



PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
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LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING: COMPARISON OF NATIONAL SYSTEMS

Legal Memorandum

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LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING: COMPARISON OF NATIONAL SYSTEMS

Executive Summary

This memorandum addresses the legal and regulatory frameworks applicable to advertisements containing gender stereotypes or sexist media content under various domestic systems. The memorandum addresses the legal framework regarding both non-discrimination and media law, as well as case law. The memorandum also addresses the way in which the relevant regulatory bodies in each system deal with sexism in advertising. The national systems analyzed are: Bulgaria, Denmark, France, Germany, Norway, Sweden, the United Kingdom (UK), and the United States of America (US). Many of these states prohibit sexist advertising, whereas others have more generic bans related to violations of human rights or dignity. Some states refuse to enact laws prohibiting sexist advertisements based on the primacy given to free speech.

For example, Norwegian and Danish legislation bans sexist advertising. According to their respective Consumer Ombudsman offices, the legislation is violated if the use of a model's body is irrelevant to the product in question. In France, Germany, and Bulgaria, human dignity plays an important role when assessing the content of advertisements. In France, a specialized council monitors respect for human dignity in publicly available programs and has frequently found that the degrading or demeaning depiction of women violates French law. Similarly, both regulatory bodies in German and Bulgaria have condemned the portrayal of the female body as a sexual object. The relevant UK agency has found offence on a number of occasions where women were portrayed sexually in advertising. In contrast, Sweden and the US do not strictly regulate advertising due to the great protection afforded to free speech.

The legal and regulatory frameworks addressed in this memorandum provide comparative practice for how to control and circumscribe the sexist content of advertisements. The standards, policy, and practice of national advertising bodies provide useful examples for regulating, monitoring, and assessing cases of sexism or gender stereotyping in advertisements. Such comparative information regarding the regulation of sexist advertising across different states may be useful for jurisdictions seeking to reform their own national system.

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LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING: COMPARISON OF NATIONAL SYSTEMS

Statement of Purpose

The purpose of this memorandum is to analyze the legal and regulatory frameworks of various domestic systems applicable to advertisements containing gender stereotypes or sexist content. The national systems analyzed are Bulgaria, Denmark, France, Germany, Norway, Sweden, the UK, and the US. The memorandum addresses the legal framework regarding both non-discrimination and media law, as well as case law. The memorandum addresses the way in which the relevant regulatory bodies in each system deal with sexism in advertising. The memorandum can be used to assess whether specific advertisements may be contrary to the laws and standards in force. The purpose of the memorandum is also to present comparative state practice regarding advertising regulation that may assist other jurisdictions, such as the Netherlands, seeking to revise their standards on sexist content.

Introduction

Several Dutch companies have recently employed media campaigns that could be regarded as sexist or containing negative gender stereotypes. Examples include ‘Shameless’ by men’s clothing company Suitsupply, advertisements by the toy store Bart Smit, and advertisements for Amsterdam’s ‘Museum Night’. These advertisements led to complaints being lodged by the public with the Dutch advertisement monitoring body (*Reclame Code Commissie* – RCC). In relation to the SuitSupply ads, the RCC dismissed all of the 114 complaints.¹ Given this outcome, questions have been raised in the Netherlands about the adequacy of current legislation, policy and practice of the regulatory body regarding such advertisements. Comparative information regarding the regulation of sexist advertising in other national systems is useful in challenging such advertisements in the Netherlands and potentially reforming the system.

This memorandum analyzes the legal framework of eight states regarding sexist or gender stereotypical content in media and advertising. The national systems addressed are Bulgaria, Denmark, France, Germany, Norway, Sweden, UK, and the US. These states were selected based on their commonalities with or

¹ This memorandum does not address the legal or regulatory framework in the Netherlands as this information has been covered in separate memoranda provided to the Public Interest Litigation Project by other researchers.

relevance for the Dutch system, or due to their notable positions taken on sexism in advertising. The memorandum commences by addressing the legal framework regarding non-discrimination and media law, as well as relevant case law in each jurisdiction. Next the memorandum addresses the regulatory system and monitoring body in each state. Insofar as the national monitoring bodies conducted investigations with respect to specific advertisements or complaints, this memorandum includes analysis of those investigations. Finally, the memorandum reflects on key areas to focus on reforming in order to improve protections in the Dutch system of advertising regulation.

All of the states dealt with in this memorandum, except the US, are also subject to European Union (EU) Directives dealing with gender equality,² and the European Convention on Human Rights (ECHR). Article 14 of the ECHR prohibits discrimination on any ground (such as sex) in the enjoyment of the rights and freedoms in the Convention.³ Again with the exception of the US (which is only a signatory), all of these states are also parties to the international Convention on the Elimination of All Forms of Discrimination against Women. These regional and international legal frameworks relevant for regulating sexist or stereotypical advertising and media content are addressed in separate memoranda.

Legislative Framework: Non-Discrimination and Media Law

This section of the memorandum sets out the legislative framework for non-discrimination and media regulation in Bulgaria, Denmark, France, Germany, Norway, Sweden, UK, and the US. The relevant legislation and provisions are identified for each jurisdiction as well as its scope of application. Case law is also identified where possible. For the purpose of this memorandum, the research focused mainly on legislation dealing with gender equality and the laws regulating the content of advertisements in general, and sexist advertisements in particular.

² Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Article 14, 4 November 1950 ETS 5 (1950), available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

*Bulgaria*Bulgarian Non-discrimination Law

The Bulgarian Protection Against Discrimination Act (PADA) came into force in 2004.⁴ The PADA incorporates the EU Directives and legislation on non-discrimination⁵ into the Bulgarian legal system. The PADA prohibits discrimination on the grounds of gender and race.⁶ According to Article 6, the prohibitions in the law encompass and protect the rights of all natural or legal persons in all spheres of life.⁷ The PADA therefore regulates the conduct of individuals, private companies, organizations, governmental agencies, and local authorities. As such, victims of discrimination have the same legal protection regardless of context in which the discrimination occurs.⁸

The Act specifies eight offences: direct and indirect discrimination; harassment; sexual harassment; incitement to discrimination; persecution; racial segregation; and architectural obstacles that hinder access for persons with disabilities.⁹ Article 4(1) prohibits direct or indirect discrimination based on grounds including sex.¹⁰ The list is non-exhaustive and allows for the protection of other personal features and characteristics, for instance the change of one's sex.¹¹

Article 75(1) entitles victims of discrimination to a special anti-discrimination lawsuit via civil action.¹² Article 71(1) stipulates that a sustained claim before the civil courts must establish the type of discrimination, the defendant's obligation to cease the contested behavior, and to restore the situation to the situation that existed before the discrimination took place. The defendant is under an obligation to refrain from acting in a discriminatory manner in the future and to pay compensation to the victim for material and moral damages.¹³ Article 72 of the PADA foresees the possibility for collective claims.

⁴ *Law on the Protection against Discrimination* (Bulgaria, 2004), available in Bulgarian at <http://lex.bg/laws/ldoc/2135472223>.

⁵ Directive 2002/73/EC of the EP and of the Council of 23 September 2002 amending Council Directive 76/207/EEC; Directives 76/207/EEC and 97/80/EC; Council Directive 2000/78/EC of 27 November 2000.

⁶ <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

⁷ <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

⁸ <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

⁹ *Law on the Protection against Discrimination* art. 4(2) and art. 5 (Bulgaria, 2004).

¹⁰ <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

¹¹ <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>

¹² <http://women.bghelsinki.org/pravni-mehanizmi/>.

¹³ <http://women.bghelsinki.org/pravni-mehanizmi/>.

The PADA offers extensive protection to victims of discrimination. However, complaints of sex discrimination brought by women or in the interest of women before the civil courts are rare. To date, only a 2002 decision of the District Court Stara Zagora addressed allegations of gender discrimination.¹⁴ Although the decision precedes the PADA's entry into force, the case exemplifies the authorities' approach and sheds light on the reasoning in matters of gender equality and discrimination.

In that case the claimant initiated proceedings against the brewery "Zagorka" and its 2001 advertising campaign. The controversial TV ad featured the slogan: "What a man needs – a new car, a nice wife and a good beer". The claimant argued that she felt insulted and discriminated against by the degrading comparison of women with objects such as cars and beer.¹⁵ Various civil associations focusing on the protection of women against domestic violence and on the protection of the consumer submitted similar claims in the proceedings. The District Court dismissed all claims of moral damages and compensation, finding the ad in question harmless and inoffensive.¹⁶

Bulgarian Media Law

Chapter IV of the Bulgarian Law on Radio and Television (LRT)¹⁷ regulates commercial communications in broadcasting, and prohibits certain types of advertising content. Article 75(5) LRT specifies that commercial communications must not:

1. Affect human dignity;
2. Include or promote any discrimination on grounds such as sex, race or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
3. Encourage behavior that endangers public health or safety;
4. Encourage behavior grossly prejudicial to the protection of the environment.

Article 76(2) LRT refers explicitly to the ethical obligations of media service providers. It obliges media providers to observe the norms of the Code of Ethics of the Bulgarian media developed by the National Council for Journalistic Ethics, and the national ethical rules for advertising and commercial communication developed by the National Council for Self-Regulation. This provision strengthens

¹⁴ http://www.dnevnik.bg/bulgaria/2002/10/28/133548_zagorka_specheli_dela_za_skandalna_reklama/.

¹⁵ <http://economix.bg/reklami-globi>.

¹⁶ http://www.dnevnik.bg/bulgaria/2002/10/28/133548_zagorka_specheli_dela_za_skandalna_reklama/.

¹⁷ *Law on Radio and Television* (Bulgaria, 1999), available in *Bulgarian at* lex.bg/laws/ldoc/2135472223.

the codes that the National Council for Self-regulation introduced. Previously, the codes only bound media competitors that voluntarily committed to them.

Bulgarian legislation does not extensively regulate the publication of newspapers or advertising in the printed media. Therefore, the general media regulations apply.¹⁸ The Law on Radio and Television stipulates that no broadcast based on “national, ethnic, religious, racial, sexual, or other discrimination” shall be permitted.¹⁹ Sex, as an autonomous ground, is not noted explicitly in this Law.

Denmark

Danish Non-discrimination Law

Enacted in 2000, the Danish Gender Equality Act aims to promote equality between women and men.²⁰ The Act contains a prohibition against discrimination on the basis of gender. Section 2(1) of the Act stipulates that no one shall expose any person to direct or indirect discrimination on the ground of gender.²¹

Danish Media Law

Denmark bans sexist advertising in its Marketing Practices Act 2013.²² According to Section 1 traders must exercise good marketing practice in relation to consumers, other traders, and public interests.²³ The Act does not elaborate upon the meaning of “good marketing practice.” What is considered to be good marketing practice in relation to gender-related advertising is subject to the guiding principles produced by the Danish Consumer Ombudsman.²⁴ The guiding principles define gender-related advertising as advertising in which gender plays a

¹⁸ Judith Soukal, *Entwicklung der Werbung seit 1989 mit einem speziellen Augenmerk auf das Bild der Frau in der Plakat- und Fernsehwerbung in Bulgarien und Österreich (Sexismus und Diskriminierung in der Werbung)* 13 (2013), available at <http://othes.univie.ac.at/25583/>.

¹⁹ *Law on Radio and Television* (Bulgaria 1998) available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016248.pdf>.

²⁰ *Act on Gender Equality* sec. 1 (Denmark, 2000), available at <http://www.legislationline.org/documents/action/popup/id/5765>.

²¹ *Act on Gender Equality* sec. 2(1) (Denmark, 2000), available at <http://www.legislationline.org/documents/action/popup/id/5765>.

²² *The Marketing Practices Act* (Denmark, 2013), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Markedsfoeringsloven%20lbkg%202013.pdf>.

²³ *The Marketing Practices Act* sec. 1(1) (Denmark, 2013), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Markedsfoeringsloven%20lbkg%202013.pdf>.

²⁴ Forbrugerombudsmanden, *Guidelines on gender-related advertising*, 1 (Apr. 1, 2012), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Koensrelateret%20reklame%20eng.pdf>.

considerable role, or in which nudity or eroticism are included as essential elements.²⁵

According to the Consumer Ombudsman, good marketing practice implies that an advertisement is designed with public interests in mind. In conjunction with the Danish Gender Equality Act, this means that an advertisement may not discriminate on the ground of gender, and that an advertisement must be decent and designed with a sense of social responsibility.²⁶

In its guidelines, the Consumer Ombudsman notes that an advertisement discriminates against gender if it:

- Represents gender in a derogatory manner;
- Includes nudity in a manner that is derogatory to the relevant gender;
- Gives the audience the impression that the role of one gender is socially, financially or culturally subordinate to the other gender;
- Gives the impression that one gender is less competent, less intelligent or less suited to perform tasks that both genders can perform equally well;
- Gives the impression, in a derogatory manner, that one gender has certain negative personality traits or characteristics.²⁷

The Danish Consumer Ombudsman considers nudity or eroticism in an advertisement offensive, derogatory, or contemptuous if a person in the advertisement is reduced to a sex object.²⁸ An advertisement in which nudity plays an essential part is indecent if the advertisement in question is undeniably designed to cause offence.²⁹ The Danish Ombudsman is the competent body to receive complaints on the Marketing Practices Act. The section on Danish regulatory bodies explains this in further detail.³⁰

²⁵ Forbrugerombudsmanden, *Guidelines on gender-related advertising*, 2 (Apr. 1, 2012), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Koensrelateret%20reklame%20eng.pdf>.

²⁶ Forbrugerombudsmanden, *Guidelines on gender-related advertising*, 3 (Apr. 1, 2012), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Koensrelateret%20reklame%20eng.pdf>.

²⁷ Forbrugerombudsmanden, *Guidelines on gender-related advertising*, 4 (Apr. 1, 2012), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Koensrelateret%20reklame%20eng.pdf>.

²⁸ Forbrugerombudsmanden, *Guidelines on gender-related advertising*, 4 (Apr. 1, 2012), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Koensrelateret%20reklame%20eng.pdf>.

²⁹ Forbrugerombudsmanden, *Guidelines on gender-related advertising*, 5 (Apr. 1, 2012), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Koensrelateret%20reklame%20eng.pdf>.

³⁰ See in this legal memorandum pp. 23-26.

*France*French Non-discrimination Law

In July 2014, the French Parliament adopted the Law for the Real Equality between Women and Men.³¹ It aims to achieve comprehensive equality between men and women³² by addressing inequalities in the private, professional, and public spheres of life.³³ The Law aims to tackle the systemic character of gender inequality. Title 1 addresses the conciliation between professional and parental life, and the efficiency of existing rules on professional equality between men and women.³⁴ Title 2 relates to overcoming precariousness as a result of inequalities.³⁵ Title 3 contains measures to counter gender-based violence and violations of dignity.³⁶ Title 4 implements the constitutional goal of parity in the public sphere, mainly in politics and sport.

