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THE PROPOSED EUROPEAN UNION BAN ON TELEVISION ADVERTISING TARGETING CHILDREN: WOULD IT VIOLATE EUROPEAN HUMAN RIGHTS LAW?

I. INTRODUCTION

Swedish law bans all television advertising that specifically targets children under the age of twelve.¹ This prohibition, the most extensive of its kind in Europe, affects not only toy advertisements, but covers advertising for sweets and fast foods as well.² Sweden has clearly stated its intention, upon assuming presidency of the European Union ("EU") in January 2001, to press for an expansion of their domestic ban to all of the EU's fifteen member states.³

European toy marketers and broadcasters are strongly opposed to any such extension and intend to contest it on all possible fronts.⁴ One possible legal challenge would contend that the ban violates certain provisions governing freedom of expression⁵ outlined by the European Convention on Human Rights("Convention").⁶ This note evaluates the prospects of such a

1. SWEDISH BROADCASTING LAW art. 11, Sec. 4 (Radiolag 1966:755). The statute reads: "Commercial Advertisements in a television transmission may not have the purpose of attracting the attention of children under the age of twelve." *Id.*

2. See *Industry Divided Over Prospect of Ban on Children's Advertising*, *MARKETING WEEK*, July 8, 1999, at 17 ("*Industry Divided*").

3. See Harriet Green, *Children's Ad's Under Threat of EU Ban*, *CAMPAIGN*, May 7, 1999.

4. See Jonathan Annells, *Euro Group Battles Kids Ad Ban*, *HOLLYWOOD REPORTER*, June 9, 1999, at 6.

5. See, e.g., Axel Edling, Address at conference in London regarding TV Advertising and Children (Nov. 23, 1999), available at <<http://lists.essential.org/commercial-alert/msg00028.html>>. Edling, Sweden's Consumer Ombudsman, is responsible for overseeing the administration of Sweden's advertising regulations.

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S 222 (Convention). A declaration of the Council of Europe, the Convention was signed in Rome on Nov. 4, 1950, and came into effect on September 3rd, 1954. *Id.*

challenge, and concludes that it would fail. Under the Convention, State interference with free expression is permissible when a State acts in the interest of protecting public morals.⁷ Because an EU-wide ban on television advertising directed at children would advance the EU Member States' interest in protecting children's morals⁸ it would not violate the Convention.

Part II of this note determines the likely structure of the proposed EU-wide ban on children's advertising on television, and will also briefly review the social arguments for and against a ban. Part III of this note provides a brief overview of the European Convention on Human Rights, as well as the jurisdiction and authority of The European Court of Human Rights ("ECHR"), the Court that would ultimately adjudicate any Convention-based challenge to the ban. Part IV examines Article 10 of the Convention, which promulgates the rights of free expression. This section analyzes the case law surrounding commercial speech under Article 10, and specifically examines the three-part test the ECHR has developed for ascertaining violations of Article 10. This note applies the three-part test, and determines that the ECHR would be unlikely to find that a ban on all television advertising targeting children would violate the Convention.

II. THE PROPOSED BAN

A. Sweden's Domestic Ban

Sweden's broadcasting law bans all television advertising targeting children under the age of twelve.⁹ It is important to note that this ban specifically regulates the content and structure of television advertisements, not simply what can and cannot be advertised.¹⁰ Toy advertisements, for example, may be aired only if they are designed to attract and inform adults rather than children.¹¹ This distinction between target and content allows marketers of commodities typically consumed by children to maintain an advertising presence on television, as long as they attempt to market only to teenagers or adults.¹² Conversely, advertisements for commodities that appeal to children as well as adults, such as fast food and candy, must be

7. See Convention, *supra* note 5, Art. 10.

8. See Edling, *supra* note 6.

9. See SWEDISH BROADCASTING LAW, *supra* note 1.

10. See *id.*; see also *Industry Divided*, *supra* note 2.

11. See Richard Tomkins, *Selling to a Captivated Market*, FIN. TIMES (LONDON), April 23, 1999, at 10.

12. See *id.*

designed with great care as they cannot appear to appeal directly to children under twelve years old.¹³

Similar but less severe bans on children's advertising currently exist in several other EU nations.¹⁴ Generally, the bans regulate the scheduling and placement of advertising, but not specific content.¹⁵ Only Norway maintains a ban that is as strict as Sweden's.¹⁶ Still other EU nations prefer a self-regulatory approach, leaving it up to the broadcasting and advertising industries to define its own standards.¹⁷

13. See *Industry Divided*, *supra* note 2. Television advertisements for McDonald's in Sweden cannot incorporate any images of the clown Ronald McDonald. *Id.*

14. See *Green*, *supra* note 3. In the Flemish region of Belgium, advertising is prohibited from five minutes before to five minutes after all children's programming. Denmark, Poland, and Ireland all have domestic legislation regulating content and scheduling of children's advertising. *Id.*

Greece maintains a ban on all toy advertising on TV, although many contend that this ban is more a commercial measure designed to protect domestic toy makers than an effort to protect children. In August of 1999, the European Commission declined to investigate a claim brought by the European toy industry in 1994 alleging that Greece's ban violated EU single market rules. The EC's refusal to investigate has fueled fears that an EU-wide ban is not far off. Darran Gardner, *Toy Makers Vow to Fight if EU Bans Advertising*, THE SUNDAY HERALD (GLASGOW), August 22, 1999, at 6.

15. See *Green*, *supra* note 3.

16. ACT NO. 127 OF 4 DECEMBER 1992 RELATING TO BROADCASTING, Sec. 3-1 (Norway). The Act states: "Advertisements may not be broadcast in connection with children's programs, nor may advertisements specifically target children." This ban, like Sweden's, is content based. *Id.*

17. See *Tomkins*, *supra* note 11. Advertisers in the UK operate under a self-imposed code of conduct. *Id.*

B. The Television Without Frontiers Directive

There is no EU law that directly governs advertising.¹⁸ Instead, An EU directive, The Television Without Frontiers Directive (TVWF),¹⁹ sets television content and scheduling criteria that each EU Member State must comply with.²⁰ Member States adhere to the directive through passage of local legislation.²¹ An extension of the Swedes' domestic ban would entail

18. See Thomas W. Reader, Comment, *Is Self-Regulation the Best Option for the Advertising Industry in the European Union? An Argument for the Harmonization of Advertising Laws Through the Continued Use of Directives*, 16 U. PA. J. INT'L BUS. L. 181 (1995).

19. Council Directive 97/36/EC, amending Council Directive 89/552/EEC, 30 June 1997 "Television Without Frontiers" (TVWF), 1997 O.J. (L 202); 1998 O.J. (L).

