

The Regulation of Child Consumption in European Law: Rights, Market and New Perspectives

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*Abstract**

This article aims to examine the condition of children in contemporary society and concerns their specific position of consumers. In this perspective, the analysis of the relations between minors and market joins juridical, sociological and philosophical issues and furthermore it is related also to the transformations of childhood in modern society (through the shift, for children, from a dimension of “incapable” persons to another that portrays them as autonomous and competent beings). The fil rouge of this research consists in examining the figure of the child consumer through an analysis of the state of the art of the juridical forms of protection, but also in a de iure condendo approach, considering the new rights and needs of children and the different models of regulations of their status and specific condition. In the background, there is the doctrinal debate concerning the position of minors in private law, their capacity to act beyond their legal incapacity (for example for the necessities acts) and the problem to evaluate the relevance of their consent (and their –if any– contractual liability) also in order to protect third parties who have contractual relationships with them.

Keywords: Minors, Consumer Law, Advertising, Product Safety, Unfair Commercial Practices, European and Comparative Law, Legal Harmonization, Contractual Capacity

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1. Children consumers: introduction

This article aims to provide an overview of the protection of children consumers in Europe in relation to the evolution of the concept of childhood in contemporary society.

The scientific debate concerning infancy, working on an interdisciplinary level, has overcome the old conception of minors as mere incapable persons, since, at present, on a juridical basis, the capacity of children of self-determination is considered a relevant factor according to their progressive autonomy and maturity.

In principle, in fact, minors are no longer considered object of the protection of adults but also authors and competent actors of social behaviour relevant in contractual and extra-contractual relationships.

In this context, it's useful to recall the two different ways of regulation of the *status* of minors: the first (known as "paternalistic" approach) was based on the supposed lack of maturity and natural vulnerability of minors and was centred on the key-concept of a necessarily different regulation/protection due to children.

This approach found its expression in the early Declarations of children rights, which emphasized the duties of adults towards children, rather than the "rights" of minors autonomously considered (the Declarations of the Rights of the Child of 1959, for example, reflects this genre of social attitude towards infancy).

The second approach (which is more innovative and recent than the previous) considers children competent actors of social behaviour and, for this reason, it points out the need of emancipation of children towards the world of adults, especially for what concerns the equal affirmation and exercise of fundamental rights, liberties, respect of autonomy and self-determination (as a manifestation of this "liberationist" approach we remind the Convention on the Right of the Child of 1989 which acknowledges the fundamental right of the child, who is capable of forming his or her own views, to express those views freely in all matters affecting his interests and that to these views must be given due weight in accordance with the age and maturity¹).

These two different ways of considering infancy reflect, respectively, two different attitudes of considering minors in a social viewpoint: while the paternalistic approach keeps prevalent the profile of immaturity of children (and in turn it asks for specific protection), the liberationist position, by contrast, gives priority to the ability of minors and to their capacity for interacting with adults and, therefore, it vindicates for infancy the same rights that in modern society are acknowledged to adults.

This transformation of childhood (which is evident on a juridical basis through the Declarations of rights adopted during the 20th century) finds its expression in the provision of the art. II-84 of

¹ See art. 12 of the UN Convention on the Rights of the Child.

the European Constitution (based on the New York Convention on the Rights of the Child of 1989, ratified by all the Member States) which specifically lists the "*Rights of the Child*" and thus it epitomizes a new identity of minors.

The study of the category of the child consumer, which rises and grows contemporary to the reconstruction of the image of infancy, allows observers to evaluate any correspondence of juridical instruments to the specific needs of protection and, in the meantime, it permits to consider the development of juridical system in relation to the new needs and rights of children and to the different ways in which society perceives them.

2. The evolution of the category of children consumers

Historically, the category of children consumers begins to assume relevance in the mass society, during the 1920s, that is nearly the same period in which several movements aimed at the protection and vindication of the rights of consumers *tout court* rise in the United States of America.

In origin, this typology of consumers is taken into consideration in the quality of "*influentials*", i.e. for their ability to influence familiar decisions in consumption matters, conditioning the choices on the purchases of consumer goods and, as the survey (referred to the American industry of clothing) carried out by D.T. Cook demonstrates, already from 1930s there is the affirmation of "*pediocularity*" (that is the importance of the point of view of the child instead of parents').

In particular, during the following decades ('60s and '70s), minors become object of specific attention on a commercial ground for the specific ability to spend their own pocket money and in '80s the category has its precise definition, at the same time in which liberationist theories affirm their success, on a legal and social basis, for what concerns the transformation of the condition of infancy.

This is demonstrated also by the historical evolution which marks this - not accidental - coincidence: 1979 is in fact the international year of the child and in the 1989 we had the subscription of UN Convention on the Rights of the child.

Therefore, the category is visible and fully perceived on a commercial level during the years '90s, so it becomes ideally subdivided into three different groups: children consumers continue, in fact, to be considered as "*influentials*", but they also figure as "*autonomous consumers*" with an independent purchase power, as well as "*potential consumers*", towards whom the entrepreneurial strategies elaborate the (so called) "*brand loyalties*", which aim to inspire them familiarity and confidence towards specific commercial brands since toddler age, so that children not only identify those brands, but also identify themselves with them.

Thus, advertising become targeted to children for these purposes: marketers see children as a current, as well as future, market and hence brand loyalty at a young age helps in the pursuit of continued sales later.

