

# Children and Advertising - Some Perspectives on the Relevant Legal Arguments

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<b>1</b>	<b>Generally About the Problems</b> .....	436
1.1	Introduction .....	436
1.2	Advertising and the Child .....	436
1.3	The Following Study .....	437
<b>2</b>	<b>Arguments Found in Legislative Instruments of Various Types</b> .....	438
2.1	Regulations of Various Types .....	438
2.2	The Convention on the Rights of the Child .....	438
2.3	The Main Swedish Rules Dealing with Children and Advertising.....	439
2.4	The EC Rules .....	440
2.5	Conclusions .....	441
<b>3</b>	<b>Arguments Emanating from the Swedish Radio and TV Act</b> .....	442
3.1	Some Matters of Principle .....	442
3.2	Advertising Attracting the Attention of Children .....	444
3.3	Conclusions .....	446
<b>4</b>	<b>The Arguments Presented before the Swedish Television Bills</b> .....	447
4.1	The General Situation .....	447
4.2	Transfrontier Television and the Council of Europe .....	447
4.3	The Various Proposals that led to the Present Provisions .....	448
4.4	Conclusions .....	451
<b>5</b>	<b>Arguments Emanating from the Actual Risks for Children</b> .....	452
5.1	Introduction .....	452
5.2	The Child and the Market .....	453
5.3	The Particular Vulnerability of Children .....	454
5.4	Risks Connected to Marketing as Such .....	456
5.5	Risks Connected with the Child-parent Relationship .....	456
5.6	Conclusions .....	457
<b>6</b>	<b>Today and Tomorrow</b> .....	457
6.1	Problems Connected with the Present Legislation .....	457
6.2	Some Specific Matters .....	458
6.3	A Framework for new Legislation .....	459
6.4	Concluding Remarks .....	461

## 1 Generally About the Problems

### 1.1 Introduction

Commercial activities are widespread with respect to various kinds of consumer goods. Advertising is found almost everywhere in the physical environment as well as in various media. For more vulnerable citizens this could entail problems. There might i.e. be difficulties to understand what marketing/advertising really aims at, i.e. to promote a certain consumer product, or to ascertain that a certain material really is advertising.

However, it is also clear that marketing in general, and advertising specifically, is also indispensable for the functioning of the economic system. According to the European Convention of Human Rights, Article 10, traders also have a right to speech and information. To generally state that commercial communications are bad and should be suppressed is apparently not a good way to argue in connection with legislation in this area, and the law could forbid marketing i.a. for the protection of health, morals or rights of others.

The question also arises how to legislate in connection with children. What are the main reasons for childprotection in this area, how do these relate to the problems at hand and what solutions best adapted to this?

Closely connected to this is the question of who should do what to protect children, i.e. the legislator, parents or the trader. It could be argued that if parents in reality could not do anything and the legislator/traders do not do enough, the child will have to live with the possible problems. It is therefore very important to thoroughly discuss the problems that arise.

The following article will mainly forms the legal rules, although most of the existing rules today could be found in the self-regulation of traders, in particular within the framework of the International Chamber of Commerce (ICC).<sup>1</sup> The discussion will also mainly deal with the Swedish situation against the background of i.a. the legal system of the European Union. One reason for this is that Swedish legislation probably is one of the most advanced in Europe in its preoccupation with the protection of children. When the concept “children” is used, it covers persons below the age of 18 years, in accordance with the UN Convention on the Rights of the Child (CRC), 1989, Art. 1.

### 1.2 Advertising and the Child

There are a number of marketing techniques such as advertising, direct marketing, interactive online marketing and sales promotion. This article, however, will mainly deal with advertising. It has been disputed whether and how advertising really works. It used to be considered that advertising could convince someone to buy something that (s)he had never bought before. Today the picture is much more complicated and subject to competing theories. One important component appears however to be the importance of the creation of consumer habits. This ought to be more economically effective, the earlier the habit is formed. Thus advertising could be directed towards children. Even if the primary intention is not to address children it could be good to involve children

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1 See *Advertising and Marketing Communication Practice*. Consolidated ICC Code.

as well. Thus, an advertisement could be devised in such a way that it is likely to be noticed by children.<sup>2</sup> Children could also be totally irrelevant to the trader and yet might still be reached by advertising.

Advertising could take place through various media. The most important Swedish rules concern TV advertising, but today Internet, TV games, etc., are also important sources for advertising to children. Of importance is also the fact that media of today are converging in various ways.

Marketing in general and advertising in particular could concern various kinds of goods. There are products of interest for *children only*, such as cheap toys, for *children and adults*, such as a bit more expensive toys, etc., and/or products that both children and adults appreciate like sweets and ice cream, for *adults generally* as children generally are not interested in i.a. products for the building, repair or maintenance of buildings, or for *adults only*, i.e. goods or services that children are not allowed to buy at all.

Children are also a complicated group among citizens. First, from the day of birth they develop into an adult person in 18 years. This means that their capacity to understand the world and to act in it is evolving during the childhood and a 17 year old does not have the same needs or interests as a 8 years or 4 years old. Second, society of today is also very rich in products, producers, media, subcultures, etc., which means that parents have immense difficulties in controlling what their kids do and what advertising reaches them. This influence also emanates from other European states than Sweden. Third, children also have a fair amount of money.<sup>3</sup> When one also considers that they are generally interested in a smaller number of products, they appear to be very important in connection with the products that they actually consume. This means that children could be very important targets for some advertisers. Fourth, they are the children of parents, who are, at least in Sweden, legally responsible for their upbringing and, as the number of children in each family is generally lower than it was 100 years ago, children would with all certainty play a more important role in the family of today.

### **1.3 The Following Study**

The aim of this study is threefold: to clarify which problems/arguments the legislators have appreciated as important, to try to deepen the discussion as to the possible risks, and, finally, to discuss whether the problems/arguments/risks found could be legally provided for in a better way. The study is to a large extent based on the book *Barnet, marknadsföringen och rätten*.<sup>4</sup> Thus, first an overview of the relevant legislation will be made, which involves Swedish as well as European rules and international conventions. This will be done in Chapter 2. Then it is necessary to analyse the Swedish prohibition a bit more

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2 Handsley E., Nehmy, Ch., Mehta, K. and Coveney, J. *Media, public health and law: A lawyer's primer on the food advertising debate*, *Media & Arts Law Review* 2007, Vol 12 p 101.

3 See below Ch. 5.2.

4 Olsen, L. *Barnet, marknadsföringen och rätten* (The Child, the Marketing and the Law) Norstedts Akademiska Förlag 2006.

closely, Chapter 3 and the arguments put forward in the proposals before the bill, Chapter 4. There is also a need to go into some of the risks posed to children in connection with advertising generally, Chapter 5. Finally, a *lege ferenda* discussion will take place, Chapter 6.

## 2 Arguments Found in Legislative Instruments of Various Types

### 2.1 Regulations of Various Types

The regulations of importance in connection with children are wide-ranging. First, there is the UN Convention on the Rights of the Child. There is also national legislation in the Swedish Parents' and Children's Code dealing with the status of the child within the family. However, these rules will not be dealt with here.<sup>5</sup> I will limit myself to the Swedish commercial practices legislation and to the particular TV rules dealing with children and advertising. It is also important to briefly describe the EC rules of significance, i.e. the new Commercial Practices Directive and the TV without frontiers directive, with regard to children and advertising. Only to a limited extent will various court cases be considered.