20. See *id.* The TVWF Directive primarily covers the transmission of television broadcasts between EU member states. Art. 2, Chapter II sets the basic rule that broadcasters are only required to comply with the broadcasting laws of the Member State from where the transmission originates, and are not required to adhere to the laws of nations where their transmissions may be received. The operation of this directive is illustrated in the recent De Agostini case. Joined Cases 34/35 Konsumentombudsmannen (KO) v De Agostini (Svenska). Case C-34/35 Forlag AB and Case 35/95 and Case 36/95 TV-Shop i Sverige AB, 1997 ECJ CELEX LEXIS 7506, (1997). In De Agostini, the European Court of Justice ruled that because TVWF Directive supercedes local broadcasting laws, toy advertisements broadcast from the UK into Sweden were not subject to Sweden's domestic ban on children's advertising. The De Agostini decision has undoubtedly been a motivating factor in their desire to extend their domestic ban to the entire EU. See Annells, *supra* note 4.

21. Treaty Establishing The European Economic Community, Art. 189 [hereinafter EEC Treaty]. "A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.*

Member States must enact some form of legislation to comply with the Directive, unless sufficient legislation already exists. Informal national commitments to uphold a Directive's standards, through common law or otherwise, are not sufficient. See John Usher, *The Legal Framework of the European Union*, THE EUROPEAN UNION ENCYCLOPEDIA AND DIRECTORY, (Europa Publications Ltd. 1999).

an amendment to the TVWF,²² which would in turn require each Member State to modify their National broadcasting laws accordingly.²³

The existing TVWF advertising restrictions reflect two main concerns. The Directive contains provisions aimed at overall consumer protection and also attempts to minimize children's exposure to misleading or morally corrupting advertising.²⁴ The TVWF addresses these concerns by mandating that advertising must clearly be distinguishable from programming, and by limiting the ratio of advertising time to programming time.²⁵ Further guidelines regulate the nature and content of advertisements, dictating they cannot be offensive to human dignity or religious or political beliefs, that they cannot reflect race, gender, or nationality based discrimination, and that they cannot encourage dangerous behavior.²⁶ These purposely equivocal guidelines reflect the EU's awareness of inconsistencies in both the regulatory and moral standards among the various EU Member States, and provide Member States with standards that can be interpreted and applied in a manner consistent with public sentiments.²⁷

22. See generally D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Butterworths 1995). The general EU legislative procedure involves the European Commission making a proposal to the European Council, which in turn may pass legislation on it. In various circumstances, the Council may be required to obtain an opinion from either the European Parliament or the Economic and Social Committee. *Id.*

23. See *id.*

24. See TVWF, *supra* note 19, Chapter IV, "Television Advertising, Sponsorship, and Teleshopping". Art. 10 introduces the chapter and provides a summary of the Chapter's concerns: "(1) Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means; (2) Isolated advertising and teleshopping spots shall remain the exception; (3) Advertising and teleshopping shall not use subliminal techniques; and (4) Surreptitious advertising and teleshopping shall be prohibited." *Id.*

25. See *id.* at Art. 11. "No advertisements may air during religious broadcasts, or during any newscasts, current affairs, documentary, or children's programs when their scheduled duration is less than 30 minutes." *Id.* at para. 5. For programs lasting more than thirty minutes, the TVWF provides restrictive scheduling guidelines for advertising placement. *Id.* para. 3 & 4.

26. See *id.* at Art. 12. "Television advertising shall not: (a) prejudice respect for human dignity; (b) include any discrimination on grounds of race, sex or nationality; (c) be offensive to religious or political beliefs; (d) encourage behavior prejudicial to health or safety; (e) encourage behavior prejudicial to the protection of the environment." *Id.*

27. See Perry Keller, *The New Television Without Frontiers Directive*, in THE YEARBOOK OF MEDIA AND ENTERTAINMENT LAW 1997/98 189 (Prof. Eric M. Barendt ed., 1997).

There are three areas, however, in which the TVWF commands stricter standards. These areas relate to television advertising for tobacco, alcohol, and children's advertising.²⁸ The TVWF prescribes an outright ban on all tobacco advertising.²⁹ This ban is absolute, simply stated, and it provides for no exceptions.³⁰ Since its inception in the original TVWF directive in 1989, it has not been legally challenged.³¹ Some television advertising for alcoholic beverages is allowable under the TVWF, but it is subject to restrictions that prohibit a broad range of possibly irresponsible depictions and messages.³² One of these restrictions prevents alcohol advertisements from specifically targeting minors, as well as from including minors within the commercial.³³

The TVWF attempts to protect children by stating generally that "Television advertising shall not cause moral or physical detriment to minors"³⁴ and then supplying several criteria which children's advertising must adhere to.³⁵ These criteria consist of prohibitions against exploiting

28. See TVWF, *supra* note 19, arts. 13, 15, and 16.

29. See *id.* at Art. 13. "All forms of tobacco advertising for cigarettes and other tobacco products shall be prohibited."

30. See *id.*

31. See J. Steven Rich, Note, *Commercial Speech in the Law of the European Union: Lessons for the United States?*, 51 FED. COMM. L.J. 263 (1998). The fact that no legal challenge to the ban on tobacco advertising does not in itself suggest that the ban is legally sound. The lack of any significant challenge is more likely due to the advertising and tobacco industries recognition of overwhelming public support for the measure. It is quite likely that if the ban was struck down, it simply would be replaced by voluntary measures. Prof. Rich argues that the ban likely violates the European Convention on Human Rights dictates protecting free commercial speech. *Id.* at 270.

32. See TVWF, *supra* note 19, Art. 15. "Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria: (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages; (b) it shall not link the consumption of alcohol to enhanced physical performance or driving; (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success; (d) it shall not claim that alcohol has therapeutic qualities of that it is a stimulant, a sedative, or a means of resolving personal conflicts; (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light; (f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages." *Id.*

33. See *id.*

34. See *id.* at Art. 16.

35. See *id.* The full text of Art. 16 reads: "Paragraph 1: Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection: (a) it shall not directly exhort minors to buy a product or a service

children's naivete or capitalizing upon their trust in adults, against coercing children to pester their parents into purchases, and against depicting minors in "unreasonably" dangerous situations.³⁶

Structurally, Sweden's ban on children's advertising more closely resembles the TVWF's absolute ban on tobacco advertising than it does the collection of standards provided for the protection of children.³⁷ The Swedish ban is unequivocally stated, and excepts no circumstances in which advertising targeting children under twelve would be permissible.³⁸ For the purposes of this note, we will assume that should the Swedes be successful in their endeavor to extend their domestic ban, the subsequent amendment to the TVWF would be similarly absolute, and would mirror the structure of the current TVWF ban on tobacco advertising.³⁹

C. Social Arguments For and Against a Ban

Public debate over the necessity of an EU-wide ban on children's advertising has been largely carried out between an alliance of various advertising and broadcast industry groups ("advertising industry")⁴⁰ and a collection of unallied advocates for a ban which include consumer advocate organizations, environmentalists, and various children's rights groups

by exploiting their experience or credulity; (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised; (c) it shall not exploit the special trust minors place in parents, teachers or other persons; (d) it shall not unreasonably show minors in dangerous situations. Paragraph 2: Teleshopping shall comply with the requirements referred to in paragraph 1 and, in addition, shall not exhort minors to contract for the sale or rental of goods and services." *Id.*

36. *See id.*

37. *See SWEDISH BROADCASTING LAW, supra* note 1.

