

The New Practice (TNP)

- An Andersen Collaborating Firm



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Advertising is an important tool for providing visibility to a business's products and services. Over the years, advertising has evolved from traditional (billboards, television, or radio jingles) to digital adverts that leverage technology and social media platforms. The Advertising Regulatory Council of Nigeria (ARCON) was established in 2022 to replace the Advertising Practitioners Council of Nigeria (APCON). The ARCON Act, which created ARCON, gave it powers which were significantly wider than those of APCON. ARCON's expanded functions now include overseeing self-advertising by any person (whether an advertising practitioner or not) who sponsors or takes benefit of an advertisement or marketing communications service. In addition, the Act requires pre-publication approval for the exposure of any promotional material or advertisement on any platform including social media. This requirement, and ARCON's expanded authority remain a controversial issue that has sparked debates, leading to several criminal prosecutions at the Advertising Offences Tribunal, and challenges at the Federal High Court.

This article examines the constitutionality of some of ARCON's powers, relevant case law, and statutes.

The Constitutionality of ARCON's Powers

Most of the resistance to ARCON's expanded powers is premised on the provisions of the 1999 Constitution of the Federal Republic of Nigeria, which is at the apex of Nigeria's hierarchy of laws. The Constitution delineates the powers of the federal and state governments, primarily through the exclusive and concurrent legislative lists contained in its the Second Schedule.

The exclusive legislative list itemises matters over which only the National Assembly has the exclusive power to legislate, while the concurrent list deals with matters over which both the National Assembly and State Houses of Assembly may make laws. The implication of this is that where a subject matter does not fall under either the exclusive or concurrent list, only the states can make laws on such matters (residual powers). This distinction is essential when analysing ARCON's authority to regulate self-advertising.

Self-Advertising Under Scrutiny: Exploring ARCON's Boundaries

The exclusive and concurrent lists make no reference to advertising. The only reference to advertising in the Constitution is in the Fourth Schedule which lists the functions of local governments. It states that local governments shall "control and regulate outdoor advertising and hoarding."

The exclusive legislative list empowers the National Assembly to legislate on "professional occupations as may be designated by the National Assembly". It is therefore not in doubt that the National Assembly can validly make laws that regulate advertising practitioners (i.e. persons or corporate bodies that provide advertising services to third parties). But does this power extend to making laws that regulate self advertising (i.e. the advertisement by an individual or a company of its own products or services without the services of an advertising professional)?

In an attempt to enforce the powers conferred on it by the ARCON Act, ARCON began to issue demand notices to several companies (not advertising practitioners) for violation of its advertising laws. In many cases, such notices have culminated in ARCON initiating criminal charges against such companies and their executives. This approach by ARCON has raised questions about the limits of the agency's powers and the constitutional propriety of its attempts to regulate advertising by businesses or individuals promoting their goods or services without the intermediation of an advertising practitioner.

In our view, the regulation of self-advertising by individuals or businesses promoting their products, without engaging professional advertising practitioners, is beyond the contemplation and intent of the Constitution. More worrying is the requirement for approval by ARCON before publication of any advertisement by any person or company. Apart from the impracticality of the requirement for pre-publication approval, this may be perceived as antagonistic to businesses, especially small companies trying to thrive in a challenging economy.

Who Should Regulate Self-Advertising?

Section 7(5) of the Constitution requires the House of Assembly of a state to confer specific functions listed in its Fourth Schedule on local government councils. These functions include the regulation of outdoor advertising and hoarding. It is our view that because the Constitution does not explicitly mention "advertising" in the exclusive or concurrent legislative lists, it is only the state Houses of Assembly that have the power to make laws on advertising. The state Houses of Assembly

must however, in making such laws, reserve the regulation of outdoor advertising and hoarding for the local governments within their territory.

The National Assembly's attempt to delve into state matters by authorising ARCON to regulate all forms of advertising, including self-advertising, particularly on social media platforms, is, in our view, an overreach. The Nigerian courts have held in several cases that the various tiers of government must not tread beyond the constitutional bounds of their legislative powers. One of such cases is Attorney General of Ogun State v. Alhaja Ayinke Aberuagba, where the Supreme Court held that the federal government could not legislate on matters that were clearly within the residual powers of the states.

Similarly, in the case of Attorney General of Lagos State v. Attorney General of the Federation, the Supreme court reaffirmed that state governments have the power to legislate on matters not expressly assigned to the federal government by the Constitution.

What Falls Under Item 49, Second Schedule of the Constitution?

Item 49 of the Second Schedule to the Constitution empowers the National Assembly

to legislate on "professional occupations as may be designated by the National Assembly." It is therefore our opinion that ARCON can only regulate advertisements published by someone who advertises on behalf of third parties for a living (i.e. as a profession). Conversely, ARCON's attempts to regulate self-advertising—where individuals or businesses advertise their products without the involvement of professional advertising practitioners—are unconstitutional.

How Practical is ARCON's Attempt to Regulate Self-Advertising?

Beyond the legal and constitutional issues, there are significant practical challenges associated with ARCON's attempt to regulate self-advertising in Nigeria. With the proliferation of digital platforms and social media, millions of Nigerians engage in self-advertising every day. Attempting to regulate every individual or business that advertises its own products on platforms like Facebook, Instagram, and Twitter is not only impractical but will also stifle entrepreneurship and innovation.

Enforcing such regulations would require significant resources, and a solid structure to monitor and regulate the vast amount of self advertising that occurs on digital platforms. More importantly, ARCON's enforcement approach seems to be more concerned with revenue generation rather than safeguarding the public from harmful advertisements. This has created the perception that ARCON is simply exploiting Nigerians in an increasingly challenging economy.

Conclusion

While we are willing to concede that ARCON has the constitutional authority to regulate professional advertising services by virtue of Item 49 of the Exclusive Legislative List and the ARCON Act, its attempts to regulate self-advertising is patently unconstitutional. The Constitution's division of powers between the federal and state governments suggests that the regulation of self-advertising falls within the residual legislative powers of the states.

It is important to consider the likely consequences of ARCON's attempts to regulate self-advertising. It is also left to be seen if this enforcement drive will promote a fair and competitive advertising landscape or is more likely to stifle innovation, hurt small businesses, and impose burdens on individuals and companies trying to promote their own products.

¹ Section 54 of the ARCON Act 2022
² Part I and Part II, Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999.
³ Item 49, Part I, Schedule II of the Constitution
⁴ (1985) 1 NWLR (Pt. 3) 395
⁵ (2003) 12 NWLR (Pt. 833) 1

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