

Minors' data protection between e-learning and social network platforms

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Abstract

The paper analyses the impact of Internet on minors' privacy right. It focuses on two aspects. On the one hand, the health emergency of the last few months has imposed schools to provide smart lessons, which, however, pose new problems of data protection. On the other hand, more complex issues are involved when minors use social networks. Thus, it is essential to determine which role parents have and in which extent minors are able to express their consent. The purpose of the paper is to show the new emerging challenges in this field, overcoming some difficulties of coordination between the Italian law and the E.U. framework, in order to assure an effective protection to minors in the digital environment.

Keywords: minor's privacy right - data protection; smart learning; digital consent - social network - compliance.

Summary: Introduction. – 1. Minors and smart learning: new challenges for data protection. – 2. Minors' digital consent in the social network context. – 3. Possible conflicts between minor's digital consent and parents' liability. – Conclusions.

Introduction.

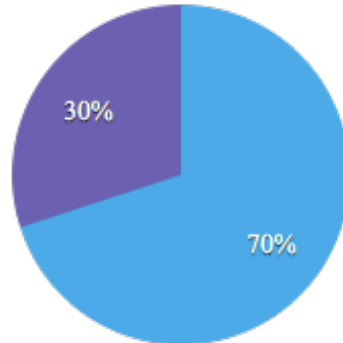
Nowadays, data protection of individuals is one of the most challenging issue from a legal point of view. The development of new technologies and the constant use of the Internet enhance the exchange of personal data in a way which is not always well-informed. The unseen risks of the web may be even more harmful when children are in front of a computer or a mobile phone and are left alone to surf the Internet. Indeed minors may be completely unaware of privacy risks, on the one hand, and may not be able to understand privacy terms of an online service or platform, on the other hand. Such issue has become more compelling in accordance with the increasingly presence of the Internet in children's lives and the amount of time they spend online¹. Scientific and sociological studies show that the largest percentage of minors use the web to keep in touch with their friends by-means of several social networks, creating their own profile and posting photos or videos with great confidence, but without having any knowledge or – the worst - interest for possible implications about their privacy². Moreover, even adults often use social networks posting

1 See. F Di Ciommo, 'Diritti della personalità tra media tradizionali e avvento di internet', in G Comandè (ed), *Persona e tutele giuridiche* (Giappichelli, 2003); S Livingstone, *Ragazzi online. Crescere con internet nella società digitale* (Vita e pensiero, 2010); A Spangaro, *Minori e mass media: vecchi e nuovi strumenti di tutela* (Ipsos, 2011); J Van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford University Press, 2013); S Rodotà, *Il mondo nella rete, quali i diritti e quali i vincoli* (Laterza, 2014); C Perlingieri, 'La tutela dei minori di età nei social network' (2016), *Rass. dir. civ.*, 1324.

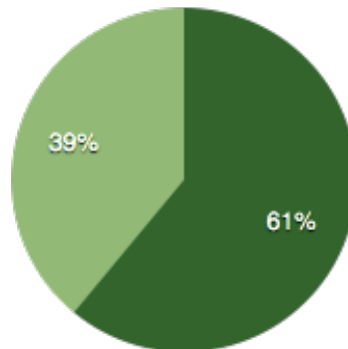
2 See. A Thiene, 'L'incosistenza della tutela dei minori nel mondo digitale' (2011), 5, *Studium iuris*, 528; K Davis, C James, 'Tweens' Conception of Privacy Online: Implications for Educators' (2013), 1, *Learning*,

photos or videos of their children.

- Ragazzi che navigano su internet senza controllo
- Ragazzi che navigano su internet con la guida dei genitori



- Condivide foto o video personali
- Non condivide foto o video personali



3^a Annual Survey of the Scientific Observatory of the non profit
"Social Warning – Movimento Etico Digitale"
of the 9th February 2021

The problem is that the web is completely transparent and reflects everything we store in it for ever, with scarce possibility to delete the traces of our past. But this is not the worst side of the Internet. The greatest risks for minors are represented by the use that social networks and other platforms can make of personal data they insert in order to access such