38. *See id.*

39. It is very likely that a ban on children's advertising, if even passed by the European Council, would not be as absolute as the tobacco ban. Rather, a reformulation of the current language may result from a compromise on matter. *See, e.g.,* Annells, *supra* note 4. However, the various possible structures of a ban on children's advertising is beyond the scope of this note, which only focuses on the Human Rights questions presented by the ban in the form currently proposed by Sweden.

40. *See* James Geary, *Childhood's End?* TIME August 2, 1999. The European advertising industry has pooled resources to create a lobbying group known as the "Children's Programme" which produces research and commentary relating to the proposed ban. For the purposes of this note, references to the "advertising industry" will implicitly include all advertising and broadcasting industry groups opposed to the proposed ban. *Id.*

("advocates").⁴¹ The EU has fueled the debate by publishing several follow-ups⁴² to the Green Paper on commercial communications of 1997, which recognized some Member State's calls for stricter controls on children's advertising.⁴³ The EU called upon the advertising industry to participate in the development of new methods of protecting minors from irresponsible advertising, and to cooperate with both national and European authorities to devise an EU-wide approach.⁴⁴

The advocates claim that children represent the advertisers' dream target; naive consumers who are easily impressed and manipulated into spending money.⁴⁵ They support that argument with studies that suggest that children have difficulty distinguishing between advertisements and actual programming,⁴⁶ and that children tend to trust advertising messages more than adults do.⁴⁷

Advocates of a ban also enjoy the implied endorsement of various national legislatures who have already passed laws regulating children's advertising.⁴⁸ These laws are usually justified on two grounds, one moral and the other more economic.⁴⁹ The primary purpose often reflects belief that it is simply unethical to entice young and naive children into the brutal world of mass marketing and consumerism.⁵⁰ A second purpose is rooted in the desire of legislators, many of whom are parents themselves, to limit what

41. See *Industry Divided*, *supra* note 2. Friends of Earth, an environmental group argues that any increase in consumerism worldwide inevitably leads to environmental damage. Food Alliance, and Sustain, consumer watchdog groups argue that advertisements for foods high in sugar, salt, and fat content undermine parents' efforts to encourage healthy diets. *Id.*

42. See *Results of the Public Consultation on the Convergence Green Paper Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions*, COM 108 (1999).

43. See *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation*, COM 97 623, (Dec. 03, 1997).

44. See *Results*, *supra* note 42.

45. See Edling, *supra* note 6.

46. See Lene Hansen, *Television Advertising Directed at Children*, (European Comm'n Commercial Communications Newsletter), Oct., 1997.

47. See *id.*

48. See Allyson L. Stewart-Allen, *Rules for Reaching Euro Kids are Changing*, *MARKETING NEWS*, June 7, 1999.

49. See *id.*

50. See *id.*

advocates call “pester power”, which describes children’s tendency to badger parents into purchasing what they’ve just seen advertised on TV.⁵¹

The advertising industry readily answers the advocates’ arguments. Despite its blunt and despairing assessment of modern culture, the advertising industry argues that today’s world is consumer driven, and children ought to be indoctrinated into that reality at a young age.⁵² This implies that the advertising industry sees children’s advertising not as immoral, but in fact helpful to their development. Research suggests that children as young as five easily distinguish advertising from actual programs, and even at that age even start ignoring them.⁵³ In regards to complaints about pester power, advertisers respond that the phrase simply describes a “1,000 year old problem” that cannot be attributed to the “fifty-year-old invention of television.”⁵⁴

The advertising industry’s most cogent argument against a ban contends that it would have an intensely detrimental effect on the quality of children’s programming in Europe.⁵⁵ As broadcasting revenues from children’s advertising have skyrocketed in recent years,⁵⁶ a good portion of the money generated has gone into funding a higher quantity and quality of children’s programming.⁵⁷ The advertising industry argues that the loss of these revenues would force European broadcasters to rely heavily upon lower quality imported television shows.⁵⁸

51. See Hansen, *supra* note 46.

52. See Tomkins, *supra* note 11.

53. See, e.g., Dr. Reinhold Berger, *The Effects of Commercial Advertising on Children*, (European Commission Commercial Communications Newsletter) Jan., 1999. Although the argument that children “ignore” television advertisements seems to undermine to advertisers’ inherent purposes, any such conclusion is false. Modern advertising revolves around the concept of “branding” which, in simplified explanation, is the practice of making names and images of products (“brands”) instantly recognizable via saturation through media exposure. *Id.*

54. See *Selling to a Captivated Market*, FIN. TIMES (LONDON) (April 23, 1999) at 10.

55. See Annells, *supra* note 4.

56. See *id.* According to the European Group for Television Advertising, a trade group representing broadcasters, in 1998 95% of the annual \$248.6 million earned by its members from children’s commercials is invested in domestic production of kids shows. *Id.*

57. See *id.*

58. See *id.*

III. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. *The Convention*

The European Convention on Human Rights (the Convention)⁵⁹ is widely regarded as the modern world's most successful system of international law for the protection of human rights.⁶⁰ The Convention and its subsequent amendments comprise fifty-nine articles⁶¹ enumerating certain fundamental civil rights⁶² and the mechanics of the Convention's application.⁶³ All EU Member States are signatories to the convention.⁶⁴

The EU itself is not a signer to the Convention and therefore not directly bound by its dictates.⁶⁵ The Convention does, however, control aspects of EU law in that it has been incorporated into Union law via the Maastricht Treaty.⁶⁶ The Convention is often referred to in decisions of the European Court of Justice, the EU's supreme judicial body.⁶⁷ The lack of formal accession to the Convention by the EU means that neither an individual nor signatory State can directly challenge an EU law or provision

59. See Convention, *supra* note 5.

60. See Hon. John P. Flaherty, Maureen E. Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249, 276 (1998).

61. See Convention, *supra* note 5.

62. See *id.* These listed rights include: the "right to live"; the right to be "free from torture or degrading punishment"; the prohibition of slavery and compulsory labor; the right to "liberty and security of person"; the right to a fair trial and a presumption of innocence; protection from ex post facto laws; the right to respect for "private and family life...home...and correspondence"; the right to freedom of "thought, conscience, and religion"; freedom of expression; freedom of peaceful assembly; the right to marry and found a family; a right of remedy and protection from discrimination against anyone based upon race, religion, nationality, birth, sex, and political orientation. *Id.*

63. See *id.*

64. See Flaherty, *supra* note 61. With the exception of Great Britain, Ireland, and Denmark, all EU member states have incorporated the Convention into their domestic law. *Id.*

65. See HARRIS, *supra* note 22, at 27.

66. Treaty on European Union, FEB. 7, 1992 O.J. (C 224) 1, ART. F (Treaty of Maastricht). The Maastricht treaty states: "Union shall respect fundamental rights, as guaranteed by the European Convention...as general principals of law." *Id.*

