

ARTICLES

COMMERCIALIZING CHILDREN: LAWS AND REGULATIONS AFFECTING ADVERTISEMENTS DIRECTED AT CHILDREN IN FRANCE, SPAIN AND SWEDEN

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I. INTRODUCTION

From a financial perspective there may be no better investment, or more sensible target for advertising than one directed at the interests of children.¹ This focus is perfectly understandable for a firm aiming to maintain a continually expanding and predictable source of profit. What children lack in spending power compared to other age groups, they make up for in potential longevity to consume, as well as their sheer amount of exposure to such advertising outlets, not only in hours spent, but in the various forms of technology to which they are regularly exposed.² Children have an uncanny ability to mold the financial choices of their parents from the relatively minuscule purchase of a small toy or candy bar they had seen on television, to suggesting vacation destinations that can cost in the thousands.³ In many nations, including the United States, firms have interpreted the recognition of the growing influence of children on markets as justification to target them in their advertising campaigns.⁴

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1. In the United States alone, in 2009 advertisers spent over \$17 billion on advertising to children, more than double the amount spent in 1992. *How Marketers Target Kids*, MediaSmart, <http://mediasmarts.ca/digital-media-literacy/media-issues/marketing-consumerism/how-marketers-target-kids> (last visited July 30, 2017) [<https://perma.cc/935C-VKU4>].

2. S.L. Calvert, *Children as consumers: advertising and marketing*, *FUTURE CHILD*, 206-207 (2008).

3. *Id.*

4. See *Target Market: Children as consumers*, About Kids Health, <http://www.aboutkidshealth.ca/en/news/newsandfeatures/pages/target-market-children-as-consumers.aspx>,

Countries have responded in a variety of ways to advertising targeting children. While the United States has been reluctant to restrict advertising to children, other countries have not been similarly reluctant.⁵ This article examines the approaches three member states of the European Union have taken to the regulation of advertising aimed at children. By examining these approaches, we can visit alternative regulatory approaches to advertising targeting children, and in the process uncover insights that could enhance approaches to the regulation of advertising directed toward children in the United States.

This article begins with a description of the general approach of the European Union to advertising to children. The next several sections then detail the approaches taken by three EU countries: France, Spain, and Sweden, as well as underlying rationales for each nation's approach to regulating advertising to children. Section XI then examines how these nations' experiences can be useful to the United States.

II. THE ROLE OF THE EUROPEAN UNION

As member states of the European Union, France, Spain and Sweden are subject to many of the EU's overarching standards and consequently surrender parts of their sovereignty when they adopt regulations required for all members. The EU recognizes the need for a common set of regulatory rules among member states to provide consumers with the kind of marketplace in which consumers can make more rational decisions.⁶ For instance the European Union Directive 2005/29 on unfair business-to-consumer commercial practices recognizes that children are vulnerable to certain forms of advertising because they do not possess the critical faculties required to make a safe and healthful consumption decision.⁷ This specific directive leads many EU member states to regulate advertising directed at children extremely closely. It establishes the belief that children are unskilled and unwitting participants in the marketplace. The

(noting that children were first identified as a target market in the 1960s, and the concept has continued to increase in popularity, as evidenced by the recent explosion of books focusing on how to market to teens, tweens, and children.) (last accessed July 30, 2017) [<https://perma.cc/N8D6-8M3U>].

5. Countries are on a continuum when it comes to restrictions on advertising to children. At the most restrictive end of the spectrum are Sweden, Norway and Quebec, which completely ban advertising directed toward children under twelve years of age, and at the opposite, and least restrictive end, is the United States, where there are very few legal restrictions on the material advertisers can broadcast to children and the average child views an estimated 16,000 advertisements a year, making US children the most frequent consumers of advertising in the world. Bruce Watson, *The Tricky Business of Advertising to Children*, GUARDIAN, 2/24/available at: <https://www.theguardian.com/sustainable-business/advertising-to-children-tricky-business-subway>.

6. A. Garde, *Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators?*, INT'L J. CHILDREN'S RTS. 524-25 (2011).

7. Directive 2005/29, OJ 2005 L 149/22.

assumption of the directive is that children cannot adequately distinguish between truthful, quality product information and deceitful marketing ploys.

The lofty goal of the European Union Directive 2005/29 is achieved only to the extent that member states agree and enact regulatory regimes that enforce the objective. However, member states have been far from unified in their approaches to protecting children from advertising that targets them. Most such regulatory policies have either focused on controlling the content that children view in advertisements or the time of day advertisements are shown and how frequently they are aired.⁸

III. LAWS REGULATING ADVERTISING TO CHILDREN IN FRANCE

Advertisers in France are increasingly targeting children, spending around 150 million dollars yearly on various forms of advertisements aimed at children less than 12 years of age.⁹ As compared to other European countries, France is often reluctant to legislate or use the state to enforce regulations aimed at advertising directly at children unless children's health is clearly at risk.¹⁰ The French government prefers to rely on self-regulatory bodies to act as the enforcement structure maintaining responsible for maintaining ethical marketing standards, rather than requiring more direct government oversight.¹¹

French law has had minimal impact on advertisements targeting children compared to other European states.¹² In contrast to Sweden, for example, which restricts any advertisement designated at any child below 12 years of age,¹³ the French have regulations restricting advertisements targeted to children only with respect to specific products, but no general laws protecting children from being targeted by advertisers. Advertisements containing or referencing pornographic material, tobacco and alcohol products, as well as foods and drinks directly known to cause obesity in any form are regulated not only to protect children, but also to help adults make rational choices.¹⁴ Doubtlessly, these regulations affect the extent to which any such advertisements are seen by children, but they do not directly address the efforts of advertisers to influence household consumption decisions by targeting children.

1. Drugs, Tobacco and Alcohol Advertisements

The French government has made a concerted effort to drastically decrease the access that children have to tobacco and alcohol products. One of the major

8. BARRIE GUNTER, CAROLINE OATES & MARK BLADES, *ADVERTISING TO CHILDREN ON TV: CONTENT, IMPACT, AND REGULATION* 142 (Routledge, 1st ed. 2004).

9. MICHEL BÉJOT & BARBARA DOILLAU, *ADVERTISING TO CHILDREN IN FRANCE* (2004).

10. *Id.*

11. *Id.*

12. *Id.* at 3.

13. Swedish Broadcasting Law Art. 22, Sect. 4 Radiolog 1966:7550.

14. *Id.*

steps taken was the implementation of the Loi Evin in 1991.¹⁵ This law sought to put a ban on attractive forms of advertising that directed tobacco and alcohol products to new consumers. For example, it was illegal for these products to be represented in a way that implied that any form of pleasure, success, sport or performance enhancement, or sexual gratification could be attained through using these items.¹⁶

The Loi Evin effectively eliminated alcohol and tobacco advertisements on television and implemented a system that forced advertisers to promote a health and safety message along with each product being advertised, stating that the product was dangerous to one's health.¹⁷ This approach initially made the law extremely effective. However, children are increasingly using other media outlets not covered by the 1991 law. Accessibility of the internet to children has given rise to new problems concerning the regulation of advertising.¹⁸ Now more than ever, it is increasingly difficult to monitor and control who sees tobacco and alcohol products advertised online, and children are coming into contact with such ads more frequently.¹⁹ As of 2009, it has become illegal to place these advertisements on the internet if they are directed at children. Not acting in accordance with the law can cost a firm up to 75,000 Euros or up to 50% of the total cost of the advertisement.²⁰

2. Food and Drink Advertisements

France is attempting to address the growth of obesity through a form of preventative legislation tightly controlling advertisements aimed at children.²¹ France has also established a multitude of governmental bodies such as the Ministry of Health, the Department for Competition, Consumption and Suppression of Fraud, and the Ministry of Culture and Communications that operate together to achieve policy goals that aim to protect the French people, including children.²²

15. KARINE GALLOPEL-MORVAN & JACQUES FRANÇOIS DIOUF, RESTRICTIONS ON ALCOHOL MARKETING IN FRANCE: THE EVIN LAW CONTENT, EFFECTIVENESS AND LIMITATIONS 4-6 (2015).

16. *Id.*

17. Tom Farell & Benoît Lecat, Regulating Alcohol Marketing practices in France and UK 4 (2014).

18. See also Soontae An & Susannah Stern, *Mitigating the Effects of Advergaming on Children*, 40 J. ADVERT. 43-56 (2011). This article describes the newly introduced games that promote products at children in a media that they would not generally expect. The child unwittingly plays a game focused around a certain product and is meant to influence the child and extend to family consumer choice.

19. Tom E. Carroll & Robert J. Donovan, *Alcohol Marketing On The Internet: New Challenges for Harm Reduction*, 21 DRUG & ALCOHOL REV. 83-91 (2002).

20. *Id.*

21. Brigitte End, *Senate Report on the Organization of Research and Prospects for Prevention and Treatment of Obesity*, No. 158 Senate (2010).

22. World Health Organization: Regional Office for Europe, *Action plan for implementation*

In many situations France allows industries to regulate their own advertisements. Apparently, either self-regulation is effective in this domain or the French government is inattentive to violations because there are very few instances of published disputes between negligent firms and governmental agencies.²³

When the French government does perceive that products represented in advertisements are harmful to overall public health, however, the French government and other regulatory bodies intervene.²⁴ They do so by enforcing regulations that force companies to market their food with warning labels and nutritional content information on products containing a high amount of sugar, fat, salt or other substances that have a possibility of causing health risks.²⁵ However, large corporations may pay a minimal 1.5% tax to bypass the regulation in the Public Health Act of 2004.²⁶

Essentially, when confronted with the choice between the free market and government intervention as a solution to fighting the country's public health problems, the government chooses the side of paternalistic policies. They make this choice in part because they believe that children need to be protected from deceptive advertising practices that specifically target them in a way that takes advantage of their lack of knowledge and experience.²⁷

When regulating advertising directed at children, the self-regulating entities, operating in accordance with policies formed by the *Autorité de Régulation*

of the European Strategy for the Prevention and Control of Noncommunicable Diseases 2012–2016 (2011).

23. *Id.*

24. DLA Piper, *Advertising and Marketing to Children Global Report* (November 2016). This compilation of French restrictions on advertisements targeting children is extensive and makes it clear that French regulation of these advertisements is almost never about “advertising”, but about “advertising of specific products”, such as alcohol. The ARPP's (The ARPP makes policies that self-regulatory bodies are required to follow.) Recommendation on Children provides that food advertising should not encourage unhealthy eating behaviors. For instance, advertising should not promote excessive consumption of food or snacking all day long. Moreover, advertisements should not undermine the role of parents in educating children to have a balanced diet and be healthy individuals. Pursuant to the ARPP's Recommendation on food behaviors, children should not be led to think that food can change their daily life (e.g., artistic activities, school and sport) by exceptional performances. The use of humor, original and unusual situations, or the reference to an imaginary world, is possible if it stays in a fantasy world and doesn't risk being understood by children as real achievements which could result from food consumption. Moreover, an advertisement using imaginary characters well-known in children's broadcasted entertainment and encouraging children to consume a product, should not promote behaviors which are contrary to healthy eating behaviors and lifestyles.

