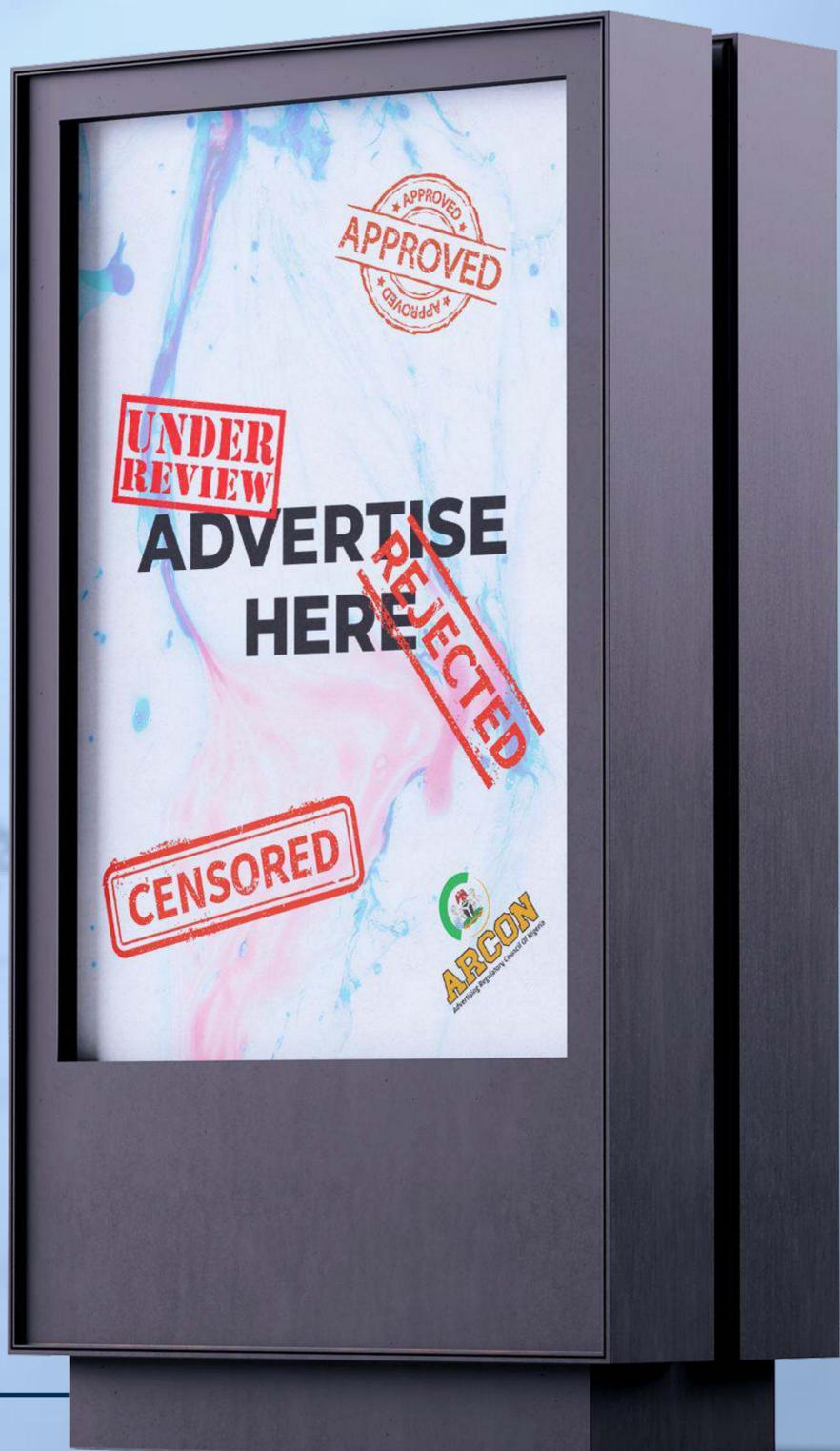




# CRIMINALIZATION OF FAILURE TO OBTAIN ADVERTISING APPROVAL AND UNJUSTIFIED PIERCING OF CORPORATE VEILS BY ARCON - WRONGFUL AND ULTRA VIRES ENFORCEMENT OF ADVERTISING RULES IN NIGERIA



## 1.0 Introduction

The Nigerian advertising and marketing communications landscape and industry continues to undergo significant transformation following the enactment of the Advertising Regulatory Council of Nigeria (ARCON) Act, 2022 (“the Act”) and the revised Nigerian Code of Advertising Practice. These instruments introduce far-reaching provisions that redefine the scope of advertising and marketing communications towards ensuring that advertisements directed at the Nigerian market are legal, decent, honest, truthful, respectful, devoid of misinformation and disinformation and mindful of the Nigerian culture, constitutional tenets as well as relevant laws. They are also geared towards promoting and encouraging local content, best practices, fair competition, foreign investment, innovation and efficiency while preventing misleading, harmful or offensive advertisements.

