

# Refining the legal approach towards the underage consumer: A process still in its infancy

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## A. Introduction

- 1 If asked in what respects present-day consumers differ from those of a century ago, one can think of many possible answers, such as disposable income, brand loyalty, mobility, mentality and so on. One very significant aspect, though, will often not come to the mind: consumers have become much younger. The advent of e- and m-commerce has further sped up this development that was already in full swing. Nowadays children and adolescents constitute a sizable segment of the consumer population with their very own, sometimes contradictory, characteristics. On the one hand they are viewed as particularly vulnerable and protection-needy, while on the other they can be savvy and media literate as no other group. But not only may the nature of this heterogeneous consumer category be complex, the legal regime(s) under which they fall can be just as intricate. Especially the application of traditional, national rules in a digital and cross-border environment may prove confusing, to say the least. This situation thus gives rise to a broad spectrum of questions that is likely to continue to occupy the minds of academics (and hopefully those of politicians as well) in the years to come.
- 2 Recently, the author of this article contributed to an EU-commissioned study on 'digital content services for consumers' in which the subgroup of minors re-

ceived research attention as well. The comparative analysis that was carried out in this context gives interesting insights into the current European situation with regard to the underage consumer. The perspective of this article, however, will be broader (both in space and in time) than this study alone: the child-consumer will also be put in a historical context, which may shed some light on long-run tendencies regarding the economic relevance and autonomy of this subgroup as well as the legislative responses to these developments. Against this backdrop it will be examined in which direction(s) lawmakers have moved so far and to what extent this concords with everyday practice.

- 3 Besides that, there is the continuous interplay with technological aspects. While new media, platforms and devices can complicate the functioning of existing rules and provisions, they can also be used to make enforcement more effective and reliable. As a brief outlook, the final part will touch upon a few challenges and opportunities that the on-going digitization may bring about.

## B. A new consumer segment taking shape

- 4 Due to terminological and geographical indeterminacies, it is unfeasible to establish a precise moment in time when ‘the underage consumer’ came into being. It seems fair to assume, however, that the position of the child in the consumption process began to change somewhere in the early 20<sup>th</sup> century, especially in the United States.<sup>1</sup> In the 1910s, apparel retailers started to sell clothing for children in separate departments.<sup>2</sup> Previously, articles were arranged according to type, rather than to the age of the intended user. Of course, commerce specifically aimed at children was not completely new at the time – in Western Europe, toy shops already existed in the 18<sup>th</sup> century.<sup>3</sup> The change merely lay in the fact that children’s departments were created within warehouses selling mainstream products. Purchasing decisions, however, were still made by parents. Minors, far from being an autonomous group of consumers, could at best influence the parental choice. This factor, the indirect decisional power of children, became increasingly important in the decades ahead.<sup>4</sup>
- 5 At the same time, a more fundamental transition evolved in which traditional educational values, such as thrift and frugality, were replaced with new ones, such as wise spending.<sup>5</sup> In the United States, for example, School Savings Bank programs were gradually overtaken by consumer education. Along with this shift of emphasis from saving to spending, pocket money was ever more used as an instrument to familiarize children with controlling their own finances.<sup>6</sup> This can be considered an important step in the emancipation of the underage consumer: the commercial relevance of this group was no longer exclusively based on their ability to influence purchasing decisions; with their own money at their disposal, children also became directly involved in the consumption process.
- 6 In the years after World War II, the autonomy of the underage consumer increased even further. This is partially due to the consolidation of changes already set in during the early 20<sup>th</sup> century, but other developments played a role, too. Among the latter, one can discern the enhanced position of minors in the job market. During the economic boom in the post-war period, wages went up significantly, particularly when compared with the meagre years of the depression in the 1930s.<sup>7</sup> In the late 1950s, a teenage worker in Britain earned 50% more in real terms compared to pre-war levels.<sup>8</sup> These incomes often came on top of the pocket money they already received.
- 7 Changes in consumption patterns were also associated with demographic factors. First of all, the number of children per family steadily declined over

the last fifty years.<sup>9</sup> Combined with higher incomes brought about by the increase of dual-working families, more money could be spent per child. Similar numerical changes, with similar consequences, took place in the relationships of grandparents vis-à-vis grandchildren.

- 8 The sociological, psychological and cultural explanations for the rise of the child-consumer that have been put forward are even more numerous. Just to mention a few: as a reaction to the (relative) scarcities they had experienced in their own youth, the previous generation (over)compensated by coddling their children, the baby boomers;<sup>10</sup> working parents often redeemed guilt feelings towards their children with presents and gifts;<sup>11</sup> and through successful efforts by marketers to change the connotation of consumption – from traditionally feminine into a masculine, entrepreneurial and juvenile activity as well – a broader and younger segment of the population was tapped.<sup>12</sup>

## C. Economic and media literacy

- 9 With minors gaining financial autonomy and visibility in the course of the past century, advertisers also began to take increasing interest in this group of consumers. New technologies – the first of which was the television pervading the Western world in the post-war decades – gave rise to direct and insistent marketing strategies.<sup>13</sup> With the gradual diversification of programming, commercials could reach the intended viewer in a more precise manner.<sup>14</sup> This form of communication between business and the child-consumer further strengthened a direct relationship between them, thus contributing to the ongoing ‘emancipation’ of the latter.
- 10 With the advent of Internet, this process even seemed to accelerate. According to a Belgian survey about minors and e-commerce,<sup>15</sup> conducted in the scope of the European Commission’s Safer Internet Programme,<sup>16</sup> 34% of the minors interviewed have Internet access in their own room, and nearly all can use a shared computer for this purpose. When surfing on the Internet, most preadolescents (11 to 13 years old) and all adolescents (14 to 16 years old) visit commercial websites.<sup>17</sup> The frequency of Internet use steadily increases during childhood, reaching daily use around the age of 11. According to declarations of participants to the survey, awareness of privacy risks is quite low among all age groups and personal data – used to customize commercial communications – are often being shared without much of a hesitation.<sup>18</sup>
- 11 These findings suggest that children are often exposed, consciously and unconsciously, to commercial content and (targeted) advertising online. Even though the precise results may change per coun-

try, it seems fairly safe to conclude that the Internet has become an important (commercial) forum for minors, considering how early in life and how often it is used.