25. French Code of Public Health, Article :21331-1, <http://www.legifrance.gouv.fr> [<https://perma.cc/S26H-RQFV>].

26. *Id.*

27. KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* (Yale University Press, 1st ed. 2011).

Professionnelle de la Publicité (ARPP), state three considerations advertisers should make before releasing an advertisement. First, the advertisement must be easily identifiable as such. The ad, for example, cannot appear to be something like a news report or a public service announcement. Second, it must consider dignity and decency. Third, it should show aspects of social responsibility through promoting citizenship values, environmental protection, respecting others, and legal social behaviors.²⁸ Along with these stringent requirements, France also prioritizes its culture over commercialization, so they do not refrain from regulating advertising they view as an infringement on their cultural heritage.²⁹ The French have increasingly protected French public health and culture from bombardments of deceptive advertising through a system of constraints best conceptualized as co-regulation by industry and government.³⁰

3. French Self Regulating Bodies: The AARP, CEP, CPP, and the JDP

The self-regulatory bodies associated with advertising and marketing ethics in France consist of the ARPP, the Conseil de l'Éthique Publicitaire (CEP), the Conseil Paritaire de la Publicité (CPP), and The Jury de Déontologie Publicitaire (JDP).³¹ The ARPP is a self-regulating institution comprised of three groups: advertisers, advertising agencies, and media companies. Their stated goal is “to maintain high standards in terms of legal, honest, and truthful advertising, which is in the interest of both the consumers and the advertisers.”³² One step the French government has taken to decrease governmental regulation is by placing the responsibility of television pre-clearance for all advertisements in the hands of the ARPP.³³ The ARPP also takes a firm stance on advertisements directly aimed at children for the purpose of profit. “Advertising must not create risks for the public or for a category of the population-- particularly the most vulnerable ones such as children.”³⁴

The ARPP children's code contains a series of moral and ethical provisions and regulations that apply to advertisements aimed at children and advertisements in which children are participating.³⁵ The preamble of the children's code identifies children as requiring protection and issues a range of regulations that

28. *Id.* at 3.

29. MARY ALICE SHAVER & SOONTAE AN, *THE GLOBAL ADVERTISING REGULATION HANDBOOK* 111 (Routledge, 1st ed. 2013).

30. *Id.*

31. *Id.*

32. The ARPP, <http://www.arpp.org/the-arpp/> [<https://perma.cc/59SD-XN2V>].

33. *Id.*

34. *Id.* at 27, 227.

35. Autorite de regulation professionnelle de la publication, *Children's Code*, <http://www.arpp.org/nous-consulter/regles/regles-de-deontologie/childrens-code/> (last visited March 12, 2018) [<https://perma.cc/ES57-SRXB>]. See also: Autorite de regulation professionnelle de la publication, *ICC Code*, http://www.arpp.org/wp-content/uploads/2016/05/code_consolide_pratique_publicite_marketing.pdf (last visited March 12, 2018) [<https://perma.cc/35PG-WTCJ>].

act as restraints against the advertising industry.³⁶

Although the ARPP is the most prominent self-regulating body, other institutions play a key role in regulating advertising to children in France. For instance, the CEP plays an integral role in identifying future issues and working to solve current problems as well as those that arise as a result of technological progress. This body is comprised of independent experts and professionals independent of the advertising industry.³⁷

The CPP acts as a forum or meeting place for 9 independent experts and 9 representatives of the advertising industry. As a forum for discussion between the two parties, the CPP states that “its mission is to alert ARPP Board of Directors about the expectations of different associations concerning the content of advertisements. Another part of its mission is to provide constant re-evaluation of the self-regulatory codes.”³⁸

Finally, the JDP acts as a judiciary committee that evaluates the codes set forth by the ARPP and determines whether certain advertisements are breaching the agreed upon codes of conduct.³⁹ The JDP may be petitioned by a public official or any member of society. The JDP then determines whether the advertisement complies with ARPP recommendations. If ARPP recommendations are violated, then the advertisement is immediately withdrawn and the violation is publicized, thereby shaming the advertising company.⁴⁰ These governing bodies work together to establish, enforce, and evaluate ethical and practical codes of advertising that regulate the flow of product information to children.

4. *Factors Shaping French Regulation of Advertising Directed at Children*

Several factors are used to sustain the French regulatory model of advertising directed at children.⁴¹ Their approach emerges from the increasing concern of the social effects of a relatively unregulated commercial system in France.⁴² Unlike Americans, most French people consider the state a protection against the hazards of life and not a burden.⁴³ This has led to recognition that people must be protected from an unconstrained capitalist market in which the main goal is to create profit. Partnering with self-regulatory organizations has been the primary vehicle by which the state has voiced its belief that parents need help protecting

36. *Id.*

37. *Id.* at 30.

38. *Id.*

39. JDP, <https://www.jdp-pub.org/qui-sommes-nous/mission/> (last visited June 19, 2018) [<https://perma.cc/HH4G-GQ9Z>].

40. *Supra* note 35.

41. *Supra* note 29.

42. Elizabeth Sage, *Disciplinary Practice and the Practice of Discipline, or Political and Paternalism in Nineteenth-Century France*, 2 *Business and Economic History* 1, 11 (2004).

43. Understanding France, *Intercultural Differences: What the French Like Best*, <https://www.understandfrance.org/France/Intercultural7.html> (last visited March 12, 2018) [<https://perma.cc/6FAG-MNXY>].

their children from misleading advertisements.⁴⁴

France's policy decisions to allow advertisements to be directed towards children are largely influenced by the United Nations' ideas in the International Rights of the Child.⁴⁵ Although much of what comprises the International Rights of the Child is unaffiliated with advertising or advertising law and regulation, it does shape the overall general consensus of French thought towards children. This document affects how the French choose to legislate and regulate potential dangers children face and how children are perceived within society. Children are perceived as individuals who have access to rights just as adults do, and in many instances this recognition produces challenges to the government and the voluntary bodies that seek to protect them.⁴⁶ A long cultural distaste for advertisements is another explanatory factor responsible for the regulatory partnership of legislation and industry self-regulation. Anytime we hear the term self-regulation we are entitled to wonder just how aggressive an enforcement mechanism an industry is going to deploy against some of its own members. In France, though, self-regulation works because firms know they can create positive regard in the minds of potential consumers by acting on statements about the need to protect the vulnerable from marketing abuse.⁴⁷ This kind of vigorous self-regulatory response to advertising directed to children is visible due to a generalized French mistrust of advertisements in general.

IV. LAWS REGULATING ADVERTISING IN SPAIN

Spanish law regulates various types of advertising, including all major media such as television, the postal service, and the internet.⁴⁸ They also regulate a variety of content types, from retail trade and healthcare, to campaign advertising.⁴⁹ Basic regulatory guidelines are found in the Spanish Constitution, the Legal Protection of Minors Act, and the General Law of Advertising.⁵⁰ The Spanish Constitution is also relevant as it protects citizen privacy. Section 18.1 states that "the right to honor, to personal and family privacy and to the own image is guaranteed."⁵¹ These form protected areas upon which commercial

44. See also Jonathon Rowe & Gary Ruskin, *The Parent's Bill of Rights: Helping Moms and Dads Fight Commercialism* 28 (2003).

45. Law Library of Congress, *International Rights of the Child: Children's Rights, France* (2007).

46. *Id.*

47. *Supra* note 35 (Enhancing the state-industry partnership is the work of dozens of consumer watchdog groups who monitor particular aspects of advertising in France. As many as 18 of these groups are subsidized by the Consumer Affairs Ministry of the government.).

48. For a comprehensive overview of advertising regulation, see MERCEDES MEDINA, *THE GLOBAL ADVERTISING REGULATION HANDBOOK* (2014).

49. *Id.*

50. *Id.*

51. CONSTITUCIÓN ESPAÑOLA, *Boletín Oficial del Estado* (Spain), http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf

information may not infringe.⁵² Further, Section 21.4 states that rights to free speech, assembly, artistic expression, and academic freedom “. . . are limited. . . especially by the right to honor, to privacy, to the own image and to the protection of youth and childhood.”⁵³ Further, the Legal Protection of Minors Act, a statute governing treatment of minors, states that they are protected from information that is contrary to their interests.⁵⁴

The General Law of Advertising, a broad advertising regulation statute, outlaws untruthful, misleading, and subliminal advertising.⁵⁵ It allows for comparative advertising, provided that the goods compared serve a similar purpose and the comparison is being made on objective and relevant criteria, including price.⁵⁶ The Law also protects women from harmful and discriminatory advertising.⁵⁷ Lastly, the Law regulates advertising for specific goods that are potentially socially harmful.⁵⁸ Television advertising of tobacco and for beverages that contain over 20% alcohol is prohibited.⁵⁹ These products cannot be advertised in places where they are not allowed to be consumed.⁶⁰ Television advertisements are prohibited for prescription medicines and medical devices as well as medical treatments.⁶¹ Advertising for firearms are limited to firearm-related magazines.⁶²

Like the Constitution, many advertising laws provide special provisions and protections for children.⁶³ Children are defined as individuals under the age of 18.⁶⁴ Television advertising regulation provides a good example of strict regulations. Some regulations restrict the timing of advertisements. Spain’s Television Law allows advertising that may adversely affect childhood development only between the hours of 10 pm and 6 am, and implements fines for inappropriate advertising between 5-8 pm.⁶⁵ Children’s television shows lasting 30 minutes or less may not have advertisements.⁶⁶

In terms of content, ads for children “must be handled extremely carefully, i.e. they must not exploit the natural ingenuity, immaturity, inexperience or

[<https://perma.cc/3JDD-8P67>].

52. Gehard W. Volz, Felipe Bances Handschuh & Dora Poshtakova, *Advertising to Children in Spain*, 6 *YOUNG CONSUMERS*, 2005, at 71.

53. *Supra* note 51.