### 2.2 The Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) was introduced in 1989 and has been ratified by every state in the world except the US and Somalia. It is apparent that the convention, given this widespread ratification, is of considerable importance. The Swedish legislator has also expressed that Swedish legislation generally has gone further than the Convention and that it is important that this remain the case in the future as well.<sup>6</sup>

The Convention lays down the duties of the signatory States. There are no express provisions dealing with children and marketing.<sup>7</sup> The provision in Article 32, i.e. the right of the child to be protected from various kinds of exploitation, is not relevant in connection with advertising.<sup>8</sup> However, the main principles found in Articles 2, 3, 6 and 12 are very important. They deal with the prohibition against discrimination, the best interests of the child, the right to development and the right to be heard. It is also necessary to stress that children have a right to information, Articles 13 and 17. Even if the Convention stresses the rights of the child, the states also have duties to protect children to an extent "necessary for his or her well-being, taking into account the rights and duties of

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5 For the family law rules of importance for children acting as consumers – see Olsen, *ibid.* p. 45-49,

6 Prop. 1997/98:182 p. 18.

7 The importance of the UN Convention of the Rights of the Child 1989 in connection with advertising is discussed more fully in Olsen, *ibid.* p. 28-45.

8 Van Bueren, G. *The International Law on the Rights of the Child* 1998 Chapter 10, differs between economic, sexual and other forms of exploitation, including social exploitation, but none covers situations of interest here.

his or her parents, legal guardians, or other individuals legally responsible for him or her”, Article 3.2. In this regard one has to mention the principle of the children’s evolving capacities, i.e. that children develop over time, Article 5. This could be said to mean that the need for protection is greater the younger the children are, while their rights become more important the older they become.<sup>9</sup>

### **2.3 The Main Swedish Rules Dealing with Children and Advertising**

There is no express rule in the present Marketing Practices Act (MPL) (1995:450), that concerns children and marketing. Instead the responsible Minister, in connection with an earlier act, has stated that there are reasons to require particular honesty and trustworthiness in relation to consumer groups that could be regarded as less critical, such as children.<sup>10</sup> This has led to i.a. a prohibition in the case law applying the Act, against advertising directly addressed to children below the age of 16.<sup>11</sup> There is also an express prohibition in the Alcoholic Beverages Act (1994:1738) 4:8, against various marketing practices directed towards or depicting children or young people below the age of 25.

The rules for the protection of children in connection with TV advertising were originally included in the Radio Act<sup>12</sup> of 1991.<sup>13</sup> Since 1996 the rules are found in the Radio and TV Act (RTVA) (1996:844). The best known rule in the Swedish system is the prohibition against advertising attracting the attention of children below the age of 12 years in the RTVA 7:4 p. 1.

The prohibition became more widely known in Europe after the European case *Konsumentombudsmannen v. De Agostini et al.*<sup>14</sup> It dealt with TV advertising addressed to children by an Italian firm, over a) TV4, i.e. a Swedish TV commercial channel, and b) TV3 and Channel 5, i.e. commercial channels based in England. The general result was that Sweden was not allowed to apply the prohibition in the RTVA with relation to the channels based in England, only vis-à-vis Swedish TV4.

There are also other rules in the RTVA aiming at the protection of children. In 7:4 p 2 there is a prohibition against the use of persons or figures playing a prominent part in a programme mainly directed towards children below the age of 12 years. The relevant state authority dealing with this rule as well as the above-mentioned general prohibition is the Consumer Agency, 9:2. Further, all advertising interrupting programmes mainly directed towards children below the

9 The principles for this appear in the Commission of the rights of the child General Comments CRC/C/GC/7 2005 *Implementing child rights in early childhood* and CRC/C/GC/4 2003 *Adolescent health and development in the context of the Convention on the rights of the child*. Thus the right to information for children below eight years is not mentioned at all while the same right for adolescents is of fundamental importance.

10 Prop. 1970:57 p. 69.

11 MD 1999:26.

12 SFS 1966:755.

13 SFS 1991:1066.

14 *Konsumentombudsmannen v. De Agostinis Förlag m.fl.* [1997]C-34/95 and C-36/95 ECR I-3843.

age of 12 years, is prohibited, 7:7b. Nor may advertising be sent directly before or after such a programme. The relevant state authority dealing with this provision is the Swedish Broadcasting Commission, 9:2. Beside these rules, the provision in RTVA 6:2 should be mentioned. According to this rule, programmes with excessive violence and pornography should not be transmitted during such a time when there is a substantial risk that children could see them.

#### **2.4 The EC Rules**

One problem in connection with the Swedish rules, and in particular the general prohibition in the RTVA, is that the EC rules are very different. To the extent that the EC rules are of a minimum character Swedish legislation is allowed to diverge.<sup>15</sup> However, when a total harmonization is intended through a directive it becomes more difficult. As the EC directive relating to misleading advertising (84/450/EEC) was of a minimum character and did not even mention the fact that certain consumers are particularly vulnerable, the most important rules were found in the Television-without-frontiers directive (TWFD) 89/552/EEC with amendments 97/36/EC.

First, the TWFD Article 16 directly targets advertising and children. The general idea is that advertising shall not cause moral or physical detriment to minors. This is accomplished through four, more particular rules as to advertising: a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity; b) it shall not directly encourage minors to persuade their parent or others to purchase the advertised products; c) it shall not exploit the special trust minors place in parents, teachers or other persons; and finally d) it shall not unreasonably show minors in dangerous situations. Second, there is also a particular rule dealing with alcoholic beverages in Article 15, which states that such advertising may not be aimed specifically at minors, or depict minors consuming such beverages. Third, there are also rules as to the possibility to interrupt children's programmes with advertising and teleshopping. Thus, according to Article 11, children's programmes may not be disrupted if they are of a duration of less than 30 minutes. Finally, according to TWFD Article 22 the television broadcasts may not include programmes which might seriously impair the physical, mental or moral development of minors. The rule particularly focuses on pornography or gratuitous violence.

There have been a lot of difficulties with the directive, as new sorts of advertisements and marketing appear on the screen. A number of these new forms have been dealt with i.a. in an Interpretative Communication by the Commission.<sup>16</sup> However, the technological development in particular, where i.a. linear, i.e. television, and non-linear, i.a. on-demand technology, are converging, makes it necessary to take a combined approach. Thus there is political agreement as to a specific Audiovisual Media Services Directive. However, there appears to be no substantial change in the attitude described above in

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<sup>15</sup> This was also the reason behind the De Agostini case.

<sup>16</sup> *Commission interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive* OJ C 102, 28.4.2004.

connection with the TWFD, as to the relevant arguments in connection with children and advertising.

The Misleading Advertising Directive and the TV-without-Frontiers directive, in the part dealing with advertising, are only minimum directives, which explains the judgement in the De Agostini case. However, the new general directive dealing with marketing directed to consumers, i.e. the Unfair Commercial Practices Directive (UCPD) 2005/29/EG, means a total harmonization. It would thus be impossible to have particular rules contrary to the directive. However, this would also depend on whether the directive have been dealing with children and marketing. The UCPD is limited to some extent. It deals with commercial practices that traders use towards consumers and is limited to the protection of the economic interests of the consumer, Article 1. The question thus appears to be to what extent children could be regarded as consumers with economic interests only, a question to be discussed later.

The UCPD applies to unfair commercial practices that the trader is using before, during and after contracting, Article 2(d). An important concept in the directive is also the average consumer, who is reasonably well-informed, reasonably observant and circumspect, Preamble para 18. However, the directive also seeks to protect particularly vulnerable consumers and, in particular, the average member of that group. The protection of children appears in Article 5, where unfair commercial practices are prohibited, s. 1. A commercial practice is unfair if it is contrary to the requirements of professional diligence and distorts the economic behaviour of the average member, when the practice is addressed to a particular group of consumers, s. 2. Further, commercial practices which are likely to materially distort the economic behaviour only of particularly vulnerable consumers, such as children, shall be assessed from the perspective of the average member of that group, s. 3. An unfair commercial practice also appears when it is aggressive, Article 8, i.e. when it significantly impairs the average consumer's freedom of choice. In an annex to the directive a number of practices are described which are i.a. considered as aggressive. Thus, a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy for them, is regarded as aggressive, number 28.