In '90s marketing aimed at minors (that during the previous decades had not assumed important dimensions) acquires a big increment, and that's a consequence of media transformations and technological innovations: on the one side, for the proliferation of television programming channels (addressed to minors) and, on the other side, for the creation of Internet, which in 1994 already connected 5 million computers, destined to grow enormously in the following years.

The increasing proliferation of commercial communications directed to children - at school, at home, in sport, in media of all forms, in leisure activities (etc.) -, the growing importance of new forms of commercial communication, including sponsorship, integrated marketing, merchandising, and interactive communication (Internet) and the ancillary developments such as the increasing ability of operators to collect and process personal data on childrens' interests, preferences and consumption patterns (and to use that data to shape or devise individual commercial messages targeted to individual children) are some of the main reasons of the development of the commercial relevance of children consumers.

Thereby, in contemporary society minors represent an important share of consumers, for the dimensions of that market in which they receive commercial communications and act, and also for the influence that they still exercise on familiar purchases of consumer goods and service, often also with an important economic weight (like, e.g., vehicles and travel or vacations).

For this reason, children have a huge purchasing power, both directly and indirectly in the sense that they are able to influence their parents on what to buy: the same advertising to children isn't in fact just for purchasing children's goods, since it influences other items not necessarily of children's use. Therefore, advertising and commercial practices and consumer goods are present constantly in children's lives, from television commercials, to ad placement within video games, to toys, Internet, mobile telephones and more.

3. The protection of children in European consumer law

In the light of this evolution, we can understand why the protection of children consumers gets a legislative goal only in a subsequent phase and later than the affirmation of consumer politics *tout court* which took place with the aim to protect consumers rights, as individual buyers or customers (beyond their age), towards manufacturers or producers.

In Europe, the first directives aimed at the protection of the consumer (who is defined as "any natural person who is acting for purposes which are outside his trade, business or profession": see art. 2, lett. *b*) of the Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer

contracts) are approved in the early 1970s² and continue, without interruption, during the next decades³.

On the contrary, a specific directive concerning children consumers is approved only in 1987 and it is n. 87/357/EEC (concerning products which, appearing to be other than they are, endanger the health or safety of consumers⁴) which is followed by a second one which regulates toys safety (dir. 88/378/EEC)⁵.

For the purpose of this study, we can affirm that EU protection of young consumers (mostly belonging to the area of producer liability) is inherent, on the one hand, to the topic of product safety⁶ and is aimed to protect children, defining a safe product (safe in normal or reasonably foreseeable use, taking into account of a number of factors including instructions and warnings given with the goods and the categories of consumer at serious risk when using the product, particularly children) and laying down a framework for assessing safety (measures for assessing safety include published safety standards and codes of practice).

The same definition of safe product, for what concerns toys, is constructed, considering that toys (placed on the market) should not jeopardize the safety and/or health either of users or of third parties and the standard of toys safety is determined in relation to the criterion of the use of the product, although allowance should also be made for any foreseeable use, «bearing in mind the normal behaviour of children who do not generally show the same degree of care as the average adult user»⁷.

² The aims of communitarian politics in consumer affairs are the protection of health, safety and economic interests of consumers, as well as the organization of a system which may allow adequate instruments of information, counselling, education, damage compensation and consumers representations (even during the elaboration of the official documents regarding consumers rights).

³ The areas of intervention are multiple, they cover, for example, misleading advertising, producer liability, distance contracts, consumer credit, product safety, unfair terms in consumer contracts, timeshare, personal data processing, consumer goods guarantees, unfair commercial practices, etc. (just to recall the best-known regulations).

⁴ This directive prohibits the marketing of products which possess a form, odour, colour, appearance, packaging, labelling, volume or size, such that it is likely that consumers, especially children, will confuse them with foodstuffs and in consequence place them in their mouth, or suck or ingest them, which might be dangerous and cause, for example, suffocation, poisoning, or the perforation or obstruction of the digestive track.

⁵ This directive was modified by the directive 93/68/EEC. See also the new Toys Safety Directive 2009/48/EC of 18 June 2009.

⁶ As for general product safety, see directives 92/59/EEC and 2001/95/EEC.

⁷ See directive 88/378/EEC.

The protection that EU regulation provides concerns, on the one side, the necessity of protecting children warning them from dangers deriving from the use of products, dangers that may be even autoprovoked⁸⁻⁹.

On the other hand, EU regulation foresees a protection for children towards commercial communications. Considering the serious concern caused by the developments of commercial communication directed to children, communitarian institutions turned to protect them from undue pressure and exploitation and to achieve a proper balance between the rights of children (and their parents) and the rights of commercial communicators to market products and services. In this perspective, there are specific provisions in EU regulation of advertising and of unfair business-to-consumer commercial practices¹⁰.

In 1989, there was the adoption of the 'Television Without Frontiers' directive¹¹ (the same year of the emanation of New York Convention on the Rights of the Child) which pays attention to the function performed towards minors by television advertising and sponsorship of goods and services (destined or not to minors).

This directive establishes principles aimed at the protection of children towards negative effects of advertising messages, which put at risk children safety or abuse of their natural ingenuousness and inexperience.

⁸ See directive 87/357/EEC.