67. Benjamin L. Apt, *On the Right to Free Expression in the European Union*, 4 COLUM. J. EUR. L. 69, (1998).

through the Convention's enforcement mechanisms.⁶⁸ In order to contest an EU Directive via the Convention, the challenge must be brought against an EU Member State's domestic law that has been passed in accordance with an EU Directive.⁶⁹

B. The European Court of Human Rights

The Convention provides for both a European Commission on Human Rights⁷⁰ ("Commission") and The European Court of Human Rights ("ECHR").⁷¹ The Commission's role is to receive petitions against signatory States and attempt to settle the matter if possible.⁷² Failing resolution of the dispute, the matter may be referred on to the ECHR, which is located in Strasbourg, France.⁷³ The ECHR is the supreme judicial body for determining violations of the Convention.⁷⁴ Its jurisdiction extends to "all cases concerning the interpretation and application" of the Convention.⁷⁵ All EU Member States, as signatories to the Convention,⁷⁶ are bound by decisions of the ECHR.⁷⁷

It should be noted that the ECHR does not operate under the principal of *stare decisis*,⁷⁸ but instead follows the European continental custom of only deciding the case presented.⁷⁹ However, in practice the ECHR tends to follow prior decisions, and routinely refers to them its opinions.⁸⁰ It is therefore not difficult for Member States to ascertain the state of human

68. See HARRIS, *supra* note 22, at 27.

69. See *id.*

70. See Convention, *supra* note 5, Arts. 19-37.

71. See *id.* at Arts. 38-56.

72. See *id.*

73. See HARRIS, *supra* note 22, at 27.

74. See ANDREW DRZEMCZEWISKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 84 (1983).

75. See Convention, *supra* note 5, Art. 32.

76. See HARRIS, *supra* note 22, at 27. All EU member states have bound themselves to the Convention twice—once as individual signatories, and once as signatories to the Maastricht treaty. *Id.*

77. See *id.*

78. See Rich, *supra* note 31, at 267.

79. See *id.*

80. See *id.*

rights law under the Convention, nor is it difficult to analyze the case law with a reasonable degree of predictability.⁸¹

Before reaching the ECHR, all cases must first be considered by the Commission.⁸² Any individual, group of individuals, or non-governmental organization may file a petition with the Commission against a signatory state provided that the concerned state "recognizes the competence of the Commission to receive such petitions."⁸³ Although the Commission is not required to accept the petition,⁸⁴ if it does, it will attempt to reach a settlement that is acceptable to all parties.⁸⁵ If no such agreement can be brokered, the Commission prepares a report stating its opinion on whether or not there has been a violation of the Convention.⁸⁶ The Commission's report is not legally binding on the parties.⁸⁷

A case may reach the ECHR only after the Commission completes its report, either by referral from the Commission itself, or by petition from party with a recognized interest in the matter.⁸⁸ Final legal resolution of the conflict can come only in the form of a judgement of the ECHR, or from the Committee of Ministers of Council of Europe.⁸⁹ ECHR decisions are final and are binding on the signatory states.⁹⁰

81. *See id.*

82. *See Flaherty, supra* note 61, at 278.

83. *See Convention, supra* note 5, Art. 34.

84. *See Flaherty, supra* note 61, at 279. The Commission will reject anonymous petitions, petitions that are "substantially the same" as ones examined before, and frivolous petitions. Important to note is that the Commission will reject a petition if it finds that not all domestic remedies have been exhausted. *Id.*

85. *See id.* If a "friendly settlement" is achieved, the commission will prepare a report detailing the settlement for publication.

86. *See Convention, supra* note 5, Art. 31; *see also* HARRIS, *supra* note 22, at 5.

87. *See id.*

88. *See id.*

89. *See id.* Although final legal resolution can come in the form of an opinion by the Committee of Ministers as well as an ECHR opinion, that particular body's processes for determining Convention issues is beyond the scope of this article.

90. *See id.*

IV. ARTICLE 10

A. Structure and Scope

Article 10 of the Convention decrees individual rights of freedom of expression.⁹¹ The Article, structured in two sections, extends to protect virtually all forms of expression,⁹² and then enumerates several circumstances in which a state may legitimately interfere with free expression.⁹³ One of these legitimate purposes under which a state permissibly may restrict free expression arises when a State acts in the interest of protecting public morals.⁹⁴ Thus, protecting the morals of children, provides the most justifiable grounds within the Convention for ban on children's advertising.⁹⁵

91. See CONVENTION, *supra* note 5, Art. 10. Article 10 reads: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, of public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. *Id.*

92. See HARRIS, *supra* note 22, at 375.

93. See *id.* The two-part structure of Article 10 helps illustrate the difference between the Convention's treatment of free speech and that of the United States Constitution. The First Amendment to the United States Constitution places great emphasis on *what forms* of expression fall within its shield, and provides absolute protection to those that do. *Id.* Unlike the First Amendment, Article 10 protection extends to ALL forms of expression, and emphasis shifts to the justification of any interference, based upon Article 10(2). *Id.*

94. See *Jacobowski v. Germany*, 19 Eur. Ct. H.R. (ser. A) (1994); see also *Markt intern and Beerman v. Germany*, 11 Eur. Ct. H.R. (ser. A) (1989).

95. States have often cited the protection of morals as the primary purpose when children are involved. See, e.g., *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. (ser. A) (1976) (British authorities confiscate book marketed to adolescents containing sexual advice); see also, *Muller and Others v. Switzerland*, 13 Eur. Ct. H.R. (ser. A) (1988) (Swiss authorities ban specific artwork containing depictions of homosexuality and bestiality from public display.)

Restrictions on advertising often are justified as actions intending to "protect the rights of others." See *Cosado Coca v. Spain*, 18 Eur. Ct. H.R. (ser. A) (1994); see also

Broadcast advertising clearly falls within the scope of Article 10. Advertising is a form of commercial expression,⁹⁶ one of the three categories of protected expression that the ECHR has identified.⁹⁷ Not only is a particular instance of expression itself protected, but the means of transmitting that expression are as well.⁹⁸ Thus, in the case of televised advertising, not only is the commercial itself protected, but also the right to transmit the commercial over the airwaves.⁹⁹

B. Case Law

While there is a considerable amount of Article 10 case law regarding commercial expression, there have been no cases implicating restrictions on large-scale advertising before the ECHR.¹⁰⁰ Of the relatively few advertising cases that the ECHR has decided, none concern advertising specifically targeting children or any other particular group of consumers.¹⁰¹ Certainly, there have been no cases regarding restrictions upon advertising that come near to approaching the scale of an EU-wide ban. The collection of commercial speech cases comprising the case-law tend to concern either very localized forms of advertising, such as newspaper ads publicizing a professional's practice,¹⁰² or editorial commentary in newsletters or trade magazines that were held by National Courts as violating local anti-

Barthold v. F.R.G., 7 Eur. Ct. H.R. (ser. A) (1985). However, in nearly all cases the "rights" of others that States seek to protect are those of members of certain professional classes who feel that advertising sullies the reputation of their respective professions.

