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Alcohol advertising in Sweden, UK  
and EU  
-a comparative study

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# Summary

We are exposed to advertising on a daily basis. Advertising attracts, influences and encourages us to purchase the advertised product. Alcohol advertising is a special area of advertising that has been subject to much debate. Numerous studies have been done showing the link between alcohol advertising and the consumption of alcohol. Since alcohol advertising can encourage alcohol consumption there are different opinions on alcohol advertising and its appropriateness. There are even those that are demanding a total ban on alcohol advertising, in all types of mediums.

The advertising of alcoholic beverages is not a harmonised area on EU level. There are many different policies regarding alcohol across Europe in the different Member States. There are no bans on alcohol advertising in EU law. Whether to allow alcohol advertising or not is therefore mainly the concern of the individual Member State which has the main responsibility for national alcohol policy. The ECJ has concluded that national alcohol advertising bans or restriction can have an effect equivalent to a quantitative restriction, because they can restrict the marketing of certain imported alcoholic products. But such restrictions may be justified because of public health concerns if the measures taken in the Member States are not disproportionate. Because of this the ECJ has permitted alcohol advertising bans and national restrictions based on public health concerns. In the Swedish well-known case, the Gourmet case, the Swedish alcohol advertising ban in periodicals was found to be disproportionate, the ban was not effective to the aim sought. This led to a legislative change and there is now uncertainty about the legal situation in the country.

On the area of advertising, alcohol advertising in particular, the UK has adopted a self-regulatory system. The advertising rules are created and monitored by self-regulatory bodies. UK is the only European country with no alcohol advertising bans at all. There are no volume restrictions either. The content of the advertisement is regulated by the self-regulatory codes, the CAP Code and the BCAP Code. The rules have been accused of not being strict enough. There is even a trend in Sweden where Swedish programme companies are establishing themselves in the UK in order to fall under the jurisdiction of the UK self-regulatory rules. Sweden on the other hand has been accused of having rules on advertising, alcohol advertising in particular, that are too strict. This has encouraged programme companies to move abroad. Here we have two completely different systems, one self-regulatory and one statutory. The reason why the rules on the area of alcohol advertising differ so much is because Sweden and the UK have two completely different alcohol policies, which reflects on all other aspects of the handling of alcoholic beverages in the society.

# Sammanfattning

Vi är utsatta för reklam för olika produkter dagligen. Reklamen lockar, den påverkar och uppmuntar oss att införskaffa den marknadsförda produkten. Ett speciellt område är reklamen av alkoholhaltiga drycker, vilket varit föremål för stor debatt i samhället. Det har utförts ett antal studier som visar på sambandet mellan alkoholreklam och alkoholkonsumtion. Då alkoholreklamen kan uppmuntra till konsumtion finns det olika åsikter om alkoholreklam och dess lämplighet. På grund av detta har ett totalförbud mot alkoholreklam påkallats från olika håll i alla medier.

Alkoholreklam är ej ett harmoniserat område på EU-nivå. I de olika medlemsstaterna förkommer därför olika alkoholpolitik. Det finns inget förbud mot alkoholreklam i EU-rätten. Att tillåta alkoholreklam eller ej är en fråga som medlemsstaterna själva får reglera. Medlemsstaterna har huvudansvaret för den nationella alkoholpolitiken. Reklamförbud för alkoholhaltiga drycker eller andra sådana restriktioner kan enligt EU-domstolen anses utgöra ett hinder mellan medlemsstaterna eftersom det kan påverka avsetningen av varor från andra medlemsstater. Ett sådant hinder kan emellertid vara motiverat med hänsyn till skyddet av folkhälsan. Åtgärden skall även stå i proportion till det eftersträvade målet. EU-domstolen har följaktligen prövat frågan om ett medlemsland kan införa förbud mot alkoholreklam och liknande nationella restriktioner. Domstolen har kommit fram till att medlemsstaterna själva kan besluta hur långtgående skyddet av folkhälsan skall vara och hur det skall säkerställas. Medlemsstaterna måste dock iaktta proportionalitetsprincipen. I det mycket uppmärksammade svenska Gourmet-målet prövades förbudet mot alkoholreklam i kommersiella annonser i tidningar. Förbudet ansågs vara föga effektivt i förhållande till sitt syfte och därför betecknades det som alltför långtgående och därmed oproportionerligt. Detta ledde till ändringar i alkohollagen. Målet har även resulterat i osäkerhet kring vad som egentligen gäller på området.

I England reglerar man reklam, och särskilt alkoholreklam, genom självreglering. Alkoholreklamsreglerna skapas och övervakas av olika självregleringsorgan. England är det enda europeiska land som ej har några reklamförbud för alkoholhaltiga drycker och det finns heller inga volymrestriktioner angående hur mycket alkoholreklam som får visas i medierna. Regler om alkoholreklams innehåll återfinns i CAP Code och BCAP Code som tagits fram av de ansvariga självregleringsorganen. De engelska reglerna för alkoholreklam har kritiserats med motiveringen att de ej är tillräckligt strika och effektiva. I Sverige förekommer det en trend där svenska kanaler som TV3 och Kanal5 etablerar sig i England så att de faller under självregleringsreglernas jurisdiktion. De svenska reglerna å andra sidan, för reklam och särskilt alkoholreklam kritiserats för att vara för hårda. Detta har lett till att kanaler flyttar utomlands där reglerna ej är så strika där de får större utrymme att annonsera hur de önskar. På detta område kan vi se

att Sverige och England har två helt olika system vad gäller alkoholreklamsregleringen. England har självreglering medan Sverige har lagstiftning. Anledningen till varför reglerna för alkoholreklam skiljer sig åt så mycket är för att de olika länderna för helt olika alkoholpolitik. Detta påverkar i sin tur all annan reglering av alkohol i samhället, som t ex reglerna kring alkoholreklam.

# Abbreviations

ASA	Advertising Standards Authority
AGM	Alcohol Suppliers' Scrutineer
AMS	Audiovisual Media Services
BCAP	Broadcast Committee of Advertising Practice
BCAP Code	Television Advertising Standards Code
BMA	British Medical Association
CAP	Committee of Advertising Practice
CAP Code	British Code of Advertising, Sales Promotion and Direct Marketing
EASA	European Advertising Standards Alliance
ECJ	European Court of Justice
ELSA	Enforcement of national Laws and Self-regulation on advertising and marketing of Alcohol
EU	European Union
FHI	Statens folkhälsoinstitut
ICAP	International Center for Alcohol Policies
ICC	International Chamber of Commerce
NCC	National Consumer Council
Prop	Proposition (bill)
SEK	Swedish krona
SOU	Statens offentliga utredningar
TWF	Television Without Frontiers
UK	United Kingdom
WHO	World Health Organisation



# 1 Introduction

## 1.1 Background and purpose

Different countries apply different policies concerning alcohol. Some apply strict rules while others tend to be more liberal. This can depend on a number of reasons, inter alia, because of differences in culture, because of the wish to protect the minors or because of the public health in general.

The policy concerning alcohol that a country applies reflects upon the rules on advertising of alcohol in that country. Those with a strict policy will have stringent rules concerning the advertising and those with not as strict policy will have less stringent rules. Two examples are Sweden, where alcohol advertising is subject to many restrictions and the UK, where the rules are self-regulatory. EU has affected the different policies on alcohol in the Member States since they have to comply with the general principles of EU law. Swedish legislation prohibiting alcohol advertising in periodicals had to be changed in order to be compliant with EU principles. EU law enables Swedish programme companies to evade the strict domestic rules. The UK has chosen to regulate the advertising of alcoholic beverages completely by self-regulation but the efficiency of these self-regulatory rules is being questioned by organisations and even parliamentary committees.

The purpose of this essay is to examine the alcohol advertising rules in the UK and in Sweden. Considering that both countries are members of the European Union it is essential to examine the EU rules on this area and the impact that the rules have on the Member States. In order to understand the alcohol advertising rules in each country the alcohol policies, that are a foundation to the rules, need to be explored. The purpose is also to compare the two different systems and analyse which one is to be preferred, the self-regulatory or the statutory. The essay is not strictly juridical since the effects of alcohol advertising on people's behaviour are also examined and discussed.

The idea to write about this subject developed during my exchange studies in the UK, at the University of Westminster in London. During the module Entertainment Law we discussed the alcohol advertising and its rules in the UK. The difference between the UK rules and the Swedish rules struck me. It is interesting that the two states that are similar to each other in other areas and aspects, both being modern western states, but in this area the difference is palpable.

## 1.2 Method and Material

The method in this essay is a comparative legal method. It is a study of the UK, the Swedish and also the EU alcohol advertising rules. The method is to analyse each system in order to establish their weaknesses and problematic areas. The impact of alcohol advertising on people's behaviour is also examined in the essay.

In the examination of the Swedish system the material that was used consists of preparatory legislative materials, legislation, case law and articles. In the examination of the UK system the rules created by the different self-regulatory bodies were used and also these bodies' publications, reports and information on their webpages. The material consists of legal doctrine, articles and official and governmental reports as well. I gathered material during a visit to London after my exchange studies. In the examination of the EU rules the material that was used consists of the EC Treaty, Directives, Recommendations, other publications and ECJ case law. Besides examining the national rules and the EU rules, it is imperative to examine and explain the system of self-regulation since it is a significant part of the UK rules. The material that was used consists of reports from European projects, reports from national and European organisations and information on their webpages. The impact of alcohol advertising on people's behaviour is also discussed in the essay and for this part various studies, which show the impact of alcohol advertising on the alcohol consumption, were examined.

## 1.3 Delimitations and Disposition

The aim of this essay is to examine the alcohol advertising rules in the UK, in Sweden and in the EU. Particular rules about what is permitted in the content an alcohol advertisement will be closely presented. I will be focusing at the traditional advertising mediums, that is television, magazines and newspapers. That means that new media, such as the Internet and texting, even though it is a current issue, will not be examined. Neither will sponsorship, where alcohol advertising is very common. Self-regulation as an alternative to statutory regulation will be examined but the discussion has been limited to self-regulation in the area of alcohol advertising. The reason why I chose to examine Swedish legislation and UK self-regulation is because they are in big contrast to each other on the same area.

*Chapter 1* of the essay is an introduction to the subject. The background, purpose, method and material used is described. *Chapter 2* describes the role of advertising in the society in general, the importance of it and different mediums that might be utilised. Furthermore, the impact of alcohol advertising on people's lives will be analysed. *Chapter 3* explains the system of self-regulation in general. The advantages of a self-regulatory system in the area of alcohol advertising are discussed as well as the

efficiency of such a system. In addition to this a European project is presented with statistics on how alcohol advertising is regulated across Europe, by self-regulation, statutory legislation or both. *Chapter 4* explains EU law on alcohol advertising by referring to relevant Directives. The non-harmonised alcohol policy is described and relevant ECJ case law is discussed. *Chapter 5* examines the UK system by describing the UK alcohol policy, the self-regulatory bodies and their tasks and this part of the essay also presents the specific alcohol advertising rules and how advertisements are allowed to be designed, both in the broadcast and non-broadcast media. The compliance of these rules and whether the self-regulation is effective is also discussed. *Chapter 6* examines the Swedish system by describing the alcohol policy in the country and the impact of the EU membership. Furthermore, rules on alcohol advertising in the relevant laws are described and also the Swedish self-regulation regarding alcohol advertising. Finally, *Chapter 7* provides an analysis of the presented material, but analysis and discussion takes place during the course of the essay as well.

# 2 Advertising

## 2.1 The power of advertising

Advertising attracts and influences people. It is through advertising that producers, distributors and retail dealers reach people with information, making us aware of new products. We are exposed to advertising on a daily basis, when we watch television, listen to the radio, read a newspaper or magazine and even when we are just walking down the street, by billboards, flyers and so on. For most of us, it is impossible to evade the numerous messages that we are exposed to through advertising. This is a enormous force in the society. Since advertising encourages competition and stimulates growth and innovation, it plays an essential part in the economy.<sup>1</sup> The advertising industry often uses the expression that "Advertising is persuasion and persuasion is an art. Therefore advertising is the art of persuasion".<sup>2</sup>

The objectives of this essay is advertising of alcoholic beverages. This is a special area of advertising since it deals with a special type of product that differs from others. Since advertising can encourage consumption there are therefore different opinions on alcohol advertising and its appropriateness. Numerous studies have been done showing the link between alcohol advertising and the consumption of alcohol. Alcohol advertising is a highly debatable area, and this is no surprise especially considering the power of advertising and its great impact on people's lives. Mark Snyder, who has done numerous studies on the subject of alcohol advertising, states that advertising is the most influential force affecting our habits and our way of living, regardless if it is a matter of choosing food, how we clothe ourselves, how we work and enjoy ourselves.<sup>3</sup>

According to Aitken, an American scientist on alcohol, advertising has six purposes<sup>4</sup>, and this is applicable on any product, not just alcohol. These are:

- Encourage those that do not drink to start drinking
- Prevent those that drink from stop drinking
- Encourage those that drink to increase their consumption
- Prevent those that drink to cut down on their consumption
- Encourage those that drink to maintain or increase their drinking habits
- Encourage those that drink to maintain or change their brand preferences

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<sup>1</sup> EASA, <http://www.easa-alliance.org/About-us/page.aspx/165>.

<sup>2</sup> Helling, S, *Berusing till salu*, 2004, p. 11.

<sup>3</sup> Ibidem.

<sup>4</sup> Ibidem, p. 12.

## 2.2 Mediums

The advertising industry has the opportunity to advertise products in various ways and different types of mediums are utilised. Considering that most households own a television this is probably the most effective and traditional medium. Others are radio, newspapers and magazines. There are however other alternatives and also new technologies to get the products out there. Advertising through sponsorship is a great way for a brand to make us aware of its existence and make its logotype well known.<sup>5</sup> Alcoholic beverage companies are very often using different sporting events to advertise themselves through sponsorship. It is probably in football where this is most visible and popular where teams, leagues and players are sponsored by different alcoholic beverage companies. Another non-traditional way to advertise, originating from the US, is through product placement. This means that companies pay for their products to be visible in movies and TV-shows hoping that their name will be exploited on television so that the viewers choice of brand gets affected.<sup>6</sup>

Among new technologies that companies can use to advertise is texting and the Internet with its social networking sites, email etc. Here is a completely new world at disposal where alcoholic beverage companies can advertise their products and this world is growing fast. The new media is popular since it is less regulated than traditional media. These are just a few examples on how companies can advertise their products but there are many other options that they might exploit. In this essay however, the main focus is held at the traditional advertising mediums, that is the advertising on television, newspapers and magazines.

## 2.3 The impact of alcohol advertising

Alcohol advertising has increased during the last decades. This has led to a debate whether the advertising has effects on people's behaviour and alcohol consumption. There are studies which show that there are links between alcohol advertising and the alcohol consumption but there are also studies that contradicts this.

According to FHI, alcohol advertising is well financed and inventive and it aims to attract, affect and recruit new generations of potential consumers.<sup>7</sup> There are several studies regarding other products which show the influence that advertising has on people's behaviour and consumption and there is no reason to believe that alcohol advertising is less successful in influencing people.<sup>8</sup>

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<sup>5</sup> Helling, S, *Berusing till salu*, 2004, p. 13.

<sup>6</sup> Ibidem, p. 21.

<sup>7</sup> *Alkohol, ingen vanlig handelsvara*, Statens folkhälsoinstitut, 2004, p. 232.

<sup>8</sup> Prop. 2003/04:161, p. 25.

According to Edwards, alcohol advertising can have the aim to distinguish different brands and strengthen brand fidelity but it can also strengthen positive attitudes towards alcohol so that people consume or want to consume alcohol.<sup>9</sup> Alcohol advertising can change behaviour and increase the consumption among those that already drink, it can encourage larger quantities or encourage consumption on more occasions.<sup>10</sup> Alcohol advertising does not force us to consume alcohol but it cannot either be ignored that alcohol advertising can have an effect on the alcohol consumption. If alcohol advertisements did not have any effects on people and their behaviour the alcohol industry would not spend money on advertising. For instance, it is estimated that the alcohol industry in the UK spends approximately £800m every year promoting their products.<sup>11</sup> The alcohol industry claims that alcohol advertising does not encourage more people to consume alcohol instead it is a way to persuade those who already consume alcohol to switch brands.<sup>12</sup> Even though this might be true there is also a side effect, and it is that the consumption increases.