## **2.5 Conclusions**

Apparently there are a number of problems/arguments appearing in the various sources. The CRC generally stresses the rights of the child to be recognized, as well as the need for protection, and more specifically that the needs of children differ between various stages of childhood. Swedish legislation is adapted to this idea, as different ages are mentioned in the legislation, and this could be seen as a deficiency in the EC rules. However, the age mentioned in the RTVA is rather high, which means that children in the middle group are denied advertising as to objects of more specific interest to them. This could be regarded as a lack of respect for the rights of these children. On the other hand, the EC rules recognise the rights of information also with regard to the youngest children, when they hardly have any capacity at all to evaluate the information. Thus the need for protection of the youngest is not considered by the EC.

When comparing the Swedish and EC rules, the former entail that children below the age of 12 years should not encounter any advertising at all, when only

watching children's programmes. If they also watch other programmes they should not be exposed to advertising addressed specifically to them. Children above 12 years are only governed through the general Marketing Act, although some children in this group are also protected if they are watching younger children's programmes.

Besides television advertising, the arguments relate to advertising directly addressed to children below the age of 16, the fact that advertising includes pictures of children and a type of goods as dangerous as alcoholic beverages.<sup>17</sup>

The EC rules differ from the Swedish ones. The main Swedish rule deals with advertising addressed to children, while the EC rules mainly deal with advertising reaching children. This is an important distinction which needs further elaboration. The UCPD stresses the fact that children could be regarded as consumers, or, rather, that the consumer have to have economic interests of his/her own. Different rules in the Swedish, as well as the EC could also serve as arguments to be compared. Thus the exhortation to children to buy and the exhortation to children to persuade their parents or other adults to buy goods for them appears in the TWFD as well as the UCPD, and they also appear in the Swedish Consumer Agency/Ombudsman's Interpretative advice. The "argument" in the TWFD, that children should not be depicted in dangerous situations could be said to be the counterpart of the Swedish prohibition against the depiction of children in connection with advertising for alcoholic beverages. However, it is not clear whether there are any counterparts to the rule/argument, that advertising shall not exploit the special trust minors place in parents, teachers etc.

Finally, the Swedish rules as to characters playing a prominent role in children's programmes and the prohibition against interruptions could perhaps be regarded as a support to children's culture, uninterrupted by adults' commercial interests..

### **3 Arguments Emanating from the Swedish Radio and TV Act**

#### **3.1 Some Matters of Principle**

##### **3.1.1 The general prohibition against TV advertising aimed at children**

The provision in RTVA 7:4 reads as follows:

"Commercial advertising in a television broadcast may not be designed to attract the attention of children under 12 years of age.

Individuals or characters, who play a prominent part in programmes which are primarily addressed to children under 12 years of age, may not appear in commercial advertising in a television broadcast."

It is mainly the first part of the provision that will be discussed below. However it is also interesting to compare the different wordings of the two parts. The first appears to be directed towards how the child is reacting to the advertising, while

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<sup>17</sup> In Sweden there is a case law-based prohibition against depicting children in dangerous situations – MD 1979:24.



the second concerns to whom the programme is directed. The difference will be discussed in greater depth below.

There have been six cases from the Marketing Court dealing with television advertising and children. Of these there was a court prohibition in 4 cases, but in 3 cases the Consumer Agency to some extent failed. Before the more detailed discussion of the RTVA 7:4 part 1, some matters of principle will be dealt with.

### 3.1.2 One general prohibition or particular restrictions?

The first question that arose in the 1990/91 Bill to amend the Radio Act was whether there should be a total prohibition or whether particular restrictions would suffice. As examples of regulations taking the latter approach the Minister mentions the ICC Code of Advertising Practices, the Swedish Marketing Act, and in particular the fact that the Swedish law does not generally support the idea that advertising through a certain medium should be unfair.<sup>18</sup>

However, the Minister for the Bill draws the following conclusion:

“According to my view, a medium with such a persuasive force as television should not be allowed for advertisements that particularly address themselves to younger children. Younger children could not always differentiate between advertising and ordinary television programmes. Nor do they always understand that the purpose of advertising is to lure the addressee into buying. Thus they accept the message of the advertisement without the scepticism that older children and teenagers have learnt to develop. A concurrent aspect is also that children watch TV a lot. Children’s programmes often receive very high ratings within those age groups to which they are directed. TV could thus constitute a particularly effective medium for advertisements aimed at influencing younger children. To use television in that way would however clearly be contrary to the interests of children.”<sup>19</sup> (*The author’s translation.*)

In the 1995/96 Bill, i.e. for the Radio and TV Act, the responsible minister states that the matter is closely connected with the question of advertising identification.<sup>20</sup> It is also mentioned that TV4 during 1992-1995 had breached the prohibition about 10 times, which according to the Minister meant that advertising to young children is effective and profitable.<sup>21</sup>

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18 Prop. 1990/91:149 p. 120.

19 Prop. 1990/91:149 p. 121 “Enligt min mening bör emellertid ett medium med så stor genomslagskraft som televisionen inte alls få användas för reklam som särskilt vänder sig till yngre barn. Yngre barn kan inte alltid skilja mellan reklamslag och vanliga TV-program. Inte heller förstår de alltid att avsikten med reklamslag är att locka till köp. Därmed tar de till sig reklamens budskap utan den skepsis som äldre barn och tonåringar lär sig utveckla. Samtidigt ser barn mycket på TV. Barnprogrammen får ofta mycket höga tittarsiffror inom de åldersgrupper som programmen vänder sig till. TV kan därför vara ett särskilt effektivt medium för reklam som syftar till att påverka yngre barn. Att använda televisionen på det sättet skulle emellertid strida klart mot barnens intressen.”

20 Prop. 1995/96:160 p. 116. If the only reason for the rule is advertising identification, it would in my view be very difficult to argue that the rule is not covered by the new EC directive.

21 Ibid.

The reasons for the prohibition are not altogether clear. Should the fact that children do not understand the objective of advertising be regarded as a matter of advertising identification. And what is “the interests of children”? Is it the weakness of the child that is the essence or is it something else, perhaps the commercial influence as such? But there is no general discussion as to when commercial influence could be regarded as particularly dangerous.

### **3.1.3 Advertising “attracting the attention of” compared with “addressed to”?**

Furthermore, it is difficult to understand why different wordings are used in the same provision. The problem is not specifically discussed in the Bill. Indeed, the responsible minister with relation to both parts of the RTVA 7:4 refers to “rikta”, i.e. address to. However, he also stresses the fact that advertising could be addressed to children although it is not specifically designed with regard to this group.<sup>22</sup> The wording thus appears to have been chosen to stress that the judgment should be objective, and not subjective as to the actual intentions of the relevant trader.<sup>23</sup> If this contention is correct the two different wordings in practice appear to have the same meaning.

### **3.1.4 The relevant age group**

As will be seen below in connection with earlier proposals, the relevant age group was there defined very differently and 9 and 10 years were mentioned as well as 14 years. In the original Bill the relevant age group was defined as “younger children”. However, this concept was criticised by the Council on Legislation as being too vague.<sup>24</sup> According to the Council the intention appeared to be to cover children below adolescence and thus proposed the 12-year age limit. This idea was accepted by the responsible minister.<sup>25</sup> According to this view there are just two groups of children in connection with TV advertising, i.e. adolescents and younger.

## **3.2 Advertising Attracting the Attention of Children**

### **3.2.1 The evaluation of the purpose**

As has been seen above the prohibition deals with TV advertisements which, from an objective perspective, appear to be directed towards children below the age of 12 years, and the question that arises is how to ascertain that such is the case. How to judge the purpose is not at all mentioned in the Act itself. However it was discussed in the original Bill.<sup>26</sup> The Consumer Agency has also agreed with the traders about an “Interpretative advice”.<sup>27</sup> Thus, all important aspects

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22 Prop. 1990/91:149 p. 122.