96. See *Jacobowski* 19 Eur. Ct. H.R. (ser. A) (1994) (defining Commercial Expression as: "Expression that is directed to furthering the economic interests of individuals and enterprises [whether by advancing their own interests or undermining those of their rivals] through the medium of expression, particularly advertising or other means of commercial information to consumers.") *Id.*

97. See, e.g., HARRIS, *supra* note 22, at 377. The three types of expression are political expression, artistic expression, and commercial expression. The distinctions between these three categories is discussed *infra*.

98. See *Autronic v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1983) (holding that Article 10 extends to means of transmission and reception as well as content of expression.)

99. See HARRIS, *supra* note 22, at 378.

100. See generally HARRIS, *supra* note 22.; see also Rich, *supra* note 31.

101. See *id.*

102. See *Casado Coca*, 18 Eur. Ct. H.R.

competition laws.¹⁰³ However, despite the lack of pure advertising cases, Article 10 case law on commercial speech evinces a helpful consistency; assessing the prospects of a challenge to a pan-European ban on children's advertising is not a wholly unpredictable endeavor.¹⁰⁴

The ECHR routinely classifies all forms of expression into one of three categories: political expression, artistic expression, or commercial expression.¹⁰⁵ A hierarchy of value exists between the three categories, and each group is afforded a different level of protection by the ECHR.¹⁰⁶ Commercial expression, less fundamental to the exchange of ideas within a free and democratic society, is in the ECHR's view clearly secondary in importance to political or artistic expression, and is provided with the lowest level of protection.¹⁰⁷ The effect of this diminished valuation is that State restrictions on advertising are very rarely found to violate Article 10.¹⁰⁸

The permissiveness of a State's interference with commercial speech depends upon the particular circumstances surrounding the interference.¹⁰⁹ Restrictions on free expression are allowed only when they are laid out in a clearly appreciable law,¹¹⁰ pursue a legitimate goal,¹¹¹ and are necessary in

103. See *Markt intern and Beerman v. Germany*, 11 Eur. Ct. H.R. (ser A) (1989). *Markt intern* concerned an injunction issued against a trade magazine from publishing an article that raised doubts about the commercial reliability of an enterprise operating in the market sector it reported on. The Court conceded that *Markt intern* itself was not a competitor in the relevant market, but since it did intend to protect the interests of a group operating in that sector, namely the retail purchasers of products, the ECHR determined that that editorial commentary within the magazine was commercial expression; See also HARRIS, *supra* note 22, at 405. *Markt intern* is considered the leading case on commercial speech, and it is notable for its almost complete deference to national decision (Germany) as well as for "the brevity with which the applicant's arguments were treated." *Id.*

104. See Rich, *supra* note 31, at 260.

105. See HARRIS, *supra* note 22, at 396–397.

106. See *id.*

107. See *id.*

108. See *id.*

109. See *id.*

110. See HARRIS, *supra* note 22 at 386.

111. See *id.* at 391.; see also Convention, *supra* note 5, Art. 10(2). A legitimate state goal is any goal in accordance with any of the permissible grounds for interference with free expression as listed in Article 10(2).

a democratic society.¹¹² ECHR jurisprudence has molded these requirements into a three-part test, which evaluates each one in strict order.¹¹³

The first element of the test requires that any State interference with free expression must come arise out of law.¹¹⁴ The law does not necessarily have to be in the form of a statute.¹¹⁵ This requirement that an interference be "prescribed by law" rarely poses a problem in Article 10 cases.¹¹⁶ National laws clearly satisfy this requirement, as do codified regulations that have been given effect of law by legislatures.¹¹⁷ The ECHR has very willingly considered regulations imposed by local professional associations upon their members, such as those imposed by bar councils,¹¹⁸ and chambers of commerce,¹¹⁹ as "prescribed by law" when national legislatures have given those codes effect of law.

The function of the "prescribed by law" requirement is to ensure that all violations of laws abridging free expression are foreseeable by the offender.¹²⁰ Absolute precision in the law is not required.¹²¹ If the possibility of being held in violation of a law is ascertainable through legal counsel, that

112. See HARRIS, *supra* note 22, at 396.

113. See *Casado Coca*, 18 Eur. Ct. H.R.; See also *Open Door and Dublin Well Women v. Ireland*, 15 Eur. Ct. H.R. (ser. A) (1992).

114. See HARRIS, *supra* note 22, at 389.

115. See *Sunday Times v United Kingdom*, 30 Eur. Ct. H.R. (ser. A)(1979) (English common law rule on contempt of court held to be prescribed by law).

116. See *id.*

117. See, e.g., *Open Door*, 15 Eur. Ct. H.R. at 261. (Irish Constitutional prohibition on distribution of information relating to abortion procedures held to be prescribed by law.); see also *Barthold v. F.R.G.*, 7 Eur. Ct. H.R. (ser. A) (1985) (noting Hamburg veterinary Surgeons' Council's competence to devise regulations in the sphere of professional conduct, and also that German law gave such council's codes legal authority, the ECHR held that the council's rules were prescribed by law). *Id.*

118. See *Cosado Coca v. Spain*, 18 Eur. Ct. H.R. (ser. A)(1994). Mr. Cosado Coca argued that the interference did not come from a 'public authority', rather, the Barcelona Bar Council's written warning could be regarded as a reprimand by his peers. The Court rejected this argument, finding that Spanish law on professional associations states that they are public-law corporations, and therefore act with governmental authority. *Id.*

119. See *Barthold*, 7 Eur. Ct. H.R.

120. See HARRIS, *supra* note 22, at 390.

121. See *Market intern and Beerman v. Germany*, 11 Eur. Ct. H.R. (ser. A) (1989). With regards to commercial speech, the Court has noted that absolute precision could not be achieved in "spheres such as that of competition, in which the situation is constantly changing in accordance with developments in the market and in the field of communication." *Id.*

is enough to satisfy the requirement.¹²² It is evident that the ECHR expects those operating in the heavily regulated media environment to be properly advised on legally controversial matters, and any claim that an interference was not adequately “prescribed by law” will likely receive little attention.¹²³

The second element of the test considers the legitimacy of the interference under the Convention.¹²⁴ This stage of the test does not attempt to gauge the suitability of the law for obtaining its purpose, but rather if that purpose itself corresponds with any of the several exceptions within Article 10 under which a State may abridge free expression.¹²⁵ If the purpose is found to be within the specified exceptions, it is held to be legitimate.¹²⁶

The ECHR allows a margin of appreciation to national determinations of what is legitimate under the Convention, the breadth of which depends upon the basis on which the State acts to restrict expression.¹²⁷ When States legislate in the interest of protection of morals, the ECHR gives the States extremely wide latitude in determining exactly what morals are, and what is necessary to protect them.¹²⁸ The Court has repeatedly defended this wide margin of appreciation by pointing to the difficulties and likely inequities of a supra-national body attempting to define a universal set of values where “no pan-European consensus exists.”¹²⁹ The ECHR’s continued reliance on this principal suggests that the ECHR would be receptive to a pan-European consensus on what morals consist of, and what is necessary to protect them, should the Court encounter consensus in the form of an EU-wide directive.