A research study, done by a team from Radboud University in the Netherlands, concluded that those who saw lots of alcohol advertisements drank twice as much as those that did not.<sup>13</sup> 80 young people were being monitored when watching television, some watched with alcohol advertisements and some without and it showed that those who watched television with alcohol advertisements drank more alcohol.<sup>14</sup> There is also evidence that even young children are aware of alcohol advertisements and tend to remember them.<sup>15</sup>

A way to deal with the problems of increased consumption because of alcohol advertising is to introduce alcohol advertising bans. A study done by Saffer shows that alcohol advertising bans decrease the alcohol consumption and that higher alcohol consumption will result in more advertising bans.<sup>16</sup> If we are exposed to less alcohol in the media it could have an impact on the consumption in the sense that it decreases it. It has been shown that the alcohol consumption is 16 percent lower in countries where spirits advertising are prohibited compared to countries where there is no such ban and the consumption is 11 percent lower in those countries where beer and wine advertisements are prohibited compared to countries that have prohibited spirits advertisements only.<sup>17</sup> Arguments against bans and restrictions are, inter alia, that alcohol is a legal product and it should therefore be legal to

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<sup>9</sup> Edwards, G, *Alkoholpolitik för bättre folkhälsa*, 1996, p. 202.

<sup>10</sup> Ibidem.

<sup>11</sup> BMA's report; *Under the Influence - the damaging effect of alcohol marketing on young people*, 7 September 2009, p. 14.

<sup>12</sup> Helling, S, *Berusning till salu*, 2004, p. 9.

<sup>13</sup> *Alcohol on TV "prompts drinking"*, BBC News, 4 March 2009.

<sup>14</sup> Ibidem.

<sup>15</sup> IAS Factsheet, 4 January 2008, p. 5.

<sup>16</sup> Saffer, H, *Alcohol consumption and alcohol advertising bans*, 2000, p. 13.

<sup>17</sup> Edwards, G, *Alkoholpolitik för bättre folkhälsa*, 1996, p. 204.

advertise it like any other product and people have responsibility on their own to control their consumption.<sup>18</sup>

There are however other factors as well, besides alcohol advertising that might affect the consumption. These are the influence from friends and parents, the social environment, income, price and availability.<sup>19</sup> All these factors might have an impact on the consumption, together or separately, and because of this it can be difficult to establish with is dominating and what role the advertising has.

As already mentioned, there are different opinions on whether alcohol advertising has an impact on the consumption and there are also different opinions whether alcohol advertising bans are effective. The effectiveness of bans was studied by two research teams in the USA, one supported by the alcohol industry and the other independent, which came to two different results.<sup>20</sup> They used the same material but in spite of this the first team claimed that the ban had no effect on the consumption while the other team concluded that the ban in fact did have an effect on the consumption.<sup>21</sup>

The British Medical Association (BMA) has concluded that alcohol marketing has a powerful effect on young people and the alcohol advertising is linked with the beginning, amount and continuance of their drinking.<sup>22</sup>

Member States of the WHO, including the UK and Sweden, adopted in 1995 at the WHO European Conference on Health, Society and Alcohol in Paris the European Charter on Alcohol. According to the Charter “All children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages.” Ten health promotion strategies, for alcohol action, were also adopted and one of them states that each Member State should “Implement strict controls, recognizing existing limitations or bans in some countries, on direct and indirect advertising of alcoholic beverages and ensure that no form of advertising is specifically addressed to young people, for instance, through the linking of alcohol to sports.”<sup>23</sup>

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<sup>18</sup> IAS Factsheet, 4 January 2008, p. 4.

<sup>19</sup> Helling, S, *Berusing till salu*, 2004, p. 42.

<sup>20</sup> *Ibidem*, p. 48.

<sup>21</sup> *Ibidem*.

<sup>22</sup> BMA's report; *Under the Influence - the damaging effect of alcohol marketing on young people*, 7 September 2009, p. 1.

<sup>23</sup> See the 5<sup>th</sup> strategy in the Charter.

# 3 Self-regulation

## 3.1 Introduction

The advertising sector is often under the control of the state through different bodies ensuring that the applicable statutory rules are being complied with. The advertising rules vary in different countries; in Sweden for instance there is a law regarding marketing in general, *lex generalis*. Rules about advertising alcohol in particular are found in a specific law, *lex specialis*. An alternative to detailed legislation is self-regulation. Here the alcohol industry participates actively, taking measures on its own to regulate the rules concerning advertising of their products. The industry is doing the regulation and not the government.<sup>24</sup> So, the alcohol advertising industry gets to influence and be a part of making their own rules. The term self-regulation has been defined by the European Parliament, the Council and the Commission “*Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)*”.<sup>25</sup>

Self-regulation can appear in different forms. It is not always the industry alone that makes the rules, enforces them and also decides on the sanctions. There is also something called “co-regulation” meaning that the rules are developed, administered and enforced by a combination where the government is responsible for some parts and the industry for other parts of the process.<sup>26</sup> A good example of a co-regulation, which will be explained later, is in the UK with the statutory body Ofcom and the industry body Advertising Standards Authority (ASA).

Self-regulation might be used in situations where there is a difficulty to legislate. Another reason to self-regulate is because the rules can be made more detailed than they usually are in traditional legislation and if there is a change in circumstance it is easier to amend the self-regulatory rules than the governmental.<sup>27</sup> Sometimes there is also the need of quick changes in the society. Self-regulation is preferred by the alcohol advertising industry because it means that it avoids exposure to statutory legislation and statutory controls.

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<sup>24</sup> Andersson, P & Baumberg, B. (2006) *Alcohol in Europe*. London: Institute for Alcohol Studies, p. 283.

<sup>25</sup> European Parliament, Council, Commission Interinstitutional Agreement on better law making (2003/C 321/01), 22.

<sup>26</sup> Andersson, P & Baumberg, B. (2006) *Alcohol in Europe*. London: Institute for Alcohol Studies, p. 284.

<sup>27</sup> *Ibidem*.



The efficiency of self-regulation within the alcohol advertising industry has been questioned and studies show that it does not have a good track record for being effective.<sup>28</sup>

## 3.2 Advantages of self-regulation

There are many arguments in favour of self-regulation as an alternative to legislation. Some of the advantages include efficiency, increased flexibility and increased incentives for compliance.<sup>29</sup> It will also lead to reduced costs for the government since it will be funded by the industry instead. The alcohol beverage companies possess better knowledge on this subject than state authorities meaning that they will compose better suited rules in the area on the advertising of alcoholic beverages. As mentioned above, self-regulation might be preferred because the rules can be made more detailed and adjusted to that particular industry and it is easier for the industry to amend the rules than it is for the government to amend statutory rules. Because of this, self-regulation is more flexible than government regulation.<sup>30</sup> Self-regulation increases incentives for compliance, this means that the industry is more likely to follow their own rules and consider them to be reasonable than those created by the state.<sup>31</sup> Looking from the alcoholic beverage company's point of view, one of the greatest advantages of self-regulation is the avoidance of statutory controls. With no governmental regulation it is easier for the industry to advertise their products. This freedom will probably lead to increased sales making better profits for the companies.

## 3.3 Efficiency of self-regulation?

There are those that criticise self-regulation and the main argument is the claimed inefficiency of the system. It is claimed that companies are not likely to use their expertise to the benefit of the public but that the industry will rather use this knowledge to maximize the industry's profit and the argument that the industry is more likely to comply with its own rules than the governmental is considered to be weak.<sup>32</sup> A strong argument that puts the efficiency of self-regulation in question is whether the industry has the power to enforce adequate sanctions. A system lacking power to take measures when someone violates the rules seems quite meaningless and this means that there would be no point in complying with the existing rules if no sanctions are tied to violations. When the heaviest sanction is expulsion it leads to the question whether this is an effective deterrent and when the company in question can make a greater profit by ignoring the rules then it is likely to do so.<sup>33</sup> This is one of the major drawbacks with self-regulation

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<sup>28</sup> Andersson, P & Baumberg, B. (2006) *Alcohol in Europe*. London: Institute for Alcohol Studies, p. 7.

<sup>29</sup> *Ibidem*, p. 284.

<sup>30</sup> *Ibidem*.

<sup>31</sup> *Ibidem*.

<sup>32</sup> *Ibidem*.

<sup>33</sup> *Ibidem*.

and the question is whether there is a way to evade this problem and make self-regulation more effective.

It is not suggested that the self-regulation should be abolished and replaced with governmental legislation but the best way for it to be effective is that the self-regulation should be monitored and adjudicated by a body that is independent of the alcohol and marketing industries.<sup>34</sup> Self-regulation is effective when an independent third-party is decisive on whether the rules are being complied with. Sanctions are essential and necessary and the independent party is also to enforce these sanctions when a breach occurs.<sup>35</sup> Experience shows that only self-regulation is fragile and not a very effective way of protecting the public health.<sup>36</sup> Also, in order for self-regulation to be effective there needs to be a threat of law if the rules are not being complied with and the threat of law is a strong incentive to comply with the rules, since the greatest advantages of self-regulation for the alcohol beverage companies is the avoidance of statutory controls.

The National Consumer Council (NCC) has published a report regarding self-regulation and the steps that, according to their experience, need to be taken in order for self-regulation to be effective.<sup>37</sup> According to the report *“The governing bodies of self-regulatory schemes should include a majority of independent representatives – if possible, up to 75 per cent. This might include professionals, academics, representatives of other industries and statutory regulators, as well as consumers. Where outside representatives are in a minority, they may need the power of veto, or special voting rights”*.<sup>38</sup> Again, we see the importance of independence of the bodies in a self-regulatory system. The importance of adequate sanctions is also highlighted in the report stating that *“To be taken seriously, self-regulation demands adequate, meaningful and commercially significant sanctions for non-compliance. Failures to redress wrongs would be a particularly significant breach. Penalties can include fines, suspension, or the threat of expulsion”*.<sup>39</sup>

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<sup>34</sup> Ibidem, p. 17.

<sup>35</sup> SOU 2003:69, p. 71.

<sup>36</sup> Ibidem.

<sup>37</sup> The NCC is an independent consumer expert, from the UK, championing the consumer interest to bring about change for the benefit of all consumers.

<sup>38</sup> NCC, *Three steps to credible self-regulation*, p. 3. (2003-03-27).

<sup>39</sup> Ibidem, p. 4.

### 3.4 The EASA and ICC

The EASA (European Advertising Standards Alliance) is a non-profit organisation that provides detailed guidance on how to go about advertising self-regulation across the market for the benefit of consumers and businesses.<sup>40</sup> The EASA also recommends that the body responsible for the practical application of self-regulatory codes should be independent of the industry since impartiality is seen to be the key to an effective code and public trust in it.<sup>41</sup> The EASA is of the opinion that self-regulation works best within a legislative framework. The two complement each other because the law lays down broad principles, for instance, that advertising should not be misleading, while self-regulatory codes, because of their flexibility, can deal quickly and efficiently with the details of individual advertisements.<sup>42</sup> The EASA promotes self-regulation and believes that advertising should be legal, decent, truthful and honest. These ethical rules are based on the ICC International Code of Advertising Practice, which promotes high standards of ethics in marketing via self-regulatory codes.<sup>43</sup> This well-known code, issued by ICC, is the foundation of the self-regulation in the advertising industry. The code sets out basic principles that should be followed when drawing up self-regulatory codes in the advertising industry.

### 3.5 ELSA-project

A European project, ELSA (Enforcement of national Laws and Self-regulation on advertising and marketing of Alcohol), which was co-financed by the European Commission, has made an overview of the existing regulations on advertising and marketing of alcohol.<sup>44</sup> According to the report most European countries have both a statutory system as well as self-regulation. The statutory system and the self-regulation tend to complement each other where in countries with little statutory rules on alcohol advertising there is more room for self-regulatory rules and in countries with a larger legal framework there might not be room left for self-regulation.<sup>45</sup>

The report contains many interesting facts about what regulations that exist across Europe regarding the advertising of alcoholic beverages. According to the report most countries (23) have statutory regulation and in many of these (17) there is a non-statutory regulation.<sup>46</sup> There is only one country where there is co-regulation due to contract between a statutory body and a

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<sup>40</sup> EASA, <http://www.easa-alliance.org/page.aspx/227>.

<sup>41</sup> Self-regulation of Beverage Alcohol Advertising, ICAP Report 9, January 2001, p. 1.

<sup>42</sup> EASA, <http://www.easa-alliance.org/page.aspx/166>.

<sup>43</sup> Article 1 stating that "All advertising should be legal, decent, honest and truthful.", ICC International Code of Advertising Practice, 1997 Edition.

<sup>44</sup> ELSA-project, STAP (2007). *Regulation of Alcohol Marketing in Europe*. Utrecht: National Foundation for Alcohol Prevention.

<sup>45</sup> EASA, <http://www.easa-alliance.org/page.aspx/124>.

<sup>46</sup> ELSA-project, STAP (2007). *Regulation of Alcohol Marketing in Europe*, p. 18.

non-statutory body on advertising and this country is the UK. There are six countries with only statutory regulation (all Eastern European countries and Finland) and there are only two countries that in practice have no statutory regulation (the UK and the Netherlands).<sup>47</sup> Another interesting observation is that all countries, except for the UK, have at least one ban in the national regulation regarding alcohol advertising.<sup>48</sup> Regarding what actions that can be taken in the event of a breach the possibility to complain is the most common procedure (23 countries).<sup>49</sup> Sanctions connected to the violations are big in variety. They include fines (which can be up to €600,000), warnings and reprimands, the temporarily or definite cessation of marketing activity or the hindering of the trade of the advertised product.<sup>50</sup>

To sum up, the ELSA-project has found and concluded that statutory regulations are stronger than non-statutory regulations since statutory regulations are more likely to include systematic checks on violations of codes and they are also more likely to cover volume restrictions.<sup>51</sup>

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<sup>47</sup> Ibidem.

<sup>48</sup> Ibidem, p. 26.

<sup>49</sup> Ibidem, p. 28.

<sup>50</sup> Ibidem.

<sup>51</sup> ELSA-project, STAP 2007, *Alcohol Marketing in Europe: Strengthening Regulation to Protect Young People*, p. 7.

# 4 EU on alcohol advertising

## 4.1 Introduction

The cooperation in the EU is based on treaties between sovereign states. The Member States have, through the treaties, conferred some of their power and decision-making to the European Institutions. In some areas the cooperation has a supranational character meaning that the European Institutions have the power to make decisions for the Member States.<sup>52</sup> There are mainly five different types of legal document that the European Institutions can pass, these are regulations, directives, decisions, recommendations and opinions. Regulations are binding and directly applicable in every Member State. As soon as a regulation comes into force it automatically becomes a part of the national legal system in every Member State. A directive is binding for the Member States regarding the result that has to be achieved but leaves it up to each Member State to decide on the form and carry out the procedure to implement it. The purpose with directives is to harmonise the legislation between the Member States. Decisions are binding for those that they are addressed to. Recommendations and opinions are not binding. The EC Treaty is based on a number of principles; among these are the principles of free movement of goods and free movement of services.

### 4.1.1 The alcohol policy

There is a lack of harmonisation in the different alcohol policies in Europe. The reason for this is that Member States have not conferred the power to the Institutions to pass laws in the area of protecting the public health.<sup>53</sup> Therefore it is up to the Member States to decide on the degree of protection, which they wish to afford to public health and on the way on which that protection is to be achieved.<sup>54</sup> The Member States have the main responsibility for national alcohol policy. Because of this the EU has, through the use of soft law, in the form of non-binding resolutions and recommendations urged Member States to act in a certain way.<sup>55</sup> Alcohol and its impact on the public health has received more and more attention in the European countries and in the EU.<sup>56</sup> This is a big change considering that until recently alcohol was considered like any other product or even a agricultural product.<sup>57</sup> We are now more aware of the damages that alcohol

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<sup>52</sup> Prop. 1998/99:134, p. 73.

<sup>53</sup> Andersson, P & Baumberg, B. (2006) *Alcohol in Europe*. London: Institute for Alcohol Studies, p. 366.

<sup>54</sup> This has been established by the ECJ in various cases, some of which will be presented later in this chapter.

<sup>55</sup> Andersson, P & Baumberg, B. (2006) *Alcohol in Europe*. London: Institute for Alcohol Studies, p. 366.

<sup>56</sup> Prop. 2000/01:20, p. 20.

<sup>57</sup> *Ibidem*.

brings to people and therefore the attitude and policy towards it is also changing.

Even though the alcohol policies are not harmonised in the EU it does not mean that the European Institutions are not doing anything to deal with the alcohol related problems in Europe. One example of this soft law action is a 2001 Council recommendation on the Europe-wide problem of drinking by young people, in particular children and adolescents.<sup>58</sup> The Council recommended that the Member States should encourage the establishment of effective mechanisms in the fields of promotion, marketing and retailing to ensure that producers do not produce alcoholic beverages specifically targeted at children and adolescents.<sup>59</sup> Also to ensure that alcoholic beverages are not designed or promoted to appeal to children and adolescents, and paying particular attention inter alia, to the following elements<sup>60</sup>:

- the use of styles (such as characters, motifs or colours) associated with youth culture,
- featuring children, adolescents, or other young-looking models, in promotion campaigns,
- links with violence or antisocial behaviour,
- implications of social, sexual or sporting success,
- encouragement of children and adolescents to drink,
- advertising during, or sponsorship of, sporting, musical or other special events which a significant number of children and adolescents attend as actors or spectators.