23 See also MD 2000:14.

24 Prop. 1990/91:149 p. 121.

25 Ibid.

26 Prop. 1990/91:149 p. 122.

27 The Swedish Consumer Agency Interpretative Advice on the Prohibition of Commercial Advertising to Children on Television.

should be considered, such as the advertised goods or service, the design of the advertisement and the context in which the advertisement is broadcast.

### **3.2.2 The relevant goods**

The relevant type of goods could be a toy, a game, a collector's series or such a service as a TV channel particularly adapted to children. In the case law, advertisements for the collection of Pokémon cards or dinosaurs, as well as a particular TV channel, have been found to address children.<sup>28</sup> It could also be a matter of certain kinds of foods such as cereals, beverages or sweets, which particularly appeal to children below 12 years of age.<sup>29</sup> Thus ice-lollies with the taste of tutti-frutti and small cornets with the taste of vanilla, strawberry and banana were considered to be particularly aimed at children.<sup>30</sup> However in such situations a further analysis could be necessary. In one case, MD 2000:14, cereals were advertised with the use of animated figures. The court found on the evidence, that the cereals in question were not intended for children.

### **3.2.3 The relevant design**

The relevant design is of course essential. The "Interpretative Advice" mentions i.a. the introductory seconds of a commercial, even though the overall impression is most important. Thus if the introductory part contains pictures, that typically appeal to children, such as pictures of animals or toys, or such sounds as children laughing or talking or a melody for a children's song, it is likely that it is addressed to children. The speaker is also very important.<sup>31</sup> The use of animated figures could mean that it is directed towards children, but not necessarily. Thus in MD 2002:31 the use of animated penguins in advertising for ice cream was not regarded as decisive. "The Interpretative Advice" finally stresses that no encouragement to purchase may be directed to children.

### **3.2.4 The relevant context**

As has been seen above the fact that the advertisement is broadcast in close vicinity of children's programmes is a strong indication that it is addressed to children.<sup>32</sup> Another strong indication is that the commercial is broadcast during a time when there are a lot of children watching.

### **3.2.5 The mixed messages**

As have been seen there have been six cases dealing with the relevant provision. In four cases advertising has been found to address children and in three cases it was not found to do so. This result could be viewed as unsuccessful and it is important to analyze why the provision has been so difficult to apply.

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28 MD 2001:8, 1998:17, 1993:13.

29 See further the Interpretative Advice.

30 MD 2002:31.

31 Cf with the Cinderella case, MD 2001:5.

32 Thus a particular Pokémon trailer, which was sent directly after a Pokémon serial, was regarded as a commercial addressed to children.

As has been seen, the judgement should be based on an overall assessment of the product, design and context, and advertising apparently directly addressed to children is generally covered by the rule. In the cases where the Consumer Agency failed, the message appears to be more mixed in nature. Thus the relevant products could be used by children as well as adults (ice cream, cereals). The advertising contains aspects of interest for children as well as adults, and it could be broadcast at times when children constitute a minority of the viewers. Such advertising thus addresses both children and adults, and has been called “mixed messages”.<sup>33</sup>

The most obvious example of this is MD 2001:5, which concerned a commercial for the Walt Disney movie Cinderella. The advertisement included pictures of children, parents and animated figures from the movie. However the speaker was a male voice speaking in a way that was ordinary for adults and it was also considered to be transmitted at times when children were not the main group of viewers, i.e., 3 p.m., 3.35 p.m., 8.30 p.m. and 9 p.m. The court found that the provision was not applicable.

Mixed messages would be most common in connection with goods that both children and adults are interested in. Such products could be i.a. sweets, ice cream and cereals, which both parties are interested in for their own consumption. However, the adults could also be interested in a product because they want to buy them for their kids. One such example is the above-mentioned case of Cinderella.

The Consumer Agency has reacted on this and demanded, until now unsuccessfully, that the legislator should react, as the prohibition could be without any effects.<sup>34</sup>

### **3.3 Conclusions**

What the intention of the general prohibition really is, is not particularly clear from the legislation. It could be the commercial influence as such on children, in which case the judgement appears to be based more on feelings than reason. The interests of children are also referred to. What the interests of children could be in connection with advertising is, however, not more deeply analyzed. Further, the responsible minister in the second Bill states that the rule is closely related to the question of advertising identification. That could mean that the provision is solely of an economic character and it is hard to see that there is a particular place for such a rule, when the new UCP directive should be implemented.

It is apparent that the law is based on an evaluation of the advertisement as a communication between a sender and a receiver. This is also stressed in marketing theory today. What you can do in such a case is to consider the message from an objective or subjective perspective, and the legislator has chosen the objective angle, which cover more cases. An alternative that has been suggested is to consider whether the advertisement is likely to be noticed by

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33 Olsen, *Children and Internet Trade* in Seipel (ed.) *Law and Information Technology. Swedish Views*. SOU 2002:112.

34 Skrivelse 2003-04-15 – ”[www.konsumentverket.se/mallar/sv/artikel\\_datum.asp?IngArticleID=2966&IngCategoryID=1082](http://www.konsumentverket.se/mallar/sv/artikel_datum.asp?IngArticleID=2966&IngCategoryID=1082)”.

children, irrespective of the possible intentions of the trader.<sup>35</sup> Also the Swedish Consumer Agency appears to look at it in this way.

As has been seen the legislator appears to regard advertisements as a form of communication. One interesting point in that case is to whom the communication is addressed. The rules differ between two groups of advertising, i.e. advertising addressed to children and advertising addressed to the general public, i.e. adults. However, the application of the rule shows that one has to distinguish between at least three groups: advertising addressed to children, to the general public, i.e. adults, and, finally, the mixed messages to both adults and children. This distinction depends largely on the relevant type of goods, even if i.a. the design could be of interest as well.

As the present legislation and the Bills where the provisions were introduced are vague as to the specific reasons behind the rules, it is necessary to look further into the earlier development to see if the picture becomes clearer.

## **4 The Arguments Presented before the Swedish Television Bills**

### **4.1 *The General Situation***

Swedish television was until 1991 publicly governed in its entirety. Before the introduction of commercial television there was a lot of anxiety as to the introduction of TV advertising, in particular with regard to children. Thus, the Nordic Council financed a number of seminars and research in the field and the various proposals were summarized in a particular report, NEK report 1989:5. Furthermore, the TV Committee discussed the problem, without any suggestions as to the relevant provisions. The Radio Act Committee put forward the first legal proposals, which were in part based on the Convention of Transfrontier Television 1989. These sources will be dealt with below.

### **4.2 *Transfrontier Television and the Council of Europe***

Already in 1984 the Council of Europe, Committee of Ministers decided on Recommendation R (84) 3 on principles on television advertising. As a general principle the Recommendation states that advertisements should be prepared with a sense of responsibility towards society and give particular attention to moral values. The protection of children is also specifically mentioned in connection with the content of television advertising. Thus “[a]dvertisements addressed to or using children should avoid anything likely to harm their interests and should respect their physical, mental and moral personality”.

This wording was changed in the 1989 Convention on Transfrontier Television.<sup>36</sup> Chapter III of the Convention deals with i.a. advertising and generally such advertising should be fair and honest, Article 11.1. Article 11.3 deals with advertising and children, and *advertising addressed to or using children* shall avoid anything likely to harm their interests and shall have regard to their special susceptibilities. The respect for the personality of the child in the

<sup>35</sup> Handsley et al. 2007 p. 101 has criticized the Swedish rules on this ground.

<sup>36</sup> The convention is not ratified by Sweden.

Recommendation has thus become a concern for children's special susceptibility, i.e. their particular vulnerability, in the Convention. However, both stress the interests of children. It has not been possible to find any more detailed discussion of what children's interests could be and, more specifically, what is meant by children's special susceptibilities. However, in an Explanatory Report from the Council, the rules in the TWFD Article 16 are mentioned as examples of the way children could be protected from moral or physical harm.<sup>37</sup>

There are also other rules in the Convention of importance to the protection of children, such as rules dealing with pornography and violence, or the possibilities to transmit advertising at all in connection with children's programmes. There are finally limits on advertising depending on the particular kind of goods. Thus, advertising for alcoholic beverages shall not be addressed particularly to minors, and a person used in the advertising may not be perceived to be a minor.