54. *Id.*

55. MEDINA, *supra* note 48.

56. *Id.*

57. *Id.*

58. *Id.*

59. Volz et al., *supra* note 52.

60. *Id.*

61. MEDINA, *supra* note 48.

62. Volz et al., *supra* note 52.

63. *Id.*

64. MEDINA, *supra* note 48.

65. Volz et al., *supra* note 52.

66. *Id.*

credulity of children or adolescents, nor may they take advantage of children's sense of loyalty, or contain declarations or visual presentations that might damage them mentally, morally or physically."⁶⁷ Further, advertisements featuring children must show them using age appropriate products that are safe, and not being used in unsafe situations without adult supervision.⁶⁸ In terms of implicit or explicit sponsorship, television actors or animated characters cannot provide products and services in their programs, use product placement in children's shows, or use children to promote a product or service.⁶⁹ Finally, there are also restrictions associated with certain products.⁷⁰ Children cannot be used in ads for alcohol nor can ads encourage consumption by minors.⁷¹ Over the counter medicines cannot be directed to children, other than toothpaste.⁷²

Protections for children extend to industry self-regulatory codes.⁷³ The handbook of the main self-regulatory body, Autocontrol,⁷⁴ provides special consideration for advertisements to children. Section E, "Protection of children and adolescents" reads as follows:

- Advertising messages addressed to children shall be extremely careful. They must not exploit the naivety, immaturing, inexperience or natural gullibility of children or adolescents, nor take advantage of their sense of loyalty.
- Advertising messages aimed at children or adolescents, or which are likely to influence them, must not contain statements or visual presentations which may harm them mentally, morally, or physically.
- Special care will be taken to ensure that advertisements do not mislead children as to the actual size, value, nature, lifespan or performance of the advertised product. If extra items (e.g. batteries) are required to use the product or to produce the results described or shown (e.g. paint) they must be explicitly pointed out. Advertisements must not overestimate the degree of skill or the age limit of the children in order to enjoy or use the products.⁷⁵

In contrast, the US self-regulatory equivalent private organization, the National Advertising Division, does not have specific codes of practice, and thus

67. Mercedes Medina & Soontae An, *Advertising self-regulation activity: A Comparison between Spain and US* (2012).

68. MEDINA, *supra* note 48.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Medina & An, *supra* note 67.

74. See section VII, *infra*, for further detailed discussion of Autocontrol and industry self-regulation.

75. Autocontrol, *Code of Advertising Practice*, <https://www.autocontrol.es/wp-content/uploads/2017/12/code-of-advertising-conduct-autocontrol.pdf> [<https://perma.cc/V4K7-TZNA>].

no special protection specified for children, and has generally avoided decisions about controversial issues.⁷⁶ It does, however, have a division, the Children's Advertising Review Unit CARU, that investigates media to advance truthfulness, accuracy and consistency with CARU's self-regulatory guidelines.⁷⁷

One example illustrating self-regulatory protections that gained a lot of attention in Spain is the case of a Nintendo advertisement.⁷⁸ The ad featured several individuals playing a racing video game while seated on a boat.⁷⁹ To prevent a female player from winning the race, another player lassos her and drags her from the boat into the water.⁸⁰ The Autocontrol jury ruled that the ad violated constitutional protections for the young and that children might misinterpret it as condoning violence.⁸¹

Additionally, in 2005, the Spanish Agency for Consumer Affairs, Food Safety and Nutrition an independent government agency within the Ministry of Health, in conjunction with dozens of food manufacturers, developed the Code of Self-Regulation of the Advertising of Food Products Directed at Minors, or *Publicidad, Actividad, Obesidad y Salud* (PAOS Code).⁸² The Code stipulates that celebrities can be used in advertisements only to promote healthy eating.⁸³ Advertisements cannot promote unhealthy eating or inactive and sedentary habits.⁸⁴ Autocontrol examines advanced copy of ads aimed at children under 12 years of age broadcasted during protected viewing time from 8am-9am and 5pm-8pm weekdays, and 9am-noon on weekends.⁸⁵ This code has come under criticism, however, for not regulating the nutritional content of advertised food and for low advertiser compliance.⁸⁶

76. Medina & An, *supra* note 67.

77. Advertising Self-Regulating Council, *About CARU*, <http://www.asrcreviews.org/about-caru/> (last visited March 12, 2018) [<https://perma.cc/Q5SS-A4EH>].

78. Volz et al., *supra* note 48.

79. *Id.*

80. *Id.*

81. *Id.*

82. World Health Organization, *Marketing of Food and Non-Alcoholic Beverages to Children*, <http://www.who.int/dietphysicalactivity/publications/Oslo%20meeting%20layout%2027%20NOVEMBER.pdf> (2006) [<https://perma.cc/NP7F-8UD9>].

83. *Id.*

84. *Id.*

85. Romero-Fernandez, Ma Mar, Miguel Angel Royo-Bordonada & Fernando Rodríguez-Artalejo. *Evaluation Of Food And Beverage Television Advertising During Children's Viewing Time In Spain Using The UK Nutrient Profile Model*, 16 (07) PUB. HEALTH NUTRITION 1314 (2010).

86. *Id.* See also Romero-Fernández, M Mar, Miguel Ángel Royo-Bordonada & Fernando Rodríguez-Artalejo. *Compliance With Self-Regulation Of Television Food And Beverage Advertising Aimed At Children In Spain*, 13 (7) PUB. HEALTH NUTRITION, 1013, 1013 (2010).

A. Advertising Self-Regulation in Spain

Similar to other countries, Spanish advertising regulation relies in part on industry self-regulation. Spain's self-regulatory organization began in 1977, but did not have much impact until it took a more active role after 1994 when it was renamed.⁸⁷ Its role expanded again in 2000 as it took on a larger number of regulatory areas, such as the internet.⁸⁸ At this time it was renamed the Association de Autocontrol del la Comunicacion Commercial, or the Spanish Self-Regulatory Association for Commercial Communications, commonly referred to as "Autocontrol".⁸⁹ Autocontrol is part of a larger network of advertising self-regulatory organizations in Europe and around the world, called the European Advertising Standards Alliance.⁹⁰

About 70 percent of the Spanish advertising market is currently a member of Autocontrol.⁹¹ Members agree to a variety of ethical standards, such as truth in advertising and to abide by advertising codes of the association and advertising law.⁹² In addition to various administrative wings, the primary governing body is the Advertising Jury, composed of 21 experts and academics.⁹³ The Jury hears complaints, which anyone can file, and makes decisions about whether to ban or alter advertisements.⁹⁴ Though the Jury has no binding authority to enforce compliance, few companies refuse to implement its decisions.⁹⁵ The number of cases the jury hears each year stayed relatively stable, but declined from 247 in 2000 to 147 in 2010.⁹⁶ This decline may be in part due to the dramatic rise in the use of Autocontrol's copy advice service, which provides advertisers advance feedback before airing an ad.⁹⁷ Advance copy service requests have increased dramatically from a few hundred requests in the late 1990s to over 8000 by 2010.⁹⁸

B. Cultural Values That Guide the Regulation of Advertising in Spain

What attitudes and values influence Spanish advertising law? First, Spanish citizens believe humans are vulnerable and in need of protection from the state to a larger degree than Americans. We can see this belief reflected in the following cross-country surveys.⁹⁹

87. MEDINA, *supra* note 48.

88. *Id.*

89. *Id.*

90. Medina & An, *supra* note 67.

91. MEDINA, *supra* note 48.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. The questions are taken from the Pew Research Center's Global Attitudes and Trends

| Success in life is pretty much determined by forces outside our control. (2014, 2007 for Sweden) ¹⁰⁰ | | | | | |
|---|------------------|--------------|-----------------|---------------------|------------|
| | Completely agree | Mostly agree | Mostly disagree | Completely disagree | DK/Refused |
| France | 17 | 33 | 26 | 24 | 0 |
| Spain | 15 | 36 | 36 | 11 | 2 |
| Sweden | 7 | 26 | 25 | 37 | 5 |
| United States | 11 | 29 | 36 | 21 | 3 |

| It is the responsibility of the state to take care of very poor people who can't take care of themselves. (2007) ¹⁰¹ | | | | | |
|---|------------------|--------------|-----------------|---------------------|------------|
| | Completely agree | Mostly agree | Mostly disagree | Completely disagree | DK/Refused |
| France | 49 | 34 | 14 | 3 | 0 |
| Spain | 53 | 43 | 3 | 0 | 1 |
| Sweden | 56 | 30 | 8 | 4 | 1 |
| United States | 28 | 42 | 17 | 11 | 3 |

| Most people can succeed if they are willing to work hard OR Hard work is no guarantee of success for most people. (2012) ¹⁰² | | | | |
|---|--|--|----------------------|------------|
| | Most people can succeed if they are willing to work hard | Hard work is no guarantee of success for most people | Neither/Both equally | Don't know |
| France | 46 | 54 | 0 | 0 |
| Spain | 56 | 43 | 1 | 1 |
| United States | 77 | 20 | 1 | 1 |

| Thinking about people in our country who do not have a job, in general would you say this is mostly their own fault or is it mostly because of forces outside their control? (2011) | | | |
|---|------------------------|--|------------|
| | Mostly their own fault | Mostly because of forces outside their control | Don't know |
| France | 12 | 88 | 0 |
| Spain | 6 | 91 | 3 |
| United States | 18 | 77 | 6 |

project, <http://www.pewglobal.org/question-search/>. Dates of the surveys are in parentheses after the question. Data from all countries in this article was included when available [<https://perma.cc/QU68-VJET>].

100. *Id.*

101. *Id.*

102. *Id.*

Spanish respondents reflect a greater tendency to believe that people's lives are influenced and determined by forces outside the control of individuals. Put differently, people are vulnerable to circumstance. This vulnerability is particularly recognized for children. As mentioned earlier, children are given special protection and rights in the Spanish constitution. This belief informs much of their legislation and industry self-regulatory codes. For example, the *Nintendo Autocontrol* decision mentioned above was informed in part by a belief in children's natural immaturity and naiveté. Protections in law and self-regulatory codes recognize that children are vulnerable to advertising in a variety of ways.¹⁰³ For example, regulations recognize children cannot distinguish brands from the general product (dolls from Barbie dolls) and that they have confidence in parents and other adults than can be exploited by advertisers.¹⁰⁴ Acknowledgement of these vulnerabilities results in the special protections for children outlined earlier.¹⁰⁵

This belief in children's vulnerability to persuasion and adults' vulnerability to external social forces likely informs a willingness to use the state to assist individuals. Spaniards are less hostile to state regulation of economic activity than Americans as well.¹⁰⁶ Overall, they are more comfortable with government assistance and protection, as the survey questions below suggest.¹⁰⁷

| Most people are better off in a free market economy, even though some people are rich and some are poor. (2014, 2007 for Sweden) ¹⁰⁸ | | | | | |
|---|------------------|--------------|-----------------|---------------------|------------|
| | Completely agree | Mostly agree | Mostly disagree | Completely disagree | DK/Refused |
| France | 16 | 44 | 22 | 17 | 1 |
| Spain | 11 | 34 | 38 | 13 | 3 |
| Sweden | 30 | 41 | 15 | 8 | 7 |
| United States | 24 | 46 | 19 | 6 | 5 |

103. Volz et al., *supra* note 52.

104. *Id.*

105. *Id.* Also, attitudes toward child vulnerability and the power Spanish citizens give the state to supersede private judgment, shows some consistency across policy domains. In child removal decisions, Spanish practitioners showed a greater willingness to remove children from a bad family life than N. Ireland, the Netherlands, and Israel. See Benbenishty, Rami, Bilha Davidson-Arad, Mónica López, John Devaney, Trevor Spratt, Carien Koopmans, Erik J Knorth, Cilia LM Witteman, Jorge F Del Valle, and David Hayes, *Decision Making In Child Protection: An International Comparative Study On Maltreatment Substantiation, Risk Assessment And Interventions Recommendations, And The Role Of Professionals' Child Welfare Attitudes*, 49 CHILD ABUSE & NEGLECT 63 (2015).

