketing communications in Nigeria. ADVAN seeks clarity on this, as various industry regulators also regulate advertising content for its members.

ARCON's Explanation

Every government regulatory agency created by law has its primary and secondary remit. The primary remit of the ARCON Law is to regulate advertising, advertisement and marketing communications in all ramifications. The primary remit of the Central Bank of Nigeria (CBN) Act is financial regulation, for National Insurance Commission (NAICOM) Act, it is insurance regulation, for the National Agency for Food and Drug Administration and Control (NAFDAC) Act, it's food and drugs, for National Broadcasting Commission (NBC) Act, it's the broadcast media. Notwithstanding this, all regulatory agencies also have overlapping functions on business and industry that impinge on their regulatory jurisdiction.

2. Regulatory Space/Jurisdiction ADVAN'S Position

ADVAN Members belong to various industries and are regulated by the appropriate regulators of those industries.

Here ARCON states in its new law, that it now regulates advertisers (all corporate entities that utilize advertising) even though they do not engage in the business of advertising.

ADVAN is asking the court to clarify if a regulator can move beyond its mandated regulatory jurisdiction, to regulate the clients/ beneficiaries of services of its regulated (E.g., Who does the Nigerian Bar Association regulate? Lawyers or clients of Lawyers?).

ADVAN Understanding of regulations globally is that regulations are for those registered in an industry or profession, NOT the clients or beneficiaries of the services.

ARCON'S Explanation

The primary mandate of ARCON is to regulate advertising, advertisement and marketing communications in all ramifications. ARCON does not license or seek to license ADVAN members, but rather, it sets the industry framework for the advertising industry in line with its mandate. Just as NAICOM sets the standard for the insurance industry, CBN sets the standard for the banking industry, and the Nigeria Communications Commission (NCC) sets the standard for the telecoms industry.

The example of the Nigerian Bar Association (NBA) used by ADVAN does not fit into this issue as NBA is an association of lawyers registered as an Incorporated Trustees with Corporate Affairs Council (CAC) and not a creation of the law or a regulatory agency like ARCON. NBA cannot be compared with ARCON as postulated by ADVAN.

ADVAN is enjoined to seek a legal opinion from a competent and experienced legal practitioner(s) on this, including the legal status of the NBA and the regulatory body of the legal profession.

3. Definition of Advertising by ARCON

ADVAN'S Position

This definition of advertising is incorrect. The definition tends closely to the definition of marketing and not advertising.

ADVAN is asking the court to clarify if a regulatory institution can change globally accepted definitions and terminologies arbitrarily without recourse.

If regulatory bodies can now decide their own definitions and terminologies of existing and approved terms, as it suits them.

ARCON'S Position

It is shocking and surprising that ADVAN leadership states that the definition of advertising as enacted by the National Assembly in the Act is not correct and does not conform with the globally accepted definition of advertising. This is quite laughable. Who gave the global definition? Where? And when?

ADVAN is challenging the right and power of the Federal Government to define advertising as it affects the Nigerian market.

We are not sure what ADVAN meant by the phrase "without recourse". Recourse to who? ADVAN? We will advise ADVAN leadership to speak with competent lawyers and seek education on this.

4. Registered Persons and Offences

ADVAN'S Position

ADVAN is asking that the court clarify if the above section of the ARCON law seeks to register and regulate all persons that have oversight function of their organizations advertising and marketing communication's activities. (e.g., Marketing Communications Directors of Advertiser organizations)

ADVAN is of the understanding that a business can utilize the services of any professional (person or organization) without needing to be registered with the professional/regulatory body in charge. As is the case, Accountants, Auditors etc.

ADVAN is asking the court if a business should not have the right to oversee work done by professionals without necessarily needing to be registered or regulated in that profession.

ARCON'S Position

Advertisers engage several skills and professionals in their organizations. Anyone performing an oversight function on a specialized skill area is required to practice in conformity with the regulatory requirement of that professional field. The legal departments of organization members of ADVAN is staffed with competent personnel with relevant qualifications in the legal profession. They exercise oversight responsibilities on legal matters as they affect their organisations.

Lawyers are to practice in line with the Legal Practitioners Act, Accountants are to ensure conformity with relevant financial regulations issued from time to time by relevant government agencies e.g. Financial Reporting Council, ICAN, ANAN, etc. Advertising is a specialized skill and regulated profession like others. Whoever is performing an act or oversight function in advertising should do so in line with the ARCON Act.

Each profession comes with relevant qualifications as well as a regulatory framework or guideline.

5. Advertising Offences Tribunal

ADVAN'S Position

The above stipulations of the ARCON Law seeks to create an extrajudicial system under an Executive arm of government. Nigeria as a democratic entity has clear separation of powers between the different arms of government. For a regulatory body to set up a Tribunal with powers to hear, try and pass judgment is clearly in breach of the constitution of the nation

The above section confers on ARCON the powers to issue a search warrant into private business when it deems fit. This again goes against the rights of advertisers to conduct legal private business. A regulator cannot by any definition take the place of the courts.

ARCON'S Position

Tribunal is a judicial body created by the law to adjudicate disputes of a specific type. Tribunal is not new to the Nigerian legal system as Tribunals currently exist in other industries and sectors of the economy; some of these include Investment and Security Tribunal (IST) for investment and security matters, Tax Tribunal for tax matters, Competition and Consumer Protection Tribunal for consumer protection matters and Advertising Offences Tribunal for advertising related matters among others.

It will be expedient to ask ADVAN to state the sections of the Constitution of the Federal Republic of Nigeria which the establishment of the Advertising Offences Tribunal breaches.

6. Power of the Council

ADVAN'S Position

The above section clearly interferes with the right of advertisers to conduct legal private business.

ADVAN is asking the court to clarify if a regulator of private business practice can demand access to financial records without a court order? Or compel organizations to disclose private business matters?

ARCON's Position

Every government agency with investigative power has a right of access to information to enable it to act accordingly as provided in its Act and in line with the constitution. ADVAN is advised to check this with other government agencies that have investigative responsibilities and the powers.

In this case, the information being required by ARCON is information related to advertising, advertisement and marketing communications being ARCON's primary remit.

7. Industry Payment Policy

ADVAN'S Position

Globally payment terms are under private contractual terms or as best industry practice - agreed by stakeholders within an Industry as a gentleman's agreement, not as legislation.

As a member of the World Federation of Advertisers, ADVAN has researched payment methods globally, and findings from this research show that there is NO LEGISLATION around contract and payments terms for stakeholders within an Industry.

ARCON'S Position

Payment Threshold framework and regulation varies from market to market and industry to industry. In an economy where self-regulation exists and works perfectly well, organizations within the system agree and sign off on payment threshold. This is also expected to align with statutory advertising regulatory framework.

However, in an economy or industry where self-regulation fails, regulatory agencies take up the responsibility in line with its mandate.

NAICOM introduced the zero-debt regime in the Nigerian Insurance industry and recently increased insurance rates in some cases by 200% as part of the industry business framework.

Self-regulation has failed in the Nigerian Advertising Industry. The big/strong stakeholders have continued to exploit and take advantage of the weak stakeholders. ARCON has acted within its mandate, powers and function to ensure stability in the Nigerian Advertising ecosystem.

ADVAN members are enjoined to further engage their advertisement agencies in the discussion of payment threshold. However, the agreement must align with the maximum days set by the regulator, that is 45 days payment circle.

ADVAN leadership is advised to engage and seek counsel from competent and experienced legal practitioners on Nigerian administrative law, advertising law, and jurisprudence as this will help in their quest for better clarification and understanding.

Head, Corporate Affairs

8th November, 2023