In summary, *advertising addressed to minors* may not harm their interests and shall have regard to their particular susceptibility. Nor may such advertising concern i.a. alcoholic beverages. *Advertising addressed to the public in general* should be fair and honest. It should not interrupt children's programmes shorter than 30 minutes, and if the programme is longer it could interrupt every 20 minutes, Article 14. There are also particular rules in connection with programmes, which means that they should respect the dignity of the human being and the fundamental rights of others, particularly with relation to pornography and violence, Article 7.1, and programme services likely to impair the physical, mental or moral development of children and adolescents should not be transmitted at a time when those groups are likely to watch them, Article 7.2.

### **4.3 The Various Proposals that led to the Present Provisions**

#### **4.3.1 The semi-official angle - the NEK report 1989:5**

The report was entitled "Konsumentkrav på TV-reklam till barn och unga (Consumer demands regarding TV advertising addressed to children and youth)". It is based on a Nordic seminar arranged by the Nordic Ministerial Council, where a number of influential people with an interest in the matter took part. The report consists only of seven pages, but refers to the earlier reports presented, and in particular NORD 1988:20 "Barn, ungdom och reklam (Children, youth and advertising)" and Bernitz, U., "Åtgärder mot otillbörlig reklampåverkan på barn och unga (Measures towards unfair advertising pressure on children and youth)".<sup>38</sup>

The Report mentions a number of difficulties connected with advertising, i.e. 1) that the sound, text and picture often comes surprisingly and at a high speed, 2) that the distinction between advertising and programmes is often difficult to ascertain, and 3) that it could be particularly difficult to defend oneself in the home environment.<sup>39</sup> The Report also considers what makes

37 Explanatory Report T-TT (98) 7 para. 211.

38 NEK 1989:6.

39 NEK 1989:5 p. 4.

children particularly sensitive.<sup>40</sup> Thus, children watch a lot of television and their pattern of behaviour, values and attitudes are less settled than adults. Based on the foregoing, the report advocates the adoption of certain norms in connection with TV advertising directed to children, i.e. 1) a total prohibition of advertising directed to children below 14 years of age, and 2) a prohibition of advertising shown in television before 8 p.m.

Besides these recommendations, the report recommended certain general norms with respect to all advertising in television, which deal with such matters as identification, placement and volume, social values, product presentation, persuasion, safety, violence and the participation of children, figures and dolls, etc.

#### **4.3.2 The TV Committee - SOU 1989:73**

The first official report on the matter, by the so-called TV Committee,<sup>41</sup> considers generally the questions i.a. connected with TV advertising directed towards children.<sup>42</sup> First, the TV Committee deals with the question of how much children watch television, and the Committee finds that children do watch a lot, and not only children's programmes, but also programmes made for all ages and, in particular, for adults. The Committee also finds that children probably are the group whose lives have been most changed by the media expansion, and that it is mainly children who watch foreign satellite programmes. Second, the Committee states that children have a need to create a picture of what life and the world look like and that they therefore are eager to receive new impressions, which makes them particularly sensitive to various influences. Third, the Committee finds that experience shows television to be particularly effective in connection with children. It is difficult for small children to understand what they see on television as they could not really differentiate between fiction and reality and are not totally aware of the difference between advertising and programmes. Fourth, the Committee refers to the International Chamber of Commerce and its Code on Advertising Practices which contains rules as to children, as well as the Television Convention within the framework of the Council of Europe. Finally, the Committee concludes that TV advertising directed towards particularly small children should not at all be allowed in such a potent medium. Particular caution should also be displayed in connection with bigger children and adolescents.

Thus, according to the TV Committee, a conglomerate of measures should be taken.<sup>43</sup> TV advertising, where it is apparent that it is particularly directed towards children around 9 years or younger, should be forbidden. Furthermore, also advertising not directed towards children could influence children if they appear in connection with a children's programme. Thus, the Committee mentions as alternatives either that advertisements should not be allowed before

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40 Ibid.

41 The Committee consisted of Sverker Gustafsson, professor in political science, as single investigator.

42 SOU 1989:73 pp. 168-169.

43 SOU 1989:73 p. 169.

a certain time or not be allowed in connection with children's programmes. The use of programme hosts or story figures that children recognize from children's programmes should also to some extent be forbidden in advertising. Besides the above-mentioned restrictions, the TV Committee stresses a general need for caution as children generally are a part of the public.

The proposals and those for whom they are intended may be summarized as follows. TV advertising *addressed to children* around 9 years and younger should be prohibited. With relation to *advertising addressed to the public at large* the Committee suggests 1) a general caution as children are part of the public, 2) a prohibition against such advertising in connection with children's programmes or, alternatively, a general prohibition for all advertising before a certain time of the day and 3) a prohibition against the use of certain well-known figures appearing in children's programmes.

### 4.3.3 The Radio Act Committee<sup>44</sup>

As has been mentioned, the TV Committee never put forward any express suggestions as to possible legal rules. A suggestion in this respect was instead formulated by the Radio Act Committee, SOU 1990:7. In its general reasoning, the Radio Act Committee naturally referred to the suggestions of the TV Committee, but also to the TV Convention of the Council of Europe from 1989, in particular Article 11.3, concerning advertising and children, as well as the NEK report and the proposals made there.

In its general arguments, the Committee begins by stating that there should be limits on how television may be used for advertising to children. The question then arises as to the content of the Marketing Act (SFS 1975:1418) and the Committee describes the relationship between the Act and the Code of Advertising Practices of the International Chamber of Commerce, and the latter rules are referred to in some detail. The Committee concludes that the general clause found in the Marketing Act is sufficient for the requirements stated in the TV Convention Article 11.3.<sup>45</sup>

However, the general clause is not regarded as sufficient for the stricter goals connected with the use of TV advertising directed towards children, which means that the Committee finds that particular provisions are necessary. Such necessary provisions are, in close agreement with the suggestion of the TV Committee, that an advertisement should not be intended to catch the attention of younger children, who are here defined as being below 10 years of age. Here all relevant circumstances should be considered, i.a. the advertised goods, the design of the advertisement and the context in which the advertisement appears. Further, no advertisements should be allowed immediately before or after a programme primarily directed towards children below the age of 12 years. Finally, the Committee suggests that persons or figures playing a significant role in children's programmes should not be allowed to appear in TV advertisements.

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44 SOU 1990:7 pp. 219-228.

45 Although this could be discussed, this will not be done here. The reason for this argument is probably the extensive rules suggested in the NEK-report 1989 for advertising to the general public.



The purpose of this last rule is that the confidence that children feel towards those taking part in children's programmes should not be used to increase the susceptibility of children towards the message of the advertisement. The figures covered are the programme hosts, those making presentations and the figures played by easily recognizable actors, dolls or animated figures. However, it is regarded as necessary that the part characterizes the programme. The prohibition against using such a figure should exist as long as the relevant programme is being transmitted.

The question finally arose as to the suggestion that TV advertising should be prohibited before a certain time of the day, as was suggested by both the earlier proposals. The Committee thus made a particular inquiry into the matter when children are watching. The relevant time could only be between e.g. 5.30 p.m. and 7.30 p.m., i.e. when children watch children's programmes and the Committee therefore chose not to suggest any such limitation.

The suggestions of the Radio Act Committee could thus be summarized as follows. The prohibition against *TV advertising directed to children* is now expressed as "may not have the purpose of attracting the attention of younger children". As to *advertising directed towards the public* in general, the Committee suggests the sanctuary of the children's programmes, i.e. that advertisements should neither be allowed immediately before or after a children's programme nor be allowed to interrupt them. Finally, the use of main figures in children's programmes should for a limited time be forbidden in TV advertisements.