French Media Law

The 1986 Law no. 86-1067 on the Freedom of Communication³⁷ contains provisions for the respect of human dignity, diversity, and women's rights.³⁸ In addition, Law no. 2006-396 of 2006³⁹ introduces a provision that prohibits discrimination in the field of audiovisual media. Under Article 15 of the Law, the

³¹ *Loi n°2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

³² *Projet de Loi pour l'égalité entre les femmes et les hommes, Etude d'impact*, REPUBLIQUE FRANÇAISE, p.5. (01/07/2013), available at

http://www.legifrance.gouv.fr/content/download/3882/68597/version/1/file/ei_egalite_femmes_cm_03.07.2013.pdf.

³³ <http://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-pour-egalite-entre-femmes-hommes.html>.

³⁴ *Loi n°2014-873 du 4 août 2014, Titre 1 : Dispositions relatives à l'égalité entre les femmes et les hommes dans la vie professionnelle*, Articles 2 à 26. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

³⁵ *Loi n°2014-873 du 4 août 2014, Titre 2 : Dispositions relatives à la lutte contre la précarité*, Articles 27 à 31. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

³⁶ *Loi n°2014-873 du 4 août 2014, Titre 3 : Dispositions relatives à la protection des personnes victimes de violences et à la lutte contre les atteintes à la dignité et à l'image à raison du sexe dans le domaine de la communication*, Articles 32 à 58. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

³⁷ *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930&dateTexte=20110914>.

³⁸ *Projet de Loi pour l'égalité entre les femmes et les hommes, Etude d'impact*, REPUBLIQUE FRANÇAISE, p.72. (01/07/2013), available at

http://www.legifrance.gouv.fr/content/download/3882/68597/version/1/file/ei_egalite_femmes_cm_03.07.2013.pdf

³⁹ *Loi n°2006-396 du 31 mars 2006 pour l'égalité des chances*. (République française) Available in French at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539>.

High Authority for Audiovisual Media (French abbreviation: CSA) monitors the respect for human dignity in all publicly available programs, and sanctions broadcasts that contravene the law. According to Decree no. 92-280 of 1992,⁴⁰ the publishers of services with an advertising character must respect dignity and the principle of non-discrimination between men and women.⁴¹

The Law for the Real Equality between Women and Men (Law no. 2014-873) modifies the above Law on Freedom of Communication. Under Title 3 Chapter 3,⁴² the Law gives the CSA competence to intervene in matters of women's rights violations.⁴³ It empowers the CSA regarding the representation of women in audiovisual media, and to promote equality between men and women.⁴⁴ The CSA monitors the broadcasting of gender-based stereotypes and degrading images of women. The CSA can also identify Internet images that are considered sexist.⁴⁵

The CSA provides a framework for the content of audiovisual services on TV and radio, to monitor respect for fundamental values, and to protect the public.⁴⁶ It is therefore the competent body to address complaints over sexist advertising. This is explained further in the section on regulatory bodies in France.⁴⁷

⁴⁰ *Décret n°92-280 du 27 mars 1992 pris pour l'application des articles 27 et 33 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*. (République française) Available in French at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000346165>. A Decree is adopted by the French executive branch, whereas a law is adopted by the legislator and has to pass through parliament.

⁴¹ <http://www.csa.fr/Television/Le-suivi-des-programmes/Les-droits-des-femmes/Les-textes-juridiques-sur-les-droits-des-femmes>.

⁴² *Loi n°2014-873 du 4 août 2014, Titre 3, Chapitre 3 : Dispositions relatives à la lutte contre les atteintes à la dignité et à l'image à raison du sexe dans le domaine de la communication*, Articles 56-58. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

⁴³ *Avis n°2013-08 du 4 juin 2013 sur un projet de loi relatif à l'égalité entre les femmes et les hommes portant modification de la loi n°86-1067 du 30 septembre 1986*, CONSEIL SUPERIEUR DE L'AUDIOVISUEL. Available in French at <http://www.csa.fr/Espace-juridique/Avis-du-CSA-au-Gouvernement/Avis-n-2013-08-du-4-juin-2013-sur-un-projet-de-loi-relatif-a-l-egalite-entre-les-femmes-et-les-hommes-portant-modification-de-la-loi-n-86-1067-du-30-septembre-1986>.

⁴⁴ *Projet de Loi pour l'égalité entre les femmes et les hommes, Etude d'impact*, REPUBLIQUE FRANÇAISE, p.74. (01/07/2013), available at

http://www.legifrance.gouv.fr/content/download/3882/68597/version/1/file/ei_egalite_femmes_cm_03.07.2013.pdf.

⁴⁵ *Projet de Loi pour l'égalité entre les femmes et les hommes, Etude d'impact*, REPUBLIQUE FRANÇAISE, p.75. (01/07/2013), available at

http://www.legifrance.gouv.fr/content/download/3882/68597/version/1/file/ei_egalite_femmes_cm_03.07.2013.pdf.

⁴⁶ Available at: <http://www.csa.fr/Le-CSA/Presentation-du-Conseil/Des-missions-diversifiees>.

⁴⁷ See pp. 23-26 of this legal memorandum.

*Germany*German Non-discrimination Law

Germany's General Equal Treatment Act (German abbreviation: AGG) came into force in 2006.⁴⁸ It domestically incorporates EU Directives 2002/73/EC, 76/207/EEC, and 2004/113/EC.⁴⁹ Relevantly, the AGG aims to prevent and eliminate discrimination on, *inter alia*, the grounds of gender and sexual orientation. The Act applies to both labor and civil law,⁵⁰ including all fields of employment and employment-related concerns,⁵¹ and to daily business transactions.⁵² The AGG provides individuals with the right to make legal claims against employers and private persons, if these persons/organizations violate the statutory prohibition of discrimination. The AGG deals extensively with gender concerns in everyday working life and private legal relations,⁵³ but the drafters specifically clarified that its scope of application does not extend to other areas.

German Media Law

In Germany, both the Constitution and general competition law regulate the contents of advertisements. Under the German Constitution, women's personality rights and the concept of human dignity can reasonably limit freedom of expression. German competition law contains the standards for regulating advertising, including recognizing certain types of discriminatory advertising that degrade persons or groups on grounds including gender.⁵⁴

⁴⁸ *General Equal Treatment Act* (Germany, 2006), available in German at <http://www.gesetze-im-internet.de/agg/BJNR189710006.html>.

⁴⁹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁵⁰ http://www.antidiskriminierungsstelle.de/EN/TheAct/ScopeAct/scopeAct_node.html.

⁵¹ Access to gainful employment (job advertisement, application procedure, job interview, selection criteria, conditions of recruitment; when negotiating employment contracts (terms and conditions of employment and working conditions, earnings, fringe benefits, social security benefits); in vocational training (vocational retraining, initial and continuing vocational training); in connection with questions of career advancement (promotion, transfer to another post for a longer period of time or assignment of new functions within the same job, instructions about initial, further and continuing vocational training); in case of a membership of an employees' union, trade union or professional association; when an employment relationship is terminated, and even beyond this, for example in occupational pension schemes.

⁵² http://www.antidiskriminierungsstelle.de/EN/TheAct/ScopeAct/scopeAct_node.html.

⁵³ http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Handbuch_Diskriminierungsschutz/Kapitel_1.pdf?__blob=publicationFile, p. 23.

⁵⁴ Andreas Wisuschil, *Diskriminierende Werbung – und das neue UWG-2008*, (Jan. 10, 2010) available at <http://www.anwalt24.de/beitraege-news/fachartikel/diskriminierende-werbung-und-das-neue-uwg-2008>.

The 2004 Law against Unfair Competition (German abbreviation: UWG) regulates unfair ad campaigning, which encompasses inappropriate and discriminatory advertising.⁵⁵ However, the UWG does not contain an explicit prohibition on discriminatory ads and nor does it elaborate on the discriminatory categories. German legislators explained that the purpose of competition law does not lie in the sanctioning of bad taste.⁵⁶ Lawmakers removed the “common decency” clause previously in § 1 of the UWG,⁵⁷ with the reasoning implying that “good manners” are difficult to determine in a diverse society.⁵⁸ § 4 replaced both § 1 of the UWG and the general prohibition to undertake actions for competition purposes that violate and offend the principle of common decency.⁵⁹

§ 4 lists examples of unfair competition, defined as actions that affect the consumer’s choice or other market participants by the application of pressure, the use of degrading and inhuman (“*menschenverachtend*”) means, or other improper and subjective influence.⁶⁰ This formulation limits the scope of the judiciary in interpreting the clause. In line with the case law on § 1 of the UWG (repealed), it clarifies that tasteless advertising cannot be the sole trigger for sanctions.⁶¹ However, by referring to the constitutional term “*menschenverachtend*”, the legislator clarifies that recourse to constitutional law is necessary to determine an ad’s character.⁶² According to German constitutional principles, in these cases women’s personality rights and dignity can restrict freedom of expression,⁶³ the freedom of the press and the freedom of the arts.⁶⁴

In Germany, the majority of cases dealing with advertising that infringes personality rights are settled outside of the courtroom. However, the few cases

⁵⁵ *Law against the Unfair Competition* (Germany, 2004), available in German at http://www.gesetze-im-internet.de/uwg_2004/.

⁵⁶ Andreas Wisuschil, *Diskriminierende Werbung – und das neue UWG-2008*, (Jan. 10, 2010) available at <http://www.anwalt24.de/beitraege-news/fachartikel/diskriminierende-werbung-und-das-neue-uwg-2008>.

⁵⁷ Raphael Hoffmann, *Ist diskriminierende Werbung zulässig?*, Migration Business, Jun. 12, 2013, available at <http://www.migration-business.de/2013/06/ist-diskriminierende-werbung-zulaessig/>.

⁵⁸ Raphael Hoffmann, *Ist diskriminierende Werbung zulässig?*, Migration Business, Jun. 12, 2013, available at <http://www.migration-business.de/2013/06/ist-diskriminierende-werbung-zulaessig/>.

⁵⁹ Jutta Stender-Vowrachs, *Frauen und Mann in der Werbung – rechtlich betrachtet*, in *Stereotype?: Frauen und Männer in der Werbung* 51, 51 (Christina Holtz-Bacha, 2nd ed., 2011).

⁶⁰ *Law against the Unfair Competition* § 4 (Germany, 2004).

⁶¹ Jutta Stender-Vowrachs, *Frauen und Mann in der Werbung – rechtlich betrachtet*, in *Stereotype?: Frauen und Männer in der Werbung* 51, 52 (Christina Holtz-Bacha, 2nd ed., 2011).

⁶² Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb: Kommentar* 1138 (2011), available at https://beck-online.beck.de/?vpath=bibdata%2Fkomm%2FBauHefKoWettbewR_26%2FBuch%2Fcont%2FBauHefKoWettbewR.htm.

⁶³ German Const. art. 5 (1949), available at <http://www.gesetze-im-internet.de/gg/BJNR000010949.html>.

⁶⁴ Jutta Stender-Vowrachs, *Frauen und Mann in der Werbung – rechtlich betrachtet*, in *Stereotype?: Frauen und Männer in der Werbung* 51, 52 (Christina Holtz-Bacha, 2nd ed., 2011).

decided by the courts shed light on the interplay of legislation and constitutional boundaries. For example, the German Supreme Court found in its decision *Busengrapscher* (“boob grabber”) and *Schlüpferstürmer* (“knicker raider”) that the labels of two miniature liqueur bottles violated (former) § 1 UWG.⁶⁵

The “Busengrapscher” label shows a man grabbing a woman’s breast from behind, while the “Schlüpferstürmer” label depicts a woman in her underwear. The German Supreme Court considered the values and moral portrayed and concluded that both labels convey in an obscene manner the impression of women’s sexual availability. Furthermore, the Court found the labels insinuated that such availability increases with the consumption of alcoholic beverages.⁶⁶ The Court considered the labels as humiliating and degrading for part of the population, and a violation of women’s dignity in the Constitution.⁶⁷ The term humiliating degradation applies especially when an advertisement offends the general sense of decency and contains harassing insinuations that cause public nuisance.⁶⁸

In another case, the Munich Higher Regional Court pronounced an advertisement for a brand of vodka compatible with the principles of common decency and with (former) § 1 UWG.⁶⁹ The ad depicted a woman in a strapless latex costume with a zipper on the front standing next to a bottle of vodka. The image is overwritten with the slogan “Wouldn’t you like to open it right away?”. Although the Court admitted an erotic reference, it rejected the plaintiff’s complaint that the ad contained inappropriate and offending sexual content. In the Court’s opinion, the slogan simply played with possible associations and did not go beyond the allowed use of vague erotic allusions. Thus, the advertisement did not exceed the threshold of women’s personality rights and dignity.

The Bayreuth District Court followed a similar approach in the case of a miniature liqueur bottle labelled “Scharfer Hüpfen” (“hot hop”).⁷⁰ The label depicts a cartoon-like naked man and woman. The woman is in the thought bubble of the man who puts his hand around her ankle. The Court found the ad

⁶⁵ *Busengrapscher/ Schlüpferstürmer* (1995) I ZR 91/ 93, available at <http://dejure.org/dienste/vernetzung/rechtsprechung?Text=GRUR%201995%2C%20592&Suche=BGH%20GRUR%201995%2C%20592%2C%20594>.

⁶⁶ *Busengrapscher/ Schlüpferstürmer* (1995) I ZR 91/ 93.

⁶⁷ German Const. art. 1 (1949), available at <http://www.gesetze-im-internet.de/gg/BJNR000010949.html>; *Busengrapscher/ Schlüpferstürmer* (1995) I ZR 91/ 93.

⁶⁸ *Busengrapscher/ Schlüpferstürmer* (1995) I ZR 91/ 93.

⁶⁹ *Wodka Werbung* (1996) 29 W 1587/ 96, available at <http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20M%FCnchen&Datum=13.05.1996&Aktenzen=29%20W%201587/96>.

⁷⁰ *Scharfer Hüpfen* (1996) KH O 19/96.

compatible with competition law as it did not exceed the moral threshold of what the public is used to seeing and accepts in terms of gender representation.⁷¹ Thus, the label did not violate § 1 UWG (old version) and women's dignity.

Norway

Norwegian Non-discrimination Law

The Norwegian Parliament adopted the Gender Equality Act in 1978.⁷² The purpose of this Act is to promote gender equality and it specifically aims to improve the position of women.⁷³ The Act prohibits discrimination on the basis of gender,⁷⁴ including “direct and indirect differential treatment [of women and men] that is not lawful pursuant to Section 6 or Section 7.”⁷⁵ The Act applies to all areas of society, including working life, education, health, and culture. It applies to both the public and the private sectors.⁷⁶ The Act also includes a specific provision on the protection against sexual and gender-based harassment.⁷⁷

Norwegian Media Law

The Norwegian Marketing Control Act bans sexist advertising.⁷⁸ Section 2 prohibits advertising that is contrary to the equality of the sexes, exploits the body, or conveys “an offensive or derogatory appraisal of women or men.”⁷⁹ To determine whether an advertisement violates this prohibition, the Norwegian Consumer Ombudsman assesses whether its design, format, scope, or other factors stand out as particularly intrusive.⁸⁰ The threshold for the applicability of Section

⁷¹ Jutta Stender-Vorwachs und Frau Natalia Theißen, *Das Persönlichkeitsrecht der Frau in den Medien*, 9 Neue Juristische Wochenzeitschrift 549, 567 (2006).