In order to achieve the foregoing objectives, the Act established the Advertising Regulatory Council of Nigeria (“the Council”) to administer the law, ensure compliance and impose sanctions where the provisions law are not complied with.<sup>[1]</sup>

One of the notable advertising requirements introduced under the Act is the compulsory pre-approval procedure for all advertisements directed at the Nigerian market. This is to ensure that the Council has the opportunity of scrutinizing all advertisements for the purpose of ensuring that they meet the objectives and standards prescribed under the Act before they are published.

Whilst the objectives of the law are clear and positive and whilst the establishment of the Council for the purpose of ensuring the realization of the said objectives are also positive, it would appear that the manner of enforcement of the Act by the Council runs amok.

It is not in doubt that since its establishment, the Council has made efforts to inform and sensitize Nigerians on the need to obtain prior approval before publishing adverts in the Nigerian market. However, many Nigerian businesses that are not aware of this legal requirement have been running afoul of the law. In recent times, the Council has been responding by initiating enforcement actions against defaulters. Whilst enforcement of the Act is necessary and relevant towards ensuring compliance with the legal requirement, the process of the enforcement by the Council has triggered troubling reactions and raised important questions about the appropriateness of their enforcement process and tactics.

### Enforcement Procedure Adopted by the Council

What has been observed in practice is that when the Council discovers that a person or company has published an advert without obtaining prior approval (which effectively is a contravention of the law), they gather evidence of such violation and

---

[1] This article was written by Joshua Abe, Partner and Head of Dispute Resolution Practice at Abe & Asotie LP and Adeonke Lawal, Associate at Abe & Asotie LP.

[2]Section 54, ARCON ACT

issue a letter notifying the company of the contravention of the law, namely, the provisions of section 54 of the Act, attaching the relevant particulars and evidence of such contravention. Consequently, they demand (in the same letter) payment of fine for each contravention (advertisement) among other things. However, where the company refuses to pay the fine imposed, the Council would resort to initiating criminal prosecution against the company and any of its prominent directors purportedly in the exercise of its enforcement powers.

A review of the criminal summonses issued by the Council shows that the criminal charges are often brought under the provisions of section 34(3), a general provision of the Act that imposes criminal sanction for non-compliance with the provisions of the Act.

Although the Act confers enforcement powers on the Council,<sup>[3]</sup> such powers are however governed by the provisions of the Act which provide guidance on how the sanction and process for imposition of sanction for the various offences should be applied. The enforcement approach adopted by the Council, namely, initiating criminal actions against companies and their directors for not obtaining approval before publishing advertisement therefore calls for serious scrutiny as it does not have legal backing.

Indeed, by virtue of the provisions of section 54 of the Act, anyone who intends to publish any advert through any medium in Nigeria must first obtain the prior approval of the Council and failure to do so would amount to a violation and attract potential sanction. The relevant question in the circumstances is – what is the appropriate process of enforcing the sanction for contravention of the provisions of section 54 of the Act? Is the Council empowered to initiate criminal proceedings to enforce it? Is it also empowered to proceed against directors of the defaulting company criminally?

### **Scrutiny of the Enforcement Procedure Adopted by the Council**

In answering the foregoing questions, it is important to take a look at the provisions of section 54 of the ARCON Act which provides as follows:

*“Any person including 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 without the prior approval of the Standards Panel commits an offence and is liable to such fine as stated in the Nigerian Code of Advertising Practice.”*

A careful reading of this provision reveals three critical elements. Firstly, the gravamen of the offence is the publication or exposure of an advertisement without prior approval of the Advertising Standards Panel (ASP).

---

<sup>[3]</sup> Section 35 of the ARCON ACT

Secondly, the Act itself expressly prescribes the consequence of the breach, namely, liability to a fine as stated in the Nigerian Code of Advertising Practice.<sup>[4]</sup> This means that the process for imposing sanction for violation of the provisions of section 54 of the Act is as contained in the Nigerian Code of Advertising Practice and it is purely administrative and regulatory in nature. It does not have the semblance of a criminal or quasi-criminal process.

Thirdly, the enforcement process under the provisions of section 54 of the Act is clearly designed to operate exclusively within the Council's regulatory and supervisory framework/environment, allowing the Council to impose fines, demand compliance, and recover prescribed penalties in accordance with the Code without the involvement of any third-party institution.