Media and Technology, 4; C Perlingieri, *Profili civilistici dei social networks* (Edizioni Scientifiche Italiane, 2014); A Mantelero, 'Teens online and data protection in Europe' (2014), *Contr. e impr./Eur.*, 442; K Montgomery, J Chester, 'Data Protection for Youth in the Digital Age: Developing a Rights-based Global Framework' (2015), 4, *Edpl*, 277; , K Mc Cullag, 'The general data protection regulation: a partial success for children on social network sites?', in T Bräutigam, S Miettinen (ed), *Data protection, privacy and europea regulation in the digital age* (Unigrafia, 2016), 110; G Spoto, 'Disciplina del consenso e tutela del minore', in S Sica, V D'Antonio and GM Riccio (eds), *La nuova disciplina europea della privacy* (Cedam, 2016), 111; G Pedrazzi, 'Minori e social media: tutela dei dati personali, autoregolamentazione e privacy' (2017), 1-2, *Informat. e dir.*, 437; F Naddeo, 'Il consenso al trattamento dei dati personali del minore' (2018), 1, *Dir. informaz. e informat.*, 27; F Resta, 'Condizioni applicabili al consenso dei minori in relazione ai servizi della società dell'informazione', in GM Riccio, G Scorza and E Belisario (eds), *GDPR e normativa privacy. Commentario* (Wolters Kluwer, 2018), 84; VE Andreola, *Minori e incapaci in Internet* (Edizioni Scientifiche Italiane, 2019); A R Popoli, 'L'adeguamento dei social network sites al GDPR: un percorso non ancora ultimato' (2019), 6, *Dir. informaz. e informat.*, 1289; IA Caggiano, 'L'età del consenso e il trattamento dei dati personali dei minori', in C Fabbriatore, A Gemma, C Guizzi, N Rascio, A Scotti (eds.), *Liber Amicorum per Paolo Pollice* (Giappichelli, 2020), 83-100.

services. Thus, from a legal point of view, it is interesting to understand what legal tools can be provided to prevent minors' data profiling when they use social platforms and in which extent adults' behaviours on the web can contribute to breach their privacy. As we will see, the answer can be found partly on the GDPR rules and partly on the Italian civil code rules about capacity and parents' liability.

Furthermore, minors' privacy issues have been meeting new challenges even from another point of view. Within the several problems caused by the COVID-19 emergency, we have to analyse a new area of sensitive privacy. As a result of locked schools, children have been joining lessons on online platforms directly at home from their or their parents' computers or tablets. Such a revolution for the Italian educational system has been implying several problems, especially from a data protection perspective. The use of e-learning platforms by minors and the consequent exchange of data between teachers and pupils by-means of the Internet require to focus on possible privacy breaches to be prevented and to be managed. The positive chances that smart learning will be able to carry out in the next future show the necessity to study also this new aspect of minors' data protection.

On the basis of the above-mentioned considerations, the present study aims at analysing the implication of the Internet on minor's privacy right, focusing on the main rules introduced by the GDPR in the Italian system, with particular regard to both the idea of a minor's right to express her/his digital consent to sign-up on a social platform and the legal role of parents in the use of such platforms. The purpose of the study is to show that the Internet should have a central – and unavoidable – role in the education and the development of new generations. But this challenge requires to guarantee an effective protection³ for children's privacy by-means of the involvement and cooperation of schools and parents.

1. Minors and smart learning: new challenges for data protection.

In the last few years, the Internet has been assuming a central role in children's education not only for a more frequent use to prepare for a test or to do homework, but also because digital tools are available at school⁴. Italian schools have been experimenting with new educative schemes in which the Internet is a fundamental part. However, in the last months, further privacy problems are emerging when the whole educational activities suddenly have turned into an e-learning school due to the COVID-19 emergency. As a result of the lockdown, schools and teachers had to carry out lessons with the help of new technologies, in particular by-means of the use of either e-mails to exchange didactic materials and