⁷² *Act relating to Gender Equality* (Norway, 1978), available at <https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>.

⁷³ *Act relating to Gender Equality* sec. 1 (Norway, 1978), available at <https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>.

⁷⁴ *Act relating to Gender Equality* sec. 5 (Norway, 1978), available at <https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>.

⁷⁵ Sections 6 and 7 set out the instances in which both lawful differential treatment and positive differential treatment are permitted. *Act relating to Gender Equality* sec. 5 (Norway, 1978), available at <https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>.

⁷⁶ Norwegian Ministry of Children, Equality and Social Inclusion, *Equality 2014 – the Norwegian Government's gender equality action plan*, 90 (Nov. 2011), available at https://www.regjeringen.no/globalassets/upload/bld/action_plan_2014.pdf.

⁷⁷ *Act relating to Gender Equality* sec. 8 (Norway, 1978), available at <https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>.

⁷⁸ *The Marketing Control Act* (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>.

⁷⁹ *The Marketing Control Act* sec. 2 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>. This ban on sexist advertising forms part of the Marketing Control Act since 1978, the year the Norwegian parliament adopted the Gender Equality Act. See The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 2 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

⁸⁰ *The Marketing Control Act* sec. 2 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>.

2 is higher for the use of men in advertising than for the use of women in advertising.⁸¹ The Consumer Ombudsman explains that this is due to the fact that the aim of Section 2 is primarily to improve the position of women, since men continue to hold a stronger position in society.⁸² The Consumer Ombudsman designed a set of guidelines on sexist advertising, which stipulate that a widespread, long-term campaign will be assessed more strictly than advertising “of more moderate means.”⁸³

Sweden

Swedish Non-discrimination Law

The Swedish Discrimination Act⁸⁴ entered into force in 2009. Under this Act, no person may be discriminated against or prevented from exercising their rights on the basis of “gender, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.”⁸⁵ The purpose of the Act is to combat discrimination and to promote equal rights and opportunities for all.⁸⁶ The Act prohibits both direct and indirect discrimination⁸⁷ based on gender in various areas of society, including working life, educational activities, and health and medical care.⁸⁸

Swedish Media Law

Sweden does not have legislation dealing with gender discriminatory advertisements.⁸⁹ Past proposals for legislation banning sexist advertising have been rejected by the Swedish Government on the ground that they conflicted with

⁸¹ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 3 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

⁸² The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 3 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

⁸³ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 3 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

⁸⁴ *Discrimination Act* (Sweden, 2008), available at <http://www.government.se/content/1/c6/11/81/87/36dc60a5.pdf>.

⁸⁵ *Discrimination Act* sec. 1 (Sweden, 2008), available at <http://www.government.se/content/1/c6/11/81/87/36dc60a5.pdf>.

⁸⁶ *Discrimination Act* sec. 1 (Sweden, 2008), available at <http://www.government.se/content/1/c6/11/81/87/36dc60a5.pdf>.

⁸⁷ *Discrimination Act* sec. 4 (Sweden, 2008), available at <http://www.government.se/content/1/c6/11/81/87/36dc60a5.pdf>.

⁸⁸ See *Discrimination Act* (Sweden, 2008), available at <http://www.government.se/content/1/c6/11/81/87/36dc60a5.pdf>.

⁸⁹ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in *MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA* 99, 104 (Maria Edström, Ragnhild Mølster eds., 2014).

the freedom of expression, including freedom of the press.⁹⁰ The latest proposal was put forth in 2008.⁹¹

The Swedish Market Act promotes broadly the interests of consumers and businesses in relation to the marketing of products.⁹² Section 1 of the Act stipulates that its aim is to prevent marketing that is unfair to consumers and traders. Under Section 5, marketing must be consistent with good marketing practices. Sections 7 and 8 prohibit aggressive and unfair advertising respectively. The Act contains no reference to sex or gender.

United Kingdom

UK Non-discrimination Law

Section 4 of the UK's Equality Act 2010 lists sex as a "protected characteristic"⁹³ and chapter 2 prohibits certain discriminatory conduct.⁹⁴ Section 13(1) of the Equality Act provides that a person discriminates against another when they treat that person less favorably than they would others because of a protected characteristic (or a combination of characteristics under Section 14).⁹⁵ Part 10 concerns contracts and other agreements,⁹⁶ with Section 142(1) providing that a contractual term is unenforceable against a person if it constitutes, promotes, or provides for treatment of that or another person that is prohibited by the Act.⁹⁷ Chapter 2 and Part 10 of the Act prohibit various forms of sex discrimination.

In addition, Section 3 of the Human Rights Act 1998 specifically stipulates that any legislation must be read and given effect in a way that is compatible with the rights contained within the European Convention on Human Rights "so far as it

⁹⁰ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 104 (Maria Edström, Ragnhild Mølster eds., 2014). See also European Advertising Standards Alliance, *Portrayal of Gender: Report on Advertising Self-regulation Across Europe*, 35(May, 2008), available at <http://www.asa.org.uk/~media/Files/ASA/Reports/2008EASARreportportrayalofgender1.ashx>.

⁹¹ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 104 (Maria Edström, Ragnhild Mølster eds., 2014).

⁹² *The Marketing Act* (Sweden, 2008) available at http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/sfs_sfs-2008-486/.

⁹³ Equality Act 2010, section 4 (UK, 2010), available at <http://www.legislation.gov.uk/ukpga/2010/15/section/4>

⁹⁴ Equality Act 2010, chapter 2 (UK, 2010), available at <http://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/2>

⁹⁵ Equality Act 2010, section 13 (UK, 2010), available at <http://www.legislation.gov.uk/ukpga/2010/15/section/13>

⁹⁶ Equality Act 2010, section 19(1) (UK, 2010), available at <http://www.legislation.gov.uk/ukpga/2010/15/section/19>

⁹⁷ Equality Act 2010, section 142(1) (UK, 2010), available at <http://www.legislation.gov.uk/ukpga/2010/15/section/142>

is possible to do so”.⁹⁸ Therefore, both the Equality and the Human Rights Acts provide the UK with a comprehensive statutory framework on the equal treatment of men and women and the prohibition of discriminatory practices.

UK Media Law

In the UK, two Acts regulate the media and communications, one of which creates the regulatory body tasked with monitoring the content of programmes and advertisements. The Office of Communications Act 2002 created the Office of Communications (Ofcom) regulatory body.⁹⁹ The Communications Act 2003 grants the powers and functions of Ofcom.¹⁰⁰ Section 319(1) of that Act imposes a duty upon Ofcom to set, and review from time to time, the standards for the content of programmes on television and radio.¹⁰¹

Section 319(2)(h) of the Communications Act relates to the objective of preventing “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services”.¹⁰² Section 319(2)(i) provides that another objective is to comply with the UK’s international obligations regarding advertising.¹⁰³ Section 319(4) lists the factors that Ofcom must consider in setting and revising the standards, which includes “(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description”. The standards may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (both generally or in particular circumstances).

The Audiovisual Media Services Regulations 2009 also deals with advertising. Section 368F(4)(b) provides that advertising included in an on-demand program service must not “include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual

⁹⁸ The Human Rights Act 1998, section 3 (UK, 1998), *available at* <http://www.legislation.gov.uk/ukpga/1998/42/section/3>

⁹⁹ The Office of Communications Act 2002, section 1 (UK, 2002) *available at* http://www.legislation.gov.uk/ukpga/2002/11/pdfs/ukpga_20020011_en.pdf.

¹⁰⁰ The Communications Act 2003, part 1 (UK, 2003) *available at* <http://www.legislation.gov.uk/ukpga/2003/21/part/1>.

¹⁰¹ The Communications Act 2003, section 319(1) (UK, 2003) *available at* <http://www.legislation.gov.uk/ukpga/2003/21/section/319>.

¹⁰² The Communications Act 2003, section 319(2)(h) (UK, 2003) *available at* <http://www.legislation.gov.uk/ukpga/2003/21/section/319>.

¹⁰³ The Communications Act 2003, section 319(2)(i) (UK, 2003) *available at* <http://www.legislation.gov.uk/ukpga/2003/21/section/319>.

orientation”.¹⁰⁴ Similarly, Section 368G(11)(b) provides that a sponsorship announcement is prohibited from including or promoting discrimination based on the same grounds.¹⁰⁵ This also applies to a product, service, trademark, or the reference to it; which is included in a program via product placement (Section 368H(12)(b)).¹⁰⁶ However, these provisions are limited to advertising in an on-demand program service, not all programs.

United States of America

US Non-discrimination Law

There is no law in the US that explicitly prohibits all forms of discrimination by all actors in society. At the federal level, the US Constitution and legislation aim for equal treatment and non-discrimination in specific parts of everyday life. The US Constitution in its Fourteenth Amendment explicitly recognizes a citizen’s right to due process and equal protection of the laws.¹⁰⁷ In the context of advertising, however, regulation of potentially discriminatory material is circumscribed by the Constitution’s First Amendment protecting free speech.¹⁰⁸ The US Supreme Court has found that offensiveness, for example, traditionally could not justify suppression of free (including commercial) speech.¹⁰⁹

Moreover, the standard of judicial review concerning gender-based discrimination is less strict compared to other forms of discrimination such as race or national origin. In the latter type of cases, the Supreme Court uses a strict scrutiny test.¹¹⁰ This is different from cases where gender related distinctions are under review: in such cases the Supreme Court uses an intermediate scrutiny test.¹¹¹ The standard applied is whether the distinctions made ‘serve important

¹⁰⁴ Electronic Communications Broadcasting: The Audiovisual Media Services Regulations 2009, section 368F(4)(b) (UK, 2009) available at http://www.legislation.gov.uk/ukxi/2009/2979/pdfs/ukxi_20092979_en.pdf.

¹⁰⁵ Electronic Communications Broadcasting: The Audiovisual Media Services Regulations 2009, section 368G(11)(b) (UK, 2009) available at http://www.legislation.gov.uk/ukxi/2009/2979/pdfs/ukxi_20092979_en.pdf.

¹⁰⁶ Electronic Communications Broadcasting: The Audiovisual Media Services Regulations 2009, section 368H(12)(b) (UK, 2009) available at http://www.legislation.gov.uk/ukxi/2009/2979/pdfs/ukxi_20092979_en.pdf.

¹⁰⁷ U.S. CONST. 14th Amendment (1868), available at http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html.

¹⁰⁸ U.S. CONST. 1st Amendment (1791), available at http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html. See also Ashley O’Neil, *A Call for Truth in the Fashion Pages: What the Global Trend in Advertising Regulation Means for U.S. Beauty and Fashion Advertisers* 21(2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 619, 619 (2014) available at <http://www.repository.law.indiana.edu/ijgls/vol21/iss2/9/>.

¹⁰⁹ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (U.S. 1983).

¹¹⁰ Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name* 62(3) INDIANA LAW JOURNAL 779, 781 (1987) available at <http://www.repository.law.indiana.edu/ilj/vol62/iss3/10>.

¹¹¹ Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name* 62(3) INDIANA LAW JOURNAL 779, 784 (1987) available at <http://www.repository.law.indiana.edu/ilj/vol62/iss3/10>.

governmental objectives and [are] substantially related to achievement of those objectives.¹¹²

Other than the US Constitution, a number of federal laws regulate non-discrimination in certain fields. The 1964 Civil Rights Act, in Title VII, expressly prohibits discrimination on grounds of race, color, religion, sex or national origin.¹¹³ However, this only applies to employment.¹¹⁴ In 1978, the Pregnancy Discrimination Act amended Title VII of the 1964 Civil Rights Act by prohibiting sex discrimination in the workplace on the basis of pregnancy.¹¹⁵ Other examples of federal laws banning sex discrimination in specific fields include the 1963 Equal Pay Act,¹¹⁶ the 1968 Fair Housing Act¹¹⁷ and the Violence Against Women Reauthorization Act of 2013.¹¹⁸

US Media Law

Similarly, the US does not have a strict regime regulating advertising. This is due to the great protection afforded to freedom of speech under its Constitution.¹¹⁹ Specifically, the commercial free speech doctrine restricts the regulation of advertising.¹²⁰ However, there are some limited forms of regulation. The relevant body for the general regulation of advertising is the Federal Communications Commission (FCC).¹²¹ Within the FCC, the Children's Advertising Review Unit regulates specifically children's advertising.

Conclusion: Legislative Framework for Non-discrimination and Media Law

This section presented the various legislative frameworks across Bulgaria, Denmark, France, Germany, Norway, Sweden, UK, and the US dealing with anti-

¹¹² *Craig v. Boren*, 429 U.S. 190, 197 (U.S. 1976).

¹¹³ *Civil Rights Act* section 703 (United States, 1964), available at <http://www.eeoc.gov/laws/statutes/titlevii.cfm>.

¹¹⁴ *Civil Rights Act* section 703 (United States, 1964), available at <http://www.eeoc.gov/laws/statutes/titlevii.cfm>.

¹¹⁵ *Pregnancy Discrimination Act* section 1 (United States, 1978), available at <http://www.eeoc.gov/laws/statutes/pregnancy.cfm>.

¹¹⁶ *Equal Pay Act* section 2 (United States, 1963), available at <http://www.eeoc.gov/eeoc/history/35th/thelaw/epa.html>.

¹¹⁷ *Fair Housing Act* section 804 (United States, 1968), available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=FHA_fha.

¹¹⁸ *Violence Against Women Reauthorization Act* section 1 (United States, 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf>.

¹¹⁹ Ashley O'Neil, *A Call for Truth in the Fashion Pages: What the Global Trend in Advertising Regulation Means for U.S. Beauty and Fashion Advertisers* 21(2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 619, 621 (2014) available at <http://www.repository.law.indiana.edu/ijgls/vol21/iss2/9/>.

¹²⁰ Ashley O'Neil, *A Call for Truth in the Fashion Pages: What the Global Trend in Advertising Regulation Means for U.S. Beauty and Fashion Advertisers* 21(2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 619, 621 (2014) available at <http://www.repository.law.indiana.edu/ijgls/vol21/iss2/9/>.

¹²¹ See in this legal memorandum "Federal Communications Commission" at pp. 40-44.

discrimination and media law. It demonstrates that the states have adopted different approaches affording differing levels of protection regarding gender or sex discrimination generally as well as in the media. States like Norway and Denmark have detailed legal frameworks regulating sexist ads, while at the other end of the scale, states like the US and Sweden have the weakest protections in favor of free speech. Importantly, all states have legislation regarding anti-discrimination, but their scope differs. Some states have more comprehensive non-discrimination legislation while others focus on particular fields, such as employment. For example, the German Equal Treatment Act applies to everyday working life and private legal relations, whereas the gender equality laws in the Scandinavian states apply to all areas of society.