⁹ Furthermore, children's protection is ensured also towards interactive computer game playing which is a mass-market leisure activity with millions of players throughout Europe. Since 2003 PEGI (*Pan European Game Information*) is the European system which gives (consumers, particularly parents,) "age ratings" aimed to ensure that entertainment content, such as films, videos, DVDs, and computer games, are clearly labelled for the age group for which they are most suitable. Age ratings provide guidance to consumers to help them decide whether or not to buy a particular product. PEGI is considered a model of European harmonization in the field of the protection of children. See <http://www.pegi.info/en/index/id/23>; see also the Council Resolution 2002/C 65/02 (on the protection of consumers, in particular young people, through the labelling of certain video games and computer games according to age group) and the Commission Communication IP/08/618 (on the protection of consumers, in particular minors, in respect of the use of video games).

¹⁰ The category of children is included also in other EU provisions, we can mention, for example, the regulation of distance contracts (dir. 97/7/EC) which foresees (as a good faith general rule concerning contractual negotiations) that prior information «the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as *minors*» (art. 4). The directive on electronic commerce (2000/31/EC) ensures a high level of protection of objectives of general interest, in particular: the protection of *minors* and human dignity (and also consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies): see n. 10.

¹¹ Directive 89/552/EEC concerning television broadcasting activities.

For this purpose, there are specific provisions concerning television advertising: ban of advertising of alcoholic beverages aimed specifically at minors or which depict minors consuming these drinks (art. 15) and as for general provisions (beyond the advert content), it provides that «television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection: (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity; (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised; (c) it shall not exploit the special trust minors place in parents, teachers or other persons; (d) it shall not unreasonably show minors in dangerous situations»¹².

The provisions of TWF directive, which are the legal framework for television broadcasting in European internal market (and thus represent the basis of television broadcasting activities regulation on a European level), have been modified in 1997¹³, in order to regulate “teleshopping” and protect receivers, in particular minors, from the persuasions of televisive contractual offers, in which the presenter in addition to proposing the purchase of products also outlines the positive features of offered products¹⁴. In this perspective, it was introduced a §. 2 in the text of art. 16 of TWF directive: «teleshopping shall comply with the requirements referred to in paragraph 1 and, in addition, shall not exhort minors to contract for the sale or rental of goods and services».

In 2007 there was an emendation of TWF directive with the AVMSD directive (Audiovisual Media Services directive)¹⁵. The new rules, which have been called for especially by the European Parliament, respond to technological developments and create a new level-playing field in Europe for emerging audiovisual media services¹⁶.

¹² Furthermore, the directive provides that advertisements shall not be inserted in children’s programme when their programmed duration is less than 30 minutes and shall not be interrupted by advertisements (art. 11) and art. 22 imposes to EU Member States to take appropriate measures to ensure that television broadcasts, by broadcasters under their jurisdiction, do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision is extended to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured (by selecting the time of the broadcast or by any technical measure) that minors in the area of transmission will not normally hear or see such broadcasts. Member States have also to ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

¹³ Directive 97/36/EC.

¹⁴ See the *Study on the impact of advertising and teleshopping on minors* for DGEAC (http://ec.europa.eu/avpolicy/docs/library/studies/finalised/studpdf/minadv_it.pdf).

¹⁵ Directive 2007/65/EC.

¹⁶ See http://ec.europa.eu/avpolicy/reg/avms/index_en.htm.

The new directive reaffirms the pillars of Europe's audiovisual model as for protection of minors and consumer protection (but also: cultural diversity, media pluralism and fight against racial and religious hatred). AVMS directive covers all "audiovisual media services", that means traditional television as a "linear audiovisual media service" and on-demand audiovisual media services, as a "non-linear audiovisual media service". These services have to be directed to the general public and intended to inform, entertain and educate (Art. 1 (a) AVMSD). The enlarged scope of the directive responds to the increasing importance and relevance of on-demand audiovisual media services.

For what concerns minors' protection in on-demand audiovisual media services the new directive provides that content which might seriously impair the development of minors only shall be made available in such a way that ensures that minors will not normally hear or see such services. This can be achieved by access codes or other means that would efficiently prevent minors from accessing adult content.

In relation to this regulation, we may remember another kind of EU provisions, those concerning "Unfair business-to-consumer commercial practices"¹⁷, which aim at protecting consumers against unfair commercial practices in order to eliminate distortions of competitions and obstacles to the smooth functioning of the internal market¹⁸.

This directive prohibits those practices which «materially distort the economic behaviour of consumers (...) using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise» (art. 1, lett. e).

The directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.

Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice is assessed from the perspective of the average member of that group. For this reason, the directive includes in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase.

¹⁷ See directive 2005/29/EC.

¹⁸ See Preamble (n. 3). In this sense (see n. 6), it provides: «This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors».

Furthermore, the directive considers as “commercial practices which are in all circumstances considered unfair” (and prohibited ex art. 5), those which include in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them (see Annex 1, n. 28).

In conclusion, we can affirm that consumer law protects children mainly for what concerns (i) their safety and health, in this area there is the regulation of toys, product safety and advertising (but we may recall also the existence of provisions concerning food, alcoholism and tobacism) and (ii) against behaviour which may abuse of their natural inexperience, credulity and convinceability (in this sector there are the provisions of unfair commercial practices).

All these provisions, which are complementary with respect to general consumer provisions, are settled in application of International Declarations of Rights, e.g. art. 17 of UN Convention (1989) which acknowledges the important function developed by media to promote «social, spiritual and moral well-being» of infancy. For this purpose, we may quote also other instruments which appear directed to an integral protection of children consumers, as, for example, the *International Code of Advertising Practices*¹⁹ which protects children and young people towards advertising contents (art. 14). It's interesting to underline the importance given, by this article, to *Social Value* of advertising, which highlights the persuasive power of media and advertising²⁰.