106. Pew Research Center's Global Attitudes and Trends project, *supra* note 99.

107. *Id.*

108. *Id.*

| The state controls too much of our daily lives. (2007) ¹⁰⁹ | | | | | |
|---|------------------|--------------|-----------------|---------------------|------------|
| | Completely agree | Mostly agree | Mostly disagree | Completely disagree | DK/Refused |
| France | 35 | 29 | 24 | 11 | 0 |
| Spain | 14 | 47 | 28 | 5 | 5 |
| Sweden | 23 | 38 | 18 | 17 | 4 |
| United States | 28 | 37 | 26 | 7 | 1 |

| What's more important in (survey country) society that everyone be free to pursue their life's goals without interference from the state or that the state play an active role in society so as to guarantee that nobody is in need? (2011) ¹¹⁰ | | | |
|--|---|--|------------|
| | Freedom to pursue life's goals without interference | State/government guarantees nobody in need | DK/Refused |
| France | 36 | 64 | 0 |
| Spain | 30 | 67 | 3 |
| United States | 58 | 35 | 7 |

Further, Spanish political culture is informed and influenced by its history as a monarchy, followed by an authoritarian regime in the middle 20th century, and an elite led transition to democracy.¹¹¹ While perhaps inuring citizens to state influence, it has also led to an “overwhelming passive” political culture.¹¹² The political culture is characterized by a low level of interest in, and importance placed on, politics. The political culture has also moved away from old left-right divisions mediated by political parties to more individualized and instrumental political interests and participation involving mobilization around particular issues.¹¹³ These cultural attitudes stand in contrast to the US, where the lack of a feudal past created a different political culture with more hostile attitudes toward the state compared to Western Europe.¹¹⁴

Lastly, Spanish advertising regulation is partially a product of international influence from both the European Union and international private industry organizations. For example, the industry self-regulatory codes adopted by Spanish food and beverage industry groups, and enforced by Autocontrol, embody the principles of the Confederation of the Food and Drink Industries of the EU and the International Chamber of Commerce.¹¹⁵ Such efforts have been

109. *Id.*

110. *Id.*

111. See JOSÉ M. MAGONE, *CONTEMPORARY SPANISH POLITICS* (Routledge, 2d ed. 2008).

112. *Id.* at 45.

113. *Id.*

114. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (Mariner Books, 2d ed. 1955).

115. Corinna Hawkes, 2007. *Marketing Food To Children: Changes in the Global Regulatory Environment 2004-2006*, World Health Organization <http://www.who.int/dietphysicalactivity/>

pushed by the World Health Organization's Global Strategy on Diet, Physical Activity and Health.¹¹⁶ As mentioned earlier, Autocontrol is part of a consortium of international advertising self-regulatory organizations.¹¹⁷ These efforts occurred in the context of a broader influence of the EU in Spain's public policy, where the EU has been instrumental in pushing the country toward more democratic public policies post authoritarianism.¹¹⁸

V. SWEDEN

Sweden represents a regulatory regime that is the farthest removed from what dominates such legislation in the United States. France, Spain, Sweden and the United States all voice recognition that the interests of a profit-seeking firm may differ in important ways from the interests of consumers. This divergence of interests is especially marked when firms market to the vulnerable. Any consumer who lacks the knowledge, time, and awareness necessary to protect him or herself in the marketplace will either be manipulated by marketing blandishments or receive assistance from some external source, more than likely the state. The heavy weight the United States attaches to self-help and personal responsibility push that country to minimize restrictions on business behavior.¹¹⁹

A. Regulations Governing Swedish Advertising and Advertising to Children

Advertising regulations in Sweden are found mainly in the Marketing Practices Act of 1970, most recently amended in 2008.¹²⁰ The Marketing Practices Act promotes fair marketing to businesses and consumers and creates ethical guidelines for doing so.¹²¹ To protect business and consumer interests, Section 5 of the Marketing Practices Act states that "all marketing shall be consistent with good marketing practices."¹²² The law vaguely defines "good marketing practices" as "generally accepted business practices and norms."¹²³ However the law does state that practices that do not adhere to "good marketing practices" will be considered unfair if they negatively impact the ability of the target to make sound decisions.¹²⁴ While the act regulates marketing in terms of

regulatory_environment_CHawkes07.pdf [https://perma.cc/99Z7-AV98].

116. *Id.*

117. MEDINA, *supra* note 48.

118. MAGONE, *supra* note 111.

119. Everett Carll Ladd, *The American Ideology: An Exploration Of The Origins, Meaning, And Role Of American Political Ideas* (Roper Center For Public Opinion Research 1994).

120. SFS (2008:486) Marknadsföringslagen [The Marketing Act].

121. *Id.* §1.

122. *Id.* §5.

123. *Id.* §3.

124. *Id.* §6; *see also* Prop. 2003/2004:161, 24, https://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/alkoholpolitiska-fragor_GR03161/html (briefly discussing the purpose of the Marketing Act in comparison to proposed rules on alcohol advertising) (This element of their law is extremely significant because it places the force of the law on the side of the consumer when

advertising, the act also regulates marketing in terms of how discount sales are conducted, the type of information listed in a product warranty, and how companies can offer sponsorships.¹²⁵

The Marketing Practices Act clearly attempts to safeguard consumer interests. For example, buyers' interests are protected by rules governing comparative advertising; businesses cannot refer to another firm's product in a way that fails to objectively refer to relevant and verifiable characteristics of the products.¹²⁶ Furthermore, any such advertising cannot discredit or disparage another business's reputation, products, or trademarks.¹²⁷ Nor can business use another business's reputation for its own gain.¹²⁸ The Marketing Act thus protects consumers from misinformation and bolsters their ability to make well-informed decisions.

Unlike France, which outlaws sexist advertising that goes against principles of human dignity,¹²⁹ Sweden does not regulate gender discrimination in advertising through legislation contained in the Marketing Act.¹³⁰ As a result, gender discriminatory advertising cases are not handled by the Market Court.¹³¹ That is not to say that Sweden does not favor gender equality; Sweden ranked fourth in the world in 2016 in terms of closing the gender gap¹³² and the current Swedish government considers itself the first feminist government in the world.¹³³

the seller attempts to mislead. This stance is quite different from conceptualizing the law as a neutral umpire calling balls and strikes where the batter and pitcher are assumed to be equally powerful and engaged in the activity of market exchange). [<https://perma.cc/6H24-TPER>]

125. *Supra* note 120, §2, §17, §22.

126. *Id.* §18.

127. *Id.*

128. *Id.*

129. Public International Law & Policy Group, Legal Memorandum, *Legal Frameworks Regarding Sexism in Advertising: Comparison of National Systems* (2015) ("The Law for the Real Equality between Women and Men" modifies the above Law on Freedom of Communication. Under Title 3 Chapter 3, the Law gives the CSA [High Authority for Audiovisual Media] competence to intervene in matters of women's rights violations. It empowers the CSA regarding the representation of women in audiovisual media, and to promote equality between men and women. The CSA monitors the broadcasting of gender-based stereotypes and degrading images of women. The CSA can also identify Internet images that are considered sexist.").

130. Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 104, 105 (2014).

131. *See id.* (according to Svensson, the Market Court ruled that an advertisement did not violate the Marketing Act because while it was sexually discriminatory, the advertisement did not mislead consumers).

132. World Economic Forum, *The Global Gender Gap Report 2016* 10 (2016) (the Global Gender Gap Report is an attempt by the World Economic Forum is a non-profit organization based in Geneva, Switzerland, to study the level gender based disparity by measuring gaps in between men and women in health, education, economy, and politics).

133. *A Feminist Government*, Government Offices of Sweden, <http://www.government.se/>

Indeed, Sweden does have anti-discrimination laws based on gender, but there are no rules or external acts that specifically apply to gender discrimination in advertising.¹³⁴

In addition to general advertising rules in the Marketing Practices Act, there are also distinct rules for certain products. The Alcohol Act of 2010, Tobacco Act of 1993, and the Medicinal Products Act of 2015 contain provisions regulating the advertising of their respective namesakes.¹³⁵ Swedish laws concerning the promotion of Alcohol are centered on a policy of “particular moderation,” the goal of which is to reduce the overall consumption of alcohol in Sweden.¹³⁶ The policy of “particular moderation” prohibits advertisements that target those under the age of twenty-five and even prohibits advertisements that encourage the use of alcohol.¹³⁷ Instead, alcohol marketing must merely provide the relevant information such as the name, price, and warning labels without arousing interest in drinking.¹³⁸ Alcohol advertising that could lead to behavior defined to be antisocial such as drinking at work, at a sporting event, or in traffic, are banned.¹³⁹

Alcohol advertisements are also completely banned from broadcast mediums such as television, and alcohol products that contain over 15% alcohol are completely prohibited from being advertised in any medium.¹⁴⁰ Tobacco smoking, like alcohol, is also seen as a health problem, and its promotion is likewise suppressed. Like the rules governing alcohol advertisements, tobacco

government-policy/a-feminist-government/ (the self-named feminist government has proposed fifteen policies, including the creation of a gender equality agency despite the existence of the Discrimination Ombudsman, a government agency that works to promote equal rights and opportunities) [<https://perma.cc/WRQ3-RGDB>].

134. World Economic Forum, *supra* note 132.

135. SFS (2010:1622) Alkohollag [The Alcohol Act]; SFS (1993:581) Tobakslag [The Tobacco Act]; SFS (2015:315) Läkemedelslag [The Medicinal Practices Act].

136. KOVFS 2015:1 *Konsumentverkets allmänna råd för marknadsföring av alkoholdryck till konsumenter*, Konsumentverkets Författningssamling (detailing how the policy of “particular moderation” in the Alcohol Act will be implemented); *see also* Thomas Karlsson & Esa Österberg, *Sweden*, 2, 18 (2002), <http://btg.ias.org.uk/pdfs/country-reports/sweden.pdf> [<https://perma.cc/T9UY-RDG6>] (Swedes may have consumed as much as 20 liters of hard liquor annually, leading to alcohol-related problems and eventually support for the temperance movement that steamrolled strict alcohol policies into place); *see also* Jonas Arberg & Sofie Lord, *Swedish Alcohol Policy – An Effective Policy?*, 8(2009) http://www.brewersofeurope.org/uploads/mycms-files/documents/archives/hui_2009_swedish_alcohol_policy_study.pdf [<https://perma.cc/G366-4YXE>]; *see also* SFS (2010:1622) Alkohollag Chapter 7.

137. KOVFS 2015:1 *Konsumentverkets allmänna råd för marknadsföring av alkoholdryck till konsumenter*, Konsumentverkets Författningssamling §2.

138. *Id.*

139. KOVFS 2015:1 *Konsumentverkets allmänna råd för marknadsföring av alkoholdryck till konsumenter*, Konsumentverkets Författningssamling §2.