In many cases the media laws both establish and set the standards for national regulatory bodies, which then specify unsuitable content in codes and monitor their implementation. Therefore, the following section of this memorandum explores the extent to which these non-discrimination and media laws are applied by the relevant regulatory bodies in each states.

Regulatory Framework

This section analyzes the regulatory framework for advertisements in Bulgaria, Denmark, France, Germany, Norway, Sweden, UK, and US. The previous sections set out the laws of these states dealing with non-discrimination and media communications and advertisements. This section addresses the application of those laws and the functioning of the regulatory bodies tasked with monitoring the content of media communications and advertisements, as well as any relevant cases or determinations by those bodies where possible.

Bulgaria: Regulatory Bodies

Bulgaria has two monitoring bodies relevant for the purposes of the present research. The first, the Commission for Protection against Discrimination, is specifically dedicated to implementing Bulgaria's non-discrimination legislation, while the second body regulates advertising, the National Council for Self-regulation.

Commission for Protection Against Discrimination

The Protection Against Discrimination Act (PADA) established a specialized control mechanism - the Commission for Protection against Discrimination (CPD). Article 47 of the Act stipulates the CPD's general mandate

to supervise the implementation of the non-discrimination legislation by establishing violations, by imposing administrative sanctions (fines) and measures to prevent and stop discrimination. The Commission is an independent body, consisting of nine members selected for a five-year term. The National Assembly elects five members and the president appoints four.¹²² The CPD is independent from government by law and reports annually to parliament. The CPD determines complaints in three-member panels, but it can also meet in specialized formations to address cases of gender discrimination. The CPD issues binding instructions for compliance with the law and its decisions are available in a public register.¹²³

Pursuant to Article 50 PADA, proceedings before the Commission can be initiated by a victim's complaint, by third party, or by the Commission's own motion.¹²⁴ Article 52 stipulates that a complaint is admissible provided it is submitted within three years of the alleged discrimination and that there is no pending litigation. If admissible, the Commission carries out an investigation during which it can request documents, question witnesses, and gain access to premises.¹²⁵ Before taking a decision, the Commission holds a public hearing, where all parties present their arguments.¹²⁶ Upon finding discrimination, the CPD can impose an administrative penalty and instruct the violator on PADA compliance.¹²⁷ Commission decisions can be appealed.¹²⁸ The CPD's mandate does not extend to awarding compensation.

Complaints before the CPD

Since 2004 victims of discrimination have had the opportunity to take legal action against discriminatory conduct by filing a complaint with the CPD. The processing time for proceedings before the Commission is shorter than before civil courts, and members of the Commission have more subject-matter expertise. In 2010, the Commission decided a case relating to gender discrimination in favor of the plaintiff.¹²⁹ The complainant claimed that a TV ad encouraging applications for the Bulgarian edition of the reality show "Big Brother – Family 2010" was discriminatory. The complainant argued the commercial broadcast an inappropriate message by creating a humiliating, intimidating, and degrading

¹²² Available at: <http://www.kzd-nondiscrimination.com/layout/index.php/za-nas/chlenowe>.

¹²³ Available at: <http://www.kzd-nondiscrimination.com/layout/index.php/layout-over-40-positions/godishen-otchet>.

¹²⁴ Available at: <http://www.kzd-nondiscrimination.com/layout/index.php/2013-11-09-23-10-57>.

¹²⁵ *Law on the Protection against Discrimination* art. 56 (Bulgaria, 2004).

¹²⁶ Available at: <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

¹²⁷ Article 65 of the PADA. <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

¹²⁸ See the Administrative Procedure Code. <http://women.bghelsinki.org/zakonodatelstvo/zakonodatelstvo/>.

¹²⁹ Решение № 155/2010 г. по преписка № 49/2010 г, р. 2, available in Bulgarian at <http://women.bghelsinki.org/sa-d-praktika/>.

environment for a certain group of people on the grounds of their sex. The advertisement depicted the main male character stating:

I finally got divorced and now I actually need my wife back. But I'm positive once she hears about the award she'll come running. Women are like light bulbs, my friend. One is screwing them off, another one is screwing them in, but the most important thing is that one has them in his hands.¹³⁰

In its decision, the CPD considered not only the provisions of the PADA, but also the relevant regulations of the Bulgarian Law on Radio and Television (LRT). It also interpreted these in light of Articles 1, 2, 10 and 16 of the Convention for the Elimination of All forms Discrimination Against Women (CEDAW).¹³¹ The decision found that pursuant to Article 10 (5) LRT, the Bulgarian legislator prescribes in imperative terms the obligations of media service providers. These contain the principles to abstain from broadcasting content contrary to morals, to abstain from undermining human dignity, and to refrain from suggesting intolerance among citizens or inciting hatred based on gender characteristics. The Commission concluded that the ad violated women's dignity and reduced them to objects based on the attribute of sex. The commercial represented an act of harassment and discrimination under Article 5 PADA.¹³² This case is one of the very few dealing with gender discrimination and sexism in advertising and represents a landmark – especially considering that only the year before the CPD found against the complainant in a similar case.¹³³

National Council for Self-regulation

Bulgaria also has a National Council for Self-regulation (NCSR), which is a non-profit organization overseeing the advertising industry in the public interest. The Council's founders include the Bulgarian Association of Advertisers and the Association of the Bulgarian Radio and TV operators.¹³⁴ In addition to awareness raising activities, the Council is entitled to determine complaints that certain ads violate its Ethical Code submitted by any individual, legal entity or governmental organization.¹³⁵ The Council can also initiate an enquiry on its own initiative.

¹³⁰ Available at: <https://nellyo.wordpress.com/2010/01/>.

¹³¹ Решение № 155/2010 г. по преписка № 49/2010 г, р. 5.

¹³² Решение № 155/2010 г. по преписка № 49/2010 г, р. 5.

¹³³ That case related to an ad for alcohol depicting women in bikinis and topless women whose breasts were covered by watermelons. See http://news.ibox.bg/material/id_162324170/fpage_11 and <http://www.vsekiden.com/77667>; http://signal.bg/view_article.php?article_id=1666.

¹³⁴ Available at: http://www.nss-bg.org/en/about_us.php.

¹³⁵ Available at: http://www.nss-bg.org/en/trials_howto.php.

Complaints deal mostly with deceptive and misleading advertisements, and only rarely concern sexist commercials.¹³⁶

The NCSR's mission is to encourage the advertising industry in the adoption and implementation of professional standards in advertising and commercial communication.¹³⁷ To achieve this, the Council develops codes of conduct, such as the Framework for Foods and Drinks, the Standards for Spirit Drinks and the Standards for Gambling Advertising,¹³⁸ which together form the Ethical Code. The Code also contains a general part, stipulating basic principles for the entire advertising industry, including the need to respect human dignity and to avoid offence and discrimination, including that based upon gender.¹³⁹ The Council supervises the Code's implementation to ensure social responsibility, business ethics, fair competition among advertisers, and to protect consumers.¹⁴⁰

Provided the complaint fulfills the formal requirements, the Council's Ethical Committee examines the facts and the ad in question to assess the alleged breach of the Ethical Code. Breaches of the Code can result in the issuance of a binding resolution against the advertiser. However, its decisions are only binding on members of the Council.¹⁴¹ As such, advertisers that have not officially committed to the ethical principles espoused by the Council would otherwise regard the decision as a mere recommendation.¹⁴²

Denmark: Regulatory Bodies

Consumer Ombudsman

The Marketing Practices Act primarily governs Danish advertisements and the Consumer Ombudsman enforces this law. The Ombudsman ensures that businesses comply with the Act and with the principles of good marketing practices.¹⁴³ The Marketing Practices Act defines the office of the Consumer

¹³⁶ Judith Soukal, *Entwicklung der Werbung seit 1989 mit einem speziellen Augenmerk auf das Bild der Frau in der Plakat- und Fernsehwerbung in Bulgarien und Österreich (Sexismus und Diskriminierung in der Werbung)* 60 (2013).

¹³⁷ Available at: http://www.nss-bg.org/en/about_us.php.

¹³⁸ Available at: <http://www.nss-bg.org/en/kodeks.php>.

¹³⁹ *National Ethical Standards for Advertising and Commercial Communication in Bulgaria* art. 4(1), 4(2) (Bulgaria, 2009), available at <http://www.nss-bg.org/en/kodeks.php>.

¹⁴⁰ Available at: http://www.nss-bg.org/en/about_us.php.

¹⁴¹ Available at: http://www.nss-bg.org/en/trials_howto.php.

¹⁴² Available at: http://www.nss-bg.org/en/trials_howto.php.

¹⁴³ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>.

Ombudsman and its sphere of responsibility.¹⁴⁴ The Minister for Business and Growth appoints the Ombudsman for a six-year period.¹⁴⁵ The Ombudsman is an independent organ and has the power to prioritize its work and activities according to resources and needs.¹⁴⁶

The Ombudsman assesses the legality of advertisements either on the basis of a notification received from a consumer or on their own initiative.¹⁴⁷ The Consumer Ombudsman investigates specific complaints as well as cases with a wider public importance regarding marketing activities.¹⁴⁸ However, the Ombudsman does not settle individual disputes between consumers and traders, but can negotiate settlements on behalf of consumers.¹⁴⁹ The Ombudsman does have the authority to issue an interim injunction.¹⁵⁰ The Ombudsman also has the authority to bring civil and criminal actions on behalf of complainants, and may request the police to investigate and prosecute a case against a trader.¹⁵¹

Consumer Ombudsman: Case Law

Several cases on gender discriminatory advertising (in Danish) are available on the Consumer Ombudsman's website.¹⁵² For instance, in a 2008 case, the Ombudsman applied its guidelines on gender-related advertising and ruled against an ad by an underwear company. The Ombudsman held that nudity or eroticism may be used as tools in advertising, so long as their use is not of an offensive or

¹⁴⁴ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>. See *The Marketing Practices Act* sec. 22 (Denmark, 2013), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Markedsfoeringsloven%20lbkg%202013.pdf>.

¹⁴⁵ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>. See *The Marketing Practices Act* sec. 22(3) (Denmark, 2013), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Markedsfoeringsloven%20lbkg%202013.pdf>.

¹⁴⁶ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>.

¹⁴⁷ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>.

¹⁴⁸ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>.

¹⁴⁹ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>. See *The Marketing Practices Act* sec. 23 (Denmark, 2013), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Markedsfoeringsloven%20lbkg%202013.pdf>.

¹⁵⁰ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>. See *The Marketing Practices Act* sec. 27 and sec. 29 (Denmark, 2013), available at <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Markedsfoeringsloven%20lbkg%202013.pdf>.

¹⁵¹ Danish Consumer Ombudsman, *About the Institution*, available at <http://www.consumerombudsman.dk/About-us/introduction>.

¹⁵² Cases of the Danish Consumer Ombudsman are available at <http://www.forbrugerombudsmanden.dk/Sager>.

derogatory nature.¹⁵³ Nudity is offensive if a person in the ad is reduced to a sex object, which was found to be the case in the 2008 complaint.¹⁵⁴

The marketing campaign of the underwear company in question contained images of semi-nude women: a nun, nurse, maid, and a secretary. Each of these women sniffed a pair of men's underpants. These images gave the public the impression that the women had just had sexual intercourse with a man who left his underpants. The pictures portrayed the women in the typical working environment for their professions. The Ombudsman held that these advertisements reduced the female gender to a sex object, because of the manner in which the women posed, and because the sexual act took center stage.¹⁵⁵

France: Regulatory Bodies

High Authority for Audiovisual Media

Law no. 89-25 of 1989 created the High Authority for Audiovisual Media (French abbreviation: CSA).¹⁵⁶ The CSA is in charge of authorizing television and radio channel broadcasts in France.¹⁵⁷ The CSA's mission is to provide a framework for the content of audiovisual services on TV and radio, to monitor respect for fundamental values, and to protect the public.¹⁵⁸ Its various responsibilities include: the protection of minors; respect for pluralist expression of opinions; organization of electoral campaigns on TV and radio; respect for human dignity; and consumer protection.¹⁵⁹ In conducting its mandate, the CSA contributes to facilitating social cohesion and fighting discrimination in communications.¹⁶⁰

¹⁵³ See Forbrugerombudsmanden, *Undertøjsreklame gik over strengen*, (March 3, 2008), available at <http://www.forbrugerombudsmanden.dk/Sager-og-praksis/Markedsfoeringsloven/Sager-efter-markedsfoeringsloven/diskrimination/diskriminerenderekla/undertoejsreklame>.

¹⁵⁴ See Forbrugerombudsmanden, *Undertøjsreklame gik over strengen*, (March 3, 2008), available at <http://www.forbrugerombudsmanden.dk/Sager-og-praksis/Markedsfoeringsloven/Sager-efter-markedsfoeringsloven/diskrimination/diskriminerenderekla/undertoejsreklame>.

¹⁵⁵ See Forbrugerombudsmanden, *Undertøjsreklame gik over strengen*, (March 3, 2008), available at <http://www.forbrugerombudsmanden.dk/Sager-og-praksis/Markedsfoeringsloven/Sager-efter-markedsfoeringsloven/diskrimination/diskriminerenderekla/undertoejsreklame>.

¹⁵⁶ *Loi n°89-25 du 17 janvier 1989 modifiant la loi n°86-1067 du 30 septembre 1986 relative à la liberté de communication*. (République française) Available in French at <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000321869>.

¹⁵⁷ Available at: <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom/A-Vast-Array-of-Charges/Broadcasting-and-Distribution-of-Audiovisual-Communication-Services>.

¹⁵⁸ Available at: <http://www.csa.fr/Le-CSA/Presentation-du-Conseil/Des-missions-diversifiees>.

¹⁵⁹ Available at: <http://www.csa.fr/Le-CSA>.

¹⁶⁰ Available at: <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom/A-Vast-Array-of-Charges/Programme-Monitoring>.

The CSA monitors programs to check the conformity of their content with national laws and regulations.¹⁶¹ Every year, the CSA assesses¹⁶² the broadcasted programs and the publisher's compliance with its obligations and commitments.¹⁶³ However, the CSA never intervenes prior to the broadcasting of a program. The CSA has sanctioning powers over TV and radio channels,¹⁶⁴ overseen by an adversarial procedure. The CSA may:

- Suspend programs/broadcasts/distribution;
- Reduce the length of the authorization to broadcast;
- Withdraw the authorization to broadcast;
- Impose a financial penalty;
- Refer matter to the national prosecutor.¹⁶⁵

CSA and Women's Rights

As mentioned above,¹⁶⁶ the Law for the Real Equality Between Women and Men provides the CSA with the explicit competence to intervene in matters of women's rights violations. The CSA monitors the broadcasting of gender-based stereotypes and degrading images of women, and identifies Internet images considered sexist.

In 2013, the CSA created a working group on women rights with the aim of reinforcing the role and place of women within the media and combatting stereotypes.¹⁶⁷ The group's mandate includes to propose legislative measures to further their goals and to promote dialogue with media channels and civil society on women's rights.¹⁶⁸ In 2013, the working group published a report on women in the media, noting the CSA's intervention and sanctioning of discriminatory

¹⁶¹ Available at: <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom/A-Vast-Array-of-Charges/Programme-Monitoring>.