3 To reflect on the importance of the principle of effectiveness see: P Piovani, 'Effettività (principio di)', *Enciclopedia del diritto* XIV (1965), 420; N Trocker, 'Dal giusto processo all'effettività dei rimedi: l' "azione" nell'elaborazione della Corte europea dei diritti dell'uomo (Parte prima)' (2007), 1, Riv. trim. dir. proc. civ., 35; R Oriani, *Il principio di effettività della tutela giurisdizionale* (Editoriale Scientifica, 2008); N Irti, *Significato giuridico dell'effettività* (Editoriale Scientifica, 2009); C Mak, 'Rights and Remedies – Article 47 EUSEE and Effective Judicial Protection in European Private Law Matters', in HW Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford University Press, 2014), 236; G Vettori, 'Contratto giusto e rimedi effettivi' (2015), 1, Pers. e merc., 5.; Id, 'Effettività delle tutele (diritto civile)', *Enciclopedia del diritto*, Ann. X, (2017), 381; Id, 'Il diritto a un rimedio effettivo nel diritto privato europeo' (2017), 1, Pers. e merc., 15 ss.; D Imbruglia, 'Effettività della tutela: una casistica' (2016), 2, Pers. e merc., 62; A Carratta, 'Tecniche di attuazione dei diritti e principio di effettività' (2019), Riv. trim. dir. proc. civ., 1.

4 See: D Valentine, 'Distance learning: Promises, problems and possibilities' (2002), 3, Online Journal of Distance Learning Administration, 5; M Ingrosso, *Le nuove tecnologie nella Scuola dell'Autonomia: immagini, retoriche, pratiche. Un'indagine in Emilia Romagna* (Franco Angeli, 2004); A Mantelero, 'Adolescenti e privacy nella scuola ai tempi di You Tube' (2011), 2, Nuova giur. civ. comm., 139; K Davis, C James, 'Tweens' Conception of Privacy Online: Implications for Educators' (2013), 2, Learning, Media and Technology, 4; RM Colangelo, 'Istituzioni scolastiche e trattamento online dei dati personali di studenti minorenni' (2017), 13, Annali online della Didattica e della Formazione del Docente, 72-89.

homework or online platforms to create virtual classes in which teachers and pupils stay in dialogue and interact simultaneously. As a consequence, parents had to share their personal e-mail accounts with their children or create new ones, as well as to help their children to download applications and to join lessons on e-learning platforms. This situation may potentially disguise some risks for minors' data.

Until this moment, the relationship between privacy problems connected to the Internet and school activities was regarded in a more limited context. For example, minors' privacy protection has come out about photos or videos taken by parents during school plays or about their publication on school websites. But in such cases, it is sufficient for parents to sign their consent for publication. On the contrary, potentially far more complex and dangerous is allowing minors to join smart lessons or to exchange e-mails with their teachers. Consider the possibility that strangers sneak into an e-learning platform in order to acquire student's data or to spread inappropriate contents; or the possibility that students accidentally download virus or malware when trying to access up educational materials sent by e-mail or loaded on the e-learning platform; or, furthermore, they could get in contact with form of surreptitious or fraudulent advertising.

Moreover, unlike other European States, like France, the Italian Ministry for Education has not provided a unique platform to organize smart lessons. Instead, it has only suggested some e-learning platforms to choose between. Thus, each educational institution had to find its own adequate system to carry out lessons. This situation by itself represents a risk for privacy rights. Many service providers have begun to advertise their e-learning platforms, often without offering high levels of privacy protection or – even worse – disguising the risk of data profiling. It is very clear, indeed, that when a platform deals with children, it has to guarantee the maximum standard of security for their personal data, especially when it is selected by a public institution, like a school. The described situation may contrast with both national rules and European and international acts and conventions on privacy matters, that a State has the duty to guarantee with the adoption of effective legal tools.

Apparently, these worries about minors' personal data in the smart-learning environment might sound like a paradox, considering that they are usually free at home to surf up and down the web. But the great difference is that when children are at school, it is the precise legal liability of educational institutions and teachers to guarantee not only their safety and well-being, but also the protection of their rights, including privacy rights. On the basis of these elements, the Italian Privacy Authority, with the Act of 26th March 2020, stressed that schools have to choose e-learning platforms or applications with particular care and with the help of their data protection officer⁵. The choice of a service provider is a key decision and requires particular attention and competence. Thus, according to the Italian Privacy Authority, the selected platform must guarantee both privacy design and privacy by default systems; at the same time, schools have the duty to constantly supervise smart learning activities and to be prepared to immediately adopt effective protection measures even in case of mere suspect of privacy breach⁶.

But this is not sufficient. It is also important to focus on the role of the parents. On the

5 The data protection officer's role, in such context, is going to be increasingly important in assuring the respect of privacy law and in suggesting both the best practices to follow for privacy compliance and the best plans to mitigate risks of privacy breach when schools use e-learning platforms.