- 12 These emancipatory developments led to a reassessment of the relation between minors and commerce. In his book *The Kids Market*, Jim McNeal states that children constitute a three-layer market: a primary market for the money they spend on their own wants and needs, an influence market for as far as they direct their parents' purchases, and a future market of adult consumers on the basis of brand loyalty.<sup>19</sup> The author calculates that these layers, taken together, account for a multibillion market potential, unrivalled by any other demographic group.
- 13 An interesting question would be how these numbers exactly break down: What kind of products or services do minors buy? And what is the ratio between purchases made online and offline? Unfortunately, it seems that detailed statistics are still lacking.<sup>20</sup> However, in recent research on the situation, in the online environment some commercial activities and preferences are signalled more often, such as participation in auctions, visits to music and book stores like Amazon.com, the ordering of cinema or concert tickets and, ever more important, subscriptions to mobile phone services, in particular ringtones.<sup>21</sup> For some time, especially the latter has preoccupied national consumer authorities and the European Commission because a considerable number of providers active in this trade seem to operate in breach of Community law.<sup>22</sup>
- 14 It is important to notice, however, that revenues do not only come from direct transactions with minors. As mentioned earlier, in some business models the main objective is to gather personal data which are subsequently used for targeted advertising. To this end, websites offer games, quizzes or even virtual pets in exchange for children's personal data.<sup>23</sup> Considering the growing marketing expenditures for products aimed at children, a sum that in 2004 already totalled \$15 billion in the United States alone, this business sector is likely to become even more important in the coming years.<sup>24</sup>
- 15 But once we have established that minors can be quite active netizens who also use the Internet for commercial purposes, it's still unclear if they are sufficiently skilled to operate in a safe manner. Here we touch upon the issues of economic and media literacy. Given the openness of these concepts and the diversity among minors, it is hard to treat these matters properly within the limited scope of this article. Yet a few findings may be worth mentioning.
- 16 We'll first have a brief look at children's and teenagers' financial expertise. Out of the numerous studies that have been conducted in this field, the picture emerges that there are considerable differences among youngsters, often reducible to obvious factors such as age, but also to social background and access to financial institutions.<sup>25</sup> Educational efforts to improve financial literacy have often been criticized for not keeping up with present-day practice or for remaining too theoretical in nature.<sup>26</sup> That's why alternatives have been proposed that focus rather on 'empowerment' of the minor than on 'protection', as taken in its traditional sense.<sup>27</sup> This, however, should not be understood as a plea for 'learning the hard way' by letting children work it out themselves in the (online) commercial environment. Instead, one should think of opening accounts for pupils so that they get familiar with financial instruments and saving money, rather than denying them any practical experience. But when it comes to actual spending, more prudence is in order. Obviously, a (basic) understanding of financial matters does not necessarily imply the required discipline and self-control to resist all kinds of commercial temptations. Indeed, it is known that minors are particularly susceptible to marketing strategies and peer pressure.<sup>28</sup> Up to the age of 16, children are still undergoing cognitive and social developments during which the capacity to make well-informed, independent choices is not fully matured.<sup>29</sup> It is important to bear this in mind, even if modern attempts to enhance 'economic literacy' among youth might be successful.
- 17 Somewhat different is the situation with regard to media literacy. It is often held that the younger generations are much better versed in (the working of) new technologies than the older ones. Some authors even see a crucial distinction between those who are 'born digital' and those who are not.<sup>30</sup> And shouldn't it be admitted that minors can be savvy, picky, streetwise and unexpectedly well-informed as no other group?<sup>31</sup> On the other hand, it's important to realize that these characteristics are just part of a larger picture. Media literacy does not only consist in mere technical knowledge but also in the experience to put this to safe and effective use.<sup>32</sup> A recent EU-funded study called 'EU kids online' even warns that more skills are associated 'with more, not less, risk.'<sup>33</sup> In addition to that, the belief that 'digital natives know it all' tops their list of myths about children's online risks.<sup>34</sup> Of course this is not the only appraisal: there are others that put more emphasis on the 'smart kid' as well.<sup>35</sup> For the moment it may therefore be better to reiterate the earlier observation that 'minors' are anything but a homogeneous group. The cognitive differences between the various age segments are vast, and general qualifications often run the risk of being inadequate or incomplete representations of reality.<sup>36</sup>
- 18 As a consequence, a rather blurred picture of the underage consumer may arise. As one can expect, law precisely tailored to the needs of such a diverse group is hard to make. In the next paragraph we will

describe how legislations within Europe deal with this consumer on the rise.