¹⁶² *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Létard)*, Article 18. (République française) Available in French at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930&dateTexte=20110914>.

¹⁶³ Available at: <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom/A-Vast-Array-of-Charges/Yearly-Reviews-bilans>.

¹⁶⁴ Available at: <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom/A-Vast-Array-of-Charges/Sanctions>.

¹⁶⁵ <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom/A-Vast-Array-of-Charges/Sanctions>.

¹⁶⁶ See p. 7 of this memorandum, under "French Media Law".

¹⁶⁷ <http://www.csa.fr/en/Media/Files/Television/Le-suivi-des-programmes/Rubrique-Droits-des-femmes/Presentation-travaux-GT-Droits-des-femmes>.

¹⁶⁸ *Bilan des premiers travaux du groupe de travail droits des femmes*, CONSEIL SUPERIEUR DE L'AUDIOVISUEL, pp. 19-20 (01/2013), available in French at <http://www.csa.fr/en/Etudes-et-publications/Divers/Bilan-des-premiers-travaux-du-groupe-de-travail-Droits-des-femmes-Annee-2013>.

behavior and remarks that violate women's dignity.¹⁶⁹ Since 2000, the Council has addressed 27 files, delivered three warnings, and nine formal notices in matters of women's representation in media. Some of these are detailed below.

In 2005 the CSA wrote to M6 channel regarding the French broadcast of "Meet the Fockers". This program invites three male candidates to the home of a woman's parents in order for them to choose the one most appropriate for their daughter. The CSA considered that the subjugation of the women (over the age of majority) to a parental decision, and her representation as an object to be won in a television game contravened the channel's obligation to not promote discriminatory behavior. The CSA recalled that the channel's obligation to respect the rights of persons, their image, honor and reputation also extends to foreign programs.¹⁷⁰

In 2010 the CSA wrote to the television channel Direct 8 for broadcasting "sharking activities" in its program "Les perles du net". Sharking is a method that consists of filming a perpetrator forcefully removing a girl's clothes in a public space. Such behavior under French law is considered sexual aggression and distributing such images amounts to complicity in the act.¹⁷¹ The CSA held that by broadcasting the images Direct 8 had contravened its obligation to respect human dignity.¹⁷² Again in 2010, the CSA warned the channel NT1 for broadcasting 14 advertising messages for meeting services for adults. The CSA considered that two of the ads displayed a degrading image of women, which contravened channel's obligation to respect human dignity.¹⁷³

In a 2011 TF1 program entitled "Who wants to marry my son?", a mother subjected practically naked women to a consultant who would recommend cosmetic surgery for them to undergo in order to fulfill the physical criteria of her

¹⁶⁹ *Bilan des premiers travaux du groupe de travail droits des femmes*, CONSEIL SUPERIEUR DE L'AUDIOVISUEL, pp. 17-18 (01/2013), available in French at <http://www.csa.fr/en/Etudes-et-publications/Divers/Bilan-des-premiers-travaux-du-groupe-de-travail-Droits-des-femmes-Annee-2013>. The CSA has not yet published the 2014 annual report on its activities.

¹⁷⁰ Conseil supérieur de l'audiovisuel, *Lettre à TF6 concernant l'émission Mes beaux-parents et moi*. Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Emission-Mes-beaux-parents-et-moi-lettre-a-TF6>.

¹⁷¹ Conseil supérieur de l'audiovisuel, *Mise en demeure de Direct 8 dans l'émission les perles du Net*. Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Emission-Les-Perles-du-net-Direct-8-mise-en-demeure>.

¹⁷² Conseil supérieur de l'audiovisuel, *Mise en demeure de Direct 8 dans l'émission les perles du Net*. Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Emission-Les-Perles-du-net-Direct-8-mise-en-demeure>.

¹⁷³ Conseil supérieur de l'audiovisuel, *Mise en garde de NT1 pour la diffusion de messages publicitaires pour des services de rencontres*. Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Messages-publicitaires-pour-des-service-de-rencontres-NT1-mise-en-garde>.

son. The CSA considered that such a practice amounted to humiliation and reduced women's value to criteria of stereotyped beauty, which constituted a demeaning treatment.¹⁷⁴

Some of the CSA's action relates to the age recommendation of programs. For example, in 2006 the CSA sent a letter to Europe 2 TV regarding the broadcasting of the program entitled "Sexy or not" regarding the election of the sexiest man or woman of the year. The CSA recognized that the lurid, suggestive and humiliating character of the image, and the banal image of sexuality that they generate were inappropriate for children under 12 years old. The CSA considered that Europe 2 TV should not recommend this program for children under 12 and should broadcast it after 10 pm.¹⁷⁵ In 2010, the CSA intervened after the broadcasting of a program entitled "Who will be the sexiest?", which was not recommended for children under 10 years old. According to the CSA, as this program reduced women's body to an object and conveyed demeaning representation of women, the channel should have not recommended it for children under 12 years old.¹⁷⁶

Specifically regarding women's representation in advertisements, in 2012, the CSA proposed a modification to Decree no. 92-280. It proposed to add to Article 4 that "advertising messages shall not be based on gender-based prejudices neither shall it convey gender-based stereotypes."¹⁷⁷ The French Government did not modify the Decree and again in 2013, the CSA reiterated its proposition to modify Article 4.¹⁷⁸

Germany: Regulatory Bodies

Advertising Standards Council

¹⁷⁴ Conseil supérieur de l'audiovisuel, *Mise en demeure de TF1 dans l'émission qui veut épouser mon fils ?* Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Emission-Qui-veut-epouser-mon-fils-TF1-mise-en-demeure>.

¹⁷⁵ Conseil supérieur de l'audiovisuel, *Lettre à Europe 2 TV concernant l'émission Sexy or not*. Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Emission-Sexy-or-not-sous-classifiee-lettre-a-Europe-2-TV>.

¹⁷⁶ Conseil supérieur de l'audiovisuel, *Intervention auprès de Virgin 17 dans l'émission Qui sera la plus sexy ?* Available in French at <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Programme-sous-classifiee-intervention-aupres-de-Virgin-17>.

¹⁷⁷ *Rapport Annuel 2012*, CONSEIL SUPERIEUR DE L'AUDIOVISUEL, p. 37. (02/05/2013), available in French at <http://www.csa.fr/Etudes-et-publications/Les-rapports-annuels-du-CSA/CSA-Rapport-annuel-2012>.

¹⁷⁸ *Bilan des premiers travaux du groupe de travail droits des femmes*, CONSEIL SUPERIEUR DE L'AUDIOVISUEL, p.24 (01/2013), available in French at <http://www.csa.fr/en/Etudes-et-publications/Divers/Bilan-des-premiers-travaux-du-groupe-de-travail-Droits-des-femmes-Annee-2013>.

The Federal Anti-Discrimination Agency (FADA),¹⁷⁹ created pursuant to § 25 of the General Equal Treatment Act,¹⁸⁰ forwards individuals with concerns about discriminatory advertising to the German Advertising Standards Council (GASC).¹⁸¹ The GASC is a self-regulating mechanism for conflict resolution between the public and commercial advertisers. The Presiding Committee of the German Advertising Foundation elects the 10 members of the GASC every three years from among its members, which come from advertising agencies, the media, research establishments and advertising professions.¹⁸² The Council determines complaints against advertisements and draws up voluntary codes of conduct, with particular attention and strict guidelines on advertising regarding children and discriminatory and denigrating advertising.¹⁸³ The foundation of GASC's work is its Operating Principles.¹⁸⁴

The GASC's rules of procedure determine the manner it deals with the complaints.¹⁸⁵ Anyone can submit a complaint regarding an advertisement to the Council, and the latter can also initiate proceeding. Once a plaintiff has filed a complaint, the advertising company has the opportunity to respond. Afterwards, the Council decides whether to uphold the complaint and in the case of an affirmative decision, asks the advertiser to change or to discontinue the advertisement in question.¹⁸⁶ In case the advertiser neither modify nor stop the contested advertisement, the Council issues a reprimand and makes the case public.¹⁸⁷ If the Council suspects a violation of the law, it informs the authorities, *ie* the public prosecution service.¹⁸⁸ However, not many cases regarding discriminatory advertising proceed to the courtroom.

Complaints before GASC

The GASC's "name and shame" approach has proven an appropriate way to deter offending and discriminating advertisements. Often, the threat of a reprimand is sufficient to persuade companies to modify or stop the contested

¹⁷⁹ Available at: http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html.

¹⁸⁰ *General Equal Treatment Act § 25* (Germany, 2006), available in German at <http://www.gesetze-im-internet.de/agg/BJNR189710006.html>.

¹⁸¹ Available at:

http://www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Recht_und_gesetz/Handbuch/Anhang/Beschwerde_Presse_Werbung/Beschwerde_Presse_Werbung_Kurztext.html.

¹⁸² Available at: <http://www.werberat.de/keyfacts>.

¹⁸³ Available at: <http://www.werberat.de/keyfacts>.

¹⁸⁴ Available at: <http://www.werberat.de/keyfacts>.

¹⁸⁵ Available at: http://www.werberat.de/sites/default/files/uploads/media/rules_of_procedure.pdf.

¹⁸⁶ Available at: <http://www.werberat.de/keyfacts>.

¹⁸⁷ Available at: <http://www.werberat.de/ruegen>.

¹⁸⁸ Available at: <http://www.werberat.de/ruegen>.

ad.¹⁸⁹ In 2014, for instance, the Council issued 14 reprimands, and 13 in 2013.¹⁹⁰ The GASC's website lists every reprimanded company and the facts of the case. The Council's most recent annual report shows that in 2013 it received 1350 complaints regarding 522 advertisements. Most of the complaints concerned advertisements presenting women in a discriminatory manner.¹⁹¹

The Council's latest reprimands concern two sexist advertisements. The first one originates from a furniture store and shows a woman in lingerie posing on a couch on all fours with the slogan: "Live and feel good!" next to her. GASC criticized the company for reducing women to sexual objects and for portraying them as sexually available. The second reprimand concerns a TV service and its print advertisement that shows a woman in lingerie with a wrench in her hand and on all fours, whose body has almost completely entered a dryer so that only her backside and legs are visible. The slogan over the dryer reads: "Relocation! We need space for our workshop!". GASC condemned the derogatory manner in which women were presented in this advertisement and reduced to their sexuality.

Norway: Regulatory Bodies

Consumer Ombudsman and Market Council

In Norway, the Marketing Control Act and the Consumer Ombudsman regulate advertising issues related to consumer interests.¹⁹² The Consumer Ombudsman, established in 1973,¹⁹³ is an independent administrative organ that enforces the Marketing Control Act.¹⁹⁴ It ensures that the marketing methods businesses use when selling goods and providing services operate in accordance with the legislation.¹⁹⁵ The Ombudsman may consider advertisements if complaints are received from consumers or traders, and may also look at marketing

¹⁸⁹ Available at: <http://www.werberat.de/ruegen>.

¹⁹⁰ Available at: <http://www.werberat.de/ruegen>.

¹⁹¹ Available at: <http://www.werberat.de/ruegen>.

¹⁹² Sidsel G. Sverdrup and Eivind Stø, *Regulation of sex discrimination in advertising: An empirical inquiry into the Norwegian case*, 14 JOURNAL OF CONSUMER POLICY 371, 376 (1991).

¹⁹³ Sidsel G. Sverdrup and Eivind Stø, *Regulation of sex discrimination in advertising: An empirical inquiry into the Norwegian case*, 14 JOURNAL OF CONSUMER POLICY 371, 376 (1991).

¹⁹⁴ Sidsel Glefjell, *Sex-Discrimination in Advertising: Extent, Regulation, and Experiences*, in GENDER AND CONSUMER BEHAVIOR CONFERENCE PROCEEDINGS 263, 268 (Janeen Arnold Costa, ed., 1991). See also Forbrukerombudet, *The Consumer Ombudsman and the Market Council*, available at <http://www.forbrukerombudet.no/2002/05/491.0>.

¹⁹⁵ Toril Melander Stene, *Norway's new Marketing Control Act – analysis of some key provisions*, WORLD TRADEMARK REVIEW, Dec./Jan. 2010, at 68, available at <http://www.worldtrademarkreview.com/Magazine/Issue/22/Country-correspondents/Norway-Zacco>. See also *The Marketing Control Act* sec. 34 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>.

measures on its own initiative.¹⁹⁶ This organ bases all of its considerations on the interests of consumers.¹⁹⁷ When deciding whether the provision banning sexist advertising has been violated, the Ombudsman also bases its decision on the consideration of equality between the sexes, with particular emphasis on how an ad portrays women.¹⁹⁸

The Consumer Ombudsman negotiates with traders in the aim of persuading them to enter into a voluntary settlement to terminate certain marketing practices.¹⁹⁹ Failure to negotiate a settlement means that the Ombudsman may submit a case to the Market Council for determination.²⁰⁰ The Market Council is an administrative “court of law.” It supervises compliance with the Marketing Control Act.²⁰¹ The Ombudsman may also bring matters of principle before the Market Council, even when there is no dispute with the trader in question.²⁰² The Ombudsman and the Market Council have the authority to issue decisions that ban unlawful marketing when this is in the interests of consumers.²⁰³ Several cases regarding sexism in advertising have been determined under the Norwegian system. Examples are discussed below.

Consumer Ombudsman and Market Council: Case Law

The mere description of existing gender roles is not contrary to Section 2(2) of the Marketing Control Act. The Market Council enforced this in the Norsk

¹⁹⁶ *The Marketing Control Act* sec. 35 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>. See also Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 103 (Maria Edström, Ragnhild Mølster eds., 2014).

¹⁹⁷ *The Marketing Control Act* sec. 34 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>.

¹⁹⁸ *The Marketing Control Act* sec. 34 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>. See also Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 103-104 (Maria Edström, Ragnhild Mølster eds., 2014).

¹⁹⁹ *The Marketing Control Act* sec. 35 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>.

²⁰⁰ *The Marketing Control Act* sec. 35 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>. See also Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 104 (Maria Edström, Ragnhild Mølster eds., 2014).

²⁰¹ See *The Marketing Control Act* sec. 38 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>.

²⁰² *The Marketing Control Act* sec. 35 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>. See also Toril Melander Stene, *Norway's new Marketing Control Act – analysis of some key provisions*, WORLD TRADEMARK REVIEW, Dec./Jan. 2010, at 68, available at <http://www.worldtrademarkreview.com/Magazine/Issue/22/Country-correspondents/Norway-Zacco>.