6 In the note of 17th March 2020 (prot. n. 388), the Ministry of Education had required schools the data protection impact assessment of art. 35 GDPR. But then the Italian Privacy Authority act of 26th March 2020 clarified that the data protection impact assessment is not necessary, unless there are the conditions of art. 35, paragraph 2, GDPR. Thus, such impact assessment is mandatory only when schools deal with the high risks provided by art. 35 GDPR or adopt extremely intrusive platforms, such as those that process biometric data or use geolocation tools.

one hand, parents do not have to give consent to their children's data processing, because schools provide smart learning in the exercise of their institutional functions, according to art. 6, parag. 1, point d), GPRD. On the other hand, however, a complete compliance to the GDPR rules requires that schools show parents the full text of the privacy policy of the selected platform, according to artt. 13-14 GDPR, in order to inform them about several crucial aspects: how to access the system, who can join virtual classes or have contact with children, how didactic contents will be inserted and downloaded, if lessons will be registered and so on. Such information should be provided using a clear and simple language, assuring the transparency of the processing in accordance to art. 12 and the 'whereas' nn. 39 and 58 GDPR. This step, that may appear merely formal and administrative, instead represents a key moment to create a trustworthy relationship between schools, teachers and parents.

On the basis of the Privacy Authority Act of 26th March 2020, the Ministry of Education has recently provided some guidelines that express two other important indications⁷. On the one side, student's data processing can be allowed to the extent that is necessary in relation to the exercise of educational activities, according to the principle of “data minimisation” of art. 5, n. 5, GDPR. On the other side, when a platform provides extra services, schools should select only those tools (virtual class, forum, chat, mail system) that are strictly necessary to carry out lessons and exchange materials and homework. It is also essential that schools do not allow platforms to make data operations, like profiling, which may realize providers' interests not related to smart learning. Consequently, it must be considered illegitimate that a service provider sets conditions for the use of a platform which require the signing of a specific contract or parental consent to data processing for other online services, that are not strictly related to smart learning.

The respect of the described rules and guidelines will certainly contribute to prevent risks for minor's data during smart lessons. It is clear that virtual classes are far from disappearing not only because the health emergency has not completely been overcome yet and may relapse in the next future, but also because e-learning can be a useful instrument, if adequately used and combined with traditional teaching methods. Therefore, schools ought to take up this challenge and, in cooperation with the Ministry of Education, enhance new rules and good practices that assure an effective protection for minors' personal data. A crucial aspect in such evolution is represented by a cultural factor. It is essential that educational institutions and teachers acquire the knowledge of the main privacy rules and privacy policy measures of their schools, with the help of legal and technical experts in this field according to an interdisciplinary approach. Moreover, schools and teachers ought to encourage the relationships with pupils and their parents, providing the letters all the fundamental pieces of information concerning minors' data protection. Against this background, schools have a leading role not only in fulfilling the legal duty to inform parents, giving a transparent view of the adopted privacy rules; but also in contributing to the spread of a “privacy culture” among families with regard to minors' privacy rights: it is essential to develop a new sensibility and to make parents aware of their children's privacy rights. The importance of good practices in the use of the Internet should go hand in hand with the knowledge of the opportunities connected to smart learning. In such way, privacy formation and information provided by schools is a combination that shall become a virtuous circle suitable to enforce minors' privacy protection.

2. Minors' digital consent in the social network context.

7 The note n. 11600 of 3th September 2020 of the Ministry of Education offer guidelines for schools in order to provide some general principles to implement e-learning instruments, with particular attention to security and protection of personal data.

If, as has been said, there are some risks for children's privacy rights in the educational digital environment, there are even greater risks when they surf alone the web. In this context, the access to digital services, like the creation of a social network account, requires user's consent. Thus, it leads to the problem if a minor's digital consent can be considered lawful.

It is common ground that when we create an account on a social platform, we enter into a real contract, which allows us to use the multiple services offered by the provider. It is equally known that such a sign-up implies the consent to our personal data profiling. The disposal of our data is the way we usually pay for the use of a social network. For this reason, contracts should be concluded by users who have the legal capacity to act. Thus, minors should be theoretically excluded from the possibility to have a social network account. Real life, however, shows that things go very differently because almost every teenager daily uses one or more social networks. That's why it is important to understand how minors can safely and lawfully join such platforms.