## D. Legal and contractual capacities

- 19 The concept of 'legal capacities' as a way of protecting vulnerable parties has a long tradition, going back at least to Roman law.<sup>37</sup> To avoid misunderstandings, it is important to note that not the general capacity to have rights and obligations is meant here, for this is typically conferred upon natural persons at the moment of birth. In the context of the underage consumer, it is rather the 'contractual capacity' (which also goes under the broader name of 'legal capacity') that is relevant. Within the framework of this concept, rules have been developed to determine the validity of certain contracts.
- 20 At this point, no uniformity exists within the European Union, as all Member States have their own national contract laws. Even though some harmonization may be expected if Europe can, sometime in the future, agree upon a common set of contract law rules,<sup>38</sup> contractual capacities are very unlikely to be part of it. In an early stage this matter has been disqualified for harmonization, since it would rather appertain to the law of persons than to contract law. With this argumentation, the Lando Commission<sup>39</sup> has declared the subject outside the scope of the Principles of European Contract Law, as its article 4:101 explicitly states.<sup>40</sup> The subsequent (Draft) Common Frame of Reference or a future European civil code will therefore not change the continent's legal diversity on this point.
- 21 So, with regard to legal capacities, what does the European legal patchwork actually look like? For convenience of comparison it may be helpful to start with two characteristics that most jurisdictions have in common. First of all, a minor is typically defined as a person under the age of eighteen. Yet, under some circumstances – e.g. in the case of an early marriage – it is possible to attain majority even at the age of sixteen.<sup>41</sup> The second commonly shared feature is that persons enjoy no or limited legal capacities, as long as this age of majority has not been reached. Practically speaking, this means that legally binding contracts cannot be concluded unless parental consent has been given or an exception applies.
- 22 But when it comes to the exceptions, applicable laws within Europe start to diverge. Of course, this should not be understood as if every jurisdiction is highly unique in its approach: certain recurring principles can be discerned. Nonetheless, the translation of these principles into law and their interpretation by judges is often dissimilar. And even if such national idiosyncrasies did not exist, countries still make different selections out of the pool of criteria. Therefore, an overview of the European situation is hard to give without resorting to certain generalizations.
- 23 One of the most common exceptions may illustrate the point. In many jurisdictions, contracts can still be validly concluded by a minor, as long as they qualify as 'everyday' or 'usual'. But behind this broad term lies a wide range of nationally defined criteria. In France, for example, a minor always needs legal representation, except for 'acts of daily life' which, in their turn, are defined by the rather abstract concept of 'usage'.<sup>42</sup> The basic assumption that underpins this term seems to be that no serious risk may be involved in the transaction. Only trivial purchases, such as candies or other small objects, will therefore fall within the scope of the exception. In the Netherlands a comparable principle applies, but there the law refers to acts with regard to which it is 'common practice' that they are performed independently by minors of a certain age.<sup>43</sup> In the United Kingdom the situation is again somewhat different, since the Sale of Goods Act 1979 defines the exempted category as 'necessaries', i.e. goods suitable to the condition in life of the minor [...] and to his actual requirements at the time of sale and delivery.<sup>44</sup> Since this test has to be applied subjectively, with consideration of the actual circumstances it is hardly possible to predict with certainty what will be deemed a necessary other than basic needs such as food and clothing. And to make the assessment even more complicated, it is also required that the underage contractor had not already been adequately provided with the item that was purchased.<sup>45</sup>
- 24 Many more jurisdictions could be cited that all apply their own versions of this exception for 'usual' transactions. So, although it's not infrequently a common principle that inspires legislators, the diverse, national elaborations thereof do still lead to a rather heterogeneous situation in Europe. It is very likely that a doubtful case – let's say the downloading of a mid-priced video game by a fourteen-year-old minor – would be decided upon differently throughout the continent.
- 25 In some countries these difficult assessments, which are an inevitable result of 'limited' capacities, can simply be left untouched when the minor's age is below a certain minimum. In such cases, a contract concluded without parental consent is void or voidable, no matter the normality of the transaction or the necessity of the good. This 'threshold' is set at various ages, running from 7 in Germany<sup>46</sup> up to even 15 in Norway.<sup>47</sup> Of course, it is questionable whether it reflects daily practice when minors still lack any legal capacity only three years before adulthood. As pointed out earlier, in the course of the last century children have become ever more active and independent consumers. In addition to that, before turning fifteen, children are already likely to be familiar with purchasing 'anonymously' via computer or

mobile phone, which partially deprives the rule of its practical effect.<sup>48</sup> Of course, this objection can be raised (and *will* be raised later on in this article), not only with regard to minimum age provisions but on a much broader front.

- 26 But besides these protective measures, one can also find emancipatory rules – and it is the very same Norway with the high minimum age of 15 years that provides some interesting examples in this respect. Most importantly, there is the so-called pocket money exception.<sup>49</sup> This means that a minor is allowed to spend according to his own judgment all money intentionally placed at his free disposal. The same is true for transactions paid for by a minor's own earnings.<sup>50</sup> Compared to the standard of 'normality', this provision grants the underage consumer with greater autonomy. The purchase itself is not scrutinized to establish whether the transaction was allowable, but just the source of the money. It must be repeated, though, that these first steps towards full legal capacity are taken quite late in adolescence. In addition to that, exceptions for pocket money and own earnings are accompanied by rather stiff safety catches in the form of high minimum ages. Also in other countries that have similar exceptions, such as Poland and Hungary, the minimum ages are again rather high with 13 and 14 respectively.<sup>51</sup>
- 27 As this cursory look at the European situation reveals, the treatment of minors within contract law consists of a combination of elements both aimed at the protection and at the empowerment of the underage consumer. This dilemma was already faced in the 1970s when the Council of Europe adopted a resolution<sup>52</sup> that lowered the age of full legal capacity to 18 years. Its fourth recital reads: 'Believing that even though life today is more complex than formerly, the education gained during a prolonged and compulsory schooling and the abundance of information available enable young people to meet the exigencies of life at an earlier age than before.'<sup>53</sup>
- 28 The statement pithily summarized the forces that were in play: life was getting increasingly complex, and youngsters were growing more and more accustomed to it. Even though this observation may still hold some truth nearly forty years after its drafting, it also sounds somewhat dated. Today the argument of 'prolonged and compulsory schooling' sounds less compelling when it comes to the pitfalls modern consumers may encounter. In this respect, the digital and technological savvy of younger generations may sometimes trump the 'prolonged and compulsory schooling' of the older ones. Obviously, this doesn't turn things around completely: during childhood, cognitive and psychological capacities are still in the process of development and are not equal to those of an adult. However, the uneven distribution of digital skills over the generations does have its effects on traditional notions about vulnerability.
- 29 The same can be said about the information argument. Where the Council believed that 'the abundance of information' could only be beneficial to the young consumer, today this view has been substantially nuanced. Strategic uses of 'abundant information' by traders can also be a threat to transparency, hurting in particular less experienced (and often underage) parties.
- 30 Admittedly, the resolution should be understood in the context of its time, and a modern interpretation could easily fail to grasp its emancipatory essence. An anachronistic reading, however, may reveal how volatile the subject is. The appropriate level of protection should continuously be assessed against the backdrop of the society's complexity and the child's maturity (as referred to in the recital): while ever more hazards and lures are out there, minors also get increasingly skilled in understanding and avoiding them. The balance that is subsequently struck differs in space and in time. Although an overall tendency towards the enhancement of a minor's autonomy seems to prevail, a closer look shows that this course is far from 'linear'. More recent pieces of legislation, mainly in the field of unfair commercial practices (and media law), illustrate that the struggle between sufficient protection and further emancipation is still on-going.