²⁰³ *The Marketing Control Act* sec. 35 (Norway, 2009), available at <http://www.forbrukerombudet.no/id/11039810.0>. See also Forbrukerombudet, *The Consumer Ombudsman and the Market Council*, available at <http://www.forbrukerombudet.no/2002/05/491.0>

Philips A/S case. In that case, it held that a brochure for Philips dictaphone equipment containing images of men and women in work situations was not contrary to the Marketing Control Act. According to the Council, this advertisement simply provided a correct and balanced description of the current situation in most workplaces. The leaflet did not portray a gender role pattern that women in the work force might perceive as derogatory and therefore contrary to equality between the sexes.²⁰⁴

If a model advertising a product poses in an unnatural way in relation to the normal use of a product and the body takes central attention,²⁰⁵ the Market Council is likely to decide that the advertisement is contrary to the Marketing Control Act.²⁰⁶ For example, the Council held that an advertisement for a pizza company was contrary to Section 2(2) of the Marketing Control Act. The ad depicted a woman partially covered by a pizza with the heading “Greed!”. The Council found the use of the model’s body to be irrelevant to the product being advertised, and that the combination of image and text involved a clearly exploitative focus on the female body.²⁰⁷ Another case involved a catalogue for television equipment that showed women in tight, partially transparent clothing. The Council found the advertisements offensive and contrary to the Act as they portrayed the female body as a passive sexual object. In addition, female models and the female body were the main elements of the advertisements.²⁰⁸

However, where the depiction is relevant to the product being advertised, the Council is unlikely to find a violation of Section 2(2) of the Act.²⁰⁹ For example, a marketing campaign for underwear showing a woman wearing only underwear was deemed not contrary to the Act as the woman was not posing provocatively, the images did not particularly fixate on her body, and there was a high degree of relevance between the images used and the product being advertised.²¹⁰ Despite this, there is a limit on the extent to which advertisements may focus on the

²⁰⁴ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 4 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²⁰⁵ And is even more important than the product and its function.

²⁰⁶ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 5 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²⁰⁷ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 6 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²⁰⁸ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 7 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²⁰⁹ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 7 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²¹⁰ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 8 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

body.²¹¹ Moreover, the Market Council may intervene against marketing it considers gender discriminatory based on images used. In a case involving a woman wearing a bathing suit, the Market Council found that one of the images was contrary to the Marketing Control Act. The image fixated on the female body and the woman was posed in a manner deemed to go beyond what was necessary to advertise the product.²¹²

Certain products or services may themselves be considered sexist.²¹³ When marketing such products, an advertiser has to demonstrate caution with respect to gender equality.²¹⁴ For example, an advertisement in a newspaper for the erotic magazine “Cats” showed some of the magazine’s front covers. The Market Council found that this advertisement was contrary to the Marketing Control Act. An erotic magazine such as “Cats” is a sexist product and the Market Council requires that the advertiser be particularly cautious in designing advertisements for such products. However, the images of women on the front covers of “Cats” magazine depicted them as sexual objects and attention-grabbers in a way that was demeaning to the general reputation of women and their sense of pride.²¹⁵

Lastly, consumers occasionally contact the Consumer Ombudsman because they are offended by certain stereotypical portrayals in toy catalogues.²¹⁶ Images in these catalogues differentiate between “boy and girl toys” in their use of fonts, colors and images. However, the Ombudsman does not consider such advertisements to be derogatory of either gender, and the Marketing Control Act does not regulate these advertisements.²¹⁷

Sweden: Regulatory Bodies

In Sweden, a number of bodies constitute the Ombudsman system. The Advertising Ombudsman and the Consumer Ombudsman are the most relevant in the field of sexism in advertising.

²¹¹ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 8 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²¹² The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 8 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²¹³ For example, certain magazines, videos, erotic undergarments and telephone services may be perceived as sexist.

²¹⁴ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 10 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²¹⁵ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 10 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²¹⁶ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 4 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

²¹⁷ The Consumer Ombudsman, *Guidelines on Sexist Advertising*, 4 (Sept. 2009), available at http://www.forbrukerombudet.no/asset/3605/1/3605_1.pdf.

Advertising Ombudsman

The main objective of the Swedish Advertising Ombudsman²¹⁸ is to assess advertising and to ensure that advertising standards are kept high by self-regulating the industry.²¹⁹ The organization uses the ethical code established by the International Chamber of Commerce²²⁰ as a key reference when assessing advertising. An advertisement can be considered sexist, for instance, if it objectifies one of the genders, if it involves stereotyping, or if it is obviously discriminating in some other depreciatory manner.²²¹ The Swedish Advertising Ombudsman has no sanctions at its disposal, except for the possibility to publish its considerations. This is due to the fact that the Ombudsman is not a public authority.²²² The decisions of the Swedish Advertising Ombudsman, all of which are in Swedish, can be accessed via the website of this institution.²²³

Consumer Ombudsman: Case Law

The Consumer Ombudsman (Swedish abbreviation: KO) is responsible for ensuring protection of consumers through enforcing the Marketing Practices Act and the Unfair (Consumer) Contract Terms Act. The KO endeavors to settle disputes between business operators and consumers through negotiation. In cases where negotiations are unsuccessful, the KO can bring an action before the Market Practices Court (*Marknadsdomstolen*) on grounds of alleged breach of the Marketing Practices Act or the Unfair (Consumer) Contract Terms Act.²²⁴

Unlike the Norwegian Market Council discussed above, the Swedish Market Practices Court has explicitly refrained from issuing an injunction in a case

²¹⁸ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 104 (Maria Edström, Ragnhild Mølster eds., 2014).

²¹⁹ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 104-105 (Maria Edström, Ragnhild Mølster eds., 2014).

²²⁰ International Chamber of Commerce, *Consolidated ICC Code of Advertising and Marketing Communication Practice*, August 2011, available at http://www.codescentre.com/media/2083/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf.

²²¹ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 105 (Maria Edström, Ragnhild Mølster eds., 2014).

²²² Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 105 (Maria Edström, Ragnhild Mølster eds., 2014).

²²³ Decisions of the Swedish Advertising Ombudsman are available at <http://reklamombudsmannen.org/eng/search-decisions>.

²²⁴ *Act on the Consumer Ombudsman's Participation in Certain Disputes*, §2 (Sweden, 2011), available at http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-20111211-om-Konsumentom_sfs-2011-1211/.

concerning sexist advertising on the ground that the purpose of the Market Act is to protect consumers and businesses, not the integrity of women.²²⁵

In 1976, the Market Court held that a sexist advertisement was not contrary to the 1970 Marketing Act. The case, *KO v. CRC-Lafo AB*, concerned the use of the female body to sell cleaning and lubricating products for cars. The advertisement contained an image of a woman's bare back with the letters "CRC" sprayed on her back and the headline: "The mechanic's best aid. All the small, ridiculous sources of irritation in your car that drive you round the bend – spray them with CRC 5.56!..."²²⁶ The Court found that the advertisement was sexist, but did not consider it to be misleading in relation to consumers, who the Market Act aims to protect.²²⁷ Since this judgment, it is no longer possible to file a complaint against gender discriminatory advertisements before the Swedish courts.²²⁸

United Kingdom: Regulatory Bodies

The designated regulatory body in the UK to monitor compliance with the Advertising Codes is the Advertising Standards Agency (ASA). As explained below, the ASA generally analyzes whether a specific advertisement is likely to cause widespread offence. However, the result of the assessment depends highly on the audience likely to receive the information and, as a consequence, it can be difficult to identify a clear line in the cases before the ASA. Therefore, a number of examples of cases dealt with by the ASA are presented below.

Advertising Standards Agency

OFCOM was the statutory body designated with regulatory responsibilities.²²⁹ However, by virtue of the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, the Advertising Standards Agency (ASA) has assumed responsibility for maintaining broadcast advertising standards in the UK since 2004.²³⁰ The Broadcast

²²⁵ Geraint Howells, Hans-W. Micklitz and Thomas Wilhelmsson, *Towards a better understanding of unfair commercial practices*, 51 INTERNATIONAL JOURNAL OF LAW AND MANAGEMENT 69, 82 (2009).

²²⁶ Thomas Utterström, *Sex discrimination in advertising—A summary of the situation in Sweden*, 1 ZEITSCHRIFT FÜR VERBRAUCHERPOLITIK 359, 366 (1977).

²²⁷ Thomas Utterström, *Sex discrimination in advertising—A summary of the situation in Sweden*, 1 ZEITSCHRIFT FÜR VERBRAUCHERPOLITIK 359, 367 (1977).

²²⁸ Eva-Maria Svensson, *Nordic Regulation of Gender Discriminatory Advertisements*, in MAKING CHANGE NORDIC EXAMPLES OF WORKING TOWARDS GENDER EQUALITY IN THE MEDIA 99, 104 (Maria Edström, Ragnhild Mølster eds., 2014).

²²⁹ The Office of Communications Act 2002, section 2 (UK, 2002) available at http://www.legislation.gov.uk/ukpga/2002/11/pdfs/ukpga_20020011_en.pdf

²³⁰ The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, section 3 (UK, 2004) available at <http://www.legislation.gov.uk/uksi/2004/1975/contents/made>

Committee of Advertising Practice (BCAP) is responsible for writing and maintaining the UK Code of Broadcast Advertising.²³¹ However, OFCOM retains overall sign-off on major changes to the Code.²³² While the ASA is responsible for administering the Code, it is able to refer broadcasters to OFCOM for further action. However, this is extremely rare.²³³

The ASA Council consists of 13 members, which constitute the “jury” that decides whether ads breach the Advertising Codes.²³⁴ Two-thirds of the Council are independent from the industry while the others have a recent or current knowledge of the advertising or media sectors.²³⁵ If the ASA considers an advertisement in breach of the Advertising Codes, it must be withdrawn or amended and the advertiser must not use the approach again.²³⁶ The vast majority of advertisers and broadcasters comply with ASA rulings. However, in cases of non-compliance, the ASA can issue sanctions to encourage advertisers and broadcasters to comply with the rules.²³⁷ An important tool for the ASA is the ability to create bad publicity for offending advertisers.²³⁸

In the case of broadcast advertisements, the broadcaster is responsible for withdrawing, amending, or rescheduling an advertisement.²³⁹ Broadcasters are under an obligation to enforce ASA rulings in the conditions of their broadcast licences.²⁴⁰ If broadcasters persistently show advertisements in breach of the Codes, the ASA may refer the broadcaster to OFCOM, which can impose fines and even withdraw their licence to broadcast.²⁴¹ The advertisers themselves run the risk of bad publicity, as well as the potentially substantial financial costs of paying for an advertisement that cannot be shown.²⁴²

In the case of non-broadcast advertising, the majority of sanctions are issued by the Committee of Advertising Practice (CAP). Members of CAP are trade associations representing advertisers, agencies and media.²⁴³ Its members are therefore organisations that represent the advertising and sales promotion

²³¹ Available at: <http://asa.org.uk/About-ASA/About-regulation/Co-regulation-of-broadcast-advertising.aspx>

²³² Available at: <http://asa.org.uk/About-ASA/About-regulation/Co-regulation-of-broadcast-advertising.aspx>

²³³ Available at: <http://asa.org.uk/About-ASA/About-regulation/Co-regulation-of-broadcast-advertising.aspx>

²³⁴ Available at: <http://asa.org.uk/About-ASA/Our-team/ASA-Council.aspx>

²³⁵ Available at: <http://asa.org.uk/About-ASA/Our-team/ASA-Council.aspx>

²³⁶ Available at: <http://asa.org.uk/About-ASA/About-regulation.aspx>

²³⁷ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions.aspx>

²³⁸ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions.aspx>

²³⁹ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Broadcast.aspx>

²⁴⁰ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Broadcast.aspx>

²⁴¹ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Broadcast.aspx>

²⁴² Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Broadcast.aspx>

²⁴³ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Non-broadcast.aspx>

industries and most media businesses, rather than advertisers themselves.²⁴⁴ The CAP can issue alerts to its members and advise them to limit services such as access to advertising space or trading privileges. The CAP can also require persistent or serious offenders to subject their material to vetting procedures before publication for up to two years.²⁴⁵ The CAP can also issue sanctions to encourage marketers to comply with the Code in online advertising spaces. For example, CAP can request internet search engines to remove content linking to a page that hosts non-compliant marketing communications.²⁴⁶

The ASA not only acts on complaints but also carries out other regulatory activities to ensure compliance. For instance, the ASA actively checks advertisements in all media and regularly conducts surveys of advertisements published by sectors where there is either unsatisfactory compliance with the Codes or where societal concerns exist.²⁴⁷ Furthermore, the ASA works with CAP to support the industry to correctly prepare advertisements for publication, including providing guidance, pre-publication advice, and industry training.²⁴⁸

Advertising Codes

Rule 4.2 of the UK Code of Broadcast Advertising provides:

“Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards”. Rule 4.8 provides: “advertisements must not condone or encourage harmful discriminatory behaviour or treatment. Advertisements must not prejudice respect for human dignity”.²⁴⁹ Appendix 2 of the Code contains the statutory Framework for the Regulation of Broadcasting Advertising, which reflects the obligations contained in EU Directive 20/13.²⁵⁰ Paragraph 1(c) of Appendix 2 provides that audio-visual commercial communications shall not (i) prejudice respect for human dignity; and (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.²⁵¹

²⁴⁴ Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284404/oft408.pdf

²⁴⁵ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Non-broadcast.aspx>

²⁴⁶ Available at: <http://asa.org.uk/Industry-advertisers/Sanctions/Online.aspx>

²⁴⁷ Available at: <http://asa.org.uk/About-ASA/About-regulation.aspx>

²⁴⁸ Available at: <http://asa.org.uk/About-ASA/About-regulation.aspx>

²⁴⁹ The UK Code of Broadcast Advertising, Rule 4.8 available at www.cap.org.uk/advertising-codes/~media/Files/CAP/Codes%20BCAP%20pdf/The%20BCAP%20Code.ashx

²⁵⁰ EU Directive 2010/13 of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (2010) OJ L95/1 available at

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>

²⁵¹ The UK Code of Broadcast Advertising, Appendix 2, paragraph 1(c) available at www.cap.org.uk/advertising-codes/~media/Files/CAP/Codes%20BCAP%20pdf/The%20BCAP%20Code.ashx

Rule 4.1 of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code) provides:

Marketing communications must not contain anything that is likely to cause serious or widespread offence. Particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age. Compliance will be judged on the context, medium, audience, product and prevailing standards.²⁵²

The same rule contains the caveat that “marketing communications may be distasteful without necessarily breaching this rule. Marketers are urged to consider public sensitivities before using potentially offensive material”.²⁵³ Consequently, “the fact that a product is offensive to some people is not grounds for finding a marketing communication in breach of the Code”.²⁵⁴

Advertising Standards Agency: Case Law under CAP

There is evidence that the ASA will not ban advertisements that contain “traditional British humour”, even if it projects objectifying gender roles.²⁵⁵ For example, the ASA did not uphold complaints over an EasyJet advertisement showing a woman in a bikini top, accompanied by the line “discover weapons of mass distraction”, because the ASA considered it “light-hearted and humorous” and not likely to cause widespread offence.²⁵⁶

When the ASA determines whether an advertisement is likely to cause widespread offence contrary to Rule 4.1 CAP, the ASA limits the determination to the ads’ target audience.²⁵⁷ The advertisement must not simply be likely to cause widespread offence to the general public or the “reasonable” person, but rather exclusively to the particular groups or individuals that receive the advertisement. On this basis, it is possible that the same advert could be considered to cause