In order to analyse this issue, it is important to remember the legal framework of the matter. Nowadays, the GDPR establishes a general framework for national privacy laws of Member States, even with regard to minors' data protection⁸. A key rule in this matter is provided by art. 8 GDPR, which concerns the conditions applicable to child's consent to an information society service, like a social network. The processing of her/his personal data requires the respect of an age limit: on the one hand, the offer of information society services is lawful only if minors are 16 years old; on the other hand, the offer can be considered equally lawful even if minors are below the age of 16, but under the specific condition that consent is given or authorised by the holder of parental responsibility over the child. Such exception, however, cannot be eligible for minors under the age of 13, which represents the minimum limit to respect (art. 8, parag. 2, GDPR).

According to the GDPR, each Member State is able to set a different age limit to express privacy consent, even though most of them reproduce the 13 years-old legal limit determined by the US Federal Law (Children's Online Privacy Protection Act – COPPA)⁹, which was the most important benchmark in this matter also for the EU before the GDPR entered into force. This approach can also be explained with the consideration that the main online platforms are based in the USA and, therefore, apply the mentioned COPPA rules. With particular reference to the Italian Law, article 2 of the civil code sets the general 18-years-age limit to acquire the legal capacity to act. But, at the same time, there is a set of rules that seems to recognize minors a “mitigated capacity”, *id est* a limited capacity to express consent

8 See. F Pizzetti *Privacy e il diritto europeo alla protezione dei dati personali: dalla Direttiva 95/46 al nuovo Regolamento europeo* (Giappichelli, 2016); S Thobani *I requisiti del consenso al trattamento dei dati personali* (Maggioli Editore, 2016); G Finocchiaro *Il nuovo regolamento europeo sulla privacy e sulla protezione dei dati personali* (Zanichelli, 2017); F Piraino, 'Il regolamento generale sulla protezione dei dati personali e i diritti dell'interessato' (2017), 2, *Nuove leggi civ. comm.*, 369; IA Caggiano, 'Il consenso al trattamento dei dati personali nel nuovo Regolamento europeo. Analisi giuridica e studi comportamentali' (2018), 1, *Oss. dir. civ. e comm.*, 81; L Gatt, R Montanari and IA Caggiano, 'Consenso al trattamento dei dati personali e analisi giuridico comportamentale. Spunti di una riflessione sull'effettività della tutela dei dati personali' (2017), *Pol. dir.*, 363; E Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori' (2018), *Contr. e impr.*, 106; A Iuliani, 'Note minime in tema di trattamento dei dati personali' (2018), *Eur. dir. priv.*, 293.

9 The Children's Online Privacy Protection Act (COPPA) was passed by the US Congress in 1998 and took effect in 2000 and then was revised in 2011-2013. It regulates the collection of personal information from children under the age of 13 and aims at prohibiting operators of commercial websites or online service platforms or mobile apps from collecting information about children without a verifiable parental consent. The Federal Law has also been enforced by the Federal Trade Commission (FTC), which has the competence for monitoring the compliance to COPPA and for adopting penalties in case of rules breach. Moreover, the FTC states that COPPA applies even to stranger internet providers when their online service addresses also to US children under the age of 13.

for teenagers. There is for example the minor's right to be heard in every issue involving her/him, when she/he is 12 years old (or even when she/he has a lower age and the capacity for discernment) or the minors' right to be heard by a judge within the procedures dedicated to the adoption of decision involving her/his interest¹⁰. Furthermore, art. 2 *quinquies* d.lgs. n. 101/2018 (concerning the compliance of the Italian Law with the GDPR) provides that minors from the age of 14 and beyond can express the consent on their own; on the contrary, beyond the subjective and objective limits of art. 8 GDPR, minors' data processing requires the authorization of the holder of parental responsibility. It is clear that art. 8 of GDPR had a relevant impact on the Italian civil law, because it allows to lower the 18-years-age limit set by art. 2 of the Civil Code. As prestigious scholars observed, the combination of art. 8 of GDPR and art. 2 *quinquies* of d.lgs. 101/2018 seems to introduce a sort of “digital major age”, which allows minors to express her/his consent for personal data processing of information digital services¹¹. However, it persists a relevant mismatch between the age of 14 capability to express a consent according to art. 8 GDPR and art. 2 *quinquies* d.lgs. n. 101/2018 and the possibility to take legal action in case of breach of her/his rights, since the capacity to act remains acquired at the age of 18. Therefore, from this point of view, the role of parents remains central.