140. SFS (2010:1622) Alkohollag, Chapter 7, §3; *See also* SECTION ABOUT SPAIN THIS SIGNAL IS SUBJECT TO CHANGE DEPENDING ON WHERE SPAIN SECTION IS PLACED IN RELATION TO SWEDEN SECTION (Spain’s threshold alcohol content is 20%).

advertisements may not encourage the use of the product.¹⁴¹ Tobacco advertising is more severely limited than alcohol as it cannot be advertised at all except inside the point of sale.¹⁴² Tobacco advertisements considered “invasive” or “outreaching” are illegal even inside a point of sale location.¹⁴³ The regulations concerning the promotion of tobacco go so far as to prevent businesses from branding cigarettes using a trademark associated with an unrelated product.¹⁴⁴

Advertising for prescription drugs also regulated. The Medicinal Products Act was recently amended in 2015 and incorporates language that restricts how firms can market drugs. Generally, all advertising must be consistent with fair practices as noted in the Marketing Practices Act.¹⁴⁵ There are several explicit rules in addition to adherence to the Marketing Practices Act: drugs may not be marketed towards children; a drug that is not authorized for sale in Sweden may not be marketed; and prescription drugs cannot be touted to the public.¹⁴⁶ In addition to prohibiting certain predatory tactics, the Medicinal Products Act also obligates drug companies to create advertisements that are not only factual, but balanced, in accordance with fair practices.¹⁴⁷

Finally, the Television and Radio Act of 1996, revised in 2010, contains provisions governing broadcasted promotions and advertisements. Sponsorships can promote only the reputation of a business and cannot contain a product.¹⁴⁸ The law also prohibits any form of political advertising, and heavily regulates advertising aimed at children.¹⁴⁹ No commercial marketing can be aimed at children younger than twelve years old and advertisements cannot be placed before or after a television broadcast directed towards children of that age range.¹⁵⁰ The Television and Radio Act even prevents individuals or characters

141. *Selling Tobacco* 23 (2010) (Swedish National Institute of Public Health pamphlet containing rules for those intending to sell tobacco in Sweden).

142. *Id.* at 9, 23.

143. *Id.*

144. SFS (1996:581) Tobakslag, §14.

145. SFS (2015:315) Läkemedelslag, chapter 12 §2; *see also* Helen Waxberg & Jenney Bergstrom, *Pharmaceutical Advertising 2016: Sweden*, International Comparative Legal Guides, Section 1.2 (discussing that in Sweden, a broad definition of “advertising” is used in the pharmaceutical industry such that they include the unsolicited dissemination of a non-promotional scientific article if it is about the company’s own drug).

146. SFS (2015:315) Läkemedelslag, chapter 12 §1.

147. SFS (2015:315) Läkemedelslag, chapter 12 §2.

148. SFS (2010:696) Radio- och tv-lag [Radio & TV Act], chapter 7.

149. *See* SFS (2010:696) Radio- och tv-lag, chapter 5 §6 (discussing political advertisements in broadcasts); *see also id.* at chapter 8 (discussing regulations concerning children); Lena Olsen, *Children and Advertising Some Perspectives on the Relevant Legal Arguments*, Stockholm Institute for Scandinavian Law, 439 (the author states that while there is no explicit rule concerning advertising directed at children in the Marketing act, case law has led to a prohibition of general advertising directed at children under the age of 16).

150. SFS (2010:696) Radio- och tv-lag, chapter 8 §7.

that play a major role in children's programs from appearing in advertisements.¹⁵¹

B. Advertising Self-Regulation in Sweden

Many countries such as the United States, the United Kingdom, France, and Spain administer advertising laws through self-regulating bodies.¹⁵² Sweden had such a body named the Council on Business Practice, a nationwide self-regulatory group formed by commercial organizations, until 1970 when the council was abolished and replaced by the Swedish Consumer Agency.¹⁵³ Currently, the Swedish Consumer Agency (KOV), headed by the Consumer Ombudsman, regulates advertising among other market matters.¹⁵⁴ These offices hear complaints and, if needed, file cases in the Market Court, a specialized court that hears cases related to marketing and consumer legislation.¹⁵⁵ In addition to judicial intervention, both the Consumer Ombudsman and the Swedish Consumer Agency conduct research and propose new regulations for the Swedish Parliament to consider.¹⁵⁶ The Consumer Ombudsman also provides guidelines

151. SFS (2010:696) Radio- och tv-lag, chapter 8 §8.

152. See Jean J. Boddewyn, *The Swedish Consumer Ombudsman System and Advertising Self-Regulation*, 19 J. CONSUMER AFFAIRS 140 (1985) (discussing the decline of advertising self-regulation in Sweden as the government Consumer Ombudsman system was developed).

153. *Id.*; cf. Franziska Weber, *The Law and Economics of Enforcing European Consumer Law: A Comparative Analysis of Package Travel and Misleading Advertising* 184 (2016) (although self-regulation has been replaced for the most part, the relationship between government regulatory agencies and Swedish businesses is not completely one directional with the regulatory agency dictating orders to businesses); see also Mary Alice Shaver, *Sweden*, in THE GLOBAL ADVERTISING REGULATION HANDBOOK (Mary Alice Shaver & Soontae An eds., 2014) (explaining that due to Sweden's culture of compromise and consensus, the Consumer Ombudsman tries to resolve complaints by communicating directly with a business, only going to court as a last resort); see also Boddewyn, *supra* note 152 (the Consumer Ombudsman also hears complaints from businesses).

154. *About the Ombudsman for Children in Sweden*, Barnombudsmannen, <https://www.barnombudsmannen.se/om-webbplatsen/english/> [<https://perma.cc/Y49D-ECVY>] (The Ombudsman for Children hear complaints on all matters related to children, presumably including in advertising).

155. Shaver, *supra* note 153, at 101; but see Erik Ullberg, *Sweden: New Swedish Court System And Powers To The Swedish Consumer Ombudsman*, GALA, Feb. 20, 2017, <http://www.mondaq.com/x/569946/Patent/New+Swedish+Court+System+And+Powers+To+The+Swedish+Consumer+Ombudsman%20/h> [<https://perma.cc/H9Z3-WWGL>] (As of September 1, 2016, the Swedish Market Court was replaced by the Patent and Market Court. The new court will be the court of first instance for cases that were previously fileable in general courts, general administrative courts, the Court of Patent Appeals, and the Market Court. One of the significant changes because of the new court is that while the Swedish Market Court had the first and last say on cases under the Market Practices Act that do not involve damages, the new system now has a Patent and Market Court of Appeals where a loser of an initial trial can hope for a better verdict.); Peter Rindforth, *Sweden: Practice Update*, 214 (2017).

156. Boddewyn, *supra* note 152, at 142-43, 145 (the office of the Consumer Ombudsman was

to business organizations about how to best adhere to current advertising law.¹⁵⁷ The Medical Products Agency (Lakemedelsverket, hereafter MPA) is another government organization that performs a role similar to the United States Food and Drug Administration. In addition to regulating drugs, the MPA also oversees the use of marketing in the medical industry.¹⁵⁸

Although the Council of Business Practices was dismantled and its functions taken over by government agencies in 1970, self-regulatory organizations still exist in Sweden. In 2009, the Association of Swedish Advertisers and the Confederation of Swedish Enterprise formed the Swedish Advertising Ombudsman (Reklamombudsmannen, hereafter RO), a self-regulatory organization.¹⁵⁹ Although the position is formally titled “ombudsman”, this organization is not related to a government agency and does not have the regulatory authority the Consumer Ombudsman does. The RO does accept complaints from consumers and only strongly suggests changes to advertisers who are seen as breaking the rules.¹⁶⁰

There are also industry specific organizations that regulate advertising within their domain such as the Swedish Alcohol Suppliers’ Scrutineer (Alkoholgranskningsmannen, AGM) which investigates breaches in the ethical rules of alcohol advertising and has the power to intervene when a business does not abide by them.¹⁶¹ Other organizations include the Research Based Pharmaceutical Industry (Läkemedelsindustrins Informationsgranskningsman,

merged with the National Board for Consumer Policies (KOV) in 1976. The ombudsman is on the council that governs the KOV but acts independently to file cases as a prosecutor in the Market Court).

157. *Id.* at 144.

158. *Scrutinizing Advertising*, <https://lakemedelsverket.se/english/overview/About-MPA/Activities/Medicines/Scrutinising-advertising/> [<https://perma.cc/C3XV-DZUD>]; RIR 2016:9 Safe and Effective Medicines—How Does Central Government Deal With the Influence of the Pharmaceutical Industry? 47, http://www.riksrevisionen.se/PageFiles/24574/RiR_2016_9_Safe_and_effective_medicines_webb.pdf [<https://perma.cc/C2ZF-B5VD>].

159. About RO, <http://reklamombudsmannen.org/eng> [<https://perma.cc/99UJ-J2UD>]; See also Franziska Weber, *The Law and Economics of Enforcing European Consumer Law: A Comparative Analysis of Package Travel and Misleading Advertising* 216 (2016); (the Association of Swedish Advertisers is made up of 600 Swedish organizations, including the top 20 advertising firms in Sweden that assesses complaints and rule whether guidelines created by the International Chamber of Commerce have been contravened. However, the association itself does not have the capacity to levy a fine or other punishment).

160. See Carlyle Farrell, *Global Marketing: Practical Insights and International Analysis* 274 (2015) (describing a case where the Advertising Ombudsman ruled that a charity calendar featuring flight attendants in lingerie produced by the Irish airline Ryanair was sexist. Ryanair spokesman Stephen McNamara responded, stating, “we will continue to support the right of our crew to take their clothes off to raise money for those who need it most”).

161. About AGM, <http://alkoholgranskningsmannen.se/en/about-agm/> [<https://perma.cc/M73J-JTVV>].

LIF),¹⁶² the Board of Direct Marketing (DM-Nämnden),¹⁶³ and the Ethics Council for Market Research (Etiska Rådet För Marknadsundersökningar, ERM).¹⁶⁴

C. Cultural Values and Other Sources that Influence Swedish Advertising Law

What attitudes and values guide Swedish advertising law? Perhaps most important to understanding Swedish jurisprudence is the idea that Swedes see the law as a man-made instrument for social change.¹⁶⁵ One reason for this belief may be the influence of Scandinavian Legal Realism, a positivist, anti-metaphysical philosophy that attempts to explain the law in terms of facts.¹⁶⁶ Founded by Axel Hägerström and further refined by Karl Olivecrona, Vilhelm Lundstedt, and Alf Ross in the early 20th century,¹⁶⁷ scholars generally credit Scandinavian Legal Realism with having a major impact on the Swedish legal and political system.¹⁶⁸

162. Helen Waxberg & Jenny Bergstrom, *Sweden: Pharmaceutical Advertising 2016*, ICLG, June 14, 2016, <https://iclg.com/practice-areas/pharmaceutical-advertising/pharmaceutical-advertising-2016/sweden> [<https://perma.cc/V53T-A5Y5>].