²⁵² The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, Rule 4.1 *available at* www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx

²⁵³ The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, Rule 4.1 *available at* www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx

²⁵⁴ The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, Rule 4.1 *available at* www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx

²⁵⁵ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 139 *available at*

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁵⁶ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 139 *available at*

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁵⁷ The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, Rule 4.1 *available at* www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx

widespread offence in one publication but not in another. For example, the ASA received complaints regarding an ad in Zoo Magazine.²⁵⁸ The advertisement contained an image of a woman before and after she had had a breast implant and was accompanied by the text “win a boob job for your girlfriend”. The ASA considered the advertisement reflected the style and content of the magazine and therefore concluded that it was unlikely to cause serious or widespread offence.²⁵⁹

Another investigation followed complaints about an ad in a cycling magazine. It depicted two barely dressed women, one on and one leaning against a small wooden horse in a meadow.²⁶⁰ This was accompanied by the captions “sometimes it’s hard to pick the right model” and “test ride then decide”. Complaints were based on offence arising from the sexual innuendo and the fact that the image was irrelevant to the product.²⁶¹ The ASA concluded that even though predominantly men read the magazine, it was likely to cause widespread offence because it implied women were sexual objects that could be “tested”.²⁶² This was considered offensive because it was a magazine for cyclists.²⁶³

The ASA considered offensive an advertisement for an adult television channel that depicted a woman in her underwear as a string-puppet with the caption “whatever you like, you pull the strings”.²⁶⁴ The advertisement featured in both Sky TV Magazine and Loaded men’s magazine. The ASA acknowledged that about 15 per cent of Loaded readers are women and argued that the images and caption were likely to cause serious or widespread offense to some readers or be

²⁵⁸ Non-broadcast Adjudication from the ASA for EMAP Elan Ltd t/a Zoo, available at http://www.asa.org.uk/Rulings/Adjudications/2005/10/EMAP-Elan-Ltd/CS_40411.aspx

²⁵⁹ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 168 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶⁰ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 172 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶¹ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 172 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶² Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 172 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶³ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 172 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶⁴ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 200 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

seen to demean women.²⁶⁵ Even though featured in a men's magazine, the ASA considered that the context would have to be even more sexually explicit for the advertisement to be acceptable.²⁶⁶ A more sexually explicit context would imply a more prepared audience. On this basis, the ASA also considered the advertisements inappropriate for Sky TV Magazine.²⁶⁷

In September 2014, the ASA upheld complaints regarding advertisements by American Apparel on their website.²⁶⁸ The images depicted a female model with her head and upper body obstructed, leaning over so that her underwear and buttocks were visible. The product advertised was a skirt as part of the company's "back to school" range. The ASA noted the company's argument that because customers would be aware of their branding, they might expect to see such advertisements. However, the ASA nevertheless found that the ads would be likely to cause serious and widespread offense irrespective of whether the audience had "opted in" to their marketing.²⁶⁹ This was particularly so as the company had appeal to young people, including teenagers under the age of 16.²⁷⁰ The advertisements breached CAP Code (Edition 12) rules 1.3 (Responsible advertising), 4.1 (Harm and offence) and 5.1 (Children). Similarly, the ASA upheld complaints against a 2012 ad by American Apparel that depicted a girl sitting on an office chair wearing a jumper and knee-length socks, with her underwear visible. The ASA considered that this image inappropriately sexualised a model who appeared to be a child.²⁷¹

Advertising Standards Agency: Case Law under BCAP

²⁶⁵ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 202 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶⁶ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 202 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶⁷ Caroline Dahlberg, *Picturing the Public: Advertising Self-Regulation in Sweden and the UK*, 48 STOCKHOLM STUDIES IN SOCIOLOGY 1, 203 available at

<http://www.diva-portal.org/smash/get/diva2:375330/FULLTEXT01.pdf>

²⁶⁸ Non-broadcast Adjudication from the ASA for American Apparel (UK) Ltd available at

http://www.asa.org.uk/Rulings/Adjudications/2014/9/American-Apparel-UK-Ltd/SHP_ADJ_275883.aspx#.VPcv1i6fbgI

²⁶⁹ Non-broadcast Adjudication from the ASA for American Apparel (UK) Ltd available at

http://www.asa.org.uk/Rulings/Adjudications/2014/9/American-Apparel-UK-Ltd/SHP_ADJ_275883.aspx#.VPcv1i6fbgI

²⁷⁰ Non-broadcast Adjudication from the ASA for American Apparel (UK) Ltd available at

http://www.asa.org.uk/Rulings/Adjudications/2014/9/American-Apparel-UK-Ltd/SHP_ADJ_275883.aspx#.VPcv1i6fbgI

²⁷¹ Non-broadcast Adjudication from the ASA for American Apparel (UK) Ltd available at

http://www.asa.org.uk/Rulings/Adjudications/2012/12/American-Apparel-UK-Ltd/SHP_ADJ_212169.aspx#.VPHvBC6fbgI

In 2013, the ASA received complaints about an advertisement for Dreamscape Networks, a domain and web hosting company.²⁷² The advertisement depicted an office boardroom meeting full of men, chaired by a character portrayed by Pamela Anderson. When Anderson's assistant pours a cup of coffee for her and asks whether she would like cream, her cleavage becomes visible to one of the men. He then fantasizes about the two women covered in cream and dancing in bikinis until Anderson speaks to him. The final scene shows Anderson's assistant pouring the man coffee, and again revealing her cleavage.²⁷³ Dreamscape's argument failed to convince the ASA that the advert portrayed strong, confident businesswomen. The ASA considered that the ad gave the impression that the male character viewed his female colleagues as sexual objects.²⁷⁴ On this basis, the ASA considered it likely to cause serious offense to some viewers due to the sexist and degrading content. The ASA therefore upheld the complaints.²⁷⁵

In contrast, the ASA did not uphold complaints about an advertisement for Beats Pill speakers.²⁷⁶ The ad featured male singer Robin Thicke performing his song "Blurred Lines" alongside three female models. The women wore crop tops and hot pants as they danced and interacted with Thicke and the product. One shot showed all the women dressed in transparent nurses' uniforms. Towards the end, one of the models was shown kneeling on her hands and knees with the product placed on her back.²⁷⁷ The ASA accepted the scenes were sexually suggestive and noted that the women's bodies were more exposed in comparison Thicke who was fully clothed.²⁷⁸ Whilst the ASA accepted that some viewers might find the advertisement distasteful, it did not consider it likely to cause serious or

²⁷² Broadcast Adjudication from the ASA for Dreamscape Networks Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/6/Dreamscape-Networks-Ltd/SHP_ADJ_221269.aspx#.VPc56i6fbgI

²⁷³ Broadcast Adjudication from the ASA for Dreamscape Networks Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/6/Dreamscape-Networks-Ltd/SHP_ADJ_221269.aspx#.VPc56i6fbgI

²⁷⁴ Broadcast Adjudication from the ASA for Dreamscape Networks Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/6/Dreamscape-Networks-Ltd/SHP_ADJ_221269.aspx#.VPc56i6fbgI

²⁷⁵ Broadcast Adjudication from the ASA for Dreamscape Networks Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/6/Dreamscape-Networks-Ltd/SHP_ADJ_221269.aspx#.VPc56i6fbgI

²⁷⁶ Broadcast Adjudication from the ASA for Beats Electronics International Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/10/Beats-Electronics-International-Ltd/SHP_ADJ_232710.aspx#.VPdS0eGfbgJ

²⁷⁷ Broadcast Adjudication from the ASA for Beats Electronics International Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/10/Beats-Electronics-International-Ltd/SHP_ADJ_232710.aspx#.VPdS0eGfbgJ

²⁷⁸ Broadcast Adjudication from the ASA for Beats Electronics International Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/10/Beats-Electronics-International-Ltd/SHP_ADJ_232710.aspx#.VPdS0eGfbgJ

widespread offense.²⁷⁹ In taking their decision, the ASA did not consider the content of the song, which has been banned by various music venues due to its perceived sexist and offensive content.²⁸⁰

Finally, the ASA received complaints about an ad for a computer game, “Take Two Interactive Software Europe”.²⁸¹ The ad featured animated scenes that depicted naked women pole dancing in a strip club and a full-frontal view of a woman wearing only thong-style pants. Pixilation obscured the women’s bottoms and nipples. The ad also showed two girls in the club, dressed in school uniform with their hair in bunches, who were about to kiss.²⁸² Despite the pixilation, the ASA considered the presentation of the women’s bodies and their sexual movements to be too sexually explicit. The ASA believed that the scene with the two girls, considered in the context of the other scenes with sexual content, linked teenage girls with sexually provocative behavior.²⁸³ The ASA considered the ad to be too sexually explicit to be shown before 11pm, and likely to cause serious or widespread offense. However, the ASA did not consider it to be sexist.²⁸⁴

In sum, it can be difficult to determine in the UK the types of advertisement that may causes widespread offence, as the ASA bases its decisions on the target audience of the advertisement. In general, advertisements that contain “British humor” do not cause widespread offence. Furthermore, the answer to the question whether an advertisement that objectifies women, depicts traditional gender roles or contains sexist images causes widespread offence is dependent on the audience likely to receive the information. It may very well be that the same advertisement causes widespread offence when published in one magazine, whereas it does not cause widespread offence when published in another.

²⁷⁹ Broadcast Adjudication from the ASA for Beats Electronics International Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2013/10/Beats-Electronics-International-Ltd/SHP_ADJ_232710.aspx#.VPdS0eGfbgJ

²⁸⁰ <http://www.theguardian.com/music/2013/nov/13/blurred-lines-most-controversial-song-decade>

²⁸¹ Broadcast Adjudication from the ASA for Take Two Interactive Software Europe Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2011/10/Take-Two-Interactive-Software-Europe-Ltd/SHP_ADJ_161417.aspx#.VPdLtOGfbgI

²⁸² Broadcast Adjudication from the ASA for Take Two Interactive Software Europe Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2011/10/Take-Two-Interactive-Software-Europe-Ltd/SHP_ADJ_161417.aspx#.VPdLtOGfbgI

²⁸³ Broadcast Adjudication from the ASA for Take Two Interactive Software Europe Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2011/10/Take-Two-Interactive-Software-Europe-Ltd/SHP_ADJ_161417.aspx#.VPdLtOGfbgI

²⁸⁴ Broadcast Adjudication from the ASA for Take Two Interactive Software Europe Ltd *available at* http://www.asa.org.uk/Rulings/Adjudications/2011/10/Take-Two-Interactive-Software-Europe-Ltd/SHP_ADJ_161417.aspx#.VPdLtOGfbgI

*United States of America: Regulatory Bodies*Federal Communications Commission

The FCC is the regulatory body for all interstate and international broadcast communications, including advertisements.²⁸⁵ The FCC is an independent US governmental agency overseen by Congress.²⁸⁶ The US President and the Senate appoint and confirm respectively the five Commissioners that direct the FCC.²⁸⁷

The FCC is responsible for interpreting and enforcing the US Code (U.S.C.).²⁸⁸ This includes Title 18, which provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both”.²⁸⁹ Another law the FCC is responsible for stipulates:

- (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.
- (b) No licensee of a radio or television broadcast station shall broadcast on any day between 6a.m. and 10p.m. any material which is indecent.²⁹⁰

The FCC has the right to regulate advertising that is obscene or indecent, and has also asserted the right to regulate profane communication.²⁹¹ Indecent material is most relevant in the context of sexism in advertising, since profanity refers to language whilst obscenity is a higher threshold than indecency. The FCC interprets “broadcast indecency” as “language or material that, in context, depicts or describes, in terms of patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs”.²⁹² Therefore, the FCC has the mandate to regulate advertisements that are sexist by virtue of the indecent presentation of men or women. However, the FCC’s interpretation of indecency does not include material that is sexist itself, but rather material that is “patently offensive” due to the showing of “sexual or

²⁸⁵ Available at: <http://www.fcc.gov/what-we-do>

²⁸⁶ Available at: <http://www.fcc.gov/what-we-do>

²⁸⁷ Available at: <http://www.fcc.gov/what-we-do>

²⁸⁸ The United States Code is a consolidation and codification by subject matter of the general and permanent laws of the United States. Available at <http://uscode.house.gov/browse/prelim@title18&edition=prelim>.

²⁸⁹ 18 USC 1464: Broadcasting obscene language available at

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section1464&num=0&edition=prelim>

²⁹⁰ Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material) Code of Regulations, Title 47, Part 73, Section 73.3999 available at

<http://www.gpo.gov/fdsys/pkg/CFR-2012-title47-vol4/pdf/CFR-2012-title47-vol4-sec73-3999.pdf>

²⁹¹ Complaints against Various Broad Licensees Regarding Their Airing of the “Golden Globes Awards” Program, 19 F.C.C.R. 4975, 4977 (2004)

²⁹² Federal Communications Commission *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, Policy Statement, 16 F.C.C.R. 7999, 4 (2001)

excretory activities or organs”. Therefore, whilst such material may also be reasonably considered sexist, complaints must be made on the grounds of the offensiveness of the nude content, not any perceived sexism.

The law sets a high standard for advertising to be subject to regulation on grounds of sexism. First, the form or type of sexism is limited to sexism arising from nudity, and second, this itself must cause “patent offense”. However, incidents such as the Janet Jackson Super Bowl halftime performance in which images of her exposed breast were broadcast to over ninety million television viewers may have encouraged the FCC to broaden its interpretation of indecency.²⁹³ Below three examples are discussed of cases before the FCC: *FCC v Pacifica Foundation*; *Golden Globes II*; and *Super Bowl XXXVIII*.

Federal Communications Commission: Case Law

FCC v Pacifica Foundation is the seminal case on broadcast indecency.²⁹⁴ This case involved complaints over a comedian’s routine that contained offensive language.²⁹⁵ The FCC characterised the language used as patently offensive but not necessarily obscene.²⁹⁶ This distinction is significant as the US Supreme Court’s First Amendment jurisprudence does not protect obscene material.²⁹⁷ The Supreme Court defines obscenity as speech that: (a) the average person, applying contemporary community standards would find, taken as a whole, appeals to the prurient interest; (b) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁹⁸

As the FCC’s definition of indecency is broader than the Supreme Court’s definition of obscenity, the FCC’s regulation of indecent material encompasses the

²⁹³ Brian Rooder, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”*: *Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 871 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

²⁹⁴ Brian Rooder, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”*: *Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 873 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

²⁹⁵ Brian Rooder, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”*: *Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 873 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

²⁹⁶ Brian Rooder, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”*: *Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 873 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

²⁹⁷ Brian Rooder, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”*: *Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 873 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

²⁹⁸ *Miller v. California*, 413 U.S. 15, 24 (1973)

regulation of material that falls within the protection of the First Amendment.²⁹⁹ The Court affirmed this to be the scope of the FCC's regulations, justifying it on the grounds that broadcasting has unique pervasiveness and accessibility to children.³⁰⁰ Therefore, the FCC has a special mandate to regulate otherwise protected communication, namely indecent material. There is evidence in the decisions since this *Pacifica* case that the FCC is broadening its mandate to regulate indecent material.