## E. Unfair commercial practices

- 31 Under contract law, protection of minors is mainly corrective in nature, since it can only offer remedies *after* an undesired contract has already been concluded. Of course, such provisions often have preventive effects as well: when parties expect that the validity of a certain transaction can easily be affected, it is less likely to be initiated. However, this will hardly count as a sufficient reassurance. Because many unwanted contracts will still be concluded (only a small percentage of which will make it to judicial examination), earlier intervention in the form of market regulation remains necessary.
- 32 The European legislator has taken up this task on several occasions. Most recently with the introduction of a Directive on Unfair Commercial Practices, in which some provisions for the protection of vulnerable consumers have been adopted.<sup>54</sup> Article 5(3) of the Directive, for example, sets forth that commercial practices aimed at a 'clearly identifiable group [...] shall be assessed from the perspective of an average member of that group'. The article makes particular mention of those who are vulnerable because of 'their mental or physical infirmity, age or credulity'. Even more specific is the reference to 'children' in no. 28 of the Directive's first Annex, which designates as 'misleading' any 'advertisement [that contains] a direct exhortation to children to buy adver-

tised products or persuade their parents or other adults to buy advertised products for them.’

- 33 So may we already speak of a robust reinforcement of the underage consumer’s legal position? Not quite. First of all, both provisions sanction existing practice rather than enrich it with new or additional measures. The prohibition of commercial exhortations towards children was already included, albeit in a slightly different wording, in the 1989 Television without Frontiers Directive (which will be discussed shortly). And the flexible benchmark consumer, adaptable to the addressees of the commercial practice, is also certainly not a novel concept. As revealed by a survey conducted in the context of the study on ‘digital content services for consumers’, national legislations often already provide for this kind of adjustment when interpreting such open norms.<sup>55</sup> In Germany, for example, the Supreme Court considered an advertisement for an excessively priced ringtone subscription unfair by giving particular weight to the young age of the targeted public, whose inexperience was capitalized on.<sup>56</sup> It is quite conceivable that the Directive will not have a significant bearing on the approaches national courts already took. And if any effect is nonetheless to be expected, in some jurisdictions this may also be the lowering, not the heightening, of the level of protection. Indeed, the Unfair Commercial Practices Directive is a maximum harmonization instrument that could in some cases require a ‘downward’ adjustment of national legislations. Micklitz, for example, observes that under Swedish and Finnish laws, rules about advertisements aimed at children are more stringent than in the Directive, in particular no. 28 of its first Annex.<sup>57</sup> This means that the implementation of the new standard could leave the underage consumer even worse off, at least in those countries.
- 34 Of course, all this doesn’t imply that no good should be expected from the Directive. Since it outlaws a considerable number of practices for being misleading or aggressive, it undoubtedly entails benefits to the consumer *at large*. Yet before placing the Directive in a tradition of increasing (or decreasing) protection for the specific subgroup of minors, it should be examined alongside more fundamental transformations in consumer law. As some authors have roughly sketched, in the past century legislators have gradually moved away from a *laissez faire* ideology in favour of values such as solidarity and equality.<sup>58</sup> Boldly put, we are all ever more regarded as vulnerable parties. Seen within this greater development, the protection granted to minors by adopting a ‘new’, adjustable benchmark consumer for the evaluation of commercial practices hardly stands out. In addition to that, the flexibility of the standard makes its practical functioning uncertain and probably nationally coloured.<sup>59</sup>
- 35 So if the European legislator has resumed his role of caretaker towards minors by issuing the Directive on Unfair Commercial Practices, it cannot be denied that he did so with some reticence.
- 36 The relative restraint of the approach becomes even more apparent when it is compared to earlier initiatives aimed at strengthening the protection of minors, such as the aforementioned Television without Frontiers Directive,<sup>60</sup> which later was replaced by the Audiovisual Media Services Directive.<sup>61</sup> The former may – somewhat euphemistically – be called ‘ambitious’ in this respect. While commercial television was on a rapid rise, Europe felt that prompt and effective measures had to be taken to regain some control over the content and advertisements reaching the public.<sup>62</sup> Commercials and unsuitable programs were subjected to detailed rules safeguarding the physical, mental and moral development of minors. By adding subsequent amendments, which resulted in the said Audiovisual Media Services Directive, the stringency of the provisions was made contingent on whether content was broadcast or, less intrusively, made available on-demand.
- 37 The rules in these Directives are rather elaborate and explicit: they proscribe aggressive advertising strategies aimed at children<sup>63</sup> (such as those exploiting their credulity or containing exhortations to buy a product; cf. number 28 of the Unfair Commercial Practices Directive first Annex), addressing minors in commercial communications for alcoholic beverages<sup>64</sup> and making available to them pornographic or violent content.<sup>65</sup> And not unimportantly: the provisions only formed a minimum threshold. Although these and many other articles have been preserved in the Audiovisual Media Services Directive, the spirit of the Directive has changed significantly in the course of the amendments. While the first version exhibited a relatively strong belief in the efficacy of legislation, its successors appeared to put more responsibility on (media) consumers themselves. In this new approach, the emphasis shifted to – here it is again – media literacy, which according to the Directive consists of the skills, knowledge and understanding that allow consumers to use media effectively and safely.<sup>66</sup> By upgrading consumers, including minors, ‘from couch potato[es] to active market player[s]’<sup>67</sup> the European Commission made a visible attempt to eschew its traditional paternalistic reflexes. ‘Empowerment’ became the new shibboleth in Brussels, which could better be achieved by ‘continuing education’, ‘internet training’ and ‘national campaigns’ than by further expanding the legal arsenal.<sup>68</sup> The efficacy of such an approach obviously remains very uncertain. We saw before that there are clear limits to what any financial or media education program can accomplish. So, as with the Unfair Commercial Practices Directive, it again seems advisable to retain some caution about the re-