The Council also invited the Commission to produce a strategy on alcohol related harm in Europe. The purpose of the strategy is to protect the youths and to reduce alcohol related accidents.<sup>61</sup> The reason why this strategy was needed is because of the increased and extreme drinking patterns as well as under-age drinking and also because of the link between alcohol consumption and the increased mortality in deceases and accidents.<sup>62</sup>

In the report, the Commission has identified five priority themes where the EU needs to take measures in order to<sup>63</sup>:

- Protect young people, children and the unborn child;
- Reduce injuries and death from alcohol-related road accidents;
- Prevent alcohol-related harm among adults and reduce the negative impact on the workplace:

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<sup>58</sup> Council Recommendation of 5 June 2001, on the drinking of alcohol by young people, in particular children and adolescents, (2001/458/EC).

<sup>59</sup> Ibidem., Part II, Section 1.

<sup>60</sup> Ibidem.

<sup>61</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, An EU strategy to support Member States in reducing alcohol related harm, Brussels 24.10.2006.

<sup>62</sup> Ibidem, p. 4.

<sup>63</sup> Ibidem, p. 7.

- Inform, educate and raise awareness on the impact of harmful and hazardous alcohol consumption, and on appropriate consumption patterns;
- Develop and maintain a common evidence base at EU level.

In the report, the Commission also mentions the aim to support EU and national/local Government actions to prevent irresponsible marketing of alcoholic beverages, and to regularly examine trends in advertising and issues of concern relating to alcohol advertising.<sup>64</sup>

Even though there is a lack of harmonisation in alcohol policy, EU has affected the different policies on alcohol in the Member States anyway since they have to comply with the general principles of EU law.

## 4.2 Current EU Law

### 4.2.1 Basic principles

The advertising of alcoholic beverages is not a harmonised area and there are no bans on alcohol advertising in the EU. Whether to allow alcohol advertising or not is therefore mainly the concern of the individual Member State which has the main responsibility for national alcohol policy.<sup>65</sup> However, the Member States always have to respect and comply with EU law.

National laws need to comply with the principles of free movement of goods and services. According to the EC Treaty, Article 28, *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.* Article 28 has direct effect.<sup>66</sup> This provision is relevant because it has been argued that national rules prohibiting the advertising of alcohol could have an effect equivalent to a quantitative restriction, because they can restrict the marketing of certain imported alcoholic products.<sup>67</sup>

It is however possible to make exceptions to Article 28 if one of the interest grounds in Article 30 is in question. Article 30 stating that, *The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however,*

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<sup>64</sup> Ibidem, p. 16.

<sup>65</sup> Prop. 2007/08:119, p. 27.

<sup>66</sup> Prop. 1998/99:134, p. 75.

<sup>67</sup> Fleming, H, *Is there a threat to the legal status of alcohol advertising?* Ent. L.R. 2005, 16(5), 99-104, p. 101.

*constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.* So, national rules restricting alcohol advertising are allowed according to Article 30, inter alia, when the national provisions are based on the grounds of the protection of health and life of humans.

Such national laws need to be justified and in order for a justification to apply, the taken measure must be proportionate to the aimed objectives. There cannot be other, less restrictive alternatives that can be just as effective. The different interests need to be weighed against each other, that is the interest of free movement of goods against the national interest of having a restriction or ban on alcohol advertising.<sup>68</sup>

The restriction must not constitute either a means of arbitrary discrimination or a disguised restriction between Member States. Since this is an exception from the fundamental right of free movement the ECJ has stated that the article and its exceptions are to be interpreted narrowly.<sup>69</sup> The burden of proof lays on the national authorities and they have to show that their measures are necessary in order to protect the interest grounds included in Article 30.<sup>70</sup>

Accordingly, national rules prohibiting alcohol advertising can have an effect equivalent to a quantitative restriction but it can be justified according to Article 30 because of the need of protection of health and life of humans. This issue has been up in the ECJ in a few cases, which will be presented later in this chapter.

## **4.2.2 Television Without Frontiers Directive**

Even though the area of alcohol advertising is not harmonised there are some rules regarding alcohol advertising on television. According to these rules advertising on television has to comply with certain criteria. The relevant provisions are found in the "Television Without Frontiers" Directive (TWF), which is the only European statutory regulation with rules on alcohol advertising.<sup>71</sup> The aim of the Directive is to abolish restrictions on the free movement of services in the broadcasting of television programmes. According to Article 3.1, the Directive sets minimum standards and according to the preamble, the Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting and the Member States have the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.

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<sup>68</sup> Prop. 1998/99:134, p. 76.

<sup>69</sup> Prop. 2007/08:119, p. 28.

<sup>70</sup> Ibidem.

<sup>71</sup> Directive 89/552 of October 3, 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.



”Country of origin” is the European law principle that a service provider will only come under the jurisdiction of the rules in its own Member State even when the service is available in other Member States.<sup>72</sup> This is an important part of the Directive and it can be found in Article 2, which states that each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the law applicable to broadcasts intended for the public in that Member State. It is also up to that Member State to ensure that, by appropriate means, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of the TWF Directive.<sup>73</sup> This means that it is not necessary for television broadcasters to comply with all applicable rules in all Member States for its content to be lawful according to EU law, the provider only needs to comply with its own national rules.<sup>74</sup> So, if a broadcast is legal in one Member State, it has the right to be broadcast in all Member States.

According to the TWF Directive, Article 2.2, and EU law broadcasters have the right to establish themselves in any Member State where the rules best suits them and there are programme companies that are doing this in order to escape their own national rules. It is enough for them to establish themselves in another Member State and comply with the rules there, which probably are less strict, and still broadcast in the first mentioned Member State. This is possible because the broadcaster is complying with the rules in the Member State that they now are established in and therefore have the right to, according to EU law, broadcast in all Member States. A few Swedish programme companies are doing this meaning that they can escape the Swedish alcohol advertising ban on television by establishing themselves in the UK but they are still broadcasting in Sweden. This is possible because according to Article 2.2, Sweden is to ensure the freedom of reception of television broadcasts coming from other Member States and the broadcast has to, according to the Country of Origin principle, comply only with the UK rules and the rules in the Directive. This will be more analysed later in this essay.

There is however a way to deal with this problem since the TWF Directive allows the receiving Member State to provisionally suspend retransmissions of television broadcasts.<sup>75</sup> But according to the preamble the receiving Member State can only do this exceptionally and under specific conditions.

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<sup>72</sup> Ridgway, S, *The Audiovisual Media Service Directive – what does it mean, is it necessary and what are the challenges to its implementation?* C.T.L.R. 2008, 14(4), 108-113, p. 110.

<sup>73</sup> Article 3.2.

<sup>74</sup> Ridgway, S, *The Audiovisual Media Service Directive – what does it mean, is it necessary and what are the challenges to its implementation?* C.T.L.R. 2008, 14(4), 108-113, p. 110.

<sup>75</sup> Article 2.2.

The Directive contains general rules regarding the content of advertisements on television, inter alia, that television advertising shall not include any discrimination on grounds of race, sex or nationality, encourage behaviour prejudicial to health or to safety, prejudice respect for human dignity, be offensive to religious or political beliefs and encourage behaviour prejudicial to the protection of the environment.<sup>76</sup>

In addition to this there are also more specific rules regarding the content of advertisements on television, there are rules about alcohol advertising. According to the preamble of the TWF Directive it is necessary to introduce strict criteria relating to the advertising of alcoholic beverages on television. The relevant provision on alcohol advertising is Article 15. According to this provision television advertising for alcoholic beverages have to comply with a number of criteria. The advertising may not be aimed at specifically minors or, in particular, depict minors consuming these beverages. The advertising shall not link the consumption of alcohol to enhanced physical performance or to driving. The advertising shall not create the impression that the consumption of alcohol contributes towards social or sexual success. The advertising shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts. The advertising shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light and the advertising shall not either place emphasis on high alcoholic content as being a positive quality of the beverages.

In June 1997, the European Parliament and the Council adopted a new TWF Directive, which aimed to ensure greater legal certainty and also to update the initial rules of the TWF Directive.<sup>77</sup> But no extreme changes were made.

The latest amendment to the TWF Directive was made in 2007.<sup>78</sup> It is now called the Audiovisual Media Services (AMS) Directive. Its main aim was to update the current rules and to adapt it to technological and market developments. The TWF Directive only regulates television services over wire or over the air but the AMS Directive regulates all media services, including traditional television but also new media platforms such as mobile and the Internet.<sup>79</sup>

The Directive still has the character of setting minimum standards and the Member States have the right to set more detailed or stricter rules. Member States are to make sure that their legislation complies with the provisions of the AMS Directive. The Country of Origin principle continues to apply in

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<sup>76</sup> Article 12.

<sup>77</sup> Directive 97/36 of June 30, 1997.

<sup>78</sup> Directive 2007/65 on television broadcasting activities, of 11 December 2007.

<sup>79</sup> Ridgway, S, *The Audiovisual Media Service Directive – what does it mean, is it necessary and what are the challenges to its implementation?* C.T.L.R. 2008, 14(4), 108-113, p. 108.

the AMS Directive as well. It is even expressly stated in the preamble to the new Directive that the principle remains the core of the AMS Directive, since it is essential for the creation of an internal market and that it therefore should be applied to all audiovisual media services.<sup>80</sup>

No significant changes were made regarding alcohol advertising and the above-mentioned Article 15 in the TWF Directive remains the same. But the AMS Directive introduced a new provision emphasising that audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages.<sup>81</sup>

## 4.3 ECJ decisions

The question whether national restrictions or bans on alcohol advertising are in accordance with EU law has been up in the ECJ in at least three cases. One main conclusion that can be drawn from ECJ case law is that it is up to the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved. It is however crucial that the measures taken in the Member States are not disproportionate and that they take place within the limits set by the Treaty. Accordingly, the court seems to support national alcohol advertising bans.

The first case that will be present is the case of *Aragonesa*, concerning Catalan law, which prohibited alcohol advertising in certain situations. Then, two French cases will be presented together because of their similarity to one another. The *Gourmet* case is a landmark case regarding the Swedish alcohol advertising ban in periodicals. This case led to the change of Swedish law. This case will be presented later in this essay when presenting the Swedish rules.

### 4.3.1 Aragonesa

This case<sup>82</sup> concerned Catalan law in which advertising of alcoholic drinks, with an alcoholic strength of more than 23 percent alcohol by volume, was prohibited. It was not a general prohibition but only in certain places, such as streets and highways, with the exception of signs indicating centres of production and sale, in cinemas and on public transports. The purpose of the prohibition was to prevent alcohol consumption among motorists and young people.

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<sup>80</sup> Directive 2007/65/EC, preamble 27.

<sup>81</sup> Article 3(e) (e).

<sup>82</sup> Joined cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, 25 July 1991, E.C.R.I-4151.

The question was whether this prohibition could be a measure having an effect equivalent to a quantitative restriction of exports within the meaning of Article 28 EC Treaty. According to the court, any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be deemed to be a measure having equivalent effect.<sup>83</sup> The court also concluded that legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities.<sup>84</sup> The Catalan legislation could constitute an obstacle to imports from other Member States and was therefore regarded as a measure having equivalent effect within the meaning of Article 28.<sup>85</sup>

It was now necessary to ascertain whether the Catalan legislation had the purpose of protecting public health according to one of the interest grounds in Article 30. The legislation also needs to be proportionate to the objective. The court recognised that alcohol advertising encourages consumption and rules restricting alcohol advertising in order to combat alcoholism reflect public health concerns.<sup>86</sup> Since this area is not harmonised it is up to the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved.<sup>87</sup> Member States can only do this within the limits set by the Treaty and they must also observe the principle of proportionality.

The court stated that the measure only restricted freedom of trade to a limited extent since it only concerned beverages having an alcoholic strength of more than 23 percent alcohol by volume. Furthermore it was not a general prohibition but only in specified places some of which, such as public highways and cinemas, are used by motorists and young people, two categories where the campaign against alcoholism is particularly important.<sup>88</sup>

The measure could not be criticised for being disproportionate to its objective and the Catalan legislation did not constitute arbitrary discrimination or a disguised restriction on intra-Community trade since it did not distinguish products according to their origin.<sup>89</sup>

So, even if the Catalan legislation constituted a measure having equivalent effect within the meaning of Article 28, it was justified under Article 30 on grounds of the protection of public health. This case makes it clear that national rules prohibiting alcohol advertising are allowed, even though this contravenes Article 28. The interest ground of the protection of public

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<sup>83</sup> *Ibid.*, para. 9.

<sup>84</sup> *Ibid.*, para. 10.

<sup>85</sup> *Ibid.*, para. 11.

<sup>86</sup> *Ibid.*, para. 15.

<sup>87</sup> *Ibid.*, para. 16.

<sup>88</sup> *Ibid.*, para. 17,18.

<sup>89</sup> *Ibid.*, para. 18, 25.

health has to be fulfilled and the rules need to be proportionate to the objective.

### 4.3.2 Case C-262/02 and Case C-429/02

Article 49 EC Treaty provides that restrictions on the freedom to provide services within the Community shall be prohibited. This provision may be subject to justifications under Article 46 on the grounds of public health. Advertising constitutes a service and restrictions on alcohol advertising can constitute a breach of Article 49.<sup>90</sup>

In these cases, the court had to examine the French prohibition regarding alcohol advertising on television and whether this was in accordance with EU law.<sup>91</sup> The question was whether France had fulfilled its obligation under Article 49 especially in relation to international sporting events taking place in other Member States where alcohol advertising was presented, inter alia, on billboards. There was a condition that these advertisings of alcoholic beverages had to be removed. The French legislation, The Loi Evin, bans alcohol advertising on television. Other forms of alcohol advertising are however allowed in France, inter alia advertising in the press, radio (except at certain times), posters and signboards, including on advertising hoardings placed in sports stadiums.

The court ruled that “Article 49 of the EC Treaty does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States”.<sup>92</sup>

Article 49 requires the elimination of any restriction on the freedom to provide services. The French rules on television advertising were found to constitute a restriction on freedom to provide services within the meaning of Article 49. National rules may however limit the freedom to provide services justified by the reasons mentioned in Article 46(1) read together with Article 55 or for overriding requirements of the general interest.<sup>93</sup> It is up to the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved.<sup>94</sup> Referring to the case of Aragonesa, the court stated that the Member States can do this within the limits set by the Treaty and they must also observe the principle of proportionality.

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<sup>90</sup> Fleming, H, *Is there a threat to the legal status of alcohol advertising?* Ent. L.R. 2005, 16(5), 99-104, p. 102.

<sup>91</sup> Case C-262/02 *Commission v France*, July 13, 2004 and Case C-429/02 *Bacardi France SAS v Télévision Francaise*, July 13, 2004.

<sup>92</sup> Case C-429/02.. para. 2, summary of the judgement.

<sup>93</sup> Case C-262/02., para. 23, Case C-429/02.. para. 32.

<sup>94</sup> Case C-262/02., para. 24, Case C-429/02.. para. 33.

The court recognised that such rules on television advertising pursue an objective relating to the protection of public health within the meaning of, Article 46(1), since measures restricting alcohol advertising in order to combat alcohol abuse reflect public health concerns.<sup>95</sup>

According to the court the French rules could be justified on the grounds of the protection of public health. They do not go beyond what is necessary, meaning that the principle of proportionality was fulfilled.

### 4.3.3 Comments

As we can see here, the discussion by the court is similar in these cases and in the Aragonesa case. In all three cases the court has supported the national advertising restrictions and bans. Since there is a lack of harmonisation, the court has examined three questions that obviously are of importance when national alcohol advertising bans are at issue, these are;

1. whether there is a restriction within the meaning of Article 28 or 49 of the Treaty,
2. whether there may be justification for the rules, and
3. whether those rules are proportionate.

It was mentioned above that the ECJ interprets exceptions from the fundamental right of free movement narrowly. But the court seems quite willing to allow national alcohol advertising restrictions and bans, which is an exception to the right of free movement of goods and services as we have seen in the presented cases. Since the area of alcohol advertising is not harmonised, nor the alcohol policy in general, it is understandable that the court is careful on finding national restrictions and bans to contravene EU law. The European countries have very different policies and national legislation on alcohol and some are stricter than others. For instance, in France there has been a long time television ban on alcohol advertising, in Austria and Belgium spirits are banned from television, in Italy alcohol advertising is prohibited on television between 4 p.m. and 9 p.m. and in Germany television advertising is prohibited before 8 p.m.<sup>96</sup> Because of the differences, this might be a delicate area to interfere with and perhaps this is why the ECJ leaves it up to the Member States to decide on their own on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved. There is no indication that alcohol advertising will be banned at European level. The Commission has even stated in a press release that “*Neither advertising bans for fast cars nor for alcoholic beverages are being considered at EU level*”.<sup>97</sup> But national rules prohibiting or restricting alcohol advertising are allowed, provided that

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<sup>95</sup> Case C-262/02., para. 30, Case C-429/02.. para. 37.