#### 4.3.4 Some comments by the stakeholders

The views diverged greatly among the stakeholders.<sup>46</sup> Thus, the traders did not see any reason for there being a general prohibition at all, while almost all the other stakeholders agreed, although there were differences as to the relevant age. Further, various consumer organisations proposed that advertising should be generally forbidden till 8 p.m. The Central Board of the Swedish Church also suggested that all advertising, irrespective of at what time it is transmitted, should be designed with due consideration to children.

#### 4.4 Conclusions

The special susceptibility of children is often stressed. However, it would have been better if more thorough knowledge had been presented about children and their development and various difficulties in connection with marketing. Such facts are, however, difficult to find in the presented material.<sup>47</sup> The most

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46 Prop. 1990/91:149 pp. 118-119.

47 It is interesting to note that the Nordic Council spent a lot of money on research. However, the report from the final seminar could have been a lot better. It could have been a really important report drawing the important lines as well as stating some of the most important facts, as you could hardly expect the legislator to go through hundreds of pages and to evaluate the content. Instead it mixes, under the heading of "considerations", a few research results as to children and television advertising with evaluations and conclusions. It is also difficult to understand the intended use of the fourth chapter dealing with norms for television advertising for children (below 14) and young persons (below 18).

important facts are that children watch a lot of television (which they still do)<sup>48</sup> and that their patterns of action, values and attitudes are less settled than adults at the same time as children have a need to create a picture of how the world and life could be. It is also stated that children have difficulty differentiating between fiction and reality, as well as between advertising and programmes.

Further, the difference between advertising addressed to children and advertising addressed to the public in general is often blurred, although the distinction is very important. It is also particularly stressed by the TV Committee that caution should be taken in connection with advertising to the public in general. In the NEK report and the TV Committee report, the rule should concern advertising addressed to children. However, there was no reasoning as to how this judgment should be made. The present formulation, that TV advertising should not “have the purpose of attracting the attention of children”, was put forward by the Radio Act Committee, which also clarifies the aspects that should be considered, i.e. the relevant goods, the design and the context.

An important aspect is also the relevant age, which differs from 9 years in the TV Committee report, below 10 years in the Radio Act Committee report to 14 years in the NEK report. Some stakeholders even suggest 18 years. However there is no more extensive analysis in the proposals as to what the differences between children of different ages and adults really are, which could explain the differences between the various proposals.

One suggestion that was put forward was a time limit, before which there should be a total ban on advertising. The Radio Act Committee found that such a time could be arguable e.g. between 5.30 and 7.30. As children’s need for protection at this time was covered through the children’s programmes sanctuary, there was no need for such a time limit.

## **5 Arguments Emanating from the Actual Risks for Children**

### **5.1 Introduction**

The time has now come to consider the real life of children, i.a. the susceptibility and the risks that arise. As has been seen above there are only a few such aspects that have really been taken into account in the Swedish legislation, i.e. that children watch a lot of television, are susceptible to new impressions and at the same time have less settled habits, etc. Thus it is important to go a little more in depth as to why children need certain rules, even if it is only possible to do so in outline.

It is not common that such aspects are discussed in a legal work. However, it is necessary to be aware of what the main problems are, for a proper discussion as to which legislative measures need to be taken.<sup>49</sup> Some aspects in this regard

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48 Even if other media are growing in importance, cf. Olsen *ibid.* 2006 pp. 97-99 with references.

49 Children as consumers are discussed a lot within different sciences today. Some works could be mentioned as examples of the relatively rich literature in the field: Sonesson, *Barn och konsumtion* FRN 99:6 1999; NOU 2001:6 *Oppvekst med prislapp? Om kommersialisering og kjøpepress mot barn og unge*; Hansen et.al., *Children – Consumption, Advertising and*

have been discussed by the author in the opinion *The protection of children against unfair marketing practices*<sup>50</sup> but more generally in the book *Barnet, marknadsföringen och rätten* 2006.<sup>51</sup> In the following discussion the latter work will mainly be referred to. It has not been possible to check the various research areas for new literature.<sup>52</sup>

As has been seen above, the risks could concern the particular vulnerability of children and the risks connected with marketing as such, but also risks connected with the child-parent relationship. First, however, it is necessary to look a little more closely at the child as an actual actor on the market.

## 5.2 *The Child and the Market*

The child is an interesting actor on the market. First, Swedish children, according to statistics from the year 2006, five billion SEK a year at their disposal.<sup>53</sup> Income differs between the various ages and the older they are, the more money they have at their disposal. On average, 6 year-olds receive 81 SEK/month, 7 year-olds – 102 SEK/month, 8 year-olds – 109 SEK/month, 12 year-olds – 224 SEK/month and 17 year-olds – 868 SEK/month.<sup>54</sup> Before seven years of age the actual consumption in Sweden appears to be limited to mainly sweets and toys.<sup>55</sup> Second, children are not only important for their present consumption. They also constitute a possible future market. Advertising is thus important to shape family or personal habits.<sup>56</sup> Third, children also influence the family with regard to shopping, not only of everyday or “luxurious” goods such as soft drinks, crisps, sweets, cereals etc., but also for the buying of cars, holidays, computers and furniture.<sup>57</sup> The influence is greatest in connection with child-relevant goods and least regarding durable consumption products. Thus, the problem of the pester power of children arises. However, the economic relationship between the child and the family is complicated and it is possible to distinguish between the cases when the child is i.a. the user of the goods, influences the decision or takes the decision.<sup>58</sup>

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*Media* Copenhagen Business School 2002; Tufte et al. *Frontrunners or Copycats?* Copenhagen Business School 2005; Johansson, *Barn i konsumtionsamhället* 2005. Also the ongoing studies from Swedbank and Nordea with relation to the economic situation of children should be mentioned.

50 ECLG/034/05 part 2. The report may be found on “[www.europeanconsumerlawgroup.org](http://www.europeanconsumerlawgroup.org)” as a policy report.

51 Olsen, *ibid* 2006 chapter 5.

52 It could be discussed to what extent such material is important for the law. However, it could be argued that the law achieves the best result when it is based on generally known and accepted facts. Thus, the descriptions were mainly based on Swedish text books and knowledge surveys, with some exceptions – Olsen, *ibid.* p. 26.

53 Olsen, *ibid.* p. 93 with references.

54 *Ibid.* p. 94 Figure 1 with references.

55 *Ibid.* p. 95 Figure 2 and 3 with references.

56 *Ibid.* p. 66 with references.

57 *Ibid.* p. 111-113 with references.

58 *Ibid.* p. 55-56 with references.

One could also consider to what extent children could be regarded as actors in connection with advertising and consumption, or whether they are more akin to being passive victims. The question arises whether children have a legitimate need for consumption.<sup>59</sup> Besides consumption for physical needs, consumption could fulfil social needs for love and belonging and psychological needs for development, satisfaction, pleasure and beauty.<sup>60</sup> Consumption could even be a way of living, consumerism. However, advertising and consumption are perhaps particularly important for children because of the psychological needs to construe oneself and one's identity, both for oneself and in social relations with others.<sup>61</sup> Moral issues could also influence the attitude of the child. We live today in a consumer society, even if i.a. environmental aspects are growing in importance, and children have to learn to live in it.

There are, however, certain habits of children and parents that need to be taken into account when discussing a possible framework for legislation. One important aspect is children and various media.<sup>62</sup> Television is still the most important, although Internet is steadily increasing, and on average 3.5 hours are spent with these media. Computer games are also popular. When children watch television, they mostly watch the advertising channels. According to Danish numbers 37 % of the 5-7 year-olds, 50 % of the 8-10 year-olds and 64 % of the 11-12 year-olds have a television in their nursery.<sup>63</sup> The traders are also increasingly finding their way on the Internet.

### **5.3 *The Particular Vulnerability of Children***

The vulnerability of children could be discussed from at least two different angles. An important distinction within research today is thus between the child as a being, existing in the relevant time, and the child as a younger person becoming an adult.<sup>64</sup> Children as "becomings" are within law mainly considered i.a. in connection with damages, and children as beings are at least to some extent considered within family law. Generally, both perspectives are necessary and should be considered here as well.