modelled Directive's face value until more is known about its practical consequences.

## F. Legal challenges and opportunities in the digital era

- 38 When the underage consumer ascended nearly a century ago, the world looked considerably different. Consumption required face-to-face contact with traders, no television existed and much less the Internet. Even though laws have also changed in the wake of advancing technologies, their development has been rather modest. The age of full legal capacities has been lowered somewhat, and media laws have been put in place to protect against undesirable content. However, this legislative trend, which may at best be called cautiously emancipatory, seems to have proceeded at a slower pace than everyday practice.
- 39 Especially the advent of the Internet and mobile phones has significant implications for minors as consumers, both from a practical and a legal perspective. While the former has already been briefly discussed in the historical analysis, the latter might need some further clarification.
- 40 Since online transactions take place without contracting parties being physically present, minors cannot be differentiated from adults.<sup>69</sup> This means that traders are usually not aware of the legal (in) capacities of their customers. Where minors would have difficulty to conclude certain contracts in 'offline' stores, in the digital environment they can easily escape notice. This may seriously undermine the preventive effect that the doctrine of legal capacities used to have. Obviously, this can come to the detriment of traders, who may face voidances of contracts they could hardly prevent. (To mitigate these adverse effects somewhat, a few countries have stipulated that such protection may not be invoked in case of fraud or deceit.<sup>70</sup>)
- 41 Another complication lies in the fact that e-commerce can easily cross borders, thus becoming subject to a host of different legal regimes with different criteria, exceptions and terminologies. While underage consumers gained autonomy and mobility – combined with decreased recognisability – their protection is still nationally organized and based on traditional concepts.
- 42 In addition to these uncertainties, the digitization may also give rise to legal conundrums. An important issue, for example, regards the voidance of contracts involving intangible products, such as a ringtone or a movie in a streaming format. National law often stipulates that undoing a transaction entails the restitution of the good. Obviously, this can hardly be applied to content delivered in a digital form. Hence rules relating to services – which are usually incapable of being rendered – may come into play. However, the typical solution – that in such circumstances, compensation is due if the content has been to the true benefit of the minor (which will often be the case) – makes voidance a sham remedy. But the opposite approach, in which risks and costs should be borne by traders, is also hard to justify.
- 43 So it does seem that existing laws are not always fit for the digital environment. While it is rather obvious that this will affect businesses operating online, especially when legislation is scattered or unclear, consequences may also be felt by the underage consumer. Indeed, undesired and possibly voidable contracts will often not be subject to judicial review.<sup>71</sup> Legal problems that traders may face from a theoretical point of view will therefore not always materialize in actual adverse judgments. When the increased facility of entering into all kinds of agreements has negative effects, they will not infrequently stay with the aggrieved minors and/or their parents. Secondly, legal costs that *are* being made by companies are likely to be partially passed on to their customers by way of higher prices. So the financial burden of inadequate legislation will probably be shouldered by businesses and consumers alike.
- 44 Of course, the on-going digitization should not only be viewed as a threat to the smooth functioning of laws dating from the previous century. If used intelligently, new technologies can also be used to *enhance* the transparency of online consumption. By developing sophisticated age verification tools, legal capacities can be assessed even more reliably than ever before.<sup>72</sup>
- 45 And perhaps that's not all. When such tools become part of smarter payment systems, other opportunities may arise as well.<sup>73</sup> Take, for example, the exceptions to the rule of legal incapacity in the case of pocket money or own earnings as enacted in some jurisdictions. If new payment systems allowed for the 'labelling' of money, such emancipatory provisions might gain practical significance. Instead of creating legal uncertainty, digitization could also be employed to reduce it.

## G. Conclusion

- 46 In the course of the 20<sup>th</sup> century, minors have become an ever more important consumer segment. The era in which they could, at best, influence their parents' purchase decisions, popularly termed the 'nagging factor', is long past. Today, underage consumers have their own resources at their disposal in the form of allowances or their own earnings, and spending them is often just a mouse-click away. In

addition, consumption increasingly takes place in the digital environment, which makes it harder to recognize and prevent inappropriate transactions.