<sup>96</sup> Hall, E, *Europe faults alcohol marketers for binge drinking; U.K. proposes \$286M ad ban*, Advertising Age, 10/12/2009, Vol. 80 Issue 34.

<sup>97</sup> European Commission Press Release Memo/01/205 30/05/2001.

they are proportionate to their aim of protecting public health and do not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States. Accordingly, EU law allows alcohol advertising but EU law also allows restrictions and even prohibition regarding alcohol advertising.

#### **4.3.4 The principle of proportionality**

This is a fundamental principle that has developed through ECJ case law for many years. ECJ case law shows that the principle of proportionality is of great importance when dealing with the issue whether national restrictions or bans on alcohol advertising are allowed according to Article 30 and Article 46. The principle of proportionality is found in Article 5.3 in the Treaty stating that, *Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*

The national restriction or ban cannot go beyond what is necessary and there cannot be other, less restrictive alternatives that can be just as effective. If less restrictive alternatives can give the same result then this alternative should be taken since it will lead to fewer disturbances in the trade.<sup>98</sup> As we can see in the presented cases the national restrictions were accepted because they were considered to be proportionate to the objective. Had they not been considered to be proportionate there would have been a breach of the EC Treaty. The presentation of the Gourmet-case will also demonstrate the great impact of the principle of proportionality and the consequences that it brings when national rules are considered to be disproportionate to the objective.

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<sup>98</sup> Abrahamsson, O, *Proportionalitetskrav i lagstiftningen*, JT 2008-09, nr. 4, 763-778, p. 766.

# 5 The UK system

## 5.1 The UK alcohol policy

UK's relationship with alcohol has deep cultural roots.<sup>99</sup> The image of alcohol in the UK is that it is a product enjoyed by many in moderation and according to the government "alcohol has an important place in the society and brings many benefits".<sup>100</sup> The benefits that they are referring to include the promotion of socialising, relaxation and pleasure and drinking in moderation can also provide health benefits such as lowering the risk of death from coronary heart disease.<sup>101</sup> Alcohol is a substantial part of the UK economy and over one million people are employed in hotels, pubs, bars, nightclubs and restaurants in the UK.<sup>102</sup>

But there are those who have problems with alcohol misuse, a small minority according to the government. Because of this the government implemented a strategy on alcohol in 2004, The Alcohol Harm Reduction Strategy for England.<sup>103</sup>

The aim of the strategy was to target alcohol-related harm but without interfering the lives of those millions of people who drink in moderation.<sup>104</sup> Another aim of the strategy was for it to become a key feature of the public health policy. This strategy was actually the first attempt to bring together government interventions to prevent, minimize and manage alcohol-related harm and prior to this strategy, the government had not taken any strategic approach regarding alcohol issues.<sup>105</sup>

Even though the government expressed concerns regarding alcohol misuse in the UK it is evident that the attitude towards alcohol is not as negative and strict, as for instance in Sweden, which will be presented later in this essay. They clearly expressed that "alcohol plays an important and useful role both in the economy and in British society generally."<sup>106</sup> This seems to

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<sup>99</sup> BMA's report; *Under the Influence – the damaging effect of alcohol marketing on young people*, 7 September 2009, p. 3.

<sup>100</sup> Prime Minister's Strategy Unit, Cabinet Office. *Alcohol harm reduction strategy for England*. March 2004, p. 9.

<sup>101</sup> Ibidem.

<sup>102</sup> Safe. Sensible. Social. *The next steps in the National Alcohol Strategy*, Department of Health and Home Office, 2007, p. 30.

<sup>103</sup> Prime Minister's Strategy Unit, Cabinet Office. *Alcohol harm reduction strategy for England*. March 2004.

<sup>104</sup> Ibidem, p. 2,4.

<sup>105</sup> Safe. Sensible. Social. *The next steps in the National Alcohol Strategy*, Department of Health and Home Office, 2007, p. 9.

<sup>106</sup> Prime Minister's Strategy Unit, Cabinet Office. *Alcohol harm reduction strategy for England*. March 2004, p. 9.



be a solid basis for the government's view on alcohol in the society and they tend to start off from here.

The government recognised that there are four key ways in which they can act to reduce alcohol-related harms and these are through; improved education and communication, better identification and treatment of alcohol problems, better co-ordination to combat alcohol-related crime and disorder and finally through encouraging the industry to continue promoting responsible drinking and to continue to take a role in reducing alcohol-related harm.<sup>107</sup> The government recommended that Ofcom oversee the rules on alcohol advertising and especially to focus on ensuring that advertisements do not target people under 18 and that advertisements do not glamorise irresponsible behaviour.<sup>108</sup> As a result of this, the rules were reviewed and strengthened in 2005.

In 2007 the government took the next step. This meant reviewing the 2004 strategy.<sup>109</sup> These next steps in the national alcohol strategy included, inter alia, toughened enforcement of underage sales, sharpened criminal justice for drunken behaviour, public information campaigns to promote a new "sensible drinking" culture and local alcohol strategies.<sup>110</sup> In the reviewing of the strategy the government concluded that real progress had been made since 2004 since most of the commitments within the strategy had been delivered but that alcohol-related crime and disorder still is too high.<sup>111</sup> The government also recognised that it no longer was a small minority that had problems with alcohol misuse but a significant one.

The alcohol consumption is high in the UK and it is generally accepted that Britain has an alcohol problem.<sup>112</sup> But it seems as if there is no real alcohol policy in the country. The government has published reports, strategies, recommendation etc on how to tackle the problems of alcohol-related harm but the problem still remains. Perhaps a country with an attitude towards alcohol such as the UK's is bound to have high alcohol consumption. This attitude towards alcohol is reflected in the rules on alcohol, inter alia the alcohol advertising rules. The system of self-regulation on advertising could be a factor that is contributing to the high consumption or perhaps these rules are not strict enough.

In a parliamentary Health Select Committee report on alcohol it was recommended that the most effective way of reducing consumption was to raise the price of alcohol and that an increase in price must be part of a

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<sup>107</sup> Ibidem, p. 16.

<sup>108</sup> Ibidem, p. 33.

<sup>109</sup> Safe. Sensible. Social. *The next steps in the National Alcohol Strategy*, Department of Health and Home Office, 2007.

<sup>110</sup> Ibidem, p. 5.

<sup>111</sup> Ibidem, p. 33.

<sup>112</sup> <http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/social-reform/alcohol-policy/>.

wider policy aimed at changing the attitude towards alcohol in general.<sup>113</sup> Accordingly, it is the alcohol culture that needs to change in the UK. But increased prices would penalise the majority of people who drink responsibly and the question is whether the government is willing to interfere in the lives of these people. The Health Committee is of the opinion that the government strategies are not that effective since the greatest emphasis is given to the least effective policies, that is education and information, and too little emphasis is given to the most effective policies, that is pricing, availability and marketing controls.<sup>114</sup>

## 5.2 Ofcom and the ASA

The Office of Communications (Ofcom) is the regulator of the UK communications industries and has responsibilities across television, radio, telecommunications and wireless communications services.<sup>115</sup> Ofcom was established in 2003 through the Communications Act 2003, an Act of Parliament that provides exactly what Ofcom has to do. Ofcom is responsible for setting and maintaining standards for broadcasting.<sup>116</sup> According to the Communications Act 2003 Ofcom can contract out its functions and decide that the industry should regulate themselves through self-regulation.

The Advertising Standards Authority (ASA) is an independent, self-regulatory body which was set up by the advertising industry in 1962 for non-broadcast advertising, meaning advertisements in media such as press, poster, online and cinema. The ASA is to ensure that all advertisements are legal, decent, honest and truthful by applying the Advertising Codes.<sup>117</sup> The ASA's main tasks are to promote and enforce high standards in marketing communications, to investigate complaints, to identify and solve problems through its own research, to ensure that the system operates in the public interest and to act as the channel for communications with those who have an interest in marketing communication standards.<sup>118</sup>

In 2004 Ofcom decided to contract out the regulation of broadcast advertising to the ASA and it is the ASA who has the day-to-day responsibility for applying the broadcast advertising codes, under the formal control of Ofcom.<sup>119</sup> This change was approved by parliament, which indicates that they are satisfied with the self-regulation of advertising.<sup>120</sup>

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<sup>113</sup> House of Commons Health Committee. Alcohol, Report of First Session 2009-2010, p. 5-6.

<sup>114</sup> Ibidem, p. 40.

<sup>115</sup> <http://www.ofcom.org.uk>.

<sup>116</sup> Communications Act 2003 s. 319.

<sup>117</sup> [www.asa.org.uk](http://www.asa.org.uk).

<sup>118</sup> CAP Code, Section 60.4.

<sup>119</sup> Fleming, H, *Is there a threat to the legal status of alcohol advertising?* Ent. L.R. 2005, 16(5), 99-104, p. 101.

<sup>120</sup> Robertson & Nicol, *Media Law*, 5th Ed, 2007, Sweet & Maxwell, p. 798.

As a result of Ofcom contracting out its broadcast advertising the ASA has responsibility for maintaining standards for broadcast and non-broadcast advertising in the UK and is therefore a single advertising regulator. Under ASA are two committees, who write and maintain the rules for advertising. The first is the Committee of Advertising Practice (CAP) for non-broadcast advertising. The second one, for broadcast advertising, is the Broadcast Committee of Advertising Practice (BCAP) to which the ASA delegated the responsibility for television and radio advertising when it assumed the responsibility from Ofcom.<sup>121</sup> These committees have created one code each, the CAP created the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code) and the BCAP created the Television Advertising Standards Code (the BCAP Code). The ASA is to ensure that the Codes are applied in the public interest, by investigating complaints about advertisements, by identifying and solving breaches of the Codes and by promoting and enforcing high standards in advertisements generally.<sup>122</sup>

The members of CAP include advertisers, promoters and direct marketers, their agencies, the media and other trade and professional organisations in the advertising, sales promotion and direct marketing industries.<sup>123</sup> The BCAP represents broadcasters, advertisers and agencies.<sup>124</sup>

Accordingly, the advertising regulatory system in the UK is a mixture of

- Self-regulation for non-broadcast advertising, and
- Co-regulation for broadcast advertising.<sup>125</sup>

The self-regulation for non-broadcast advertising, that is in print media, has existed for a long time, since 1962, when the ASA was established. The co-regulation for broadcast advertising, that is television, has existed since 2004 when the ASA assumed responsibility from Ofcom. Prior to this, broadcast advertising was regulated by statutory rules. This is described as co-regulation because there is an actual contract between Ofcom, the statutory regulator, ASA and also BCAP, non-statutory regulators. The ASA describes the system as self-regulation within a co-regulatory framework.<sup>126</sup>

To ensure that advertisements are compliant with the rules something called pre-clearance has been introduced. Regarding broadcast advertising this means that television advertisements are pre-cleared before they are broadcast.<sup>127</sup> This provides an early warning before the advertisement is broadcast and could also result in prior censorship.<sup>128</sup> Pre-clearance is more

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<sup>121</sup> <http://www.asa.org.uk/Regulation-Explained/Control-of-ads.aspx>.

<sup>122</sup> ASA Compliance Report, 2008, s. 2.1.

<sup>123</sup> Ibidem.

<sup>124</sup> Ibidem.

<sup>125</sup> <http://www.asa.org.uk/Regulation-Explained/Control-of-ads.aspx>.

<sup>126</sup> <http://www.asa.org.uk/Regulation-Explained/Control-of-ads/Co-regulation-broadcast.aspx>.

<sup>127</sup> <http://www.asa.org.uk/Regulation-Explained/Control-of-ads.aspx>.

<sup>128</sup> Robertson & Nicol, *Media Law*, 5th Ed, 2007, Sweet & Maxwell, p. 798.

difficult to apply on non-broadcast advertisements since there are millions of advertisements every year.

The ASA is primarily a complaint-based regulator. The producing and publishing of the Compliance Reports is a great way to get information about how the rules are working, if they are complied with, what types of advertisements that have been found in to be in breach of the rules and they also constitute good way of scrutinizing the system of self-regulation.

## 5.3 The Portman Group

The Portman Group was established in 1989 by some of the major alcoholic beverage companies. The group's aim is to promote responsible drinking to help prevent alcohol misuse, to encourage responsible marketing and to foster a balanced understanding of alcohol-related issues.<sup>129</sup> Their Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks was first introduced in 1996 and sets the rules for the responsible marketing of alcoholic drinks.<sup>130</sup> The Portman Group works with the naming, promotion, packaging, branded merchandise and press release but not advertising of alcoholic drinks meaning that the Portman Group regulates marketing which is not otherwise regulated by Ofcom or the ASA.<sup>131</sup> The Code seek to ensure that alcohol is promoted in a socially responsible manner and only to those over 18.<sup>132</sup> Other provisions of the Code state that a drink, its packaging and any promotional material or activity should not in any direct or indirect way have the alcoholic strength or the intoxicating effect, as a dominant theme, suggest any association with anti-social behaviour or sexual success, it should also not suggest that consumption can lead to social success and it should not encourage immoderate consumption.<sup>133</sup> If the rules are not complied with, the product in question can be denied shelf space.

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<sup>129</sup> <http://www.portmangroup.org.uk/?pid=14&level=2>.

<sup>130</sup> <http://www.portmangroup.org.uk/?pid=3&level=1>.

<sup>131</sup> The Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks, 4th Edition, Section 1.2, 1.3.

<sup>132</sup> Ibidem, Section 1.1.

<sup>133</sup> Ibidem, Section 3.2.

## 5.4 The rules

### 5.4.1 Introduction

Specific rules for alcohol advertising have existed since 1975. In UK, the alcohol advertising is governed by self-regulation and there are no alcohol advertising bans. There are restrictions on the content of advertisements but no restrictions on the volume of advertisements. All advertisements should be legal, decent, honest and truthful, and this is to be assured by the ASA. The ASA does not write the rules and the relevant Codes, CAP Code and BCAP Code, are written by the CAP and the BCAP. The Codes contain broad principles and rules on advertising in general, applied on all types of products, such as that advertisements are not to mislead, offend or harm. Both Codes contain restrictions on alcohol advertising. The content of the rules in the Codes were tightened in 2005 as a result of the concerns in the 2004 government strategy. The primary objective was to reduce the appeal of alcohol advertising to children and young people because of the excessive drinking, binge drinking and anti-social behaviour among teenagers.

### 5.4.2 Non-broadcast rules

The CAP Code contains rules for non-broadcast advertisements, sales promotions and direct marketing communications in the UK. As I mentioned earlier the CAP is the self-regulatory body that creates, revises and enforces the CAP Code. The CAP Code applies to, inter alia, advertisements in newspapers, magazines, posters, brochures, leaflets, it also applies to advertisements in cinema and videos but also online advertisements.<sup>134</sup> The CAP Code is primarily concerned with the content of advertisements, promotions and direct marketing communications and not with terms of business or products themselves.<sup>135</sup> The CAP Code provides a number of rules regarding the content of advertisements that have to be complied with when advertising alcoholic beverages.

Alcohol has to be shown being handled and served responsibly. Advertisements may portray the consumption of alcohol as sociable and thirst quenching but advertisements should be socially responsible and should neither encourage excessive drinking nor suggest that drinking can overcome boredom, loneliness or other problems.<sup>136</sup> Advertisements should not be directed at people under 18 and no medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18.<sup>137</sup> Advertisements should not feature those who seem to be under the age of 25 and if younger people are being shown it has to be obvious that they are not

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<sup>134</sup> CAP Code, Section 1.1.

<sup>135</sup> Section 1.4.

<sup>136</sup> Section 56.2, 56.4.

<sup>137</sup> Section 56.5.

consuming alcohol.<sup>138</sup> For instance, children may be presented at a family celebration scene. Advertisements should also not feature or portray characters who are likely to appeal to people under 18 so that they are encouraged to consume alcohol.<sup>139</sup>

Advertisements should not suggest that alcohol has therapeutic qualities or can enhance mental, physical or sexual capabilities, confidence, popularity, attractiveness, masculinity, femininity or sporting achievements.<sup>140</sup> A Lambrini advertisement for sparkling wine was found to be in breach of the Code because the advertisement featured a man that was too attractive and there were three women flirting with this man.<sup>141</sup> According to ASA the advertisement implied that by drinking Lambrini you could achieve social and sexual success and ASA required that the man instead should be unattractive, middle-aged, bald etc.<sup>142</sup>

Also, advertisements should not suggest that drinking alcohol is a reason for the success of any personal relationship or social event and alcohol should not normally be shown in a work environment.<sup>143</sup> Party scenes are not prohibited but the alcohol cannot be shown as the main source of fun. Advertisements should not depict activities or locations in which drinking alcohol would be unsafe or unwise.<sup>144</sup> This includes situations where concentration is required, such as when operating machinery and driving.<sup>145</sup>

### 5.4.3 Broadcast rules; television

The BCAP Code contains rules that apply on broadcast advertisements, in this case, television. Ofcom has authorised BCAP to take responsibility for maintaining, reviewing and updating the BCAP Code. There is a co-regulatory partnership between Ofcom, ASA and BCAP. The main responsibility lies on the broadcaster who is to ensure that advertisements comply with both the spirit and the letter of the BCAP Code.<sup>146</sup> Just as the CAP Code, the BCAP Code contains a number of rules regarding the content of advertisements that have to be complied with when advertising alcoholic beverages. BCAP has produced Guidance Notes for the television alcohol advertising rules as a help to interpret the rules in the BCAP Code.<sup>147</sup>

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<sup>138</sup> Section 56.6.