163. DM Committee, <http://dm-namnden.org/om-dm-namnden/> [<https://perma.cc/4WD4-5PLR>].

164. ERM, <http://www.etiskaradet-erm.se/om-erm/> [<https://perma.cc/99V5-4K4K>].

165. Ole Lando, *Nordic Countries, a Legal Family? A Diagnosis and Prognosis*, 1 GLOBAL JURIST ADVANCES 1, 8 (2001); Johanna Niemi-Kiesiläinen, *Comparing Finland and Sweden: The Structure of Legal Argument*, in NORDIC LAW – BETWEEN TRADITION AND DYNAMISM 89, 92 (Jaako Husa, Kimmo Nuotio, and Heikki Pihlajamäki eds., 2007); cf. Johannes Lindvall & Bo Rothstein, *Sweden: The Fall of the Strong State*, 29 SCANDINAVIAN POL. STUD. 47 (2006) (discussing that while Swedish politics assumed that social change could be attained by the state, this widely accepted ideology has decayed in the decades following 1980).

166. KARL OLIVECRONA, LAW AS FACT (1939); AXEL HÄGERSTRÖM, INQUIRIES INTO THE NATURE OF LAW AND MORALS (Karl Olivecrona trans., 1953).

167. Toni Malminen, *So You Thought Transplanting Law is Easy?*, in NORDIC LAW – BETWEEN TRADITION AND DYNAMISM 75, 77 (Jaako Husa, Kimmo Nuotio, and Heikki Pihlajamäki eds., 2007).

168. *Id.* at 82 (“Instead of religious and moral fundamentalism, political *status quo*, and legal conservatism, the legal realists sought to defend the instrumental nature of law and progressive social policy”); see also Ellen Margrethe Basse & Jørgen Dalberg-Larsen, *The Danish Legal System*, in LEGAL SYSTEMS AND WIND ENERGY: A COMPARATIVE PERSPECTIVE 61, 66 (Helle Tegner Anker, Birgitte Egelund Olsen, and Anita Rønne eds., 2008) (discussing how Alf Ross’s interpretation of legal positivism has influenced the Nordic countries of Norway, Sweden, and Denmark to become more pragmatic); Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 RATIO JURIS 1, 14 (2005) (suggesting that implications of the moral nihilism present in Scandinavian Legal Realism can lead lawyers to “behave as social engineers knowing how to operate the legal machinery while failing to address its merit or demerit in terms of the proper ends to be pursued by human beings as responsible persons and free agents”); but see Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1081 (1997) (implying that Scandinavian realism is a dead philosophy. “Unlike Scandinavian Realism, historicism, and numerous other legal theories surviving only in the museums of jurisprudential

One aspect of Scandinavian Realism is the rejection of moral absolutism and the notion of “rights.”¹⁶⁹ The rejection of “rights” creates an overarching conviction within the Scandinavian Realists that a right should not obstruct legal reform.¹⁷⁰ That Swedish Realism had an impact on political discourse in Sweden can be evidenced by the acceptance of its ideas by the Swedish Social Democratic Party, the single most successful political party in Sweden’s modern history.¹⁷¹ Lundstedt, who was also a Swedish Social Democratic Party legislator in parliament, and other prominent Swedish Social Democrats, used concepts found in Swedish Legal Realism to support their policies.¹⁷²

Of course, Swedish society was not one-sidedly transformed by a political party and a circle of intellectual elites; the success of the Social Democrats had as much to do with their clever incorporation of Swedish myths, ideals, and values.¹⁷³ Examining the Swedish ethos can elucidate an explanation of Sweden’s approach to policies, including advertising laws. For example, the Swedish legal system is known for its emphasis on pragmatism, compromise, and collective

archaeology, legal positivism is still with us”).

169. Geoffrey MacCormack, *Scandinavian Realism*, 11 JURIDICAL REV. 33, 34 (1970) (“Hägerström maintained that any attempt to find facts with which the rights duties of a modern legal system could be identified must end in failure. On the other hand people did talk about rights and duties as though they were real entities possessed of an objective existence. The only conclusion possible was that they meant by rights and duties, mysterious, supernatural powers and bonds”); see also Gregory S. Alexander, *Comparing the Two Legal Realisms--American and Scandinavian*, 50 AM. J. COMP. L. 131, 149-160 (2002) (discussing the critique of rights, including property, made by Hägerström, Lundstedt, and Olivecrona).

170. Toni Malminen, *So You Thought Transplanting Law is Easy?*, in NORDIC LAW – BETWEEN TRADITION AND DYNAMISM 75, 80 (Jaako Husa, Kimmo Nuotio, and Heikki Pihlajamäki eds., 2007).

171. BO ROTHSTEIN, *THE SOCIAL DEMOCRATIC STATE: THE SWEDISH MODEL AND THE BUREAUCRATIC PROBLEM OF SOCIAL REFORMS* 3 (1996).

172. See *id.* at 80, 81 (“Vilhelm Lundstedt, to take on example, defined rights as products of legal machinery. . . This analysis turned legal terminology upside down. Ownership was no longer an obstacle to, for instance, tax law reform or expropriation, because ownership is basically what the state says it is”); see also Björn Wittrock, *The Making of Sweden*, in NORDIC PATHS TO MODERNITY 89, 98-99 (Jóhann Páll Árnason & Björn Wittrock eds., 2012) (The impact the Scandinavian Legal Realists had on Social Democrats cannot be understated because of the supremacy of the party for most of modern Swedish history. “It is no exaggeration to say that the Swedish political scene has been dominated by social democracy for the past eighty-six years . . . Since at least the mid-1960s, the Social Democrats also enjoyed what might be termed a social hegemony in the sense that the party not only represented large parts of society, it also shaped a society in its own image and created a logic of needs and demands in terms of both employment and public consumption patterns that made it difficult for any political opposition to challenge its policies without alienating large sections of the population”).

173. Nina Witoszek, *Moral Community and the Crisis of the Enlightenment*, in CULTURE AND CRISIS: THE CASE OF GERMANY AND SWEDEN 48, 57 (Nina Witoszek & Lars Trägårdh eds., 2002).

decision making.¹⁷⁴ The Swedish Social Democrats crafted a new ideology, known as *folkhem* (the people's home), in the late 1920s to gain support and unite the country.¹⁷⁵ According to Nina Witoszek, associate professor at Oslo University and Fellow at Mansfield College, the *folkhem* narrative integrated Swedish enlightenment ideals of rationality and a scientific worldview, while also accepting values such as compromise, reconciliation, and adaptation.¹⁷⁶

Another clue to understanding the Swedish legal system lies in the high levels of social trust found in Sweden.¹⁷⁷ Sweden ranks among the highest in the Organization for Economic Cooperation and Development (OECD) in trusting public institutions such as the legal system, political system, and police force.¹⁷⁸ Social trust is positively correlated with better working democratic institutions, less crime, and less corruption.¹⁷⁹ Looking from the opposite perspective, preliminary findings by Bo Rothstein, a Swedish political scientist at Oxford, suggests that the quality of political institutions is causally related to levels of social trust in a country.¹⁸⁰ The claim seems to be true at face value as Sweden ranked third on the Economic Intelligence Unit's democracy index and the fourth least corrupt country by Transparency International.¹⁸¹ The backdrop of citizens confident in political institutions conjoined with a pragmatic democratic government that policies regulating advertising to children are enacted.

174. Basse & Dalberg-Larsen, *supra* note 168, at 66 ("An attempt to identify some of the important general characteristics of Scandinavian law would point to its pragmatic, practical and realistic conception of law"); Shaver, *supra* note 153, at 36.

175. Seppo Henttä, *The Origins of the Folkhem Ideology in Swedish Social Democracy*, 3 SCAND. J. HIST. 323 (1978).

176. Witoszek, *supra* note 173, at 58; *see also* Bo Stråth, *Nordic Modernity: Origins, Trajectories, Perspectives*, in *NORDIC PATHS TO MODERNITY* 25 (Jóhann Páll Árnason & Björn Wittrock eds., 2012) (discussing the development of the social-democratic breakthrough in the 1930s).

177. BO ROTHSTEIN, *SOCIAL TRAPS AND THE PROBLEM OF TRUST* 88 (Cambridge University Press, 2005) ("[W]e know that Sweden, together with the other Scandinavian countries, are the most high-trust societies").

178. OECD, *How's Life? 2015: Measuring Well-being* 126-28 (2015) (figures 3.13 & 3.14 showing high levels of interpersonal trust and trust in public institutions in Sweden, respectively).

179. *See* ROBERT PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (for a democracy to be successful, there needs to be a level of social trust); *see also* Sonja Zmerli & Ken Newton, *Social Trust and Attitudes Toward Democracy*, 72 PUB. OPINION Q. 706 (2008) (finding that there is a statistically significant association between generalized social trust, confidence in government institutions, and satisfaction with democracy); Christian Bjørnskov, *Social Capital, Political Competition, and Corruption* (Aarhus School of Business, Working Paper 03-13, 2003).

180. BO ROTHSTEIN, *THE QUALITY OF GOVERNMENT: CORRUPTION, SOCIAL TRUST, AND INEQUALITY IN INTERNATIONAL PERSPECTIVE* (University of Chicago Press, 2011).

181. Democracy Index 2016, <http://www.eiu.com/topic/democracy-index> [<https://perma.cc/AZ9T-FA54>]; Sweden Corruption Rank, <https://tradingeconomics.com/sweden/corruption-rank> [<https://perma.cc/64L9-FY2S>].

Swedes put an extreme emphasis on individualism and autonomy.¹⁸² According to Michael Funke, in his 2011 Uppsala University essay, consumer activists and established intellectuals in Sweden had already been debating the effects of advertising since the 1940s.¹⁸³ By the time the radical-left gained power in 1970, advertising had been severely criticized in the public sphere as increasing the price of products and more importantly, lacking relevant consumer information.¹⁸⁴ The Marketing Act can be seen as a reflection of the Swedish dedication to autonomy because it protects consumers' decision making abilities by banning misleading advertising.¹⁸⁵

Despite Sweden's radical commitment to individualism and autonomy, children are still seen as vulnerable and in need of protection in Sweden.¹⁸⁶

182. Henrik Berggren & Lars Trägårdh, *Social Trust and Radical Individualism: The Paradox at the Heart of Nordic Capitalism*, in *NORDIC WAY* 13, 14, 16 (2010). The apparent contradiction between extensive regulations and an emphasis on autonomy is best understood through an appreciation of the Nordic repugnance for the effects of ignoring the lottery of birth. When Nordic cultures use state action to move toward equal opportunity, they do so in a vigorous effort to create a level playing field so that the fruits of individualism are more fair. ANU PARTANEN, *THE NORDIC THEORY OF EVERYTHING* (2016).

183. Michael Funke, *Swedish Business and the Political Radicalism of the 1960s: The Case of Advertising*, in *AKTÖRER OCH MARKNADER I OMVANDLING: STUDIER I FÖRETAGANDETS HISTORIA TILLÄGNADE KERSTI ULLENHAG* 103 (Lars Fälting, Mats Larsson, Tom Peterson & Karin Ågren eds., 2011).