Such considerations require now to be analysed *funditus*. In particular, it is interesting to develop the two following aspects.

First of all, it is important to underline the relationship between the above-mentioned new rules and contract law¹². It is interesting to understand if and how the breach of art. 8 GDPR may impact contractual validity. On this matter, art. 7, paragraph 4, GDPR states that the “*utmost account shall be taken of whether (...) the performance of a contract (...) is conditional on consent to the processing of personal data that is not necessary for the performance of that contract*”. In order to clarify such rules, the Working Party Article 29 gave a formal opinion called “*Guidelines on consent under the Regulation 2016/679*”¹³: art. 8 GDPR does not concern the problem of validity of contracts between users and providers. Indeed, the contractual legal regime is regulated by Member State laws. This means that a lawful data processing does not necessary imply the validity of the contract. With reference to the Italian law, the question is which contractual remedies can be implemented to protect minors' data, when they express a

10 The above-mentioned laws, introduced by the reform on matter of parent-child in 2012-2013, are the expression of principles stated on international level by the New York Convention of 1989, the Strasbourg Convention of 2003 and the European Union Chart of Fundamental Rights. See: F Ruscello, 'Garanzie fondamentali della persona e ascolto del minore' (2002), *Famiglia*, 933; A Gorgoni, 'Capacità di discernimento del minore e incapacità legale nell'adozione' (2011), 1, *Pers. e merc.*, 49-67; Id, *Filiazione e responsabilità genitoriale* (Cedam, 2017); V Di Gregorio, 'L'ascolto, da strumento giudiziale a diritto del minore' (2013), *Nuova giur. civ. comm.*, 2013, 1031; I Bitonti, 'Perenne attualità dell'istituto dell'ascolto del minore' (2017), *Riv. Trim. dir. proc. civ.*, 1069; A Nascosi, 'Nuove direttive sull'ascolto del minore infradodicenne' (2018), *Fam. e dir.*, 2018, 355.

11 See. F Naddeo, 'Il consenso al trattamento dei dati personali del minore' (n 2), 50; A Thiene, 'Riservatezza e autodeterminazione del minore nelle scelte esistenziali' (2017), 2, *Fam. e dir.*, 72; IA Caggiano, 'L'età del consenso e il trattamento dei dati personali dei minori' (n 2), 83; A Astone, 'L'accesso dei minori d'età ai servizi della c.d. società dell'informazione: l'art. 8 del Reg. (UE) 2016/679 e i suoi riflessi sul codice per la protezione dei dati personali' (2019), *Contr. e impr.*, 614; C Irti, *Persona minore di età e libertà di autodeterminazione* (2019), 3, *Giust. civ.*, 617-650.

12 See. P Rescigno, 'Capacità di agire', *Digesto civ.*, II (1988); G Alpa, 'I contratti del minore. Appunti di diritto comparato' (2004), 5, *Contr.*, 521; M Cinque, 'Il minore e la contrattazione telematica tra esigenze di mercato e necessità di apposite tutele' (2007), 2, *Nuova giur. civ. comm.*, 24; M Dogliotti, *La potestà dei genitori e l'autonomia dei minori* (Giuffrè, 2007); G Capilli, *La capacità digitale del minore nella società dell'informazione. Analisi comparata e prospettiva di riforma* (Giappichelli, 2012); I Garaci, 'La capacità digitale del minore nella società dell'informazione. Riflessioni sul corretto esercizio della responsabilità genitoriale fra esigenze di autonomia e di protezione' (2019), *Nuovo dir. civ.*, 59.

13 Opinion n. 259 of 10th April 2018.

consent beyond the legal limits. The answer is not simple. From a certain point of view, it can be supposed that a contract lacking necessary consent is to be considered void for reasons of an illicit object or the breach of an imperative law (art. 1418 c.c.). But such an approach consequently arises the issue of the effects of a consent expressed by the user in a second moment, since it is debated if a contractual nullity is suitable for emendation. From another point of view, it can be supposed that the sign-up for a social network remains without effect until the expression of the consent is in accordance with the law. So the debate is still ongoing and it will be interesting to analyse the judges' approach with particular reference to the discipline of invalidity of art. 1425 c.c., which seems to be suitable for protecting minors' interest in contractual field¹⁴.