<sup>139</sup> Section 56.7.

<sup>140</sup> Section 56.8, 56.9.

<sup>141</sup> Theobald, T & Willis, A, *New rules for alcohol advertising*, Ent. L.R. 2005, 16(8), 224-225, p. 225.

<sup>142</sup> Ibidem.

<sup>143</sup> Section 56.11, 56.14.

<sup>144</sup> Section 56.14.

<sup>145</sup> Theobald, T & Willis, A, *New rules for alcohol advertising*, Ent. L.R. 2005, 16(8), 224-225, p. 225.

<sup>146</sup> BCAP Code, Section 1.2.

<sup>147</sup> <http://bcap.org.uk/Resource-Centre/Advice-and-guidance/Broadcast-guidance-and-help-notes/Advertising-guidance-notes/Advertising-guidance-6.aspx>.

The rules are quite similar to those in the CAP Code. Advertisements must not suggest that alcohol can contribute to popularity, confidence, enhance personal qualities or that refusal is a sign of weakness.<sup>148</sup> Advertisements should not suggest that the success of a social occasion depends on the presence of alcohol and they must not link alcohol with daring, aggression or anti-social behaviour.<sup>149</sup> Advertisements cannot suggest that drinking can overcome problems and they are not to encourage immoderate drinking.<sup>150</sup>

Advertisements must not link alcohol with sexual activity or sexual success or imply that it can enhance attractiveness.<sup>151</sup> According to the Guidance Notes, sharing affectionate kisses or glances is fine and the rule is not designed to prevent the use of glamorous images.<sup>152</sup> But sexual contact, an erotic atmosphere or implications of a sexual motive is prohibited. Mild flirtation and romace is allowed.

In all advertisings alcohol must be handled and served responsibly.<sup>153</sup> Scenes with traditional popping of champagne corks are not prohibited but scenes of partygoers being soaked in champagne are not acceptable and alcohol should also not be thrown or poured over people.<sup>154</sup>

It is prohibited to link alcohol to youth culture and advertisements must not appeal to people under 18.<sup>155</sup> According to the Guidance Notes, advertisements should avoid themes that are associated with youth culture, avoid teenage fashion and clothing, avoid personalities who are likely to have a strong appeal to the young (this means that pop stars, sportsmen, television personalities and others who might have an influence on young people should be avoided in advertisements), avoid music or dance that is likely to appeal strongly to those under 18, avoid language used by the young (slang) and caution is needed in the use of all sports.<sup>156</sup> Children must not be seen or heard, and no one who is, or appears to be, under 25 years old may play a significant role in advertisements for alcoholic drinks and no one may behave in an adolescent or juvenile way.<sup>157</sup> There is an exception for advertisements in which families are socialising. In these circumstances, children may be included but they, and anyone who is, or appears to be, under 25 must only have an incidental role and it must be explicitly clear that anyone who appears to be under the age of 18 is not drinking alcohol.<sup>158</sup>

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<sup>148</sup> BCAP Code, Section 11.8.1.a.

<sup>149</sup> Section 11.8.1.a.b.

<sup>150</sup> Section 11.8.1.d.g.

<sup>151</sup> Section 11.8.1.c.

<sup>152</sup> Guidance Notes for Section 11.8.1.c.

<sup>153</sup> BCAP Code, Section 11.8.1.g.

<sup>154</sup> Guidance Notes for Section 11.8.1.g.

<sup>155</sup> BCAP Code, Section 11.8.2.a

<sup>156</sup> Guidance Notes for Section 11.8.2.a.

<sup>157</sup> BCAP Code, Section 11.8.2.a.

<sup>158</sup> Section 11.8.2.b.

## 5.4.4 Sanctions

Complaints from the public must be directed to the ASA Council. This is the body that adjudicates on formally investigated complaints and decides whether an advertisement is in breach of the Codes, their adjudication is published on the ASA website.<sup>159</sup>

When there has been breach of the Codes the ASA asks the advertiser to amend or withdraw the advertisement and, according to the ASA, most advertisers comply.<sup>160</sup> But ASA has a range of sanctions at their disposal against those that do not comply. First there is the weekly publication of the ASA adjudication and this attracts a great amount of media attention.<sup>161</sup> This is a powerful sanction since, according to the ASA, the most persuasive sanction is bad publicity because an advertiser's reputation can be damaged. The rulings are published for five years. The second sanction is the refusal by media owners to feature advertisements that are in breach of the Codes.<sup>162</sup> The ASA can ask publishers not to print advertisements in breach of the CAP Code and CAP can issue alerts to its members not to provide advertising space to such advertisements.<sup>163</sup> Broadcasters do not air advertisements in breach of the BCAP Code since they are obliged by a condition of their broadcast licences to comply with ASA rulings.<sup>164</sup> Another sanction, if a non-broadcast advertiser refuses to comply with the ASA and persistently breaks the CAP Code, is that the ASA can refer the advertiser to the Office of Fair Trading for legal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008.<sup>165</sup> Broadcasters who persistently air advertisements that are in breach of the BCAP Code can be referred, by the ASA, to Ofcom and Ofcom can fine them or even withdraw their licence to broadcast.<sup>166</sup>

In order for the sanctions to be effective it is quite important that the media industry cooperates and help enforce the rulings of the ASA. The ASA cannot threaten with criminal sanctions. The question is just how effective the sanctions really are. Deceitful advertisers can get away with advertisements for months until a complaint is upheld. Since the commitment from the media is essential, perhaps the sanctions are not that effective when there is a lack in the cooperation. The problem with ineffective sanctions is a serious disadvantage that can result in the failing of the whole system of self-regulation.

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<sup>159</sup> Fenwick, H and Philipson, G, *Media Freedom under the Human Rights Act*, 2006, Oxford, p. 548.

<sup>160</sup> <http://www.asa.org.uk/Regulation-Explained/Control-of-ads.aspx>.

<sup>161</sup> Ibidem.

<sup>162</sup> Ibidem.

<sup>163</sup> <http://www.asa.org.uk/Complaints-and-ASA-action/Sanctions.aspx>.

<sup>164</sup> Ibidem.

<sup>165</sup> Ibidem.

<sup>166</sup> Ibidem.



## 5.4.5 Compliance

The ASA regularly publishes Compliance Reports on alcohol advertising in order to assess the compliance rates for advertisements and breaches of the Codes. This is a good way of establishing how the rules are working and if they are complied with. Since the alcohol advertising rules are governed by self-regulation there are no court rulings in this area that are precedent. Therefore the ASA adjunctions and Compliance Reports can serve as a type of case law which helps advertisers to establish what is allowed in an advertisement and helps us to understand the present legal situation.

According to the 2006 Compliance Report the compliance rate was 94 percent.<sup>167</sup> During December 2006 the monitoring team picked up 210 advertisements in which 147 were from non-broadcast media and 63 from television. Of all advertisements they found that 12 had breached the Codes, 9 non-broadcast advertisements and 3 advertisements on television.

The 2007 Compliance Report found that the compliance rate was 97 percent. The monitoring team picked up 463 advertisements in December 2007 of which 12 breached the Codes. In 2008 the compliance rate was 99 percent. December was again the sampling period and 456 advertisements were assessed, 394 in non-broadcast (3 breached the CAP Code) and 62 in broadcast media (2 breached the BCAP Code). In 2009 the compliance rate was whole 99.7 percent. 307 advertisements were assessed, 241 appeared in non-broadcast media (1 breached the CAP Code) and 66 appeared in broadcast media.<sup>168</sup>

### 5.4.5.1 Examples

One television advertisement that ASA received complaints about from the public was a vodka advertisement for the brand Vodkat.<sup>169</sup> The advertisement featured several men and women, all dressed up in a club making statements directed at the viewer as they crossed the screen. The statements were: "It's not an attitude, it's the way I am"; "Since when did girl mean girly?"; "Cool, calm and under control"; "It's all about respect"; "What?"; "I'm not high maintenance, I just deserve better"; "Are you looking at me?"; "Why not?"; "Respect me. I do." The last scene of the advertisement showed a bottle of Vodkat beside two shot glasses as a female voice said: "Vodkats. You've got to be one to drink one."

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<sup>167</sup> The reports can be found at <http://www.asa.org.uk/Resource-Centre/Reports-and-surveys.aspx>.

<sup>168</sup> Compliance Report, Alcohol Advertising Survey 2009.

<sup>169</sup> See the verdict in the 2006 ASA Compliance Report.

The ASA found the advertisement to be in breach of the BCAP Code Sections 11.8.1(a)(1), 11.8.1.(c) and 11.8.2(a)(1) since the advertisement implied that drinking Vodkat could contribute to popularity, confidence and attractiveness and it was also likely to appeal strongly to people under 18 years of age.



Another advertisement in breach, in national press, for Belvedere vodka, showed a man sitting on a couch with a woman on either side of him.<sup>170</sup> The women were staring at the man and one woman had her arm around his neck. On the table in front of them were plates of food, glasses of drink and a half full bottle of Belvedere vodka. Text stated "luxury reborn".

The ASA found the advertisement to be in breach of the CAP Code Section 56.9 because it linked Belvedere with sexual success. The close physical contact and the expression on the women's faces implied that the women were sexually attracted to the man.



There are also many examples of advertisements that the ASA have found not to be in breach of the Codes. One example is a television advertisement where two men filled a car boot with cases of beer and cider.<sup>171</sup> The boot was too full to be shut and a voice said: "there's more beer for less at Asda", "more for you for less". An on-screen text stated "Any 2 £18 Any 3 £24".

The ASA did not find the advertisement to be in breach of the BCAP Code Section 11.8.1.(g), that advertisements must not show, imply or encourage immoderate drinking. According to the ASA viewers were likely to understand that the men were taking advantage of a price promotion and that they did not intend to consume all the beer at once.

<sup>170</sup> See the verdict in the 2008 ASA Compliance Report.

<sup>171</sup> See the advertisement in the ASA 2006 Compliance Report.



The ASA argues that complaints about alcohol advertisements are few and as we can see from the numbers from the Compliance Reports from the last couple of years, the compliance rates are high. A factor that might be contributing to this high rate of compliance can be the fact that advertisements can be very expensive to make, especially on television, and advertisers might not be willing to take a risk, so they comply with the rules.

In December 2008 the ASA stated in a Background Briefing on alcohol<sup>172</sup> that "the already strict rules for alcohol advertising were further strengthened in 2005 when tough new rules were introduced for advertising on TV and in all non-broadcast media".

Accordingly, the ASA states that the alcohol advertising rules are very strict and also that most advertisements comply with the rules. But 99.7 percent of compliance is high, perhaps too high. The question arises whether the rules really are that strict as the ASA claims and if they are, would it not be more difficult to comply?

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<sup>172</sup> <http://www.asa.org.uk/Resource-Centre/Background-Briefings.aspx>.

## 5.5 The self-regulation

As mentioned before, the advertising rules in the UK are governed by self-regulation. Self-regulation for non-broadcast advertising has existed since the ASA was established and now broadcast advertising is also a part of this system. The system is funded by the advertising industry and not the taxpayer.<sup>173</sup>

The self-regulation system in the UK has the support of the government.<sup>174</sup> ASA has achieved considerable success in persuading the government that self-regulation works better and is cheaper than statutory regulation when it comes to advertising.<sup>175</sup> When Ofcom in 2004 delegated the responsibility for broadcast advertising to the ASA, resulting in self-regulation of the whole advertising rules system, this decision was approved by the government. Clearly they are satisfied with the self-regulation system otherwise they would not abandon the previous statutory rules regarding broadcast advertising. The courts share this view on the system as well and they have tended to show considerable respect to self-regulating bodies.<sup>176</sup> In addition to this, EU also encourages the self-regulation system. In the preamble to the AMS Directive it is stated that the Directive encourages the use of co-regulation and self-regulation.<sup>177</sup>

The advertising industry prefers self-regulation because it means that it avoids exposure to statutory legislation and statutory controls. To avoid this exposure to laws the advertising industry funds the ASA with more than £3 million annually.<sup>178</sup> So, the industry writes the advertising Codes but does not administer its own rules since the independent ASA does this. But it is the industry that funds the ASA. This might put the independence of the body in question. It might also lead to doubts about the efficiency of the self-regulation system.

### 5.5.1 Is the self-regulation effective?

There are groups that criticise the self-regulation and the rules on alcohol advertising. They are of the opinion that the self-regulation system of UK alcohol advertising has failed. One of these groups is the BMA. In 2009 the BMA published a report about the damaging effects of alcohol advertising on young people.<sup>179</sup> They expressed their concern about the increased alcohol consumption in the UK and the fact that UK is among the heaviest

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<sup>173</sup> <http://www.asa.org.uk/Regulation-Explained/Control-of-ads/Co-regulation-broadcast.aspx>.

<sup>174</sup> Fenwick, H and Philipson, G, *Media Freedom under the Human Rights Act*, 2006, Oxford, p. 546.

<sup>175</sup> Robertson & Nicol, *Media Law*, 5th Ed, 2007, Sweet & Maxwell, p. 793.

<sup>176</sup> *Ibidem*, p. 759.

<sup>177</sup> Directive 2007/65/EC, preamble 26.

<sup>178</sup> Robertson & Nicol, *Media Law*, 5th Ed, 2007, Sweet & Maxwell, p. 757-758.

<sup>179</sup> BMA's report; *Under the Influence – the damaging effect of alcohol marketing on young people*, 7 September 2009.

alcohol consuming countries in Europe.<sup>180</sup> According to BMA, young people are drinking more because the whole population is drinking more. The BMA demands a total ban on alcohol advertising, in all medias and are of the opinion that the government should enforce this. According to the BMA, the weakness of the system is that the current controls on alcohol promotion are inadequate because they are based on voluntary agreements.<sup>181</sup> Other weaknesses are that the system focuses on the content, rather than the amount of alcohol advertising and also that the reliance on public complaints is of limited effectiveness.<sup>182</sup> The BMA finds “it essential that all the UK governments move away from partnership with the alcohol industry and look at effective alternatives to self-regulation.”<sup>183</sup> The government should also, inter alia, establish minimum price levels for the sale of alcoholic products, regulate the availability of alcoholic products through a reduction in licensing hours and prohibit the development of products that either appeal to young or are particularly associated with problematic drinking.<sup>184</sup>

BMA’s main conclusion is that the government has to end the partnership with the alcohol industry and find other alternatives to self-regulation. The question is whether the government is willing to take this step. As we have seen earlier they are content with the current system of self-regulation and this was even more evident when they in 2004 approved Ofcom’s decision to delegate broadcast advertising responsibility to ASA. It seems as if there are no plans to replace the current system with legislation, in spite of pressure from organisations such as the BMA.

The above-mentioned Health Select Committee report on alcohol also examined the success of the self-regulation. Referring to the government’s 2004 alcohol strategy, this report also criticised the relationship between the alcohol industry and the government. According to the Health Select Committee the government strategy put the interests of alcohol producers and retailers above the health of UK citizens.<sup>185</sup> Furthermore, they stated that “we are concerned that Government policies are much closer to, and too influenced by those of the drinks industry and the supermarkets than those of expert health professionals.”<sup>186</sup> Just as the BMA concluded it is also the Health Select Committee’s conclusion that the regulation of alcohol promotion should be completely independent of the alcohol and advertising industries.<sup>187</sup>

The government has responded to the Health Select Committee’s report and conclusion that the regulation of alcohol marketing should be independent

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<sup>180</sup> Ibidem, p. 8.

<sup>181</sup> Ibidem, p. 1.

<sup>182</sup> Ibidem, p. 24.

<sup>183</sup> Ibidem, p. 41.

<sup>184</sup> Ibidem.

<sup>185</sup> House of Commons Health Committee. Alcohol, Report of First Session 2009-2010, p. 38.

<sup>186</sup> Ibidem, p. 40.