This specific provision seems relevant on the side of the formation and protection of minors' growth, also considering the values of communitarian action, specifically mentioned by the European Constitution which acknowledges the children's right to protection and care necessary for their well-being and affirms that child's best interest must be a primary consideration in all actions relating to children, whether taken by public authorities or private institutions.

From a different point of view, furthermore, if we should find a possible direction *de iure condendo*, it could be found in a new classification of the several provisions concerning children consumers considering the difference between children and teens and respectively their different needs. Consequently, another question rises and it is given by the necessity to identify the moment in which the use of advertising appears ethically correct. Has it significance, for

¹⁹ The content of the *International Code of Advertising Practices* is generally re-edited in national self-regulatory advertising codes. For instance the Italian “*Codice di Autodisciplina della Comunicazione Commerciale*” (of 8 June 2009) reflects the *International Code* in its content.

²⁰ Art. 14, §.3 «*Social Value*: a. Advertisements should not suggest that possession or use of a product alone will give the child or young person physical, social or psychological advantages over other children or young people of the same age, or that non-possession of the product would have the opposite effect. b. Advertisements should not undermine the authority, responsibility, judgment or tastes of parents, taking into account the current social values. Advertisements should not include any direct appeal to children and young people to persuade their parents or other adults to buy advertised products for them».

example, if inserted in TV programmes destined to children aged 3-5? And, if so, for what kind of products? Then, this theme requires further analysis and scientific elaborations on an interdisciplinary level, in order to connect the different knowledges (from economic to medical and psycho-pedagogic sciences, also considering the results of social and juridical scientific fields) to protect children and their fundamental rights in a consumption society, which often assumes the features (even more dangerous) of a “risk society”.

4. Outlines of comparative law: the protective approach

In consumer policies, there is an homogeneous trend which is inclined to limit commercial pressure targeted at minors, through advertising and broadly through commercial practices directed to minors, although there are not organic regulation *ad hoc*, which specifically regulates the protection of children consumers.

Generally, among national provisions, there are sector regulations about advertising, concerning commerce of specific products (alcoholics, tobacco, toys, food, etc.) and regarding the various aspects regulated by communitarian directives. Only in Spain we can find a specific regulation concerning children consumers in the *Legislación autonómica*²¹⁻²² which provides a group of norms aimed at the *Protección de los niños y los adolescentes como consumidores*, «*como colectivos de consumidores con necesidades y características específicas*» (artt. 40). In particular, these provisions concern product safety, alcohol and tobacco consumption, hotel lodging, medicines, recreation places, gamblings, bets and game machines²³.

Apart from this legislation, in the other national systems there are only specific provisions which are implementation of European directives.

Nevertheless, national consumer ombudsmen have specifically introduced guide-lines referred to children consumers: see e.g. the Norwegian guide-lines “Marketing in relation to children and young people”²⁴, the Danish “Children, Young People and Marketing Practices”²⁵ and the Finnish “Minors, marketing and purchases”²⁶.

²¹ (Comunidad de Cataluña) *Ley 8/1995, de 27 de julio 1995, de atención y protección de los niños y los adolescentes y de modificación de la Ley 37/1991, de 30 de diciembre, sobre medidas de protección de los menores desamparados y de la adopción*. See also *Ley 3/1993, de 5 marzo Estatuto del consumidor* (see in particular art. 22).

²² As for national statutes, see *Ley 34/1988, 11 de noviembre 1988* (concerning misleading advertising, amended in 2002 and 2004) and *Ley 25/1994, 12 de julio 1994* (application of TWF directive, subsequently modified by *Ley 22/1999, 8 de junio 1999*). Furthermore, the implementation of the Unfair Commercial Practices Directive is contained in a *proyecto de ley*, at this moment, still in progress.

²³ See artt. 40/47.

²⁴ See http://www.forbrukerombudet.no/asset/509/1/509_1.doc.

²⁵ See <http://www.forbrug.dk/english/dco/dcoguides/guidelines-and-guidances/childrenmarketing/>.

For what concern specific national provisions, just to illustrate some examples, we may quote the German Act of 2004 (*Gesetz gegen den unlauteren Wettbewerb* - UWG, amended in 2008 with the implementation of the Unfair Commercial Practices Directive) which prohibits the exploitation of consumers (and children's) credulity; the Norwegian Marketing Control Act (Act. N. 2 of 9 January 2009), which «relates to the control of marketing, commercial practices and contract terms and conditions in consumer relations, and requires traders to follow good business practice in their transactions with one another» (this Act contains a Chapter 4 with specific provisions relating to the protection of children)²⁷ and the Danish Act of 2005 on marketing practices (amended in 2007), which foresees specific provisions for commerce and marketing targeted at minors and prohibits violent behaviour and the use of alcohol and drugs.

In Sweden, national legislation contains a Marketing Practices Act of 2008 (implementation of the Unfair Commercial Practices Directive) and also a specific protection for minors towards advertising and marketing within the Radio-och TV Act (1996:844)²⁸, which prohibits advertising directed to minors of less than 12 years and in general of TV advertising during children TV programmes. Prohibitionist norms are contained in the Tobacco Act and in the Alcohol Act.