184. *See id.* at 97-98.

185. *Cf.* M. Neil Browne & Lauren Biksacky, *The Significance of the Distinction Between Children and Adults for Consumer Protection*, 25 *LOY. CONSUMER L. REV.* 185 (2013) (contrary to the United States where the fully autonomous adult is expected to independently find relevant consumer information, Sweden's idea of autonomy includes government involvement to level the information playing field); *see also* Berggren & Trägårdh, *supra* 182, at 21 ("The central axis around which the Nordic social contract is formed is the alliance between state and individual, what we call "statist individualism." Here an emphasis on individual autonomy coincides with a positive view of the state as an ally of not only weaker and more vulnerable citizens, but the citizenry at large. This is coupled with a negative view of unequal power relations between individuals in general and hierarchical institutions in particular, such as the traditional patriarchal family and demeaning charitable organizations in civil society"); *see also* Filip Wijkström, *Changing Focus or Changing Role? The Swedish Nonprofit Sector in the New Millennium*, in *STRATEGY MIX FOR NONPROFIT ORGANISATIONS* 15, 18-19 (Annette Zimmer & Christina Stecker eds., 2004) (discussing the Swedish disdain for charity services).

186. *See* Henrik Berggren & Lars Trägårdh, Pippi Longstocking, *The Autonomous Child and the Moral Logic of the Swedish Welfare State*, in *SWEDISH MODERNISM: ARCHITECTURE, CONSUMPTION AND THE WELFARE STATE* 10 (Helena Mattsson & Sven-Olov Wallenstein eds., 2010) (discussing the paradox of a strong state that values radical individualism that is at odds with an inherent value of youth in Sweden); *see also* Brian M. Young, Anne De Bruin and Lynne Eagle, *Attitudes of Parents Toward Advertising to Children in the UK, Sweden, and New Zealand*, 19 *J. MARKETING MGMT.* 475, 485 table 6 (2003) (shows that the majority of surveyed Swedes saw children as innocent; 64 saw children as innocent, 24 saw children as capable, and 11 were unsure);

Sweden was the first nation to forbid corporal punishment against children.¹⁸⁷ Sweden was also the first Western nation to ratify the United Nations Convention on the Rights of the Child (UNCRC).¹⁸⁸ Sweden's commitment to children is cemented by the fact that it is one of the largest core donors to the United Nations Children's Fund.¹⁸⁹ The preparatory legislative material for the original Radio and Television Act of 1996 include studies that endorse the view that children are especially vulnerable to manipulation from television advertising.¹⁹⁰

Lastly, Swedish advertising regulation is also a product of international

see also id. at 486 (“In Sweden, as contrasted with the UK, there is a greater tendency to view children as in need of protection from advertising, marketing, and commercial life in general”).

187. Joan E. Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effects*, in FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY 19-25 (1996); *see also* Jonas Freden, *First Ban on Smacking Children*, Sweden, Dec. 14, 2015, <https://sweden.se/society/smacking-banned-since-1979/> (quoting the professor of public health Staffan Janson discussing the bill that outlawed corporal punishment “When parliament voted on the issue in 1979, two-third of parents were already in favour of a legal injunction”).

188. *See* United Nations Treaty Collection Chapter IV: Human Rights, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (showing a list of countries that have ratified the UNCRC. Sweden is the 9th country to ratify the UNCRC, but it is the first Western country to do so. The United States has yet to ratify the treaty) [<https://perma.cc/W483-EMD7>]; *but see* LAURA CARLSON, THE FUNDAMENTALS OF SWEDISH LAW: A GUIDE FOR FOREIGN LAWYERS AND STUDENTS 213 (2012) (“Sweden has signed the United Nation's Convention on the Rights of the Child, but as not yet enacted it as legislation nor transformed it as required under dualism for it to become Swedish law. Thus [,] the Convention on the Rights of the Child is binding for Sweden as between signatory countries, but individuals cannot directly assert rights under it. This not to say that the UNCRC has not affected Swedish law”).

For context, the UNCRC is the “world's most comprehensive framework for the protection of children's rights” and the US, which has not signed it, is behind most other developed countries who have signed it on key child welfare indicators. Karen Attiah, *Why won't the U.S. ratify the U.N.'s child rights treaty?*, WASH. POST, Nov. 21, 2014, https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?utm_term=.8571c4bc2238 [<https://perma.cc/68Z3-RT8A>].

189. Stefan Löfven, *Children Come First*, Nov. 20, 2014, updated May 17, 2015, <http://www.government.se/opinion-pieces/2014/11/children-come-first---in-sweden-and-around-the-world/> [<https://perma.cc/W94F-XNTS>].

190. *See* KOVS 1994/95:8, *Children and Television Advertising: A Critical Study of International Research Concerning the Effects of TV-Commercials on Children* 3 (“The reason for the ban [of advertising directed at children in television programming] is not hard to understand. Children are children; they are trusting and naive. The techniques at the disposal of TV advertising carry considerable impact. The gripping sequences of images in TV commercials reach large numbers of children at the same time and so can create a stronger pressure to buy”); *see also* Nordic Council, *Consumer Protection Requirements for Television Advertising to Children and Youth: Conclusions from a Nordic Seminar* (David Fisher trans., 1989) (this report summarized the various proposals on advertising that were generated in regard to the legislated commercialization of Swedish TV in 1991).

influence such as the European Union, the United Nations, international private organizations like the International Chamber of Commerce (ICC), and even the administrative decisions of other countries. EU influence can be both helpful and detrimental to the strengthening of advertising regulations. For example, Section 4 of the Market Practices Act contains an annex to the European Parliament Directive 2005/29/EC. This directive was passed by the EU in an attempt to standardize the meaning of unfair business practices throughout its borders to prevent confusion.¹⁹¹ On the other hand, even though advertising directed at children is by law prohibited on Swedish television, such restrictions do not apply to satellite media channels, such as television programs broadcasted from the United Kingdom.¹⁹² Since the UK does not have laws concerning child-directed advertising as Sweden, Swedish children will be exposed to marketing in television when they watch UK broadcasts.¹⁹³

When it comes to the private advertising regulation, the Swedish Advertising Ombudsman takes its cue from the ICC much like the Spanish Autocontrol.¹⁹⁴ The Swedish Advertising Ombudsman is also part of the European Advertising Standards Alliance (EASA).¹⁹⁵ The EASA is a network of forty-one organizations that represent advertising standards from twenty-seven different countries.¹⁹⁶ These interconnected and wide spanning institutions devote resources to promoting not just high advertising standards, but also push for self-regulation over public regulation.¹⁹⁷

191. *Supra* Marknadsföringslagen at §4 (stating that definitions of what constitute misleading commercial practices are taken directly from Directive 2005/29/EC of the European Parliament and the Council); *see also* Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, §5 (“In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment... should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty”).

192. *See* HAMMAD AQIL & ASIM IQBAL, *THE DILEMMA OF CHILDREN’S ADVERTISEMENT ON TELEVISION IN SWEDEN* (2011) (discussing the effects of the “Television without Frontiers” Directive issued by the EU. The directive prevents countries from muzzling the television broadcasts emitted from other countries).

193. *Id.* at 40 (The authors provide statistics that show that satellite channels are watched more than Swedish public channels.).

194. *Supra* note 132; *see also supra*, section VI.

195. *About EASA: Europe*, <http://www.easa-alliance.org/members/europe> (list of EASA members) [<https://perma.cc/5CHV-36S2>].

196. *Id.*

197. *About EASA: What We Do*, <http://www.easa-alliance.org/about-easa/what-we-do> [<https://perma.cc/3AHC-L6PW>].

VI. COMPARING THE EUROPEAN EXPERIENCE WITH REGULATING ADVERTISING
TO CHILDREN WITH THAT OF THE UNITED STATES

The regulation of advertising to children in the United States is starkly different from that in France, Spain and Sweden. In the United States, the governmental bodies with the greatest potential to regulate advertising directed toward children are the Federal Communications Commission (“FCC”) and the Federal Trade Commission (“FTC”). Unfortunately, despite a longstanding awareness on the part of these agencies of the dangers of advertising to children,¹⁹⁸ the history of advertising regulations demonstrates a reluctance on the part of both of these agencies to aggressively regulate such advertising.¹⁹⁹

The power of the FCC to regulate comes from the Communications Act of 1934, which requires that television be regulated for the “public convenience, interest, or necessity.”²⁰⁰ Congress further directed the FCC to regulate advertising to children with the passage of the Children’s Television Act of 1990,²⁰¹ which (1) mandates that the FCC establish standards for broadcasters regarding the amount of children’s television programming aired and (2) requires broadcasters to limit the amount of commercial time aired during children’s television programs to 10.5 minutes per hour or less on weekends and 12 minutes per hour or less on weekdays.²⁰² Despite how strong this mandate sounds, however, in 1996, the FCC Task Force found that the passage of this act had led to very few changes in regulation of advertising directed toward children.²⁰³

In the 1980s, under pressure from consumer action groups, such as Action for Children’s Television (“ACT”), the FCC had begun to investigate advertising to children. However, in its subsequent report, the FCC stated that there was “no basis in the record to apply a national mandatory quota for children’s programming.”²⁰⁴

ACT subsequently decided to challenge the FCC’s position in the case of

198. Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 80-81 (2006) (noting that by 1977, the FTC knew that children saw at least 20,000 commercial television ads a year, and that the children could not distinguish between commercials and programs).

199. Gaylord A. Jentz, *Federal Regulation of Advertising: False Representations of Composition, Character, or Source and Deceptive Television Demonstrations*, 6 AM. BUS. L.J. 409, 411 (1968) (explaining the importance of caveat emptor in influencing US law.).

200. 47 U.S.C. § 307(a)

201. Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified as amended in scattered sections of 47 U.S.C.).

202. 47 U.S.C. §§303a(a)-(b) (2006).

203. See Federal Communications Commission, *Policies and Rules Concerning Children’s Television Programming*, FCC 96-335 (1996), available at http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96335.htm.

204. Children’s Television Programming & Advertising Practices, 96 F.C.C.2d 634, 656 (1984).

Action for Children's Television v. FCC ("ACT I").²⁰⁵ The court decided to uphold the FCC's decision to deregulate children's television, effectively eliminating any enforceable regulations on advertising to children.²⁰⁶ ACT again filed suit in 1987, challenging the deregulation decision of 1984.²⁰⁷ *Action for Children's Television v. FCC* ("ACT II") reversed the FCC's earlier decision finding market forces effectively regulated children's television.²⁰⁸ The ultimate result of this litigation, however, was the largely ineffective Children's Television Act of 1990,²⁰⁹ described above, thereby effectively leaving regulation of children's advertising to the FTC.