<sup>187</sup> Ibidem, p. 79.

of the alcohol industry. They stated that they are “strongly supportive of the current regulatory system and notes that appropriate levels of independence are already built into the system.”<sup>188</sup> They went on arguing that, because of its success so far, the advertising will continue to be controlled by co-regulation and self-regulation, under ASA’s control. According to the response, independence is guaranteed since two thirds of the ASA Council members are independent of the advertising industry, so there is both the independence and the industry expertise offered by the system.<sup>189</sup>

As we have seen earlier, in order for a self-regulation system to really be effective it needs to be monitored and adjudicated by a body that is independent of the alcohol and marketing industries.<sup>190</sup> There have been debates about the UK self-regulatory bodies and their independence and one of them, the Portman Group, which the ASA works closely with, has received criticism for not being independent of the industry, as they claim that they are. The group has rejected suggestions that they represent the industry but there are indications that it is not independent and that it lobbies on behalf of the industry.<sup>191</sup> When a WHO report was published in 1994, that opposed the alcohol industry’s position on effective alcohol control policies, it was shown that the Portman Group had offered to pay academics to write anonymous critiques on the report.<sup>192</sup>

So, there are factors that indicate that the alcohol industry has an influence on the government. If the industry has this influence on the government it is not surprising that there are no plans to replace the self-regulation system with a statutory one. It can also be questioned whether this influence has something to do with the fact that the UK is the only European country with no alcohol advertising bans at all.

As we have seen earlier, in order for a self-regulation system to be effective it also needs to possess adequate sanctions.<sup>193</sup> The problem with weak sanctions is a disadvantage with the system of self-regulation. In the UK, it is important that the media industry cooperates and help enforce the rulings of the ASA. But even though the sanctions might be weak, the fact is, and numbers show, that most advertisements do comply with the rules. It might therefore be argued that the system is effective, in spite of the weak sanctions, because of the high compliance. But considering that the rules on alcohol advertising are not so strict, which means that most advertisements comply with them, the sanctions does not really matter. Only a very small amount of advertisement will be subject to sanctions anyway.

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<sup>188</sup> The Government Response to the Health Select Committee Report on Alcohol, 2010, p. 20.

<sup>189</sup> *Ibidem*, p. 21.

<sup>190</sup> See section 3.3 in this essay.

<sup>191</sup> Harkins, C, *The Portman Group*, BMJ 2010;340:b5659.

<sup>192</sup> *Ibidem*.

<sup>193</sup> See section 3.3 in this essay.

# 6 The Swedish system

## 6.1 The Swedish Alcohol Policy

The main aim of the Swedish policy on alcohol is to keep down the consumption of alcohol in the society in order to reduce the alcohol related damages.<sup>194</sup> The strict alcohol policy was formed during the 19<sup>th</sup> century. At the time the alcohol consumption was extremely high in the country and this led to the development of temperance movements.<sup>195</sup> During the beginning of the 20<sup>th</sup> century the high tax policy on alcohol was introduced in order to reduce the alcohol consumption.<sup>196</sup>

The alcohol policy is based on a balance between high taxation, the retail monopoly, restrictions, information and treatment.<sup>197</sup> There are two very important instruments used by the state to fulfil the aim of the Swedish alcohol policy. The first instrument is the high price and taxation on alcohol and this is one of the most important and effective ways to limit the alcohol consumption.<sup>198</sup> Sweden is one of the countries with the highest taxes on alcohol. The second instrument is the retail monopoly where the state can control the availability and sale of alcoholic beverages. The state owned “Systembolaget” controls the availability by controlling the establishment of stores, the opening hours and it also controls that alcohol is not purchased by people under 20 years. It has been shown that such a retail monopoly system as the Swedish reduces the alcohol consumption.<sup>199</sup>

The EU membership has affected the Swedish alcohol policy a lot. Some examples are liquidation of monopolies, higher import quotas and change of law regarding the alcohol advertising rules. Prior to the membership there were several monopolies in the country; there were monopolies on the import, export, manufacturing and wholesale trade for spirits, wine and beer.<sup>200</sup> However, these monopolies had to be removed as a result of the membership. But Sweden was allowed to maintain the retail monopoly, adjusted to the provisions of Article 31 in the EC Treaty.<sup>201</sup> A few years later the ECJ examined whether the retail monopoly was compatible with the EC Treaty.<sup>202</sup> The ECJ has upheld the retail monopoly.

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<sup>194</sup> Prop. 1998/99:134, p. 134 and Prop. 2000/01:20, p. 18.

<sup>195</sup> Prop. 1998/99:134, p. 28.

<sup>196</sup> Ibidem, p. 29.

<sup>197</sup> Prop. 2000/01:20, p. 18.

<sup>198</sup> Ibidem, p. 19.

<sup>199</sup> Andersson, P & Baumberg, B. (2006) *Alcohol in Europe*. London: Institute for Alcohol Studies, p. 266.

<sup>200</sup> Prop. 2007/08:119, p. 14.

<sup>201</sup> ” Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States”.

<sup>202</sup> Case C-189/95, *Criminal proceedings against Harry Franzén*, 23 October 1997.



### 6.1.1 The Franzén case

Mr. Franzén deliberately broke the retail monopoly by selling wine, which he had purchased either at Systembolaget or in Denmark, in his grocery store. He was prosecuted before the Landskrona District Court for selling the wine without a licence. He claimed however that he could not be convicted of any offence because the Alcohol Act was contrary to Articles 28 and 31 of the Treaty. The Landskrona District Court referred the case to the ECJ for a preliminary ruling because it was unsure how it should respond to that argument. The Landskrona District Court asked whether a statutory monopoly such as that of Systembolaget was compatible with Article 28 and whether a statutory monopoly such as that of Systembolaget was contrary to Article 31, and if it was are adjustments possible or must the monopoly be abolished?

The Court stated that Article 31 does not require national monopolies with a commercial character to be abolished but they have to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.<sup>203</sup> Also, the competition between the economies of the Member States is not to be distorted and the trade with goods from other Member States is not to be put at disadvantage, in law or in fact.<sup>204</sup> The Court concluded that the retail monopoly was compatible with Article 31 since it was non-discriminatory. The Court did not examine whether the retail monopoly was compatible with the principle of proportionality since this test was considered not to be necessary according to Article 31.

The Court did however find that the Swedish licensing system set up in the Alcohol Act had not been shown to be proportionate to the public health aim, according to Article 28 and 30, or that this aim could not have been attained by measures less restrictive of intra-Community trade.<sup>205</sup> The licensing system was considered as an obstacle to the importation of alcoholic beverages from other Member States since it resulted in additional costs such as intermediary costs, payment of charges and fees and costs arising from the obligation to maintain storage capacity in Sweden.<sup>206</sup> The parts that fell under Article 28 and 30 were examined more thoroughly since the principle of proportionality had to be observed as well. Accordingly, the retail monopoly was compatible with the EC Treaty but the licensing system could not be justified since it was not proportionate to the public health aim. It is therefore an advantage for the Swedish government for issues to be examined according to Article 31 rather than Article 28. Franzén was convicted by the Landskrona District Court. As a result of this case, the Swedish authorities lowered the fees and charges.

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<sup>203</sup> Case C-189/95, para. 38.

<sup>204</sup> *Ibidem*, para. 40.

<sup>205</sup> *Ibidem*, para. 76.

<sup>206</sup> *Ibidem*, para. 71.

Accordingly, Sweden was allowed to continue to use the retail monopoly as an instrument in the alcohol policy in order to reduce the alcohol consumption. But the fact is that the EU membership has led to a weakening of the traditional and strict Swedish alcohol policy. Another example of this is when Swedish law had to be changed as a result of the Gourmet-case. High taxation and the retail monopoly are still the most important instruments in the alcohol policy. Other important measures in the alcohol policy are, inter alia, limited opening-hours and restrictive provision regarding serving. The restrictions on the advertising of alcoholic beverages and the alcohol advertising ban are also a part of the alcohol policy.

## 6.2 The rules

### 6.2.1 Introduction

The Swedish rules on advertising are, unlike the British rules, primarily and almost exclusively based on statutory legislation. The Marketing Act is applicable on advertising in general and applies on the advertising regarding all kinds of goods and services, including alcohol. Section 5 is the general clause, stating that marketing shall be consistent with good marketing practice. Good marketing practice means generally accepted business practices or other established norms aimed at protecting consumers and traders in the marketing of products.<sup>207</sup>

The alcohol advertising rules are a part of the alcohol policy and the aim of the policy is to limit the consumption of alcohol in the society. Since the alcohol advertising rules are a part of the alcohol policy, they differ from the rules that apply on the advertisement regarding other products. These rules aim at protecting consumers and traders from unfair marketing while the alcohol advertising rules are a part of the public health policy.<sup>208</sup> According to the Swedish government, the view on alcohol in the society reflects on the rules on alcohol advertising and it cannot be disregarded that a legislation that allows alcohol advertising can be perceived as if the society accepts extensive consumption.<sup>209</sup> On the other hand the government recognises that the consumption of alcohol is a part of our culture and since it is legal to manufacture and sell alcohol there has to be an opportunity to advertise the product as well.<sup>210</sup> But particular rules are however required regarding alcohol advertising and such rules can be found in Swedish law.

A collective legislation regarding alcohol advertising was introduced in 1979 through the Law on Alcohol Advertising (1978:763) and this is the foundation of today's alcohol advertising rules. In 2000 the law ceased to exist and the provisions were transferred to the Alcohol Act (1994:1738) but they were not altered. This means that all provisions regarding alcohol are

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<sup>207</sup> The Marketing Act (2008:468), Section 3.

<sup>208</sup> Prop. 2003/04:161, p. 24.

<sup>209</sup> Prop. 1998/99:134, p. 135.

<sup>210</sup> *Ibidem*.

gathered in one law. The Marketing Act contains general rules regarding advertising and the Alcohol Act contains specific rules for alcohol advertising.

## 6.2.2 Particular moderation

The principal rule in the Alcohol Act is that particular moderation shall be observed when marketing alcoholic beverages to consumers (Chapter 4, Section 8). The same provision states that advertising or other marketing measures that are obtrusive or can be considered a form of solicitation or that encourage the consumption of alcohol may not be undertaken. The requirement for particular moderation applies to all marketing of alcoholic beverages to consumers. It aims to guarantee that the marketing of alcoholic beverages does not contribute to a positive attitude towards the consumption of these products.<sup>211</sup> Particular moderation has to be observed when choosing the advertising medium. It has to be observed regarding the content and design of advertisements and also on special marketing methods.<sup>212</sup>

Chapter 4, Section 8, also states that marketing may not be aimed particularly toward or feature children or young people under 25 years of age. This particular age has been chosen because studies on alcohol habits show that the alcohol consumption is highest in the age group 20-24 and the ages between 18-25 is the foundation of a persons future alcohol habits.<sup>213</sup> The protection of children and young people runs like a thread through the Swedish alcohol policy. It has been considered that it is particularly important that the alcohol debut takes place as late as possible because of the fact that when young people get used to the consumption of alcohol, there is a risk that the consumption will increase when they get older and this can in turn lead to an abuse.<sup>214</sup> It is prohibited to give alcohol to youths and there are age limits when purchasing (20 years) and serving (18 years) alcoholic beverages. Young people may be especially susceptible to alcohol advertising and it is more difficult for children and young people to be critical towards advertising.<sup>215</sup> Therefore, because of all this, it is not allowed to direct alcohol advertising towards children and young people.

The Swedish Consumer Agency has published a guideline regarding marketing of alcoholic beverages to consumers.<sup>216</sup> One of the aims is to specify the meaning of the requirement for particular moderation in the Alcohol Act. According to the guideline the assessment of whether marketing is designed to attract children or young people shall

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<sup>211</sup> Ibidem, p. 118.

<sup>212</sup> Ibidem.

<sup>213</sup> Prop. 2003/04:161, p. 36.

<sup>214</sup> Prop. 1998/99:134, p. 137.

<sup>215</sup> Ibidem, p. 138.

<sup>216</sup> KOVFS 2009:6, 20 July 2009.

be based on an overall assessment.<sup>217</sup> This means that the marketed product itself, the design and the context in which it occurs shall be considered. Symbols or phenomena that can particularly be linked with or attract children or young people under the age of 25 may not be used.<sup>218</sup> Marketing may not, through its design or the context in which it appears, be associated with situations in which, according to generally recognised opinion, alcohol consumption should not occur, inter alia, in traffic, sports or work.<sup>219</sup> Advertisements must not suggest that drinking can overcome problems as boredom, loneliness and advertisements must not either suggest that alcohol can enhance mental, physical, social or sexual capabilities.<sup>220</sup> Images may only show the item and what is naturally linked to it.<sup>221</sup> As we can see, these guidelines are quite similar to the rules regarding the content of alcohol advertisement in the CAP and BCAP Codes.

### **6.2.3 Broadcast rules; television**

Advertising may not be used to market alcoholic beverages to consumers on radio or television. The same prohibition applies to satellite broadcasts subject to Law on Radio and Television (1996:844).<sup>222</sup> There is a reminder of the prohibition in the Law on Radio and Television.<sup>223</sup> This provision also states that a programme must not be sponsored by someone whose main business is manufacturing or the sale of alcoholic beverages.

#### **6.2.3.1 Alcohol advertising on Swedish television**

Accordingly, alcohol advertising on television is strictly forbidden in Sweden and there are no exceptions to the rule. But there is indeed alcohol advertising on Swedish television every day. The reason why this is possible is because of EU law. The statutory rules, that prohibit alcohol advertising on television, can be evaded. Marketing financed channels, such as TV3 and Kanal 5 are established and are broadcasting from the UK, meaning that they fall under the jurisdiction of the UK self-regulatory rules on advertising according to the Country of Origin principle.<sup>224</sup> These channels have to comply with the UK self-regulatory rules, in this case the BCAP Code. These channel do not only get to show alcohol advertising but they also have more advertising time at their disposal in general since the rules in the UK, and the rules in the TWF Directive, are not as strict as the Swedish, where the duration and amount of advertisements is much more restricted.<sup>225</sup>

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<sup>217</sup> Ibidem, Section 2.2.

<sup>218</sup> Ibidem.

<sup>219</sup> Ibidem, Section 2.5.

<sup>220</sup> Ibidem, Section 2.6.

<sup>221</sup> Ibidem, Section 2.8.

<sup>222</sup> The Alcohol Act, Chapter 4, Para.10.

<sup>223</sup> Law on Radio and Television, Chapter 7, Para.9.

<sup>224</sup> See Section 4.2.2. of this essay.

<sup>225</sup> Prop. 2007/08:4, p. 11.

Since the broadcast is legal in the UK, it has the right to be broadcast in all Member States, including Sweden, in spite of the national alcohol advertising ban. Sweden is to ensure the freedom of reception of television broadcasts coming from the UK. Channels that broadcast from Sweden have to comply with the strict domestic rules, meaning that they are not permitted to show alcohol advertisements and they also have less time to use on advertisements in general. This is a problematic trend and has been criticised both by domestic channels and sobriety organisations. These organisations argue that it is wrong that channels are able broadcast from the UK, enabling them to advertise alcohol, and still address a Swedish audience, instead the Swedish government should make the rules more stringent.<sup>226</sup> The domestic channels, such as TV4, argue that they should be permitted to broadcast alcohol advertisement as well since the alcohol advertising ban is no longer justified.<sup>227</sup>

The government recognizes that the strict Swedish rules, regarding the permitted advertising time, are contributing to the distortion of the competition while at the same time the strict rules get limited effect.<sup>228</sup> Channels will be motivated to establish themselves in countries as the UK as long as there are differences in the duration of the permitted amount of advertisement. Since most their earnings come from the advertising that takes place on the channel it is not surprising that they would want to establish themselves where they get more time to advertise leading to greater profits. The government is aware that this makes it difficult to maintain other domestic rules which aim to protect important interests, inter alia, the alcohol advertising ban.<sup>229</sup>

In order to even out the competition and to reduce the risk of channel companies establishing themselves abroad, the Swedish rules were adapted to the EU rules meaning that the advertising time was extended from eight to twelve minutes per hour.<sup>230</sup> Since the rules were made more similar in Sweden and other Member States regarding the permitted advertising time it will contribute to channel companies remaining in the country. They will have the same conditions, regarding the advertising time, here as they will in the UK.

But even though the rules regarding the advertising time are adapting, there is still a great difference regarding the alcohol advertising rules and this difference might motivate the establishment abroad. As we have seen, the government is willing to adapt the advertising rules meaning extended advertising time but there are no indications that they will go any further and permit alcohol advertising on television. The question is whether the alcohol advertising ban alone will motivate channel to establish themselves

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<sup>226</sup> *TV4 kräver att få sända reklam för alkohol*, Riksdag & Departement, 22 March 2009.

<sup>227</sup> *Ibidem*.

<sup>228</sup> Prop. 2007/08:4, p. 11.

<sup>229</sup> *Ibidem*.

<sup>230</sup> *Ibidem*, p. 14.

elsewhere and if it does, the government just might have to ease on the rules if they want channel companies to remain in the country.

### **6.2.3.2 Even the state advertises alcoholic beverages**

While the alcohol policy and rules on alcohol advertising are strict, the state owned company, Vin & Sprit, manufacturer and distributor, with Absolut Vodka as its biggest brand, has also followed the trend. The company advertises alcoholic beverages on those channels that broadcast from the UK, in spite of the ban. This has been very criticised with arguments such as that the state on one side applies a strict alcohol policy and on the other side, a fully state owned company evades the rules in order to reach out to the Swedish market.<sup>231</sup> If the government wants a strict alcohol policy then it has to apply this everywhere; what kind of message does it send when even a state owned company evades the rules? The fact is that Vin & Sprit has been one of the biggest advertisers of alcoholic beverages in Sweden. This indicates that the state finds it more important to make money instead of upholding the strict alcohol policy because of public health concerns. In 2008 the company was sold to the French, Pernod Ricard and is now private. The selling of the company is understandable, otherwise there would be huge double standards.