The Court has been especially willing to defer to national determinations on morality when the morality of children has been

122. *See, e.g.,* Open Door and Dublin Well Women v. Ireland, 15 Eur. Ct. H.R. Despite textual ambiguity of the applicability of the Constitutional prohibition to the challengers, the ECHR found that violation of the law was sufficiently foreseeable to the challengers. The court specifically cited the fact that the challengers had obtained legal advice and had been told that an injunction against their activities was likely.

123. *See* HARRIS, *supra* note 22, at 390.

124. *See id.* at 391.

125. *See id.*

126. *See id.*

127. *See id.* at 392.

128. *See* Handyside v. UK, 1 Eur. Ct. H.R. at para. 48. “State authorities are in principal in a better position than the international judge to give an opinion on the exact content of these requirements....” *Id.*

129. *Handyside*, 1 Eur. Ct. H.R., at para. 48.

concerned.¹³⁰ However, this has usually arisen in situations where governmental notions of obscenity were clearly in line with public sentiment, such as when States have acted to protect children from exposure to obscene materials.¹³¹ To date, the ECHR has not encountered a case in which government interference with free expression with the aim of protecting children's morality has lacked overwhelming public support.¹³² However, the ECHR's willingness to defer to national determinations on questions of children and morality has been constant.¹³³ It is extremely doubtful that a lack of extensive public support for particular piece of legislation would in itself be enough to persuade the ECHR to abandon this course.

The conclusion that a particular aim is a legitimate one does not immediately justify any interference.¹³⁴ The third and most critical element of the three-part test requires the State to show that the interference is "necessary in a democratic society."¹³⁵ The necessity of a restriction depends upon several factors. The value of the expression that is prohibited¹³⁶ is taken into consideration, as well as the audience the law seeks to protect.¹³⁷ Other relevant factors may be the suitability of the law for its purpose,¹³⁸ the totality of the interference,¹³⁹ the availability of other less intrusive methods of

130. See HARRIS, *supra* note 22, at 393.

131. See, e.g., *Handyside*, 1 Eur. Ct. H.R. The *Handyside* case represented a challenge to a British confiscation of a book ("The Little Red Schoolbook") which was intended for distribution to adolescents between the age of twelve and eighteen. The book contained several sexually informative passages, which British authorities argued "could be interpreted as an encouragement to indulge in precocious activities harmful for them or even commit certain criminal offenses." *Id.*; see also *Muller and Others v. Switzerland*, 13 Eur. Ct. H.R. (ser A.) (1988), where Swiss authorities confiscated a painting depicting scenes of homosexuality and bestiality. The painting was one of three exhibited in a public show where a six year-old girl viewed it. *Id.*

132. See, e.g., HARRIS, *supra* note 22.

133. See *id.*

134. See, e.g., *Cosado Coca v. Spain*, 18 Eur. Ct. H.R.; see also *Handyside*, 1 Eur. Ct. H.R.

135. In *Handyside*, the Court expounded: "The Court notes...that, while the adjective 'necessary'...is not synonymous with 'indispensable', neither has it the flexibility of such expression as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'." *Handyside*, 1 Eur. Ct. H.R., at 48; see also HARRIS, *supra* note 22, at 396.

136. See HARRIS, *supra* note 22, at 396.

137. See *id.* at 406.

138. See, e.g., *Muller and Others v. Switzerland*, 13 Eur. Ct. H.R. at para. 36.

139. See *Cosado Coca*, 18 Eur. Ct. H.R.

achieving the specified aim,¹⁴⁰ as well as the penalties for its violation.¹⁴¹ In weighing these competing concerns the Court assesses the proportionality of the law.¹⁴² Almost all Article 10 cases are decided on the basis of proportionality.¹⁴³ Restrictions on free expression that are found proportionate to the legitimate aim pursued are upheld; those found disproportionate are not.¹⁴⁴

A margin of appreciation towards national decisions plays a key role in assessing the proportionality of the interference.¹⁴⁵ However, the margin offered by the Court when evaluating proportionality is significantly narrower than the margin offered by the Court when considering the legitimacy of the interference.¹⁴⁶ Seminal Article 10 cases set a high burden, a “pressing social need,” that States must show in order to be in accordance with the Convention.¹⁴⁷ However, this strict standard applies mainly to restraints on political speech,¹⁴⁸ and the standard is considerably more relaxed when a State regulates in the area of commercial speech.¹⁴⁹ Indeed, ECHR decisions suggest that as long as a State’s actions are a relevant method of obtaining its legitimate aim, and the sanctions and effects of the actions are not wholly disproportionate to that aim, the ECHR will not find a violation of Article 10.¹⁵⁰

140. See *Jacobowski*, 19 Eur. Ct. H.R.

141. See *Cosado Coca*, 18 Eur. Ct. H.R.

142. See HARRIS, *supra* note 22, at 411.

143. See *id.*

144. See *id.*; see also *Open Door and Dublin Well Women v. Ireland*, 15 Eur. Ct. H.R.

145. See *Harris*, *supra* note 22, at 291.

146. See *id.* at 411. “In principal, the doctrine of a ‘margin of appreciation’...is not a doctrine of judicial deference to the national decision, for the Convention authorities carry out their own fact-finding and apply the Convention law for themselves. Yet they have declined the role of a fully-fledged appeal mechanism from the national decision. Instead, the Court has said that the role of the Convention in protecting human rights is ‘subsidiary’ to the roles of the national legal systems.” *Id.*

147. See *Sunday Times v. UK*, 30 Eur. Ct. H.R. (ser. A) (1979) at 65. The Court states that freedom of expression is a principal “that is subject to a number of exceptions which must be narrowly interpreted.” *Id.*

148. See HARRIS, *supra* note 22, at 402-403.

149. See *id.*

150. See *Jacobowski v. Germany*, 19 Eur. Ct. H.R. (ser. A) (1994) at 26 (holding that in cases of commercial speech the Court must “confine its review to the question whether the measures taken at national level are justifiable in principal and proportionate.”); see also *Cosado Coca v. Spain*, 18 Eur. Ct. H.R. (holding that restrictions on lawyer’s advertising were allowable under Article 10 because they were reasonable method of protecting the rights

For the ECHR the most relevant aspect in assessing the proportionality of a restrictions on advertising has been the restriction's totality.¹⁵¹ The more difficult a restriction makes it for an advertiser to get notice of their product to the public, the more strictly the court will examine it.¹⁵² Restrictions that amount to a complete barrier between the public and a product are most likely to violate Article 10.¹⁵³ However, the existence of almost any means of advertising that remains unprohibited renders a ban less than complete and, therefore, acceptable.¹⁵⁴