In its second *Golden Globes* decision, the FCC announced profanity as a new and "independent" standard for finding a violation of 18 U.S.C.³⁰¹ The FCC declared that U2 singer Bono's use of variations of the word "fuck" necessarily depicted sexual activity and invariably invokes a coarse sexual image, causing "patent offence".³⁰² However, in its first ruling on the matter the FCC did not find the use of the word indecent as it had not been intended to depict sexual activity, but rather used as a qualifying adjective for words like "brilliant".³⁰³ This caused Congress to urge the FCC to reconsider, and the subsequent reversal in the FCC's re-examination of the case.³⁰⁴ However, this is in relation to profane speech rather than indecent material. Therefore, even though this may demonstrate the FCC broadened its regulatory scope to some extent, it does not provide assistance specifically in regulating sexist advertising.

The *Super Bowl XXXVIII* case may provide greater evidence that an increased scope exists for regulating advertising on the ground of indecency.³⁰⁵ An

²⁹⁹ Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 *FORDHAM LAW REVIEW* 871, 874 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

³⁰⁰ *Pacifica*, 438 U.S. 748-751

³⁰¹ *Complaints against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 F.C.C.R. 4975, 4977 (2004)

³⁰² Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 *FORDHAM LAW REVIEW* 871, 888 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>
Citing Complaints against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975, 4979 (2004)

³⁰³ Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 *FORDHAM LAW REVIEW* 871, 888 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>
Citing Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 18 F.C.C.R. 19,859 (2003)

³⁰⁴ S. Res. 283, 108th Cong. (2003) (resolution urging FCC to overturn the Golden Globes decision and increase enforcement activities)

³⁰⁵ Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 *FORDHAM LAW REVIEW* 871, 888 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

investigation into the Super Bowl halftime show resulted in the then statutory maximum forfeiture of \$27,500 for each of the twenty Viacom-owned CBS affiliates that broadcasted the halftime show.³⁰⁶ This resulted in an increase in self-censorship of broadcast material, including material featuring nudity.³⁰⁷ In February 2005, the Super Bowl XXXIX, Fox Television network prevented a provocative advertisement in which a woman's breast was nearly exposed from rerunning during the games fourth quarter.³⁰⁸ Therefore, there is evidence that the FCC is applying stricter rules in regard to broadcast indecency and is imposing harsher penalties.

In sum, the US FCC has the right to regulate advertising that is obscene or indecent. The FCC's interpretation of indecency does not include material that is sexist itself, but rather material that is "patently offensive" due to the showing of "sexual or excretory activities or organs". The standard for advertising to be subject to regulation on grounds of sexism is high. Firstly, the form or type of sexism is limited to sexism arising from nudity and secondly, this itself must cause "patent offense". However, recent decisions by the FCC contain evidence that the Commission is slowly broadening the scope of the notion of indecency.

Children's Advertising Review Unit

In 1974, the National Advertising Review Council established the Children's Advertising Review Unit (CARU) as a self-regulatory program to promote responsible children's advertising.³⁰⁹ As highlighted in *Pacifica*, the FCC's regulation of broadcast indecency can be justified on the ground that broadcasting has a unique pervasiveness and accessibility to children. This concern for the welfare of children explains the existence of special guidelines in relation to advertising targeted at children. These guidelines are contained within the Self-Regulatory Program for Children's Advertising.³¹⁰ Core Principle 6 provides:

Citing Complaints Against Various Television Licensees Concerning their February 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R.

³⁰⁶ Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 888 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

³⁰⁷ Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 888-891 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

³⁰⁸ Brian Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown too Big for its Britches* 74 FORDHAM LAW REVIEW 871, 891 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4117&context=flr>

³⁰⁹ The National Advertising Review Council, *Self-Regulatory Program for Children's Advertising*, THE CHILDREN'S ADVERTISING REVIEW UNIT 1, 3 available at <http://www.caru.org/guidelines/guidelines.pdf>

³¹⁰ The National Advertising Review Council, *Self-Regulatory Program for Children's Advertising*, THE CHILDREN'S ADVERTISING REVIEW UNIT 1 available at <http://www.caru.org/guidelines/guidelines.pdf>

“advertisers should avoid social stereotyping and appeals to prejudice, and are encouraged to incorporate minority and other groups in advertisements and to present positive role models whenever possible”.³¹¹

Furthermore, the Unsafe and Inappropriate Advertising to Children section of the CARU guidelines stipulates: “advertising should not portray or encourage behaviour inappropriate for children (e.g. violence or sexuality) or include material that could unduly frighten or provoke anxiety in children [...]”.³¹² Under these guidelines, advertising cannot be “sexist” due to either social stereotyping or inappropriate sexual content. The principles and guidelines apply to national advertising primarily directed to children aged less than 12 years in any medium. This is the only form of advertising regulation in the US that directly relates to sexism. This unique standard for children’s advertising is justified by children’s special vulnerability, namely their inexperience, immaturity, susceptibility to being misled or unduly influenced, and their lack of cognitive skills needed to evaluate the credibility of advertising.³¹³

The CARU monitors and reviews advertising directed to children, initiates and receives complaints about advertising practices, and determines whether there has been a violations of the program’s standards.³¹⁴ Should CARU find a violation, it seeks changes through the voluntary cooperation of advertisers and website operators.³¹⁵

Conclusion: Regulatory Frameworks

This section examined the regulatory bodies tasked with monitoring the compliance of advertisements with the relevant laws and codes in Norway, Denmark, Sweden, France, Germany, Bulgaria, the UK and the US. It also assessed the outcomes of previous investigations by these monitoring bodies where possible. This section demonstrated the variety of regulatory systems across the states and the different scope of their mandates. As reflected in the laws discussed above, there are large differences between some systems which strongly regulate

³¹¹ The National Advertising Review Council, *Self-Regulatory Program for Children’s Advertising*, THE CHILDREN’S ADVERTISING REVIEW UNIT 1, 5 available at <http://www.caru.org/guidelines/guidelines.pdf>

³¹² The National Advertising Review Council, *Self-Regulatory Program for Children’s Advertising*, THE CHILDREN’S ADVERTISING REVIEW UNIT 1, 13 available at <http://www.caru.org/guidelines/guidelines.pdf>

³¹³ The National Advertising Review Council, *Self-Regulatory Program for Children’s Advertising*, THE CHILDREN’S ADVERTISING REVIEW UNIT 1, 3 available at <http://www.caru.org/guidelines/guidelines.pdf>

³¹⁴ The National Advertising Review Council, *Self-Regulatory Program for Children’s Advertising*, THE CHILDREN’S ADVERTISING REVIEW UNIT 1, 3 available at <http://www.caru.org/guidelines/guidelines.pdf>

³¹⁵ The National Advertising Review Council, *Self-Regulatory Program for Children’s Advertising*, THE CHILDREN’S ADVERTISING REVIEW UNIT 1, 3 available at <http://www.caru.org/guidelines/guidelines.pdf>

sexism in advertising, and those that are much more permissive. The determinations of the bodies also vary and their decisions can be instructive for comparative analysis with the cases in the Netherlands.

In the continental European states with strong regulations, the protection of human dignity plays an important role. For example, the regulatory bodies of France, Germany and Bulgaria found that advertisements are contrary to their media laws and codes when the advertisement is demeaning or objectifies women. This is different than the approach in the UK, where the anticipated reaction of the *receiving audience* will determine whether the codes are breached by a sexist ad. The enforcement of the respective Marketing Acts by the Norwegian and Danish Ombudsmen is very similar. If a woman's body is depicted as an object, the Ombudsmen will likely find the Marketing Acts to be violated. This is different in Sweden, where the Ombudsman has no sanctions at their disposal and has found that the Swedish Marketing Act protects consumers and businesses, not the integrity of women. Like Sweden, the US has more limited regulation, focusing generally on obscene or indecent material.

Potential Reforms to Improve Regulation of Sexist Advertising

The purpose of the memorandum is also to present comparative state practice regarding advertising regulation that may assist other jurisdictions seeking to revise their standards on sexist content. As indicated in the introduction, questions have been raised in the Netherlands about the adequacy of current legislation, policy, and practice of the regulatory body regarding sexism in advertising. As such, this part of the memorandum reflects on potentially key areas to focus on reforming to improve protections in the Dutch system of advertising regulation. These reflections are informed by the information provided above regarding comparative state practice, and also by discussions with the Public Interest Litigation Project (PILP) at a meeting on 28 April 2015 in Utrecht.

PILP are considering the following possibilities: 1) to reform the RCC via dialogue and advocacy; 2) to bring a complaint regarding a sexist ad before the *Reclame Code Commissie* (RCC); 3) to attempt to secure the Netherlands' state responsibility regarding sexist advertisements via litigation; and 4) to initiate a reformist dialogue with SuitSupply (and other similar advertisers). Specifically, PILP sought information on reforming the RCC. The information provided in response is done so on the basis of the comparative state practice above, with the caveat that PILPG have not analyzed the Dutch legislation, policy, or regulatory

framework on advertising. As such, this information should be considered in light of substantial research on the Dutch system provided separately to PILP.

Regarding reforming the RCC through dialogue and advocacy, a first step could be to engage them on the topic of sexism and advertising and to understand their view of the issue, the regulations involved, as well as their role. PILP's reform strategy could then be tailored to the issues and obstacles identified in this discussion with the RCC. If the RCC are not very familiar with the problems of discrimination and stereotyping arising from sexist advertising, it could be useful to engage with them on the damage caused by such ads. It may also be useful to discuss not only the national framework on discrimination; but also the relevant regional (EU) and international (CEDAW) frameworks on discrimination applicable in the Netherlands (addressed in separate memoranda). Against this backdrop, amendments to the current RCC practice regarding sexist advertisements could be recommended on the basis of comparative state practice across Europe.

For example, in Norway the Consumer Ombudsman found on several occasions that if a model poses in a way that is irrelevant to the product advertised, the Marketing Control Act is violated. The Ombudsman can negotiate with traders to encourage a voluntary settlement to end the marketing practice in question. The Danish Consumer Ombudsman enforces the Danish Marketing Practices Act in a very similar way: if the female body is reduced to an object; the Ombudsman is likely to find a violation of the Act. The Danish Ombudsman has also developed guiding principles on gender-related advertising. Equally in Germany, the Advertising Standards Council has found on several occasions that if women are reduced to sexual objects, it amounts to discrimination. This would be particularly relevant in the case of the SuitSupply ads.

According to the UK Codes of Broadcast Advertising and Non-Broadcast Advertising, advertisements may not cause widespread offence or prejudice respect for human dignity. The French advertisements monitoring body, the CSA, also emphasizes in its decisions the notion of human dignity and the protection from demeaning images. Especially if women are depicted as (sexual) objects, or as being unable to make decisions for themselves, the CSA is likely to find advertisements or other communications in violation of human dignity. The CSA established a dedicated working group on women's rights and advertising, which, *inter alia*, proposes legislation on the topic. In a landmark case, the Bulgarian Commission for the Protection Against Discrimination ruled that an ad that violated the dignity of women and reduced them to objects contravened the Protection Against Discrimination Act.

It should also be noted that many of the regulatory bodies included in this memorandum can carry out investigations, issue public findings, impose pecuniary sanctions against advertisers, and sometimes can even withdraw broadcast licenses. While these can be necessary and very effective, another powerful tool for the monitoring bodies is “naming and shaming”. Often the risk of bad publicity is enough for advertisers to withdraw a (potentially) discriminatory advertising campaign. As such, the Dutch RCC, as well as civil society groups, could employ such naming and shaming tactics to counter a sexist ad campaign and raise awareness of the damage done by discrimination and stereotyping.

Conclusion

This memorandum addressed the legal and regulatory frameworks applicable to advertisements containing gender stereotypes or sexist media content under various domestic systems. This memorandum analyzed the following states: Bulgaria, Denmark, France, Germany, Norway, Sweden, the UK, and the US. As regards non-discrimination law, all states included in this memorandum aim for gender equality in their legislation, however the scope of these laws differs. Many of these states prohibit sexist advertising, whereas others have more generic bans related to violations of human rights or dignity. Some states (like Sweden and the US) have declined to enact laws prohibiting or regulating sexist advertisements based on the primacy given to free speech.

This memorandum also elaborated the way in which the relevant regulatory bodies in each system deal with sexism in advertising and any available case law. The section on regulatory bodies demonstrated that there are many possible approaches and measures available to regulate potentially discriminatory or sexist advertisements. If a state has enacted laws prohibiting advertisements containing negative gender stereotypes or sexist content, those laws can be invoked before a court or regulatory body. However, even if such laws do not exist, arguments against sexist advertisements can also be made on the basis that they violate human dignity. While the creation, composition, and mandate of the regulatory bodies differ; numerous examples are given of advertisements sanctioned for objectifying women or being too sexually explicit.

The legal and regulatory frameworks addressed in this memorandum provide comparative practice for how to control and circumscribe the sexist content of advertisements. The standards, policy, and practice of national advertising bodies provide useful examples for regulating, monitoring, and assessing cases of sexism

or gender stereotyping in advertisements. Such comparative information regarding the regulation of sexist advertising across different states may be useful for jurisdictions seeking to reform their own national system.

About the Public International Law & Policy Group

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- **Peace Negotiations**
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Through its work, PILPG promotes the use of international law as an alternative to violent conflict for resolving international disputes. PILPG provides legal counsel to *pro bono* clients during peace negotiations, advises on the creation and operation of transitional justice mechanisms, provides expertise during the drafting of post-conflict constitutions, and advises on ways to strengthen the rule of law and effective institutions. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

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In addition to a staff of full-time attorneys that implement PILPG's programs, PILPG leverages volunteer assistance from international lawyers, diplomats, and foreign relations experts, as well as *pro bono* assistance from major international law firms. Annually, PILPG is able to provide over \$20 million worth of *pro bono* international legal services.

PILPG is based in Washington, D.C., New York, and The Hague. To date, PILPG has maintained project offices in: Bosnia and Herzegovina, Côte d'Ivoire, Egypt, Georgia, Iraq, Kenya, Kosovo, Libya, Nepal, Somaliland, South Sudan, Sri Lanka, Tanzania, Tunisia, Turkey, and Uganda.

Over the course of the past two decades, PILPG has provided assistance to *pro bono* clients in Afghanistan, Armenia, Bosnia and Herzegovina, Botswana, Burma, Cambodia, Côte d'Ivoire, Darfur, Dutch Antilles, East Timor, Egypt, Estonia, Ethiopia, Georgia, Iraq, Kenya, Kosovo, Lebanon, Liberia, Libya, Macedonia, Mauritius, Montenegro, Nepal, Philippines, Rwanda, Seychelles, Somalia, Southern Cameroons, Somaliland, South Sudan, Sri Lanka, Sudan, Syria, Tanzania, Tunisia, Uganda, Yemen, and Zimbabwe. PILPG has also provided *pro bono* legal assistance to all of the international and hybrid war crimes tribunals.