### **6.2.3.3 Possibility to suspend broadcasts**

As we have seen, the TWF Directive, and now the AMS Directive, allows the receiving Member State, Sweden in this case, to provisionally suspend retransmissions of television broadcasts if there are concerns about the content. If the external broadcast is considered not to be in line with specific national rules Sweden is able to restrict reception of television broadcasts only in collaboration with the regulator in the UK, where the broadcaster is established, and the European Commission.<sup>232</sup> Sweden would have to notify these bodies in advance and the UK is not required to force the broadcaster to comply with the Swedish rules. So these types of restrictions on a broadcaster are, in practice, only likely to occur in exceptional circumstances.<sup>233</sup> Therefore the principal rule still remains to be that Sweden is to ensure the freedom of reception of television broadcasts coming from other Member States, even those that contain alcohol advertisements.

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<sup>231</sup> *Alkoholreklam ökar kraftigt*, 5 July 2007, Dagens Nyheter.

<sup>232</sup> Ridgway, S, *The Audiovisual Media Service Directive – what does it mean, is it necessary and what are the challenges to its implementation?* C.T.L.R. 2008, 14(4), 108-113, p. 110.

<sup>233</sup> *Ibidem*.

## 6.2.4 Non-broadcast rules

### 6.2.4.1 The Alcohol Act

According to the Alcohol Act, Chapter 4, Section 11, when marketing alcoholic beverages to consumers that contain more than 15 percent alcohol by volume, commercial advertising in periodicals may not be used or other publications covered by the Freedom of the Press Act and which in terms of publication are comparable with periodicals. This does not apply on publications in periodicals distributed solely at the point of sale of such beverages.

This means that only alcoholic beverages with a maximum of 15 percent alcohol by volume may be commercially advertised in periodicals. The principal rule, according to Chapter 4, Section 8, is still that particular moderation has to be observed when advertising alcoholic beverages. In addition to this, these advertisements are subject to more specific requirements, such as that images may only show the item, or raw materials included in it, individual packs of the item and the brand or equivalent mark.<sup>234</sup> Furthermore, the same provision states that the advertisement may not be larger than 2100 column millimetres and the advertisement may not be in conflict with good practice because of the context in which it occurs, or use methods that are inappropriate considering the consumer. The alcoholic strength must be specified, but the advertisement must not present the drink as preferable because of the high alcohol content. According to Chapter 4, Section 11c, advertisements under Chapter 4, Section 11a, shall contain an approved information text. Some of the approved texts include "Alcohol can damage your health", "Alcohol is addictive", "Alcohol can cause nerve and brain damage" and "Starting to drink at an early age increases the risk of alcohol problems".<sup>235</sup>

### 6.2.4.2 The Gourmet case

As we have seen earlier, the ECJ gives the Member States the opportunity to maintain national provisions that restrict the free movement of goods and service, because of public health issues, but it is however crucial that the measures taken in the Member States are not disproportionate and that they take place within the limits set by the Treaty. This was not the case here.

This has been a historical judgement and has attracted a lot of attention and even resulted in a legislative change. Prior to the Gourmet case<sup>236</sup>, according to the Alcohol Advertising Law, Section 2, all advertising of alcoholic beverages in periodicals was prohibited except for publications in periodicals distributed solely at the point of sale of such beverages, meaning

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<sup>234</sup> Chapter 4, Section 11a.

<sup>235</sup> The Alcohol Ordinance (1994:2046), Section 27.

<sup>236</sup> Case C-405/98, *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, 8 March 2001.

Systembolaget's stores or in restaurants. The prohibition did not apply to advertisements in the specialist press either, meaning the press aimed essentially at traders.<sup>237</sup>

Gourmet International Products published the magazine *Gourmet*, which was printed in two editions. One was on sale to the general public and the other was sent to subscriber only. An issue in 1997 of the edition intended for subscribers contained three pages of advertisements for alcoholic beverages, one for red wine and two for whisky. The Consumer Ombudsman applied to the Stockholm District Court that the marketing shall be prohibited and the prohibition shall be subject to a conditional financial penalty in the event of failure to comply with the prohibition. *Gourmet* responded that the application should be dismissed because the proceedings brought against it were based on legislation that was contrary to Article 28 and 49 of the EC Treaty. Stockholm District Court referred the matter to the ECJ for a preliminary ruling, with the following questions;

1. Is Article 28 or Article 49 to be interpreted as precluding national legislation entailing a general prohibition of alcohol advertising?
2. If so, can such a prohibition be regarded as justified and proportionate for the protection of life and health of humans?<sup>238</sup>

The prohibition did not only prohibit a form of advertising but in reality it meant that producers and importers were prohibited from directing any advertising messages at consumers. According to the court, in the case of products like alcoholic beverages a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television may prevent access to the market by products from other Member States more than it prevents access by domestic products, with which consumers are instantly more familiar.<sup>239</sup> The prohibition on advertising was considered to affect the marketing of products from other Member States more heavily than the marketing of domestic products and was therefore considered to be an obstacle to trade between Member States according to Article 28.<sup>240</sup> But such an obstacle can be justified by the protection of public health according to Article 30. In addition to this, the court recognised that a measure such as the prohibition has a particular effect on the cross-border supply of advertising space and is therefore also a restriction on the freedom to provide services within the meaning of Article 49.<sup>241</sup> But this restriction as well may be justified by the protection of public health. Accordingly, the court ruled that "Article 28 and 49 do not preclude a prohibition on the advertising of alcoholic beverages provided for under national legislation, unless it is apparent that the protection of public health

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<sup>237</sup> Prop. 1998/99:134, p. 120.

<sup>238</sup> Case C-405/98, para. 11.

<sup>239</sup> *Ibidem*, para. 21.

<sup>240</sup> *Ibidem*, para. 25.

<sup>241</sup> *Ibidem*, para. 39.



against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade”.<sup>242</sup>

According to established ECJ case law, rules restricting the advertising of alcoholic beverages because of public health concerns are justifiable.<sup>243</sup>

As we can see, the discussion in this case is quite similar to the discussion in the other, above-mentioned, ECJ cases. It is the next step that differs, that is the issue of proportionality.

In order for such a public health concern to be justified, the measure must be proportionate to the objective to be achieved and must not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States. In earlier cases this test of proportionality and whether the objectives might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, has been done by the court itself. In this case however the court left this to the national court to decide, with the motivation that “the national court is in a better position than the ECJ to carry out an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned”.<sup>244</sup> So, you could actually say that the court did not decide in this case. It was now the duty of the national court to determine whether the ban could be justified and whether it is proportionate to the objective.

Advocate General Jacobs, unlike the court, assessed the question of proportionality. According to him the Swedish ban on advertising was unnecessary to pursue the aim sought and he was of the opinion that it is not proportionate or effective to impose a ban on all commercial advertising of alcoholic beverages in all media directed at the general public.<sup>245</sup> Accordingly, the aims could be pursued by less restrictive measures.

### **6.2.4.3 The Gourmet case in the national court**

Back in the Stockholm District Court the court dismissed the Consumer Ombudsman’s application.<sup>246</sup> The main task of the court was to assess the principle of proportionality. The prohibition was regarded as excessive and was therefore considered to be disproportionate; the protection could be obtained by prohibitions of a more limited nature.

The Consumer Ombudsman appealed to the Market Court.<sup>247</sup> The Market Court confirmed the Stockholm District Court judgement. The question was whether the protection of public health against the harmful effects of alcohol could be ensured by measures having less effect on intra-Community trade.

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<sup>242</sup> Ibidem, Summary, para. 1-2.

<sup>243</sup> See Section 4.3 in this essay.

<sup>244</sup> Case C-405/98, para. 33, 41.

<sup>245</sup> Opinion of the Advocate General Jacobs, Case C-405/98, para. 48, 57.

<sup>246</sup> Case T 8-1111-97.

<sup>247</sup> MD 2003:5.

The Market Court decided that the public health benefits of a ban were not proportionate to the restrictions on trade.

The Swedish legislation contains a range of advertising restrictions, *inter alia*, the television alcohol advertising ban, the requirement for particular moderation and the rule that advertising must not be aimed at children and youths. The state also has other instruments at its disposal that are a part of the alcohol policy, for the protection of public health, such as the retail monopoly, limited opening-hours, serving restrictions and high taxation. The advertising ban in periodicals, set against all these other instruments, was considered to be of limited effect.

Accordingly, the court found that the ban was not effective to the aim sought, it was excessive and therefore disproportionate. The Swedish ban in the Alcohol Advertising Law was found to be contrary to EU law. It seems as if the Marketing Court, unlike the ECJ, was influenced by the opinion of the Advocate General.

#### **6.2.4.4 Results of the Gourmet case**

This case resulted in an legislative change in order to remove the ban that was at issue. It did not however mean that it now was free to advertise alcoholic beverages in periodicals. The ban was not removed completely but changed so that it instead applied on commercial advertisements in periodicals where alcoholic beverages with more than 15 percent alcohol by volume are advertised.<sup>248</sup> The government, reluctantly, had to change the law in order for it to comply with EU law. They stated that they still are of the opinion that alcohol advertising has to be limited considerably and that every alteration has to be made carefully, with the consideration of the public health.<sup>249</sup> The limit of 15 percent alcohol by volume was chosen, according to the government, because of public health reasons since it is a part of the alcohol policy to advise consumers to choose alcoholic beverages with a lower percentage instead of alcohol with a high percentage.<sup>250</sup> This limit has been criticised by the Council on Legislation. According to them, the motivation on why the 15 percent alcohol by volume was chosen had not been convincing.<sup>251</sup> This means that those wines, just above the limit of 15 percent alcohol by volume, are not allowed to be advertised and the ban also applies on some sherry brands but not others, which is unfair.

The legislative change in general has also been criticised with the motivation that the change simply has not been sufficiently prepared and the government has not taken EU law seriously.<sup>252</sup> According to Bernitz, to set

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<sup>248</sup> Prop. 2002/03:87, section 4.3.

<sup>249</sup> *Ibidem*, p. 13.

<sup>250</sup> *Ibidem*.

<sup>251</sup> *Ibidem*, Appendix 3, p. 20.

<sup>252</sup> Bernitz, U, *Gourmet-målet: Marknadsdomstolen finner annonseringsförbud för alkohol otillåtet enligt EG-rätten*, ERT, 2003 p.572-582, p. 582.

the limit at 15 percent alcohol by volume can give rise to more cases as the Gourmet case and there is a risk that the new prohibition will not hold either in a new trial.<sup>253</sup>

#### 6.2.4.5 Comments

It is interesting that the advertising ban in periodicals was considered as disproportionate because the state has other instruments at its disposal as a part of the alcohol policy in order to control the consumption. This means that in countries where they do not have these other instruments, such as the retail monopoly and the price instrument, an advertising ban as the one in the Gourmet-case would probably be considered as proportionate.<sup>254</sup>

The ECJ's decision not to decide and leave it up to the national court to determine whether the prohibition was proportionate is peculiar, especially considering the fact that the court has undertaken the test of proportionality in previous cases.<sup>255</sup> In the presented cases regarding the French advertising ban, which came after the Gourmet case, the ECJ once again examined the proportionality on its own and it found the prohibition to be justified and proportionate. Accordingly, the court should have decided in the Gourmet case as well instead of referring the task to the national court. When the ECJ acts like this it is difficult to establish whether it will assess the question of proportionality on its own or if it will leave this to the national courts. The ECJ's behaviour is more than strange. One possible explanation is that the court is cautious on deciding certain cases, such as health issues, political and economical issues, because they are considered to be sensitive and the ECJ does not wish to interfere in these areas.<sup>256</sup> But if we apply this argument on the Aragonesa case, the French cases and the Franzén case, the ECJ should have left the test of proportionality to the national courts. As we already know, this was not the case which means that this argument is not sustainable.

Advertising bans can be contrary to Article 28 of the EC Treaty but can however be justified because of public health concerns according to Article 30. ECJ has stated that this exception from the fundamental right of free movement is to be interpreted narrowly.<sup>257</sup> The Marketing Court has actually complied with this statement and applied the principal rule; that national laws need to comply with the principles of free movement of goods and services. We need to bear in mind that this is a principal rule - exception situation and exceptions are to be applied narrowly, otherwise it would not be called an exception. It is more common that national provisions do not

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<sup>253</sup> Bernitz, U, *Förbudet mot alkoholreklam tar inte EG-rätten på allvar*, Dagens Industri 2003-04-01.

<sup>254</sup> Otken Eriksson, I, *Marknadsdomstolens dom i Gourmet-målet: Resonemang kring proportionalitet*, ERT 2003, s. 585, Section 4.3.

<sup>255</sup> See cases under section 4.3 and 6.1 in this essay.

<sup>256</sup> Biondi, A, *Advertising alcohol and the free movement principle: the Gourmet decision*, European Law Review, 2001, 26(6), 616-622, p. 621.

<sup>257</sup> Prop. 2007/08:119, p. 28.

fulfil the requirements for an exception, according to Article 30 and 46, but that the provisions are contrary to Article 28 and 49.<sup>258</sup>

## 6.2.5 Sanctions

The Alcohol Act does not have its own sanction-system, there is instead a link between the Marketing Act and the Alcohol Act; marketing that contravenes the specific rules in the Alcohol Act is to be regarded as unfair according to the Marketing Act.<sup>259</sup> The Swedish Consumer Agency and the Consumer Ombudsman have the main responsibility in supervising that the rules are being complied with.

According to the general clause, marketing shall be consistent with good marketing practice and marketing that contravenes good marketing practice is to be regarded as unfair. Under Section 23 of the Marketing Act, a trader whose marketing is unfair may be prohibited from continuing with that marketing. The prohibition shall be subject to a conditional financial penalty.<sup>260</sup> Proceedings in respect of a prohibition under Section 23, shall be instituted at the Market Court and the prohibition may be instituted by the Consumer Ombudsman, a trader affected by the marketing in question or a group of consumers, traders or employees.<sup>261</sup> In addition to this, a person who intentionally or negligently violates the prohibition under Section 23, shall compensate any consumer or other trader for any damages arising from this violation.<sup>262</sup> Proceedings in respect of damages shall be instituted at Stockholm District Court.<sup>263</sup>

If a trader intentionally or negligently contravenes the television alcohol advertising ban under Chapter 4, Section 10 of the Alcohol Act, he may be ordered to pay a special charge (market disruption charge).<sup>264</sup> The charge shall be fixed at a minimum of five thousand SEK and a maximum of five million SEK.<sup>265</sup> Proceedings in respect of a market disruption charge shall be instituted at Stockholm District Court by the Consumer Ombudsman but if he decides not to commence proceedings, an individual trader affected by the marketing in question or a group of traders may institute such proceedings.<sup>266</sup>

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<sup>258</sup> Bernitz, U, *Gourmet-målet: Marknadsdomstolen finner annonseringsförbud för alkohol otillåtet enligt EG-rätten*, ERT, 2003 p.572-582, p. 580.

<sup>259</sup> Alcohol Act, Chapter 4, Section 12.

<sup>260</sup> Marketing Act, Section 26.

<sup>261</sup> *Ibidem*, Section 47.

<sup>262</sup> *Ibidem*, Section 37.

<sup>263</sup> *Ibidem*, Section 50.

<sup>264</sup> *Ibidem*, Section 29.

<sup>265</sup> *Ibidem*, Section 31.

<sup>266</sup> *Ibidem*, Section 48.

## 6.3 Case in the Market Court

Regarding alcohol advertising in Sweden it is the Gourmet case that is probably the most well-known case. But there are also other cases.

Those advertisements that get reported have in many cases breached the requirement that advertisements are not allowed to show more than the product itself or that the image contains more than the Alcohol Act allows.

One example of this is when the (formerly) state-owned company Vin & Sprit made two advertisements for the wine, Gato Negro in the magazines *Elle* and *Amelia*.<sup>267</sup> One of the images showed, besides the wine, pizza boxes and wine glasses. The other image was of a dishwasher full with wine glasses. Both images contained the text “Always in a good company”. Vin & Sprit also made an advertisement for the sparkling wine, Codorníu Clasico Seco, in the newspaper *Dagens Nyheter*. This image hints at the Creation of Adam by Michelangelo.<sup>268</sup>

The Market Court prohibited the use of these advertisements and the prohibition was subject to a conditional financial penalty of 500.000 SEK. The advertisements were legal considering that the alcoholic beverages which were advertised contained less than 15 percent alcohol by volume. But the advertisements contained more than what is allowed according to the Alcohol Act, Chapter 4, Section 11a. This provision states exactly what is allowed to be displayed in an advertisement, that is only the item, or raw materials included in it, individual packs of the item and the brand or equivalent mark. Besides this, nothing else can be shown. According to the court, there is no room for a broad interpretation of the provision so that advertisements could show more than what is listed in the provision.