This principal is well illustrated by the ECHR's decision in *Cosado Coca v. Spain*¹⁵⁵ where the court upheld a Barcelona Bar Council's prohibition on advertising by attorneys.¹⁵⁶ A key factor in the decision was the determination that the ban was not absolute.¹⁵⁷ The ECHR reached this determination despite the fact that the exception in the Bar Council regulation that permitted advertising was an extremely miserly one.¹⁵⁸ Under the bar council rules, a lawyer could place a notice in a newspaper to announce a brand new practice, or to announce the changing of the phone number of an existing practice.¹⁵⁹ Despite this meager definition of what constituted a less than total ban, the inference that any ban that was truly total would violate the Convention is discernible.¹⁶⁰

A restriction on commercial expression that fails to adequately protect against the harm it was enacted to prevent may be disproportionate

of others, in this case the reputation of lawyers in general, and because violations of the ban resulted in nominal penalties that were not disproportionate). *Id.*

151. See Rich, *supra* note 31, at 270.

152. See *id.*

153. See *id.*

154. See *id.*; see also, *Cosado Coca v. Spain*, 18 Eur. Ct. H.R.

155. See *Cosado Coca v. Spain*, 18 Eur. Ct. H.R.

156. See *id.*

157. See *id.*

158. See *id.*

159. See *Cosado Coca*, 18 Eur. Ct. H.R. at para. 52. "The Court notes that those rules allowed advertising in certain cases...and under certain conditions. The ban therefore was not an absolute one." The conditions in which advertising was allowed was set out in the Barcelona Bar Council's decision on 'Members of the Bar and Advertising' for 24 February 1981, section 2. Authorized Notices: "Members of the Bar may publish small notices in local daily newspapers in order to announce the setting up of their practices or changes in membership of address, telephone number, or telex number. The size and content of notices must be approved in advance by the Bar Council. They may not appear more than three times during a maximum period of two months." *Id.*

160. See Rich, *supra* note 31, at 273.

as well. In *Open Door Counseling and Dublin Well Women Center v. Ireland*,¹⁶¹ the ECHR found that an Irish law banning the dissemination by women's health clinics of information pertaining to the availability of abortions overseas was ineffective, and thereby disproportionate, because the same information was legally available elsewhere in Ireland.¹⁶²

Although the ECHR's definition of what constituted advertising in *Open Door*—the distribution of information relating to abortion and reproductive health¹⁶³—easily can be differentiated from traditional advertising for profit, the case still demonstrates an important principle.¹⁶⁴ A ban on commercial expression may be held disproportionate when it is ineffective.¹⁶⁵

The case law thus shows that State restrictions upon advertising for commercial profit rarely, if ever, constitute violations of Article 10.¹⁶⁶ In determining such cases the ECHR gives a wide margin of appreciation to national determinations on what constitutes a legitimate purpose under Article 10.¹⁶⁷ Whether a restriction is "necessary in a democratic society" is a question of proportionality,¹⁶⁸ and only those restrictions on commercial expression found to be disproportionate violate Article 10.¹⁶⁹ *Cosado Coca* demonstrates that a ban on commercial advertising that is anything less than total will not be found disproportionate.¹⁷⁰ Conversely, *Open Door* suggests that a ban that is ineffective may restrict needlessly, and for that reason be

161. See *Open Door and Dublin Well Women v. Ireland*, 15 Eur. Ct. H.R.

162. See *id.* The Court also pointed out that despite the ban on providing information, many Irish women had traveled overseas to obtain abortions during the time the regulation was in effect. *Id.*

163. See *id.*

164. *Open Door* is a unique case, however, and its holding may be limited by its surrounding circumstances. The underlying issues involved in the case—abortion and the right of access to healthcare for women—may have resulted in a decision that was swayed, impermissibly according to several strong dissents, by the Court's interjection of its own notion of morals in evaluating the laws proportionality. See separate dissenting opinions by Judge Cremora, Judge Matscher, and dissenting opinion of Judges Pettiti, Russo, and Lopes Rocha. *Open Door*, 15 Eur. Ct. H.R.

165. See HARRIS, *supra* note 22, at 412.

166. See *id.*

167. See *id.*

168. See *id.*

169. See *Casado Coca*, 18 Eur. Ct. H.R. (1994).

170. See *id.*

disproportionate.¹⁷¹ In the absence of such extremes, however, it appears that national authorities have substantial leeway in regulating advertising.¹⁷² The ECHR's recent judgements confirm that States continue to enjoy a wide margin of appreciation in devising constraints upon commercial expression in ways that do not violate Article 10 of the Convention.¹⁷³

C. Analysis Of The Proposed Ban

If called upon to determine the legitimacy under the Convention of an EU-wide ban on children's advertising, it is likely that the only issue the ECHR would examine with any precision would be the potential totality of the ban. The legal argument with the greatest hope for success would therefore be one that claimed that the ban amounts to an absolute barrier to the effective marketing of certain items and services typically consumed by children. A second argument urging a completely opposite estimation of the ban's effect might claim that the ban does not completely prevent advertisers from reaching children, and is therefore ineffective and disproportionate, might, if well-crafted, gain the court's attention. Although both of these arguments invoke questions of proportionality, an evaluation of the ban would nevertheless be subject to the three-part test described above,¹⁷⁴ and we will consider each element in turn.

The proposed ban would clearly satisfy the first element, requiring that it be "prescribed by law." Each EU-Member State would pass its own laws in accordance with an amended TWVF Directive,¹⁷⁵ and each instance of the ban would thereby emanate from a national governmental authority. The laws, and the possibility and scope of sanctions, would be clearly foreseeable to advertisers and broadcasters.¹⁷⁶ In a market as highly

171. *Open Door and Dublin Well Women v. Ireland*, 15 Eur. Ct. H.R.; see also HARRIS, *supra* note 22, at 413.

172. See *Casado Coca*, 18 Eur. Ct. H.R.; see also *Jacobowski v. Germany*, 19 Eur. Ct. H.R. (ser. A) (1989).

173. See HARRIS, *supra* note 22, at 406.

174. See, e.g., *Cosado Coca*, 18 Eur. Ct. H.R.; see also *Jacobowski*, 19 Eur. Ct. H.R. The Court's three-part analysis is invariable.

175. See *Usher*, *supra* note 21.

176. See, e.g., *Anells*, *supra* note 4; see also *Green*, *supra* note 3. The comprehensiveness of the advertising industry's unified opposition to the ban suggests that they are fully aware of the legal ramifications of a revised TVWF directive.

regulated as the media industry, the ECHR would clearly expect broadcasters to obtain legal advice on compliance.¹⁷⁷

The second element of the test, assessing the legitimacy of the ban's goal, similarly presents almost no window of opportunity for challenge. The legitimate purpose of the ban under Article 10 would be grounded in Member States' ability to regulate free expression where necessary to protect public morals.¹⁷⁸ Whether or not broadcast advertising detrimentally affects children's morals is a hotly contested issue.¹⁷⁹ Credible evidence on both sides of the issue has been advanced.¹⁸⁰ However, the ECHR's wide margin of appreciation for legislative determinations of what morality requires, especially when concerning children, has been continuous, and it is highly unlikely that the Court would commence to undermine national legislatures now.¹⁸¹ This is especially so in the face of a pan-European determination on what the protection of morals requires.¹⁸²

Finally, the ECHR would address the question of whether the ban would be "necessary in a democratic society," an examination of the ban's proportionality.¹⁸³ Two possible avenues of arguing that the ban is disproportionate, one asserting that it is total, and one that it is ineffective, are discernible. However, neither argument seems compelling enough to persuade the ECHR to forgo its traditional practice of providing an extremely wide margin of appreciation to States in regulating commercial speech.