Secondly, it is important to highlight the risk that minors at the age of 14 try to bypass privacy protection rules in order to sign-up for a social network. As has been said, it is a common ground experience of daily life that minors often surf the Internet alone, without paying attention to their privacy rights. Beyond the cultural and technical aspects of the problem, the reality is that children often declare a false date of birth to activate their presence on a social platform; they modify or unsubscribe the original parental authorization, in order to have access to other services offered by the same provider; or they create false profile pages. The described behaviours direct the focus of attention to two aspects: on the one hand, the role of parents is crucial in monitoring their children's behaviour; on the other hand, it is necessary to implement technical and legal measures that social platforms are expected to set up in order to verify the age of their users.

However there is something more to consider.

3. Possible conflicts between minors' digital consent and parents' liability.

It is important to underline another relevant interpretative issue. It was already shown how crucial it is that modern laws recognize minors when they exercise their non-patrimonial rights. At the same time, this approach means that their individual accountability is increasing in many fields, such as in the area of privacy. This situation, however, could create new occasions of conflicts even between minors and their parents. Consider, for example, the possibility that a teenager above the age of 14 expresses her/his consent to the sign-up for a social network or post some photos or video on a platform in contrast to her/his parents' specific will. According to a strict interpretation of art. 8 GDPR and to what has been said before, it seems that the minor's consent is sufficient to legally access a social platform and to operate on it.

Recognizing an area of autonomy for minors in the digital environment does not mean that parents can give up their legal and educational role. At the same time, laws concerning minors' rights do not imply that parents have no power of decision anymore. On the contrary, parental liability persists even if the child is 14 years old, especially when she/he are online¹⁵. Parents have the unavoidable duty to monitor and provide assistance to their

14 See V Zeno-Zencovich, 'Profili negoziali degli attributi della personalità' (1993), *Dir. inf.*, 545; G Vettori, 'Privacy e diritti dell'interessato' (1998), 4-5, *Resp. civ. e prev.*, 885; S Viciani, 'Strategie contrattuali del consenso al trattamento dei dati personali' (1999), *Riv. crit. dir. priv.*, 159-190; G Resta, *Autonomia privata e diritti della personalità* (Jovene, 2005); R Caterina, 'Cyberspazio, social network e teoria generale del contratto' (2011), *Aida*, 96; S Thobani, *I requisiti del consenso al trattamento dei dati personali* (n 8), 89; V Ricciuto, 'I dati personali come oggetto di operazione economica. La lettura del fenomeno nella prospettiva del contratto e del mercato, in N Zorzi, F Galgano (eds.), *Persona e mercato dei dati, riflessioni sul GDPR* (Cedam Wolters Kluver, 2019), 95; F Bravo, 'Lo "scambio di dati personali" nei contratti di fornitura di servizi digitali e il consenso dell'interessato tra autorizzazione e contratto' (2019), *Contr. e impr.*, 34.

15 See V Corriero, 'Privacy del minore e potestà dei genitori' (2004), 4, *Rass. dir. civ.*, 1011; A Gorgoni, *Filiazione e responsabilità genitoriale* (n 9); S Peron, 'Sul divieto di diffusione sui social network delle fotografie e di

children in order to assure that they can express their identity and personality in a safe context with reference to their fundamental rights, like privacy rights. In this perspective, “minor's interest to her/his correct and balanced psychophysical development” provided by several law and acts¹⁶ represents a general limit to the extent of the lawfulness of her/his digital consent. Privacy protection cannot be considered a value itself, especially when it concerns minors: it appears as an instrument to protect other rights, in particular minors' interest to a balanced development. Thus, if parents are expected to interfere each time with their children's actions within the digital environment it may harm such interest. This interpretative approach seems to be the best way to guarantee that minors' consent with reference to their data does not become a mere administrative formality. Otherwise, the protection of those rights would be completely compromised, in contrast to the GDPR principles.