- 47 The legislative response to the enhanced autonomy of this subgroup may be called cautiously emancipatory: the age of majority has been lowered to eighteen years throughout Europe, and exceptions to the default rule of absent legal capacities have been introduced in most countries. However, lawmakers (at both a national and a European level) have also taken steps to protect this vulnerable group against the risks of new media and intrusive or deceptive advertisement strategies. Since this simultaneous ‘paternalistic’ tendency cannot only be perceived with regard to minors, but rather to the consumer at large, it is hard to isolate and characterize the legislative stance towards the former.
- 48 But probably more important than this issue of typification is the question whether the current approach is in line with everyday practice. At this point, doubts may be raised. First of all, the current system of legal capacities works on the assumption that the suitability of contracts is assessed by traders on a case-by-case basis, considering e.g. the age of the consumer and the nature of the purchase. In the context of e- and m-commerce, such appraisals will (and can) hardly ever be made. And neither are the remedies always fit for the digital age, as the voidance of digital content contracts may illustrate. Moreover, there is the problem of scattered legislation governing a cross-border phenomenon. The legal uncertainty resulting from this fragmentation is likely to burden online commerce with practical hindrances and financial costs.
- 49 So how should policy makers respond to all this? As argued before, an easy solution to these problems probably does not exist. Minors form a large, highly heterogeneous group of consumers, which complicates the draft of clear-cut rules that suit all. In the light of this difficulty, one may be sceptical about the chances of quick and effective legal reforms being put in place. In this respect, it suffices to recall the explicit rejection to deal with the subject of legal capacities in the (Draft) Common Frame of Reference. And even if an attempt to harmonization were made, the outcome of such a harsh task would inevitably be prone to criticisms. This doesn’t alter the fact, however, that consumers and businesses would probably welcome such political courage: a single set of rules could help cross-border trade function much more smoothly, thus reducing transaction costs. If, for example, minors in Europe were allowed to conclude ‘everyday contracts’, this could significantly level the common commercial playing field without imposing a very unfamiliar criterion. But for a large number of small reasons, such a step is unlikely to be taken.
- 50 And if it’s not from a practical perspective, then there might also be a more fundamental reason to question whether trust should predominantly be put in the legislators in the present case. Technological developments have played an important role in shaping the current underage consumer and in challenging existing laws as to their applicability and tenability. It may well be the case that (a part of) the solution must be sought in the very same field that necessitated reforms in the first place. The development of reliable age verification tools or smarter payment systems could reduce uncertainties and make digital commerce more transparent for traders and consumers alike. Even though caution is advised, especially when it comes to privacy implications, the protection and empowerment of the underage consumer may this time depend on forces other than legislators alone.

- 1 D. Cook, *The Commodification of Childhood: The Children’s Clothing Industry and the Rise of the Child Consumer* (Durham: Duke University Press, 2004), 41-65.
- 2 *Ibid.* Cook mentions in particular a manufacturer of infants’ garments called Earnshaw. The new marketing strategy was combined with the issuance of specialized catalogues, such as *The Children’s Wear Review*.
- 3 P.N. Stearns, *Consumerism in world history: the global transformation of desire* (London and New York: Routledge, 2006), 20.
- 4 Cook, *The Commodification of Childhood*, 66-95.
- 5 L. Jacobson, *Raising Consumers: Children and the American Mass Market in the Early Twentieth Century* (New York: Columbia University Press, 2004) 56 et seq.
- 6 G. Cross, ‘The Consumer Economy’, in *The Encyclopedia of Children and Childhood in History and Society*, vol. 1, ed. Paula S. Fass (New York: Macmillan Reference, 2004 ), 242 et seq.
- 7 B. Gunter & A. Furnham, *Children as consumers: a psychological analysis of the young people’s market* (London and New York: Routledge, 1998) 1.
- 8 J. Davis, *Youth and the condition of Britain: images of adolescent conflict* (London: Atlantic Highlands, 1990) 118.
- 9 J. McNeal, *The Kids Market: Myths and Realities* (Ithaca NJ: Paramount Market Publishing, 1999), 20.
- 10 E. Seiter, *Sold Separately: Children and Parents in Consumer Culture* (New Brunswick, NJ: Rutgers University Press, 1993), 15.
- 11 McNeal, *The Kids Market*, 22.
- 12 Jacobson, *Raising Consumers*, 13.
- 13 See also M.L. Chiarella, ‘The Regulation of Child Consumption in European Law: Rights, Market and New Perspectives’, *Revista para el Análisis del Derecho* 3 (2009): 5.
- 14 S.L. Calvert, ‘Children as Consumers: Advertising and Marketing’, *The Future of Children* 18/1 (2008): 207.
- 15 The survey was carried out in 2008 by OIVO-CRIOC, the Information and Research Centre of the Belgian Consumer Organisations, and is online accessible at <[www.oivo-crioc.org/files/nl/3943nl.pdf](http://www.oivo-crioc.org/files/nl/3943nl.pdf)> <http://www.oivo-crioc.org/files/nl/3943nl.pdf> (Dutch) and <[www.oivo-crioc.org/files/fr/3944fr.pdf](http://www.oivo-crioc.org/files/fr/3944fr.pdf)> <http://www.oivo-crioc.org/files/fr/3944fr.pdf> (French).
- 16 For more information, see the website at <[ec.europa.eu/information\\_society/activities/sip/policy/programme/index\\_en.htm](http://ec.europa.eu/information_society/activities/sip/policy/programme/index_en.htm)> [http://ec.europa.eu/information\\_society/activities/sip/index\\_en.htm](http://ec.europa.eu/information_society/activities/sip/index_en.htm)