At first glance, the proposed ban appears to be absolute. It places an outright prohibition on television commercials designed to attract children at all times, and during all types of programming.¹⁸⁴ The advertising industry may argue that this totality renders the ban impermissible under the Convention.¹⁸⁵ However, this argument perverts the Court's conception of totality. What would actually be banned is a method of advertising appealing to children via television.¹⁸⁶ The directive would not completely bar

177. See HARRIS, *supra* note 22, at 390.

178. See Edling, *supra* note 6.

179. See Green, *supra* note 3.

180. See, e.g., Hansen, *supra* note 46; see also Berger, *supra* note 53.

181. See HARRIS, *supra* note 22, at 393.

182. See *id.*

183. See *id.*

184. See *Industry Divided*, *supra* note 2.

185. See, e.g., Edling, *supra* note 6.

186. See SWEDISH BROADCASTING LAW, *supra* note 1.

advertisers from marketing their products.¹⁸⁷ In this way, the ban would be fundamentally different from the Barcelona Bar Council's ban on lawyer advertising in *Cosado Coca*. There, almost any effort to promote a particular service was prohibited.¹⁸⁸ The Court's concern with Mr. Cosado Coca's ability to advertise at all provides an accurate illustration of what the Court is concerned about when it considers the totality of a restriction,¹⁸⁹ which is ensuring that an advertiser has at least some outlet through which to reach the public.¹⁹⁰

Considering that most purchases of goods or services enjoyed by children under twelve are actually made by adults,¹⁹¹ marketers could not say that they were prevented from reaching the people who would buy their products. Nor would the restriction completely prevent marketers from appealing directly to children. Print campaigns would still be available, as would point of sale promotions, itself a powerful marketing tool.¹⁹²

It would thus be difficult to argue that the proposed ban is a total one in a sense that would render it disproportionate under Article 10 case law. Consumers—in this case, parents—would still be aware of the advertisers' products even through television advertising.¹⁹³ Additionally, under the ban advertisers would maintain unfettered capacity to perpetuate continual commercial bombardment of children via all mediums except television.¹⁹⁴ The ECHR has yet to declare any restriction on advertising that has been less than a total violation of Article 10, and it is highly unlikely that they would disregard their settled case law to do so in this instance.¹⁹⁵

The second available argument, contending that the availability of print advertising, point of sale campaigns, marketing tie-ins, and various other advertising mediums, would render the ban useless because children would still be exposed to advertising also would likely fail. Any notion that an interference with free expression must completely insulate society from the particular harm it seeks to protect against it, lest it be under-inclusive, is

187. *See id.*

188. *See Casado Coca*, 18 Eur. Ct. H.R. (1994).

189. *See id.*

190. *See Casado Coca*, 18 Eur. Ct. H.R.; *see also Rich*, *supra* note 31, at 278.

191. *See Hansen*, *supra* note 46.

192. *See id.*

193. *See Edling*, *supra* note 6.

194. *See id.*

195. *See HARRIS*, *supra* note 22, at 406.

misguided.¹⁹⁶ In assessing restrictions on Commercial speech all that is required is evidence that the measure will be effective.¹⁹⁷

Television is an extremely potent advertising medium. The audience is essentially captive, much more so than with print advertising.¹⁹⁸ The captivating nature of TV is especially appealing to children, who will often watch whatever is on the screen.¹⁹⁹ Even when a child ignores a television commercial, it is difficult for them not to receive it peripherally.²⁰⁰ Given the ubiquity of television in children's lives, a measure preventing certain types of advertising from being shown on television could not fail to reduce their overall exposure to advertising.²⁰¹ Because the advertising industry would be unable to disprove this simple corollary, it could not successfully argue that the ban is an ineffective method of reducing children's exposure to advertising. For this reason, any argument that the ban is disproportionate due to its ineffectiveness would fail.

V. CONCLUSION.

European guarantees of free expression, enshrined in the European Convention on Human Rights, clearly articulate the right to unfettered commercial expression.²⁰² States' efforts to interfere with free expression must find justification within the text of the Convention itself.²⁰³ Conventional standards, however, are clearly related to the value of the expression that State seeks to contain,²⁰⁴ and the European Court of Human

196. See, e.g., *Handyside v. UK*, 1 Eur. Ct. H.R. (ser. A) (1976). The ECHR's idea of what is "necessary" is a balancing test—a law does not have to be an indispensable means of obtaining the legislative aim, nor can it be merely "useful." *Id.* See also *Olsson v. Sweden*, 17 Eur. Ct. H.R. (ser. A) (1994), where the Court elaborated: "According to the Court's established case-law, the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued." *Id.*

197. See *id.*; see also HARRIS, *supra* note 22, at 406.

198. See Edling, *supra* note 6.

199. See Hansen, *supra* note 46.

200. See *id.*

201. See Edling, *supra* note 6.

202. See Convention, *supra* note 5, Art. 10.

203. See *id.*

204. See HARRIS, *supra* note 22, at 411.

Rights has consistently downplayed the importance of protecting free commercial speech, as opposed to other types of expression.²⁰⁵

As a result, successful legal challenges to State infringements upon commercial speech based upon Article 10 of the Convention are extremely rare.²⁰⁶ The Court's unwavering commitment to giving States the widest margin of appreciation amounts to what can essentially be characterized as a hands-off policy in the area of commercial speech.²⁰⁷ The extensive latitude given to States gains even wider breadth when States act in the interest of protecting the morality of children.²⁰⁸

The wide margin of appreciation the ECHR offers States creates a legal chasm that the advertising industry cannot hope to negotiate. An EU-wide ban on children's advertising on television would be founded on a clearly legitimate Conventional basis, Member States' desires to protect the morality of their children.²⁰⁹ If enacted, the ban would not wholly prevent marketers from reaching children or their parents through advertising.²¹⁰ Because the ban would not be a total ban, yet would still be an effective way of limiting children's exposure to advertising, it would satisfy the ECHR's requirement that State restrictions on commercial speech be proportionate.²¹¹ For these reasons, the advertising industry has little hope of mounting a successful challenge to the ban, if enacted, based upon Article 10 of the European Convention on Human Rights.

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205. *See id.*

206. *See id.*

207. *See Rich, supra note 31, at 278.*

208. *See, e.g., Handyside v. UK, 1 Eur. Ct. H.R. (ser. A) (1976); see also Muller and Others v. Switzerland, 13 Eur. Ct. H.R.*

209. *See Edling, supra note 6.*

210. *See Hansen, supra note 46.*

211. *See Rich, supra note 31, at 278; see also HARRIS, supra note 22, at 390.*