In Italy, we have two groups of provisions which protect children consumers; both of them are application of the communitarian directives.

The first group of norms is contained in the "*Testo Unico della Radiotelevisione*" (Decreto Legislativo 31 July 2005, n. 177) which regulates radio and television activities.

A second group of norms is contained in the consumer code "*Codice del consumo*" (Decreto Legislativo 6 September 2005, n. 206) which specifically concerns the protection of consumers and contains several norms deriving from European regulation.

For what concerns the first group, the protection of minors is contained in artt. 34 (and followings), these norms are important not only because they recall European legislation aimed at the protection of children, but also because they give juridical relevance to the "*Codice di autoregolamentazione TV e minori*", a self-regulatory code which is useful for minors' protection in information society.

²⁶ See <http://www.kuluttajavirasto.fi/File/0586b0cc-6ff4-43e4-bcac-c89179c0ce52/Minors+marketing+and+purchases.pdf>

²⁷ See <http://www.forbrukerombudet.no/index.gan?id=11039810>.

²⁸ For the specific reasons of this prohibition see the argumentations of Swedish consumer Ombudsman: *Swedish Consumer Ombudsman on TV Advertising to Children*, in <http://lists.essential.org/commercial-alert/msg00028.html>

This code dedicates a specific section to advertising (sec. 4) and reflects in its content the principles deriving from European legislation and from international praxis.

The code foresees three levels of protection (general, specific and reinforced) for the different hours in which advertising appears on TV and establishes the ban, for broadcasters, of advertising or commercial communications which can be a source of danger for minors (moreover, it recognizes the relevance of the “*Codice di autodisciplina pubblicitaria*”²⁹, the Italian self-regulatory code for advertising).

Furthermore, it reaffirms the general principles aimed at the protection of minors’ safety, health and economic interests and indicates some examples of psychic and non-pecuniary loss.

The “*Commissione per i servizi e i prodotti*” (organ which belongs to the “*Autorità per le Garanzie nelle Comunicazioni*”) has the duty to verify and control the respect and the application of the norms which protect children, in collaboration with the “*Comitato di applicazione del Codice di autoregolamentazione TV e minori*” (art. 35).

The second area concerning children consumers protection is contained in the “*Codice del consumo*”, which foresees specific provisions on unfair commercial practices (artt. 20 ff.), teleshopping (artt. 28 ff.), distance contracts for financial services (art. 67-*quater*), product safety (art. 103). The “*Autorità garante della concorrenza e del mercato*” has the power to verify the application of the norms concerning unfair commercial practices and teleshopping (art. 27)³⁰, its power has been recently enlarged by Legge Giulietti (l. 6 april 2005, n. 49), which has introduced also pecuniary sanctions (once foreseen only for non-observance to Autorità’s orders).

In general, there are two instruments of protection for consumers in the Italian consumer Code: the first is the general inhibitory action (“action for an injunction”³¹) for the protection of consumers’ interests (artt. 139-140); the second is a class action (“*Azione collettiva risarcitoria*”) introduced by Italian legislator in December 2007 (art. 140-*bis*) whose purpose is to obtain compensatory damages or sum restitution for consumers in case of violation of their interests and rights.

Both of these instruments can be used in case of violation of children consumers rights and interests (although this is not explicitly asserted in the Code), since they belong to the general provisions aimed at the protection of consumers *tout court*.

²⁹ Now “*Codice di Autodisciplina della Comunicazione Commerciale*” (48th edition of 8 June 2009).

³⁰ For teleshopping, there is also the activity of surveillance performed by the “*Autorità per le Garanzie nelle Comunicazioni*” (see art. 27, *Codice del consumo*).

³¹ See directive 98/27/EC.

5. *Protective approach vs. functional approach*

The analysis of the rhapsodic rules concerning children consumers shows how European consumer law chooses a protective/paternalistic approach, which represents a steady note in global market (and this is due to the asymmetrical relation professional - consumer and to the risk of unfair practices against the latter).

For minors, in particular, this goal is stressed because of their peculiar vulnerability and of their specific need of protection. This is also due to the centrality gained in the market by children, who are frequently users of services and goods and, as such, they are often not enough aware and protected towards mass consumption system.

When we talk of children consumers, furthermore, we should consider also a different perspective, given by a functional approach (working on a different level), which shows how the picture that results from consumer law is all-encompassing and not completely corresponding to the specific role of children consumers. Considering themes such as subjectivity and capacity of minors (pointed out by liberationist social theories) allows in fact observer to deal with issues linked to minors' contracts also in the context of European harmonization.

For what concerns legal capacity, we can say that this notion has been absent in European provisions until very recent years; for long time, in fact, European laws portrayed children as consumers, user of services and, generally, only as subjects worthy of special protection.

Only recently, in application of Maastricht Treaty provisions, the issues (and the limits) of legal capacity have been examined by European community: the European Court of Justice has affirmed the importance of recognizing to children the same rights (inherent to European citizenship) of adults, since European citizenship is not to be considered a status depending on the attainment of majority³². The ECJ decisions suggest to evade the distinction existing in *Civil Law* tradition between the two forms of legal capacity (see e.g. *capacità giuridica - capacità d'agire, capacité de jouissance - capacité d'exercice, capacidad juridica - capacidad de obrar, Rechtsfähigkeit - Handlungsfähigkeit*) in the purpose to allow minors the exercise of those rights recognized (also) by the European Charter of Fundamental Rights in the perspective of *Equality before the law* (art. II-80 and *Non-discrimination*: art. II-81).