Fourthly, the provisions of section 54 are specific and self-sufficient. It defines the offence, prescribes the sanction and describes the process as well as the yardstick for the prescription and imposition of the sanction, thereby leaving no room for the Council to rely on any other provision of the Act for the purpose of enforcing violation of the said provision.

Notably, the provisions of section 54 of the Act do not prescribe, permit, or suggest enforcement by criminal prosecution or imposition of sanction in the form of imprisonment or any custodial sanction. The legislative intention is unmistakable – non-compliance with advertising pre-approval requirements under section 54 is to attract administrative penalties prescribed in the Nigerian Code of Advertising, not criminal punishment.

The fine for unapproved publication is contained in Part 3, Article 148, paragraphs A – F of the Nigerian Code of Advertising referenced in section 54 of the Act. It reads: “Any agency which creates and/or places for publication or exposure of an advertisement without the Standards Panel's Certificate of approval shall be liable to a minimum of fine of N500,000.00 (Five Hundred Thousand Naira)”. What this clearly means is that the Council can only impose fine of at least N500,000.00 (Five Hundred Thousand Naira) on any defaulting company not institute a criminal action.

### **Wrongfulness of the Council's Enforcement Process Explained**

Whilst section 34(3) defines contravention of the provisions of the Act as an offence (not criminal offence), section 34(5) provides for criminal liability, including fines and possible imprisonment, upon conviction for contraventions under section 34 which are typically offences relating to registration by advertising agencies and not failure to obtain approval. The provision reads as follows:

34.—(1) Any person, who for the purpose of procuring the registration of any name, qualification or other matter —

---

[4] Article 148 of the Code of Advertising

- (a) makes a false statement in a material particular, or
- (b) recklessly makes a statement which is false in a material particular, commits an offence under this section. (3) "A person, body corporate, associations or organization that exposes any advertisement that contravene any provision of this Act, commits an offence.
- (2) Where the Director-General or any other person employed by the Council wilfully makes any falsification in any matter relating to any register maintained under this Act, he commits an offence under this section.
- (3) A person, body corporate, associations or organization that exposes any advertisement that contravene any provision of this Act, commits an offence.
- (4) Any person or organisation who engages in the practice of advertising and advertising services as a profession without being registered with the Council and so licensed by the Council in accordance to the provisions of this Act, commits an offence under this section.
- (5) A person who commits an offence under this section is liable on conviction –
- (a) in the case of an individual, to a fine of at least N500,000 or imprisonment for a term of one year or both, and
  - (b) in the case of an organisation or a body corporate, to a fine of at least N1,000,000.
- (6) Where an offence under this Act committed by a body corporate is proved to have been committed with the connivance of or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or organisation or any person purporting to act in any such capacity, he, as well as the body corporate or organisation, shall be deemed to be guilty of that offence and punished accordingly.

A review of the provisions of Sections 54 and 34 of the Act show that under no circumstance should the Council seek to enforce failure to obtain approval before publication of an advert by criminal procedure for two main reasons. Firstly, the sanction prescribed under the provisions of section 34(5) relates specifically to offences pertaining to registration by advertising agencies because the sanction only relates to offences mentioned under section 34 which focuses on registration. Secondly, even though the sanction prescribed under the provisions of section 34(5) is generic and relates to the entire provisions of the Act, it still does not justify its application for the enforcement of the provisions of section 54 of the Act which is specific. This is because where a statute contains both a specific provision and a general provision dealing with the same subject matter, the specific provision

prevails or supersedes. This principle is commonly expressed as *generalia specialibus non derogant*.

Nigerian courts have consistently applied this doctrine where two provisions conflict on the same subject matter. In *Lokpobiri v. A.P.C.*<sup>[5]</sup>, the Supreme Court ruled that where a statute contains both a general provision and a specific provision, the general provision must give way to the specific provision.

Since section 54 of the Act is a provision that specifically and governs unapproved advertisements and also expressly prescribes the applicable sanction, it means that the said provisions of section 54 is the specific provision and section 34 which refers to offences under the Act generally is the general provision. Applying the aforementioned rules of interpretation, it suffices to say that the provisions of section 54 (which is the specific provision of the Act) supersede the provisions of section 34 of the Act (which is the general provision of the Act) as far as enforcement of unapproved advertisement is concerned.

The implication of the foregoing is that the Council cannot properly rely on the provisions of section 34, section 35 or any other provision of the Act to impose sanction on any company or entity that violates the provisions of section 54. The intendment of the legislature is to treat failure to obtain approval before publishing advertisement as an administrative offence for which administrative fine is to be paid under the Nigerian Code of Advertising and not as a criminal offence in respect of which a company or its directors will be subjected to criminal prosecution. The offences envisaged in both sections of the Act are separate and distinct and they have distinct elements and consequences. Thus, the mere fact that an advertisement lacks prior approval under section 54 does not, without more, give rise to criminal liability punishable under the provisions of section 34(5).