The authority of the FTC to regulate advertising directed at children comes from Section 5 of the FTC Act, which broadly prohibits unfair or deceptive acts or practices in commerce.²¹⁰ When an advertisement is targeted to a specific audience, the FTC determines the effect the advertisement has on a reasonable member of that group.²¹¹ Therefore, when it comes to advertising directed toward children, the FTC has the power to regulate advertising misleading to the average child. The agency can both investigate and prosecute individual cases of misleading advertisements, and engage in rulemaking to pass specific rules directing advertisers to comply with certain standards when they are advertising to children.²¹²

Unfortunately, the agency has relied on the former approach, which is insufficient in that it is reactive rather than proactive. The FTC has investigated and successfully prosecuted cases of deceptive claims in toy advertisements. For example, a case against Hasbro for using commercials and packaging that

205. *Action for Children's Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

206. *Id.* at 901 (upholding the FCC's decision to deregulate children's television including lifting the limitations on advertising). The court held that the FCC was "within the broad scope of its discretion and was adequately explained by the 1984 Order." *Id.*

207. *Action for Children's Television v. FCC*, 821 F.2d 741, 744 (D.C. Cir. 1987).

208. *Id.* at 745-50 (examining almost all of the relevant arguments present in the debate). Finding that children do deserve a special protection, the court stated: "In sum, we find that the Commission has failed to explain adequately the elimination of its long-standing children's television commercialization guidelines, and we therefore remand to the Commission for elaboration on that issue." *Id.* at 750.

209. *See* § 101, 104 Stat. at 996. Congress saw the bill as balancing the financial needs of children's television stations with necessary safeguards to protect children as it provides that "the financial support of advertisers assists in the provision of programming to children," and that "special safeguards are appropriate to protect children from over-commercialization on television." *Id.*

210. *See generally* 15 U.S.C. § 45 (2000).

211. *See In re Cliffdale Ass'n, Inc.*, 103 F.T.C. 110, 177 (1984) ("When representations . . . are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group.").

212. 15 U.S.C.S. § 45(a)(1) (empowering the Commission to prevent use of "deceptive acts . . . in or affecting commerce").

materially altered toys to advertise exaggerated features²¹³ and a case against General Mills Fun Group, Inc. for misleading advertisements that implied children could control the speed and direction of the toy after launch when they could not.²¹⁴

Despite successful cases prosecuting firms for misleading advertising toward children and the support of interest groups such as ACT, the Center for Science in the Public Interest, the Consumers Union of America, and the Committee on Children's Television, the FTC has been unable to adopt a comprehensive set of regulations directed toward advertising to children. The first attempt at such regulation occurred during the early 1970s,²¹⁵ but was met with significant public and political opposition, so the proposed rules were withdrawn.²¹⁶ This failure seemed to leave a bad taste in the mouths of the FTC commissioners, and since that withdrawal, no comprehensive set of regulations has been proposed. The current attitude toward FTC regulation of advertising to children may best be reflected by a statement by former Commissioner J. Howard Beales III that the FTC "will tread very carefully when responding to calls to restrict truthful advertising to children."²¹⁷

As this article has demonstrated, other nations have benefitted from self-regulation, attempts by the United States to self-regulate have failed. A good example of that failure is the Children's Food and Beverage Advertising Initiative (CFBAI), a self-regulatory program instituted in 2007. According to a study done by the Rudd Center for Food Policy & Obesity at the University of Connecticut,²¹⁸ from 2008 to 2011, advertising for candy brands from companies

213. *In re Hasbro, Inc.*, 116 F.T.C. 657 (1993).

214. *In re Gen. Mills Fun Group, Inc.*, 93 F.T.C. 749 (1979).

215. At that time the FTC proposed a comprehensive set of restrictions that included: (a) Ban all television advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising; (b) banning televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which poses the most serious dental health risks; and (c) Requiring televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences [*80] composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers. FTC, Children's Advertising, 43 Fed. Reg. 17,967 (proposed Apr. 27, 1978).

216. FTC Children's Advertising, 46 Fed. Reg. 48710, 48713 (rulemaking proceeding terminated Oct. 2, 1981).

217. See J. Howard Beales III, Remarks at the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection: Competition, Advertising, and Health Claims: Legal and Practical Limits on Advertising Regulation (Mar. 2, 2004), at 14, <http://www.ftc.gov/speeches/beales/040312childads.pdf> [<https://perma.cc/FF2P-P7K7>].

218. See Daniel P. Jones, *Empty Promises: Kids' Exposure to TV Ads for Candy*, UCONN TODAY (Sept. 11, 2015), <https://today.uconn.edu/2015/09/empty-promises-kids-exposure-to-tv-ads-for-candy/> [<https://perma.cc/NL32-5RTM>].

that had pledged not to advertise candy to children,²¹⁹ increased 152 percent (rising from 125 to 315 ads viewed).²²⁰

The United States' current approach to self-regulation is primarily through CARU,²²¹ a program established in 1974 and administered by the Better Business Bureau and funded by members of the children's advertising industry to "set high standards for the industry to assure that advertising directed to children is not deceptive, unfair or inappropriate for its intended audience."²²² CARU "monitors and reviews advertising directed to children, initiates and receives complaints about advertising practices, and determines whether such practices violate the program's standards. When it finds violations, it seeks changes through the voluntary cooperation of advertisers and Website operators."²²³ Participation in CARU's review process is completely voluntary, and even if a recommendation is made for a change in an advertising, such a recommendation is merely a recommendation, and is not considered any kind of definitive ruling that a law

219. *Id.* These brands included Hershey, Mars, Nestle, and Kraft, all of which had pledged not to directly advertise to children. *Id.*

220. Overall, during that same time period, children's exposure to candy ads on television increased by 74%, meaning that companies participating in the program actually increased their advertising more than those not participating. *Id.*

221. ASRC, *About Caru*, <http://www.asrcreviews.org/about-caru/> [https://perma.cc/N2KN-V8NW].

222. Children's Advertising Review Unit, *Self-Regulatory Program for Children's Advertising*, available at <http://www.caru.org/guidelines/guidelines.pdf> (last accessed July 31, 2017) [https://perma.cc/Z8VC-QJ7T].

223. *Id.* The core principles established by CARU are: "The following Core Principles apply to all practices covered by the self-regulatory program. 1. Advertisers have special responsibilities when advertising to children or collecting data from children online. They should take into account the limited knowledge, experience, sophistication and maturity of the audience to which the message is directed. They should recognize that younger children have a limited capacity to evaluate the credibility of information, may not understand the persuasive intent of advertising, and may not even understand that they are being subject to advertising. 2. Advertising should be neither deceptive nor unfair, as these terms are applied under the Federal Trade Commission Act, to the children to whom it is directed. 3. Advertisers should have adequate substantiation for objective advertising claims, as those claims are reasonably interpreted by the children to whom they are directed. 4. Advertising should not stimulate children's unreasonable expectations about product quality or performance. 5. Products and content inappropriate for children should not be advertised directly to them. 6. Advertisers should avoid social stereotyping and appeals to prejudice, and are encouraged to incorporate minority and other groups in advertisements and to present positive role models whenever possible. 7. Advertisers are encouraged to capitalize on the potential of advertising to serve an educational role and influence positive personal qualities and behaviors in children, e.g., being honest and respectful of others, taking safety precautions, engaging in physical activity. 8. Although there are many influences that affect a child's personal and social development, it remains the prime responsibility of the parents to provide guidance for children. Advertisers should contribute to this parent-child relationship in a constructive manner." *Id.*

has been violated.²²⁴

As explained above, the standards established by CARU are very broad, directing that advertisements not be deceptive, unfair, or misleading, which sounds very good. However, such broad standards may be more difficult to apply. Perhaps one thing we can learn from Spain's experience is the value of having very specific standards in self-regulatory codes. For example, as noted in Section VI, one provision of Spain's self-regulatory code provides "Special care will be taken to ensure that advertisements do not mislead children as to true size, value, nature, durability or performance of the advertised product. Extra items (for example, batteries) are required to use the product or to produce the results described or shown (for example, paint) shall be explicitly pointed out. Advertisements shall not overestimate the degree of skill or the age limit of the children in order to enjoy or use the products."²²⁵ These very specific standards make it easier for self-regulatory bodies to determine whether the codes have been violated.

Much of the advertising directed towards children in the United States is harmful to children because it encourages them to make purchases that not only harm children but are also harmful to adults, so one lesson we might learn from the French is to recognize that certain categories of advertisements are harmful enough that they should be regulated more stringently. In that way we are protecting children and at the same time also protecting adults, who in some cases may be as vulnerable as children.²²⁶ Notably, these areas of advertising include ads for foods that are unhealthy and advertisements for tobacco and alcohol.²²⁷ Perhaps we should follow that French and stringently regulate advertising these products, thereby providing greater protection for our children.

VII. CONCLUSION

A key reason for the reluctance of the United States to join of France, Spain and Sweden in protecting children from deceptive advertising resides in differences between the values and beliefs about the role of government held by the citizens of the United States and those of the other three nations. These differences in turn stem from a core belief that individuals should largely be responsible for their own health and consumption decisions. However, as this article demonstrates, citizens of France, Spain and Sweden all place a high value on protecting the vulnerable.²²⁸

224. *The Advertising Industry's Process of Voluntary Self-Regulation*, <http://www.asrcreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Effective-2-1-16.pdf> [<https://perma.cc/QU5B-DA9M>].

225. *See supra* note 64 and accompanying text.

226. *See generally* Browne & Biksacky, *supra* note 185.

227. *See supra* notes 15-20 and accompanying text for an explanation of how France regulates these categories of products.

228. *See* World Values Survey Wave 6: Aims of Country: Top Choice. Interviewees were asked to rank four goals a country should try to attain from most to least important.

While at least half of French and Spanish citizens believe, according to the World Values Survey, that success in life is outside an individual's control, the majority of Swedish citizens either completely or mostly disagreed.²²⁹ Despite their relative willingness to regulate business in the public interest, Swedish values were similar to French and Spanish values in that the majority of citizens in all three countries agreed that the government should provide for those who lacked the ability to do so.²³⁰ These surveys indicate the tendency to believe that for citizens to activate autonomy, the state needs to protect the vulnerable so as to address the unequal opportunities resulting from the lottery of birth.

Despite the United States' differences from the other three countries, in one of survey statements discussed in Section IV-C, "It is the responsibility of the state to take care of the very poor people who cannot take care of themselves," 70% of Americans surveyed either strongly agreed or agreed, thereby indicating a willingness to protect the most vulnerable.²³¹ Therefore, it may be possible to get Americans to enact more protections for children if they can somehow become more aware of children's vulnerability to advertisers.

229. *Supra* note 83.

230. *Id.*; see also World Values Survey Wave 6: Democracy: People Receive State Aid for Unemployment (Wave 5 2005-2009 for France) (Most Swedes thought that unemployment welfare was an essential characteristic of democracy. The unemployed are one category of the vulnerable); see also World Values Survey Wave 6: Confidence in the Government (in Your Nation's Capital) (The majority of Swedes expressed confidence in their government while a majority of Spanish and Americans expressed the opposite sentiment).

231. *Supra* note 83.