- 17 Survey by OIVO-CRIOC, 15-16. Contrary to what one might expect, the interest in commercial websites does not grow linearly with age, but shows two 'peaks' instead: one at the age of 12/13 and one at 16.
- 18 This should not be understood, however, as though minors were not aware of any privacy risks in the online environment. See, for example, S. Youn, 'Teenagers' perceptions of online privacy and coping behaviors: a risk-benefit appraisal approach', *Journal of Broadcasting & Electronic Media* 49/1 (2005): 86-110.
- 19 McNeal, *The Kids Market*, 29.
- 20 *Ibid.*
- 21 See the OIVO-CRIOC survey, 15-16, R. Willet, 'Consumer Citizens Online: Structure, Agency, and Gender in Online Participation', in *Youth, Identity, and Digital Media*, ed. D. Buckingham (Cambridge, MA: The MIT Press, 2008) 53, K.C. Montgomery, 'Digital Kids: The New On-Line Children's Consumer Culture', in *Handbook of Children and the Media*, eds. D.G. Singer & J.L. Singer (London: Sage Publications, 2001) 635-650, D. Cook, 'Knowing the child consumer: historical and conceptual insights on qualitative children's consumer research', *Young Consumers*, 10/4 (2009): 269-282 and Calvert, *Children as Consumers*.
- 22 See a press release by the European Commission, IP/09/1725, Brussels 17 November 2009. For an overview of the results in national investigations by consumer authorities, see the accompanying MEMO/09/05.
- 23 See, for example, Ellen Seiter about the website [www.neopets.com](http://www.neopets.com), E. Seiter, *The Internet playground: children's access, entertainment, and mis-education* (New York: Peter Lang Publishing, 2005), 83-100.
- 24 Calvert, *Children as Consumers*, 207.
- 25 M.H. McCormick, 'The Effectiveness of Youth Financial Education: A Review of the Literature', *Journal of Financial Counseling and Planning* 20/1 (2009): 70-83.
- 26 L.E. Willis, 'Financial Education: Lessons Not Learned & Lessons Learned', Legal Studies Paper No. 2011-22, Working Paper presented at Conference on Financial Education and Consumer Financial Protection (Boston 2011).
- 27 See, for example, E. Johnson and M.S. Sherraden, 'From Financial Literacy to Financial Capability among Youth', *Journal of Sociology and Social Welfare* 34/3 (2007): 119-146.
- 28 D.R. John, 'Consumer socialization of children: A retrospective look at twenty-five years of research', *Journal of Consumer Research* 26 (1999): 183-213.
- 29 *Ibid.*
- 30 See in particular J. Palrey & U. Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (New York: Basic Books, 2008).
- 31 See, for example, Seiter, *The Internet playground*, 106.
- 32 See also the definition of 'media literacy' in the Audio Visual Media Services Directive, Recital 47.
- 33 The short explanation for this statement is that 'more use leads to more skills, more skills lead to more opportunities, and opportunities are linked to risk. One reason that opportunities and risks are linked is because children must explore and encounter some risk to learn and gain resilience. Another is that exploring for information or fun leads to unexpected risks because the online environment is not designed with children's interests in mind (too many pop-ups, for instance).' See S. Livingstone et al., 'Final Report EU Kids Online', deliverable 8.3 for the EC Safer Internet Programme, 43, available online at <[www2.lse.ac.uk/media@lse/research/EU-KidsOnline/Home.aspx](http://www2.lse.ac.uk/media@lse/research/EU-KidsOnline/Home.aspx)>.
- 34 'Children knowing more than their parents has been exaggerated – only 36 per cent of 9-16-year-olds say it is very true that "I know more about the internet than my parents" – 31 per cent say "a bit true", and two in three 9-10-year-olds say "not true". Talk of digital natives obscures children's need for support in developing digital skills.' Livingstone, Final Report EU Kids Online, 43.
- 35 According to Seiter, the truth about children's ability to discriminate isn't even in the middle: 'I believe the advertising industry's image of the savvy viewer is much closer to reality than ACT's [Action for Children's Television] image of the innocent child.' Seiter, *Sold Separately*, 106.
- 36 D.R. John describes how the development of the underage consumer can be subdivided in three stages, differing significantly among each other: the perceptual stage (3-7 years), the analytical stage (7-11 years) and the reflective stage (11-16 years); see D.R. John, 'Consumer socialization of children: A retrospective look at twenty-five years of research', *Journal of Consumer Research* 26 (1999): 186.
- 37 Under Roman law, the attribution of legal capacities – that is, the faculty to enter into legally binding agreements – was made contingent upon a number of features, such as age, sex, citizenship and mental health. Male minors, for example, could independently transact all business matters for themselves from the age of 14 onwards. However, until the age of 25 they enjoyed special protection against fraudulent or even disadvantageous transactions, which made them unattractive counterparties for adult traders. Only when the minor had appointed a curator (which was often the case, especially when the minor had possessions of any significance) could contracts confidently be concluded upon the approval of the latter. See A. Berger, *Encyclopedic dictionary of Roman law* (Philadelphia: The American Philosophical Society, 1991), 379 and W.L. Burdick, *The principles of Roman law and their relation to modern law* (Clark NJ: The Lawbook Exchange 2007), 269.
- 38 For an update by the Commission about the progress that has been made so far, see the 'Optional Instrument', European Commission, Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011)636final, Brussels, 11.10.2011.
- 39 Officially known as the Commission on European Contract Law.
- 40 This chapter does not deal with invalidity arising from illegality, immorality or the lack of capacity.'
- 41 M. Loos et al., *Digital Content Services for Consumers: Comparative analysis, law and economics analysis, assessment and development of recommendations for possible future rules on digital content contracts* (Amsterdam: University of Amsterdam, 2011), final report prepared for the European Commission, accessible online at <[http://www.ivir.nl/publications/helberger/digital\\_content\\_contracts\\_for\\_consumers.pdf](http://www.ivir.nl/publications/helberger/digital_content_contracts_for_consumers.pdf)>, p. 138.
- 42 The so-called 'actes de la vie courante,' see N. Baillon-Wirtz, *L'enfant, sujet de droits* (Paris: Lamy, 2010), 126 on article 408 of the French civil code.
- 43 See article 1:234 of the Dutch Civil Code.
- 44 Sale of Goods Act 1979 s 3(3).
- 45 P. Richards, *Law of contract* (Oxford: Oxford University Press, 2007), 86.
- 46 Article 104 of the German Civil Code.
- 47 Article 33 of the Norwegian Guardianship Act.
- 48 The Consumer's Ombudsman in Norway has indicated this lack of physical presence as one of the major challenges with regard to the enforcement of the Guardianship Act. See the 'Consumer's Ombudsman Guidelines on Commercial Practices towards Children and Youth' (Oslo 2009), 15 available at <[www.forbrukerombudet.no/english](http://www.forbrukerombudet.no/english)>.
- 49 Loos et al, *Digital Content Services for Consumers*, p. 138-141.
- 50 *Ibid.*