In this direction, the main goal is the implementation of the "non discrimination principle", which aims to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation³³.

³² See e.g. for ECJ: *Zhu case* (C-200/02 *Zhu*) and *Garcia Avello case* (C-148/02, *Garcia Avello*).

³³ The "non discrimination principle" combined with the notion of European citizenship allows also minors' rights to be taken into account wherever relevant in the conduct of European policies under the various legal bases of the Treaties: see COM (2006) 367, 4.7.2006.

This interpretation of minors' status reflects an attempt (common in modern sociological and legal theories) to overcome a dogmatic approach towards capacity, giving priority to the concept of legal subjectivity rather than to a (classical) legal presumption of incapacity. In this viewpoint, according to a functional approach, capacity should be assessed individually, taking into account the specific condition of each minor and according to the necessity to safeguard, even through representation, the exercise of fundamental rights.

6. *Minors' contractual capacity and *aquis communautaire**

In this light, we can affirm that the various provisions protecting minors in the field of European law cannot be regarded as being of the same nature. Since European law embraces different matters, we can differ a protective approach and a functional approach. The first is contained in the European provisions protecting minors with the aim to protect them from being harmed or deceived. These rules can be considered (in a wide sense) as public order and safety rules. Contrariwise, the functional approach is related to the notion of legal capacity and subjectivity of minors. In this regard, we evoked the jurisprudence of the European Court of Justice which make clear that a functional approach shall be followed in the European context with regard to rights guaranteed by European Treaties (as well as to human rights under the European Convention of Human Rights).

Put in this wider context, the issue of contractual capacity of minors gets linked to European harmonization and to *Common Frame of Reference* Process. Important as it is, this process concerns the revising of the *aquis communautaire* in the area of private law and the elaboration of a basis for a future European Code of Contract Law or *amplius* a European Civil Code³⁴.

We wonder which role is recognized in CFR to minors' capacity and how it performs this role in the smooth functioning of common market. However, this enquiry is destined not to find positive results. In fact, CFR draft³⁵ and PECL contain no rules concerning minors' contractual capacity, even if this choice is in contrast to the private laws of Member States. Among the *matters excluded*, in fact, we find «the status or legal capacity of natural person» and «lack of capacity»; thus, while European consumer laws keep a protective approach towards minors, the CFR process do not deal with questions of validity of contracts for the lack of capacity, considering rather this issue a matter of the law of persons than a matter of consumer or contract law. Another possible explanation of this choice could be that all Member States have rules concerning contractual

³⁴ See the Communication of the Commission to the European Parliament and the Council: A More Coherent European Contract Law. An Action Plan, COM (2003) 68 final. See also the Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Aquis: The Way Forward, COM (2004) 651 final.

³⁵ See http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf.

(in)capacity of minors and for this reason an harmonization of law in this field may look unnecessary.

However, although there's at stake no process of harmonization about contractual capacity, two seems to be the possible options to follow in a similar process: a *positive* and a *negative harmonization*. While a *positive harmonization* should balance adequately «*the three concerns (...): the concern for protection, the concern for emancipation and the concern for the interest of other Market participants*»³⁶, a *negative harmonization* would rather imply a reciprocal acknowledgment of national laws whenever these laws don't contrast with European Treaties rights. This is the rationale developed since *Cassis de Dijon*³⁷, according to which in case of absence of legal harmonization, the leading rule is the non discrimination principle.

7. Outlines of comparative law: the functional approach

Anyhow, as said, national laws of Member States have a common historical basis for legal capacity of certain categories of persons (minors and people with mental disease) which aims to protect them against their lack of competence. The purpose of these laws is traditionally found in the need of protection of these persons against their own acts and also in the protection of the interest of the other party of the contract; in this sense, the construction of legal incapacity is settled in *Civil Codes* also for legal certainty in trade, through a formal and rigid definition of the categories of incapables (whose contractual consent determines the invalidity of contract).

In national laws incapables are protected through the remedy of invalidity of contract, although there are differences in each system concerning the way in which this remedy works. In Italy, for instance, contracts are avoidable in case of incapacity (art. 1425 *c.c.*), unless the minors has hidden his age with tricks (art. 1426 *c.c.*). The party entitled to avoid the contract is the same minor once the *status* of incapacity is ceased (art. 1442 *c.c.*), the legal representative and those people allowed by *civil code* (artt. 322, 377, 396). Provisions like these are foreseen also in other systems: in France the contract can be avoided for lack of capacity, but only in the case of economic loss: «*La simple lésion donne lieu à la rescision en faveur du mineur non émancipé, contre toutes sortes de conventions*» (art. 1305 *c.c.*)³⁸. Similar provisions of voidability for minors' contracts are set also in Spain, England and several other countries: somehow, in fact, this rule represents a common core of national private law.

³⁶ See HESSELINK (2005, p. 500).

³⁷ ECJ (C-120/78).

³⁸ While according to Italian civil code «*minor restituitur tamquam minor sed non tamquam laesus*», French law follows the opposite rule «*minor restituitur non tamquam minor sed tamquam laesus*». German law foresees incapacity to contract for those persons who have not completed the seventh years of age and for those who have mental illness (§. 104 BGB) and declares void the declaration of intent made by a person without capacity (§. 105 BGB).