## 6.4 Self-regulation

It is evident that Sweden has an extensive statutory system regarding advertising, and the advertising of alcoholic beverages in particular. The alcohol advertising rules are strict because they are a part of the alcohol policy. It was mentioned earlier that in countries with a large legal framework, regarding alcohol advertising, there might not be room left, or little room left, for self-regulation. The latter is the case in Sweden.

The self-regulation in the alcohol industry in Sweden is made up of the trade organisations, and among these are Brewers of Sweden (trade organisation for Swedish beer breweries, cider, soft drinks and bottled water producers) and Swedish Spirits and Wine Suppliers (trade organisation for importers and manufacturers of wines and spirits). They are trying to promote standard interpretation and application of the rules regarding alcohol

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<sup>267</sup> MD 2006:26.

<sup>268</sup> See the images in Supplement B.

advertising.<sup>269</sup> Recommendations have been adopted with the purpose to interpret the particular moderation requirements of the Alcohol Act in order to give the members guidance. The latest recommendation on advertising for alcoholic beverages was adopted in 2006 by the Association of Swedish Advertisers, Brewers of Sweden, Swedish Spirits and Wine Suppliers and Swedish Marketing Federation.<sup>270</sup> This recommendation serves as an interpretation of Chapter 4, Sections 8-13, of the Alcohol Act and the Marketing Act. The purpose of the recommendation is to provide guidance for marketing of alcoholic beverages based on the requirement that such beverages should be marketed with particular moderation, to promote standard application of the rules for marketing of alcoholic beverages in the Alcohol Act and to provide guidance for marketing low-alcohol beverages so that this cannot be considered to encourage marketing of alcoholic beverages.<sup>271</sup>

In addition to the recommendation, the Brewers of Sweden and Swedish Spirits & Wine Suppliers have appointed, on their own initiative, a scrutiniser, called the Alcohol Suppliers' Scrutineer (AGM). The AGM scrutinises alcohol advertising. She monitors how companies market and inform about alcoholic beverages in Sweden and has the power to impose fines, up to SEK 500.000 on companies that contravene the recommendations and laws relating to alcoholic beverages, that is the Alcohol Act and the Marketing Act.<sup>272</sup> Since the AGM is not an authority, she does not have a statutory right to impose the fine and she has actually never had to impose it either, because, according to her, the member always comply with her decisions.<sup>273</sup>

The effectiveness of this self-regulation can very much be questioned and whether it serves any purposes at all. The rules are in fact only recommendations and the recommendation is only a help to interpret the rules in the Alcohol Act and to provide guidance. Besides interpreting the already existing statutory rules, there is not much that the self-regulation brings. The statutory rules are strict and detailed and therefore there is not much room left for self-regulatory rules.

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<sup>269</sup> Prop. 2007/08:119, p. 26.

<sup>270</sup> *Recommendation on advertising for alcoholic beverages and low alcohol Beverages.*

<sup>271</sup> Section 2, of the Recommendation.

<sup>272</sup> See <http://www.alkoholgranskningsmannen.se/>.

<sup>273</sup> I received this information from an interview with the AGM, Gun Neuman.

# 7 Concluding comments

## 7.1 Introduction

Alcohol serves multiple functions in the society; it is a part of many cultures to consume alcohol, it is a product that can be sold and purchased, but it is also a type of drug that can evoke an addiction. Drinking in moderation can reduce the risk of coronary heart disease but alcohol can be harmful since most of the body's organs can be damaged and it can also cause premature death and disabilities.

The production and sale of alcoholic beverages is an important part of the economy in many countries. It generates profits for producers, advertisers and investors, creates jobs and generates income to the state from the taxation.<sup>274</sup> Alcohol is therefore an important commodity and it is of great importance for the economy. On the other hand alcohol brings problems to the society.

## 7.2 Differences in the rules

As we have seen, the rules regarding alcohol advertising are quite different in the UK and in Sweden. Having done research on both systems the conclusion can be drawn that the difference is mainly based on the fact that UK and Sweden have different alcohol cultures, leading to the great difference in the alcohol policy. There are therefore two completely different views on alcohol, the consumption of it and even the advertising of alcoholic beverages.

A contributing factor to the differences in the alcohol advertising rules, besides that we are dealing with two different alcohol cultures, might be the different views regarding what impact the alcohol advertising has on the alcohol consumption. Having looked at the preparatory work to the alcohol advertising rules in Sweden the government's opinion is quite clear; there is a significant link between alcohol advertising and the consumption, in the sense that alcohol advertising increases the alcohol consumption.<sup>275</sup> The UK government however is more sceptic. In the 2004 strategy they stated that there is yet no definitive proof of the effect of alcohol advertising on people's behaviour because there are studies that indicate that there are effects on the behaviour but there are also studies showing the opposite.<sup>276</sup> Accordingly, this might be one of the reasons why the alcohol policy and the alcohol advertising rules are so different in Sweden and in the UK. In addition to this, the UK government has been criticised for working too

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<sup>274</sup> Alkohol, ingen vanlig handelsvara, Statens folkhälsoinstitut, 2004, p. 38.

<sup>275</sup> Prop. 2003/04:161, p. 24.

<sup>276</sup> Prime Minister's Strategy Unit, Cabinet Office. *Alcohol harm reduction strategy for England*. March 2004, p. 32.

closely with and that it is too much influenced by the alcohol industry. This influence is maybe what is causing the scepticism towards the link between alcohol advertising and the alcohol consumption. For instance, the Portman Group is, obviously, of the opinion that there are no links between advertising and consumption since this is in their best interest and it has been argued that the group had a lot of influence on the 2004 government strategy.<sup>277</sup>

Whether alcohol advertising affects the consumption or not is a controversial question and the answer will differ depending on whom you ask. Even when the same material has been used to examine the effects on the consumption, the outcome has not been the same.<sup>278</sup> Obviously, those who support the alcohol industry will come to the conclusion that alcohol advertising does not affect the consumption but that it only is a way to persuade those who already consume alcohol to switch brands. Independent researchers have concluded that it in fact does affect people's behaviour and consumption. There has to be a significant amount of truth behind this, otherwise it would not be an issue. It can therefore be concluded that alcohol advertising does influence people's behaviour and consumption of alcoholic beverages. If alcohol advertising did not have any purpose or effect the alcohol industry would not spend so much money on it. If we are exposed to alcohol advertising repeatedly it will become a part of our everyday life and we will create a positive attitude towards it, which in turn will increase the consumption.

### **7.3 Should alcohol advertising be prohibited?**

Many are of the opinion that alcohol advertising should be prohibited completely mainly because it increases the consumption and because of the damaging effects that it brings, especially to young people. Drinking should not be encouraged, especially not to young people. But alcohol advertising should not be prohibited completely.

The argument, that since alcohol is a legal product it should be allowed to advertise it, makes sense. Instead of introducing major limitations on alcohol advertising we have to put an emphasis on personal responsibility since individuals have a choice in their behaviour. People need to take their own responsibility and not blame alcohol advertising for their problems. Alcohol advertising does not force people to consume or abuse alcohol, they choose to do so. Another commonly used argument by the alcohol industry is that alcohol advertising does not affect the consumption but that it only is a way to persuade those who already consume alcohol to switch brands. This is one of the aims. It is absurd to claim that the only aim of alcohol advertising is to persuade consumers to switch brands. The alcohol

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<sup>277</sup> Harkins, C, *The Portman Group*, BMJ 2010;340:b5659.

<sup>278</sup> See Section 2.3 in this essay.



advertisement, like any other advertisement, wants as many as possible to purchase the advertised product, that is what advertising is all about. But let us assume that the aim of an alcohol advertisement really is to persuade a brand switch. Some consumers will switch to this brand. But there are also those consumers who are not consuming already and the advertisement works as a trigger and encourages them to consume the alcoholic beverage. The industry's argument is true but there is a side effect and they are aware of it. The advertising industry has even stated that "Advertising is persuasion and persuasion is an art. Therefore advertising is the art of persuasion".<sup>279</sup>

The alcohol industry, like any other industry, wants to sell their products and should be able to do this since they are not doing anything illegal. But the fact is that alcohol can and does bring a lot of damages in the society and therefore the industry needs to accept that they are dealing with a special type of product that requires special rules. It is not possible to treat alcohol and the advertising of it like any other product. Alcohol advertising should not be prohibited completely but restrictions are imperative. There needs to be a balance between personal responsibility and restricting how the alcohol industry can advertise their products. Advertising brings many benefits as well, such as that it increases consumer choice and advertising is also important to a competitive economy.

To prohibit alcohol advertisements completely and applying a strict alcohol policy in general might seem as an excessive way to control people in a modern society. But on the other hand, some people need to be controlled and it is to their benefit to use such restrictions. To prohibit alcohol advertising completely and applying a strict policy so that alcohol appears as if it were taboo is not a good solution, we all know that if something is forbidden that it is tempting to go after it.

## **7.4 Self-regulation or statutory regulation?**

There are different opinions on how the rules regarding alcohol advertising should take form. Some prefer that the area of alcohol advertising is regulated by self-regulation while others prefer statutory control. There are advantages and disadvantages with both systems. An effective and well-working self-regulatory system might be preferable because it is flexible, cheaper (to the state) than statutory regulation and the rules can be adjusted to that particular business. The parties of the industry might be more motivated to comply with the rules that they were a part of creating and the industry will possess better knowledge about what is permitted without having to interpret complicated laws. It is crucial that the system has adequate sanctions at its disposal otherwise the whole system would fail. It

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<sup>279</sup> Helling, S, *Berusning till salu*, 2004, p. 11.

can be concluded that self-regulation, in order to be effective, works best within a legislative framework and there needs to be a credible threat of law.

We have seen an example of a self-regulatory system in the UK. The government has expressed their content with the system. But is it effective enough? The Swedish statutory system on alcohol advertising is part of the alcohol policy. But are the rules too strict? Here we have two different systems on each side of the scale. The conclusion can be drawn that the UK rules on alcohol advertising are not strict enough and the Swedish rules are too strict. This is supported by the fact that Swedish programme companies are moving to the UK so that they avoid the strict Swedish rules and fall under the jurisdiction of the light UK rules. Obviously, programme companies want to be under the jurisdiction of those rules that will give them most freedom to do what they want, meaning that they can make more money. We have heard the expression “tax haven” in tax law, which means that companies establish themselves in countries where they avoid paying tax or where they only pay a small amount. A similar expression could exist on this area as well where the UK is regarded as the “haven” for liberal advertising.

As we have seen in the ASA’s Compliance Reports the compliance rate is very high among broadcasters and advertisers. This high compliance rate might indicate that the rules are not strict enough. There are no prohibitions at all regarding alcohol advertising and no volume restrictions either. The Swedish rules barely allow alcohol advertising and the advertising that is allowed is a result of the EU membership. The above-presented case in the Market Court regarding the wine advertisements in periodicals that were prohibited would probably be allowed according to the UK rules if they were advertised there. And the UK television advertisement with the full car boot of beer and cider that did not breach the UK rules would most definitely not be permitted in Sweden, assuming that it in Sweden had been an advertisement in a magazine or a newspaper, since alcohol advertising on television is completely prohibited. When advertisements are compared like this the difference in the rules is obvious. The differences regarding what is permitted in the content of alcohol advertisements is also visible.

Another reason why the alcohol policy and the alcohol advertising rules differ so much might be the fact that alcohol is a very important product in many countries. The UK government has stated that alcohol is a substantial part of the UK economy. It is not desirable to restrict the sale, purchase and advertising of a product that is a source of income for the state. Sweden does not have to be as generous with the rules as the UK in order to secure income because of the retail monopoly, which is already a great source of income to the Swedish state.

Accordingly, what can be criticised in the UK system regarding alcohol advertising is that the government is probably too much influenced by the alcohol industry and this affects every other aspect of the handling of alcohol. An alcohol policy barely exists, the alcohol advertising rules are not

strict enough, and the sanctions are weak. The rules only deal with the content of the advertisements, and the compliance rates are high. There are no bans and no restrictions on the volume of alcohol advertisements. Even if the advertisements comply with the rules it does not mean that they do not affect people. With no bans at all and no volume restrictions people will be exposed to a significant amount of alcohol advertisements every day and this can increase the consumption. The problem with alcohol abuse needs to be tackled and the first step is to work in order to change the alcohol culture in the country. This can be done by adopting and developing a better alcohol policy. The government should also step away from the close relationship with the alcohol industry. The question is whether the government is willing to do this since alcohol is important in the UK economy. Probably not, the UK government has even explicitly stated that they are strongly supportive of the current regulatory system. In addition to this, the government will not take any measures that will affect those that drink in moderation, even though there is the problem with binge drinkers. Accordingly, no significant changes can be expected.

We have seen that the guidelines from the Swedish Consumer Agency are quite similar to the rules regarding the content of alcohol advertisement in the CAP and BCAP Codes. Accordingly, there are equivalent rules in Sweden to those in the UK self-regulatory codes. But it is not the other way around. There is no equivalent to the Swedish rules in the Alcohol Act in the UK. The rules in the Alcohol Act are the important ones regarding alcohol advertising and the rules from the Swedish Consumer Agency, and also the rules created by the Swedish self-regulatory bodies (which are similar to the Agency's rules), are of secondary importance only. It might be claimed that the UK is lacking these basic rules, such as the Swedish, regarding alcohol advertising. Instead, they are going directly to the secondary rules. This is a weakness in the system. The self-regulatory rules are a good help to interpret what is permitted in an advertisement and to interpret the statutory rules, but there is the need of a solid legal framework behind these self-regulatory rules.

The problem in Sweden is that the television advertising ban can be evaded. Another problem is that the Gourmet-case has led to some legal uncertainty. The case resulted in a legislative change and the government is of the opinion that the change is enough so that the Swedish rules now comply with EU law. It is however not clear that this is the case. If a similar case to Gourmet would be tried, or the television advertising ban, it would be difficult to say what the outcome would be. The television advertising ban would probably not be and is probably not in accordance with EU law. On the other hand we have seen that ECJ has allowed national restriction and advertising bans in other countries. But we need to bear in mind that the bans were allowed in countries that do not have the other strict and far-reaching instruments that are part of the alcohol policy as those in Sweden, such as the price instrument and the retail monopoly. The uncertainty will continue, at least until a new case gets tried. The Swedish alcohol policy seems to contravene principles of EU law. The rules need to be changed in

order to adapt them more to the rest of Europe. The EU membership means that there is a larger play ground now and since channels compete on the same market, similar rules and conditions should apply. Even though the rules regarding the advertising time were extended, Swedish channels are still in a weaker position in relation to their colleagues that broadcast from the UK. The fact that alcohol advertising is allowed according to EU law but rules which restrict alcohol advertising are allowed as well makes it difficult to establish what the Swedish government should do.

Both the UK government and the Swedish government are content with their own system and there are no plans to change neither one of them. But if the UK wants to reduce the alcohol consumption and tackle the alcohol problems it needs to introduce a more strict alcohol policy. If Sweden wants their programme companies to remain in the country they have to ease on the advertising ban. The total ban probably has to be eased also in order for Sweden to avoid future cases as the Gourmet-case.

So, which system is preferable, the self-regulatory or the statutory? Studies have shown that statutory regulations are stronger than non-statutory regulations. But an effective self-regulation, within a legislative framework, would probably be better-suited regarding alcohol advertising. By mixing you could take the advantages of each system and limit the disadvantages. A well-working self-regulation would probably be more effective meaning that the industry itself can supervise its competitors.

To say which system is the best, the Swedish or the UK system, is difficult. The answer would probably be that the best of both worlds is the best solution.



# Supplement A

The UK advertising rules system. Table from The Health Select Committees Report on Alcohol.

<b>Regulator</b>	<b>Ofcom</b>	<b>ASA</b>	<b>Portman Group</b>
<b>Area of responsibility</b>	Television programme sponsorship	All advertisements, e.g.: <ul style="list-style-type: none"> <li>• Television</li> <li>• Radio</li> <li>• Press</li> <li>• Poster</li> <li>• Cinema</li> <li>• Mobile phones</li> <li>• Direct mail</li> </ul>	All other alcohol producer marketing activities, e.g.; <ul style="list-style-type: none"> <li>• Naming</li> <li>• Packaging</li> <li>• Sponsorship (excluding TV programme sponsorship)</li> <li>• Sampling</li> <li>• Press releases</li> </ul>
<b>Nature of system</b>	Statutory	Co-regulatory (broadcast) Self-regulatory (non-broadcast)	Self-regulatory
<b>Rules written by</b>	Ofcom	BCAP (broadcast) CAP (non-broadcast)	Portman Group
<b>Adjudicating body</b>	Ofcom	Independent ASA Council	Independent Complaints Panel
<b>Funded by</b>	Government	Advertising industry	Drinks producers

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