### **Directors' Liability and the Misuse of the Corporate Veil Doctrine**

A second and equally troubling aspect of current enforcement practice by the Council is the joinder of company directors in the criminal prosecution for alleged advertising infractions. This approach reflects a fundamental misunderstanding, or disregard of the doctrine of separate corporate personality which separates the shareholders and directors of a company from the liabilities of the company.

The principle established in *Salomon v. Salomon & Co. Ltd*<sup>[5]</sup> remains settled law in Nigeria: a company is a legal person distinct from its directors and shareholders. Advertising without prior approval, even if wrongful, does not justify the prosecution of directors because first, the infraction (even if committed) is not a crime nor is it a fraud that would trigger the lifting of the company's corporate veil. Even if the infraction is a crime (which is not), the Council must first proof that the directors were

---

[5] (2021) 3 NWLR (Pt. 1764) 568. See also *Apapa v. I.N.E.C* (2012) 8 NWLR (Pt. 1303) 409; *A.B.S.U v. Otosi* (2011) 1 NWLR (Pt. 1229) 605 and *F.R.N v. Bankole* (2014) 11 NWLR (Pt. 1418) 337.

[6] [1897] AC 22

This practice by the Council not only undermines the integrity of corporate governance in Nigeria but also creates uncertainty for business executives, who may be exposed to criminal liability for nothing more than operational decisions taken in good faith by their subordinate management teams or external agencies.

### **Possible Motive Behind the Council's Enforcement Under the Provisions of Sections 34 of the Act.**

Having regard to the fact that the law is clear on the process of enforcement of violation of the provisions of section 54 of the Act, namely failure to obtain approval before publishing an advertisement, it is difficult to understand the motive behind the Council's choice of criminal enforcement under the provisions of Sections 34(3) & (5) and 35 of the Act. Implicit in the criminal enforcement of the provisions of section 54 of the Act by the Council is the tacit criminalization of the act of broadcasting or publishing of advertisements without approval which is not the intendment of the legislation. This therefore creates regulatory mischief and injustice that should not be allowed to linger.

One conceivable reason why the Council may be undertaking this approach is to intimidate defaulting companies and force them into negotiating the imposed fine, knowing that no company management would want to risk the possibility of conviction of their company and director on an offence that is akin to a strict liability offence. More specifically, the joinder of a director in criminal proceedings would potentially mount a higher level of pressure on the company as the company and its director would want to do everything possible to avoid the stigma of getting a conviction or the potential hardship of imprisonment.

### **Conclusion**

The ARCON Act 2022 undoubtedly strengthens advertising regulation in Nigeria and reflects a legitimate public interest in ethical marketing practices. However, enforcement must remain faithful and true to the structure, language and limits of the statute.

Where an alleged breach falls squarely under the provisions of section 54 of the Act, the Council is bound to proceed to confine the imposition of sanctions to the process and administrative fines prescribed by the Nigerian Code of Advertising Practice as referenced in the provisions of section 54 itself. The practice of invoking the provisions of sections 34(5) and 35 of the Act as coercive tools to enforce matters relating to the provisions of section 54 of the Act is legally flawed and contrary to settled principles of the rule of law, legislative intendment, rules of interpretation, fairness and justice.

Similarly, the deliberate extension of liability to company directors without clear statutory authority undermines the doctrine of separate legal personality and

exposes enforcement actions to successful legal challenges. Thus, a principled, compliant, proportionate and legally consistent enforcement approach will better serve both regulatory objectives and the rule of law.

**At Abe & Asotie LP, we have robust experience in advising and providing legal representation to corporate organizations and individuals in Nigerian Courts, Tribunals and other adjudicatory bodies, given our outstanding experience in dispute resolution.**



## AUTHORS



**Joshua Abe**

Partner

+2348036033651

[joshua.abe@abeandasotie.com](mailto:joshua.abe@abeandasotie.com)



**Aderonke Lawal**

Associate

+2348143926554

[aderonke.lawal@abeandasotie.com](mailto:aderonke.lawal@abeandasotie.com)

**For further inquiries and guidance, please book a consultation with Abe & Asotie LP**

✉ [info@abeandasotie.com](mailto:info@abeandasotie.com)

☎ +234 706 525 5012, +2348036033651

📍 Lagos Court of Arbitration Building,  
1a Remi Olowude Street, Okunde Bluewater Scheme,  
Maruwa, Lekki Phase 1, Lagos State.