As "beings" children develop physiologically and psychologically. For example, it is impossible for children to go to a shop before they can walk, etc. To be able to process advertising, etc., and make consumer decisions the brain needs to be sufficiently developed as well. One important phase in this connection comes when the child is somewhere between 4-7 years, when the brain reaches 90 % of its full volume.<sup>65</sup> That is when the frontal lobes increase

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59 Ibid. p. 89 with references.

60 Ibid.

61 Ibid.

62 Ibid p. 97-99 with references.

63 Hansen, F., Halling, J. and Nielsen, C. *The economic power of children* in Olsen (ed.) *Barns makt* 2004 , p. 85.

64 The distinction is common and is discussed i.a. in Johansson, B. *Barn i konsumtionssamhället* 2005 pp. 213-217. However the author suggests that the child rather should be regarded as a citizen, who is sometimes a being and sometimes a becoming.

65 See Olsen, *ibid.* p 100 for references.

their communication capacity as the main system between the cerebral hemispheres begins to develop. The function of the cerebral hemispheres improves, and at around 12-13 years the nerve cells are myelinated and the speed of the brain increases. This means a reorganisation and calibration of the brain which makes it much easier for the child to process information. Concentration and memory capacity increase as well. By this time the brain is fully developed.

The times for the physiological development of the brain are also important for intellectual development and here the psychological thinking of Piaget has dominated.<sup>66</sup> Thus Piaget regards the ages between 2-7 as preoperational when the capacity to understand symbols are developing. Preliminary concepts are used as well and children are very open to impressions which, however, cannot be integrated in existing patterns of thinking. During the operational stage, 7-11 years, thinking becomes more logical and from around 11 years, the formally operational stage, the child can abstract and think with the aid of hypotheses and formally logical reasoning.

The thinking of Piaget has been criticised as not considering the environment and its importance for the development of the child.<sup>67</sup> Research shows that parents who are interested in consumer matters mean a lot for the child.<sup>68</sup> However, legislation for the protection, etc., of children could hardly be based on a duty for the parents to teach the children consumer knowledge.

When children are regarded as “becomings” it is particularly necessary that their needs are taken care of. The needs that are particularly important are those that are necessary for the child – being and becoming such a well-balanced child and adult as possible and here the parents are especially important. First, for the safe development of children their physiological needs for a place to live, food, clothing, security and love should be fulfilled; these needs are generally attended to by the parents.<sup>69</sup> Thus, advertising that puts the relationship with the parents at risk is dangerous for the child and even advertising of such dangerous products as e.g. fast food to the parents may put the child at risk. It is also important that children are not harmed physically or psychologically by advertising. Secondly, children have a need for other social relationships and to explore the world. Thus, friends are important and should not be exploited, but it is also important that the world that children are exploring is not too full of apparent dangers, such as pornography and violence. Thirdly, children need help to put limits on their behaviour, which includes a moral as well as a behavioural perspective.<sup>70</sup> Certain offers such as two bags of sweets for a lower price than for two individual bags, could thus be dangerous, when the child tries to be economical.<sup>71</sup> Finally, children need to have respect for their autonomy and it

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66 Ibid. p. 100-101 with references.

67 Ibid. p. 101 for references.

68 Ibid. p. 108 with references.

69 For the emotional development, see references referred in Olsen *ibid.* p. 102-104.

70 For the moral development of children, see Olsen *ibid.* p. 101-102 with references.

71 Johansson, B. *Barn i konsumtionssamhället* 2005 pp .95, 211.

could be discussed whether advertising addressed to small children is not contrary to their integrity, as they have no chance to understand what the advertising tries to do with them.

#### **5.4 *Risks Connected to Marketing as Such***

Advertising, etc., is within business economics regarded as a communication process, in which a trader sends a particularly coded message to a receiving party through a certain channel or medium; the receiver then decodes the message and, possibly, acts upon it. One question that arises is thus to what extent children could be regarded as parties in such a process.

There are a number of risks connected with the advertising as such.<sup>72</sup> First, the identification of advertising is particularly important with relation to children as they are more easily deceived, which could lead to unnecessary economic losses for the child (or its parents). The use of figures or characters particularly known to children could also make it difficult for the child to identify the message as advertising. Furthermore, there are particular forms of marketing that tend to attract children's attention, such as directly addressed marketing, a direct address in the speech, etc., and the situation could be similar with regard to pictures of children or children's voices, pictures or voices of figures who are well known to children, animated or narrative advertising, or even advertising for dangerous products.

Secondly, the marketing of dangerous products, such as alcohol or tobacco, is generally a danger and a relatively recent risk is obesity, which makes it necessary to examine the advertising of such goods as sweets, etc, i.e. foods with a lot of sugar, salt and fat. Thirdly, the total amount of advertising for a particular product could constitute a risk, if it could amount to a veritable brainwash. Fourthly, the particular context of the advertising could pose a risk, i.a. depending on the particular medium, the relevant time and if it occurs in connection with sports, school, etc. Fifthly, there is an integrity risk for the youngest children who could not intellectually grasp what it is all about. There are also other integrity risks, as when children in connection with marketing are lured into giving information about themselves or family members, or when the trader uses pictures of children.

#### **5.5 *Risks Connected with the Child-parent Relationship***

There are a number of risks that could be of importance here for both parties, as the parents are legally responsible for the rearing and care of the child and its economy. Such risks could be connected with the pester power of children towards their parents, when traders exhort children to buy or when consumption could put the economy of the whole family at risk. Another risk is that children might meet values in advertising contrary to family ideals. This could be risky, particularly for the small child, as it is so dependent on the parents.

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<sup>72</sup> Olsen, *ibid.* p. 114-119, ECLG 2005 Ch. 2.

## 5.6 *Conclusions*

The facts show that children develop physiologically during the course of childhood, even if the development of the brain and cognitive development generally appear to go stepwise. Particularly important turning points thus appear to be around 6-7 and 12-13 years of age, which would mean around three different periods for children. The same could be said in connection with the income side. Thus, it is very difficult to measure how much money the youngest children receive, and as a teenager the amounts of money at the disposal of the child are increasing rapidly.

However, the consumer market also entail a number of risks for the economy of the child or his family, for his/her present or future well-being and for him/her being damaged. Those risks could be combined with the advertising as a communication process, but also through the fact that children actually meet advertising in various media like television and the Internet that they spend on average 3.5 hours a day consuming.

One could ask if it is not the parents' task to take care of especially the small kids. However, from the fact that so many children have televisions in their nursery, it becomes clear that parents in general do not regard such an important medium as television as any danger at all. It finally appears that children are very much on their own when receiving advertising.

## 6 **Today and Tomorrow**

### 6.1 *Problems Connected with the Present Legislation*

There are a number of functional aspects that are worth considering in this connection. As has been seen above, the Swedish prohibition against advertising addressed to children below the age of 12 years is not valid when the broadcaster is situated in another European country than Sweden, even though the broadcast programme is in Swedish. This is all the more important as children to a very large extent are watching those channels.<sup>73</sup> Furthermore, the prohibition only covers advertising addressed to children, not the mixed messages. Here, children are not particularly protected at all, except through the general rules of the Marketing Act. Many children are even active on the Internet, where there is no such general prohibition. The proposed Audio Visual Media Services directive may be the answer here. However, many children want to know more about the products that interest them, such as collection cards, etc. This may be the reason behind the fact that children to a large extent appear to prefer the advertising channels. It might be discussed why such advertising should be forbidden, as long as it is fair in other respects.

There are also various systemic incoherences. In the present Swedish rules the general prohibition appears as the leading principle, despite the fact that it only concerns one specific medium. There are other rules as well but they are scattered and have been created at different times. The result is that it is very difficult to understand the legal system related to children and advertising. The

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73 For references - see Olsen, *ibid.* p. 97-99.