Since the last decades, however, the basis and *rationale* of these laws begin to be discussed. In conformity with the liberationist movement, modern legal theories tend to revise the limits of incapacity in order to allow *incapable* the free exercise of autonomy. Furthermore, according to recent legal doctrines, this revision is settled also to protect market functioning giving a presumption of binding validity of contracts.

Somehow, we can affirm that the original protective approach of the liberal codes of 19th century is replaced by a new approach which leads to the construction of a *capacity for incapables* that aims not to limit their access to market, but in the meantime is directed to guarantee their best interest. In this perspective, for instance, according to the current interpretation of traditional private law, the voidability of minors' contracts is replaced by the validity of "necessaries" and fundamental rights exercise acts.

The affirmation of contractual capacity is settled both for the fulfilment of individual personality and for the agile functioning of trade: *«le soutien des capacités du contractant vulnérable devient un intérêt commun des parties au contrat, puisqu'il favorise la bonne exécution du contrat. Il répond également à un intérêt général puisqu'il permet de neutraliser les conséquences de la vulnérabilité d'un contractant. Le contractant vulnérable peut, malgré ses faiblesses, conclure des contrats et ainsi tenir sa place dans la société»*³⁹.

In a similar way, HESSELINK says *«the rules (...) may be explained (...) by a wish to treat minors and people who are mentally ill as much as possible like any other person. However, they may also be explained in terms of the need to protect legal certainty in trade: the market needs the certainty that ordinary transactions and/or contracts which actually (i.e. 'objectively') are in the best interest of the otherwise incapable contracting party will be enforceable in law»*⁴⁰.

The presumption of binding validity of (certain categories of) contracts could become a general clause, similar to a "money rule", which may assume as valid a contract unless one can show, for instance, the lack of good faith of the counterparty to the contract.

8. Conclusion

The current debate on children's condition and the "tension" existing between the different perspectives of autonomy and protection were the starting point of this research and represent a central issue of contemporary juridical culture.

³⁹ See GODELAIN (2007, p. 530).

⁴⁰ See HESSELINK (2005, p. 498).

If, on the one hand, the modern debate concerning childhood tends to evade the restrictions (due to legal incapacity related to children private law status) for those activities which are explications of minors personality, on the other hand, it asks for specific instruments able to combine, in a new paradigm, autonomy and protection (acknowledging value to the capacity of discernment of children for selected juridical activities and) safeguarding through specific regulation minors towards detrimental operations of their patrimonial and personal interests.

From this point of view, consumer law follows mainly the protective approach, while leaving to national legislators the application of constitutional norms concerning autonomy and subjectivity of minors.

Notwithstanding, nowadays minors are receivers and protagonists of business operations, contracts and commercial communications and, through their access to market, they fulfil also their own interests and personality. Then we wonder how this access to market could be managed by European law and also how a European regulation for minors' contracts should be: should it introduce specific rules in order to balance autonomy and protection or rather should it refer to general consumer law also for minors? Consequently we ask: contractual liability of minors must arise always? Or a protection of minors' status should imply a liability only in case of fair price?

In this sense, it's useful to recall the Roman *Lex Laetoria* of II BC, according to which the demonstration of the lack of good faith of the other party and the economic loss suffered by the minor were the instruments of protection of minors towards adults' contractual exploitation.

But, as HESSLINK puts it, we may also ask «*why should not other persons who conclude a (very) imbalanced contract be also protected for that reason?*»⁴¹. Taking as a model Scandinavian contract law, the Author affirms: «*it seems a good idea to explicitly provide in a European Code of Contracts that very unbalanced contracts are not enforceable (or, technically, may be avoided/annulled). Indeed, such a rule currently exists in the Scandinavian countries. Articles 36 of their Contract Act says: "(1) An agreement may be amended or set aside, in whole or in part, if its enforcement would be unreasonable or contrary to principle of fair conduct. The same applies to other legal transactions. (2) In applying subsection 1 of this provision, consideration shall be given to the circumstances at the time of the conclusion of the agreement, the content of the agreement and later developments". On the basis of this article also the price may be policed. The Scandinavian experience shows that such a very broad general clause is not unworkable in practice*»⁴². Thus the problem gets wider and moves to the level of a *positive harmonization*, according to which fair functioning of trade asks not "invisible hands" but certain and formal legal regulation (in this way, the liberal idea of *freedom of contract*, as *cornerstone of the economy* is replaced by a *substantive freedom of contract* instrumental to social justice and individual protection in the market)⁴³.

⁴¹ *Ibidem*, p. 500.

⁴² *Ibidem*, p. 501.

⁴³ *Ibidem*, pp. 503-507.

Among the areas for further reflections, therefore, there should be space to think about how to conciliate minors' contractual capacity with legal certainty in trade and also about the opportunity (or less) of specific rules also for contractual liability of minors⁴⁴.

Another *de iure condendo* perspective may be suggested by Latin American experience which in turn recalls Roman law and the ancient distinction between *infans* and *infantia maior, pubere* and *impubere*. Accordingly, we wonder whether a future regulation of minors consumption could differ child and teen, without embracing minors in the same all-encompassing category, but, contrariwise, differing them (functionally) on the ground of the capacity of discerning and (subsequently) of their different needs of protection.