- 51 *Ibid.*
- 52 Resolution (72)29 on the lowering of the age of full legal capacity, adopted by the Committee of Ministers on 19 September 1972 at the 213<sup>th</sup> meeting of the Ministers' Deputies.
- 53 *Ibid.*, 4<sup>th</sup> Recital.
- 54 Article 5(3) and No. 28 of Annex I of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.
- 55 Loos et al, *Digital Content Services for Consumers*, p. 141-142.
- 56 Bundesgerichtshof, case I ZR 125/0, rendered April 6<sup>th</sup> 2006.
- 57 G. Howells, H. Micklitz & Th. Wilhelmsson, *European Fair Trading Law, The Unfair Commercial Practices Directive* (Aldershot, Hampshire: Ashgate, 2006), 249, note 24 and 25.
- 58 See also M. Hesselink, 'Capacity and Capability in European Contract Law', *European Review of Private Law* 13/4 (2005), 497.
- 59 See again Micklitz, who rightly points out that the terms used in article 5(3) are often open to national interpretations, which may notably differ among each other. The 'children', for example, referred to in recital 18 are not defined (by age or otherwise) and neither are qualifications such as 'credulity' or 'commercial inexperience.' This means that 'Member States will retain a margin of appreciation in determining the need for protection of weaker parts of the population as the Community is far from agreeing and wanting to agree on such subtle, and at the same time fundamental, social policy questions.' See G. Howells, H. Micklitz & Th. Wilhelmsson, *European Fair Trading Law*, 113-115.
- 60 Directive 89/552/EEC of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.
- 61 Directive 2010/13/EU of the European Parliament and of the Council 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).
- 62 C. Pauwels, H. Kalimo & K. Donders, *Rethinking European Media and Communications Policy* (Brussels: Brussels University Press, 2010) 141.
- 63 Article 9(1)(g) of the Audiovisual Media Services Directive (2010/13/EU), which replaced article 16(a-d) of the Television without Frontiers Directive (89/552/EEC).
- 64 Article 9(1)(e) of the Audio Visual Media Services Directive replacing article 15(a) of the Television without Frontiers Directive.
- 65 Article 27 of the Audio Visual Media Services Directive replacing article 22 of the Television without Frontiers Directive.
- 66 Audio Visual Media Services Directive, 47<sup>th</sup> Recital.
- 67 N. Helberger, 'From eyeball to creator - toying with audience empowerment in the Audiovisual Media Service Directive', *Entertainment Law Review* 6 (2008) 137.
- 68 Audio Visual Media Services Directive, Recital 47. See also the Safer Internet Programme at <ec.europa.eu/information\_society/activities/sip/index\_en.htm>; a five-year extension of the programme (up to the year 2013) has been agreed upon by the European Parliament and the Council in Decision No 1351/2008/EC, entailing a € 55 million financial envelope; see art. 6(2).
- 69 In the words of D. Kidd and W. Daughtrey, '[e]lectronic contracts may never appear on a piece of paper, may involve instantaneous transactions, may involve minimal or no negotiation or interaction, and may involve no human interaction at all.' See D.L. Kidd & W.H. Daughtrey, Jr., 'Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions', *Rutgers Computer & Technology Law Journal* (26) 2000, 215.
- 70 Loos et al, *Digital Content Services for Consumers*.
- 71 Especially when the product is of limited value, as may often be the case when a purchase by a minor is concerned, many consumers would not bring a dispute to court because they deem it too costly or time consuming. See Chapter IV of the European Commission Special Eurobarometer 195, 'European Union Citizens And Access To Justice', October 2004, available at <ec.europa.eu/consumers/redress/reports\_studies/eurobarometer\_11-04\_en.pdf>.
- 72 The use of age verification tools may also have undesired side-effects, mainly in the field of privacy. About the benefits and risks of age verification technologies: F. Gilbert, 'Age Verification as a Shield for Minors on the Internet: A Quixotic Search?', *Shidler Journal of Law, Commerce and Technology* 6 (2008), G. Hornung & A. Roßnagel, 'An ID card for the Internet - The new German ID card with "electronic proof of identity"', *Computer Law & Security Review* 26/2 (2010) 151-157, and from a broader perspective S. Livingstone, *Children and the Internet* (Cambridge: Polity Press, 2009), 91-120.
- 73 Although quite a few such payment systems are the subjects of patent (applications), widespread use of these inventions still seems far away. For example, see US Patent No. 7,502,761 and Patent applications No. 20090210240 and 20080265020.