Consumer Agency has also suggested a prohibition of food advertising addressed to children. Such a suggestion is, however, difficult to combine with the present system as it partly falls under the present prohibition. There is also a risk that it would restrict the trader's freedom of expression too much if the mixed messages were also to be included in the general prohibition.

Other systemic problems occur in the clashes between the Swedish and the EC rules. Thus, the Swedish rules mainly deal with advertising addressed to children, while the EC rules to a large extent deal with advertising that reaches children.<sup>74</sup> Another difference is that the EC rules appear to take the premise that children should not be harmed, which is hardly mentioned at all in the Swedish legislation.

A systemic problem is finally the fact that the legislator has not dealt with the problem of who should be responsible for the protection of children, i.e. the parents, the trader or the legislator or even the child him- or herself.

## **6.2 *Some Specific Matters***

### **6.2.1 Who should be responsible for the protection of children?**

As has been seen above, the most elaborate rules concerning children and advertising are found in the ICC rules which have not been discussed here. Nor have possible demands on the parents been considered in any detail, as society is organized in such a way that children spend a lot of time on their own, together with a television or a computer. Instead, the legislative rules have been focussed on. The reason for this is that there is a need for overriding considerations and rules, which do not exist today.

### **6.2.2 The choice between consumer protection, public health and public order**

It could be discussed to what extent children could be regarded as consumers, i.e. have economic interests of their own. As has been seen above, the economic strength of children below the age of seven is limited, as well as their physical ability to get to a shop, in another place than in the closest vicinity. This means that their shopping will be limited as well. From that time on, however, their income as well as their expenses display an increase. Despite this there is an interest by traders to reach children with advertising in order for them to be acquainted with the trade mark and perhaps learn to appreciate the product as well. However, it could be disputed whether it is fair to 3-7 year-old children to expose them to advertising, when they do not have an economic interest of their own. It could rather be regarded as an intrusion of their privacy to force advertisements on them for goods they could not afford and do not have the possibility to buy. It is also very serious that children below that age are very impressionable, but could not analyse the information. Thus, it is in my view highly disputable whether children below seven or eight years could be regarded as consumers, with economic interests of their own. This means that consumer protection rules are doubtful for the protection of the youngest children. Above that age, however, children are more aware of society, have more money at their

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74 See above Ch. 2.



disposal, begin to have an economy of their own and begin to shop to provide for their own interests.

What then should the relevant age limit be? Here it could be borne in mind that the Commission on the Rights of the Child, in two Comments differentiates between early childhood and adolescence.<sup>75</sup> The age limit for early childhood is set at below 8 years. There is no other definite fact that states where the line should be drawn, and thus that age limit appears to be acceptable.

However, it is not only the protection of the child's private economy (and that of their families) that is of importance above the age of eight. There is also the risk that children could be harmed. This could happen in various ways. The advertising could induce children to use products such as alcoholic beverages, tobacco or even quick food as children generally are more sensitive than adults. In particular when advertising also depicts children, the danger becomes obvious. However, the protection of the health of children is not a matter that falls within the Unfair Commercial Practices Directive. This must be an issue of public health.

### **6.2.3 Advertisements addressed to or reaching children**

As has been seen above, the Swedish RTVA deals particularly with the problems that arise when traders address themselves directly to children. This has been criticized from an Australian perspective, and Handsley, et al. suggest that the more important aspect is that the advertising is likely to be noticed by children.<sup>76</sup> However, it is in my view difficult to see that this is generally of importance as such. The important thing is instead that certain advertising should not reach children at all, i.a. advertisements for dangerous goods, such as alcohol, pharmaceuticals, tobacco or pornography. An advertisement could also be designed in a particularly dangerous way. However, a prohibition on certain advertising to reach children could be to go too far. A middle solution could be to draw the line when advertising is likely to be noticed by children. One such case could be the advertising for energy-dense and nutrient-poor foods and beverages, which in itself is legal, but particularly dangerous for children.

## **6.3 A Framework for new Legislation**

### **6.3.1 Introduction**

The time has come to try to formulate a framework for new legislation, based on the arguments found in the previous chapters. It consists of five main ideas, which, however, will require further deliberations.

### **6.3.2 A separate enactment concerning children and commercial practices**

The discussion above has shown that the subject of children and marketing is generally a very complex area. It also appears that the interests of children have not been properly observed, as seems to be required in the Convention on the Rights of the Child 1989 and they could almost be described as invisible. Instead

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<sup>75</sup> See above foot note 9.

<sup>76</sup> Ibid. 2007 p. 101.

of having one rule here and one rule there, a better approach would be to deal with all the various problems connected with the area in one piece of legislation.

### **6.3.3 A general prohibition against all advertising addressed to children below the age of 8 years**

This suggestion is based on a number of considerations. As has been seen above, children below that age are very sensitive, and have not the necessary intellectual capacity to evaluate advertising. They could not be considered as an effective party in a communication process, with hardly any money and very few interests of their own. Such advertising could be regarded as shooting at sitting ducks. Even if certain media, such as television, are probably worse than others, there is no reason to allow such advertising in some media such as Internet, and prohibit it in others. The reasons are the same.

### **6.3.4 Misleading advertising addressed to children from 8–17 years of age**

Particularly in connection with the youngest of the group, i.e. 8-12 year-olds, it is obvious that they are more easily deceived by misleading practices, even if the same also could be said of the older group. In the present Swedish Marketing Act as well as in the EC Unfair Commercial Practices Directive special consideration is given to the fact that children are more easily deceived. It might be better if this is more clearly provided for in the Act itself, than is the case today. A general clause specifically dealing with this problem is therefore suggested.

The various regulations of today contain a number of arguments that have been mentioned above and are still important. It concerns practices in which children are expressly exhorted to buy a product, encouraged to persuade their parents or other adults to buy the product for them, i.e. the pestering power of children, or where the children's trust in the parents are exploited. The first is motivated by the fact that children, according to family law, have limited resources and are generally not authorized to conclude contracts. In this regard the prohibition against directly addressed advertising to children below the age of 16 could also be mentioned. The second and third rule is motivated by the fact that children need to maintain a close and trusting relationship with their parents, which trade should not try to interfere with. Thus, such rules are needed as well.

### **6.3.5 A prohibition against dangerous advertising which reaches children or is likely to be noticed by children**

There are a number of dangerous products that might be of interest to children, such as alcohol, tobacco and gambling. Today there is another danger such as energy-dense and nutrient-poor foods and beverages. It appears to be altogether clear that advertisements for such goods might influence consumption habits, which at least is the intention. There is no reason why society should allow such potentially injurious influences.

Not only goods are potentially dangerous. Also advertisements in which children are depicted doing something dangerous have been mentioned in the present regulations. Such advertisements could even contain images of life such as pornographic pictures and violence that is not suited for children at all.

One could consider whether there should be certain age limits. However, it is not always clear at an early stage whether there is a risk at hand. Thus, a sort of general clause might be better, where it would be up to the court to decide whether there are sufficient risks for the relevant age group. However, the rule should also protect young children despite the above-mentioned prohibition, as such a prohibition only would cover advertising addressed to them.

### **6.3.6 Other advertisements reaching children**

So far the problems have arisen in connection with television advertising, which, on the basis of the relevant goods, appears to be addressed to adults but which also attracts the attention of children. There is no reason why such advertising should be found in children's programmes. That is definitely so in connection with programmes addressed to children below the age of eight, but also programmes addressed to children between 8 and 12 years are to some extent watched by younger children. It could also be argued that such programmes should not be surrounded by advertising addressed to adults.

### **6.4 Concluding Remarks**

Children are an important group both for the individual families, but also for traders and for society at large. Despite this, children have to a large extent been invisible in the law. It is not good when such an important part of the population is left with no general legal principles to receive guidance from. The suggestions above would make children and the law relating to them visible and respected