9. References

- ALPA, G. (1995), *Consumatore (tutela del) II) Diritto della Comunità europea*, in *Enc. giur Treccani*.
- , *Consumatore (tutela del) III) Diritto comparato e straniero*, *ibidem*.
- (2004), *I contratti del minore. Appunti di diritto comparato*, in *I Contratti*, pp. 517 ff.
- ALSTON, P.; PARKER, S.; SEYMOUR, J. (ed.) (1992), *Children, rights and the law*, Oxford, Clarendon Press.
- ARCHARD, D. (2004), *Children, rights and childhood*, London and New York, Routledge.
- BENACCHIO, G. (2001), *Diritto privato della Comunità Europea. Fonti, modelli, regole*, Padova, Cedam.
- CAPELLI, F. (1993), *Tutela dei consumatori nella Comunità europea con particolare riferimento ai bambini*, in *Il diritto comunitario e degli scambi internazionali*, pp. 715 ff.
- CALO', E. (1997), *Appunti sulla capacità d'agire dei minori*, in *Dir. fam. pers.*, II, pp. 1604 ff.
- (2001), *Nuove frontiere della capacità minorile: il caso dell'associazionismo studentesco*, in *Riv. notariato*, I, pp. 1103 ff.
- CENDON, P. (1993), *Il bambino e le cose. Diritti e doveri dei minori nella società dei consumi*, Milano, FrancoAngeli.
- CHIARELLA, M.L. (2006), *Il minore quale "target commerciale": diritti e tutele giuridiche nella società dei consumi*, in *Rivista di diritto minorile*, 2, pp. 13 ff.

⁴⁴ In order to combine the protection of minors with the protection of other parties in case of non – performance of the contract.

EAD. (2008), *Paradigmi della minore età. Opzioni e modelli di regolazione giuridica tra autonomia, tutela e responsabilità. Profili di diritto comparato*, Soveria Mannelli, Rubbettino Editore.

CHINÈ, G. (1997), *Il consumatore*, in LIPARI, N., *Diritto privato europeo*, Padova, Cedam, pp. 165 ff.

COOK, D.T. (2004), *The Commodification of Childhood: The Children's Clothing Industry and the Rise of the Child Consumer*, Durham, Duke University Press.

DE LA VILLE, V.-I.(ed.) (2005), *L'enfant consommateur. Variations interdisciplinaires sur l'enfant et le marché*, Paris, Vuibert.

DI MATTEO, L.A. (1994), *Deconstrutting the myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, in *Ohio N.U.L. Rev.*, pp. 481 ff.

EUROPEAN CONSUMER LAW GROUP, *"The protection of children against unfair marketing practices"*, (in <http://www.europeanconsumerlawgroup.org/Content/Default.asp>).

GODELAIN, S. (2007), *La capacité dans les contrats*, Paris, Fondation Varenne, L.G.D.J.

GROSSI, E. (2003), *La tutela del minore nel commercio elettronico e nella rete Internet*, in *Liuc Papers n. 138, Serie Impresa e Istituzioni 20, Suppl. a dicembre 2003*, pp. 1 ff.

GUNTER B.; OATES C.; BLADES M. (2005), *Advertising to Children on TV: Content, Impact and Regulations*, Mahwah, Lawrence Erlbaum Associates.

HESSELINK, M.W. (2005), *Capacity and Capability in European Contract Law*, in *European Review of Private Law*, pp. 493 ff.

JAMES, A.; PROUT, A. (eds.) (1997), *Construtting and Reconstrutting Childhood: Contemporary Issues in the Sociological Study of Childhood*, London, RoutledgeFalmer.

LOPEZ SAN LUIS, R. (2001), *La capacidad contractual del menor*, Madrid, Dykinson.

MARCANTONIO, M.; NICOLELLA, M. (1991), *La direttiva "Televisioni Senza Frontiere" e la sua attuazione in Italia*, in *Riv. dir. eur.*, pp. 639 ff.

MONTGOMERY, K.C. (2000), *Children's Media Culture in the New Millennium: Mapping the Digital Landscape*, in *The Future of Children*, 10.2, pp. 145 ff.

NOVI, C. (2007), *La tutela dei diritti dei minori nell'ordinamento comunitario*, in *Diritto pubblico comparato ed europeo*, pp. 186 ff.

PRESTON, L.; WHITE, C.L. (2004), *Commodifying Kids: Branded Identities and the Selling of Adspace on Kids' Networks*, in *Communication Quarterly*, 52.2, pp. 115 ff.

RONFANI, P. (2001), *I diritti del minore. Cultura giuridica e rappresentazioni sociali*, Milano, Guerini Scientifica.

SOLINAS, A. (2001), *La responsabilità del produttore nel settore dei giocattoli*, in *Contratto e impresa*, pp. 476 ff.

ZANETTI VITALI, E. (2001), *La tutela dei minori nel commercio elettronico*, in FRANCESCHELLI, V. (ed.), *Commercio elettronico*, Milano, Giuffrè, pp. 109 ff.

ZENO-ZENCOVICH, V. (1995), *Consumatore (tutela del) I) Diritto civile*, in *Enc. giur Treccani*.

--- (2002), *La regolamentazione delle nuove forme di pubblicità nella revisione della direttiva «TV Senza Frontiere»*, in *Dir. inf.*, pp. 3 ff.

ZIINO, D. (2000), *Comunicazione, pubblicità e tutela dei bambini e degli adolescenti*, in *Responsabilità comunicazione impresa*, 1, pp. 568 ff.