Therefore, the criterion of “the best interest of the child” should be applied by judges in the equally frequent cases in which parents are in conflict among themselves. This situation happens, for example, when one parent does not agree with the decision of the other to post personal data (photos or videos) concerning their child on a social platform, in case the child is still under the age of 14 (the so called “sharenting” phenomenon)¹⁷. The combined interpretation of artt. 316 and 337 *ter* c.c. provides that each decision concerning children (including those regarding their privacy rights), ought to be taken with the consent of both parents and, in its absence, with a tutelary judge's authorization. The parental conflict can be overcome only with reference to the child's best interest. That is the reason why, according to several national and international rules, judges have to hear the child, due to her/his right to be heard within the procedures and the decisions in which she/he is involved.

Conclusions.

The above-mentioned considerations highlight that minors' data protection today represents a central issue for the agenda of each State. The present health emergency has been having a catalytic role for a series of problems concerning minors' privacy rights, that require to be solved. The launch of digital classes on online platforms is the last evidence of the increasing importance of the Internet in the education and development of our children in a world which is getting more and more interconnected. Therefore, it is important that minors are able to adequately use new technologies and, at the same time, benefit from their

altri dati personali dei figli' (2018), 2, Resp. civ. e prev., 589; M Nitti, 'La pubblicazione di foto di minori sui social network tra tutela della riservatezza e individuazione dei confini della responsabilità genitoriale?' (2018), Fam. e dir., 380; C Camardi, 'Relazione di filiazione e privacy. Brevi note sull'autodeterminazione del minore?' (2018), 6, Jus civile, 831; G Cassano, 'La responsabilità genitoriale nell'uso dell'odierna tecnologia telematica' (2020), 6, Fam. e dir., 631.

16 In particular, art. 3, par. 1, New York Convention on the Rights of Child; art. 24, par. 2, Charter of Fundamental Rights of the European Union; artt. 316, 317 bis, 321 c.c.; artt. 11, 25, 57 legge n. 184/1983. See the following studies: S Parker, 'The best interests of the child. Principles and problems', in P Alston (ed), *The best interests of the child. Reconciling culture and human rights* (Clarendon Press, 1991), 26; S Arbia, 'La Convenzione ONU sui diritti del minore' (1992), in Dir. uomo, 39; F Santosuosso, 'Il minore e la garanzia dei diritti inviolabili dell'uomo' (1997), Iust., 361; P Ronfani, 'L'interesse del minore: dato assiomatico o nozione magica?' (1997), 1, Soc. dir., 47; C Focarelli, 'La Convenzione di New York sui diritti del fanciullo e il concetto di «best interests of the child»' (2010), 4, Riv. dir. int., 981; P Martinelli, J Moyerson, 'L'interesse del minore: proviamo a ripensarlo davvero' (2011), Min. giust., 7; R Rivello, 'L'interesse del minore fra diritto internazionale e multiculturalità', (2011), Min. giust., 15.

17 See D Cino, S Demozzi, 'Figli “in vetrina”. Il fenomeno dello sharenting in un'indagine esplorativa' (2017), 2, Riv. it. edu. fam., 153-184; SB Steinberg, 'Sharenting: Children's Privacy In The Age Of Social Media' (2017), 66, Emory Law Journal, 839-1007; G Bonanomi, 'Sharenting. Genitori e rischi della sovraesposizione dei figli online' (Mondadori, 2020); M Foglia, 'L'identità personale nell'era della comunicazione digitale', in F Bilotta, F Raimondi, *Il soggetto di diritto. Storia ed evoluzione di un concetto nel diritto privato* (Jovene Editore, 2020), 265-276.

infinite opportunities. However, our legal system should provide a set of effective tools to protect minors' privacy rights in the digital environment, in accordance with European rules and principles.

Such a purpose can be reached by-means of cooperation and actions on several levels based on an interdisciplinary approach.

With reference to smart learning, firstly, the use the Internet is a challenge that the Italian system cannot ignore. It requires, however, a great attention from two points of view: on the one hand, educational institutions have to make their teachers aware of the problems connected with the use of smart learning systems, providing them a specific education in terms of either computer skills or privacy law. On the other hand, school directors and educational data officers have to draft adequate privacy policies to be submitted to parents, taking into account the new aspects of data protection regarding smart learning. The formative and in-formative moment are crucial aspects.

Secondly, parents maintain a central role with reference to their children's use of the Internet outside school-time. The new personality rights that recent Italian, European and International acts recognize are contributing to a new approach to minors' self-determination in several fields. This draws the attention of scholars and jurisprudence to read the rules of the Civil Code about the capacity to act through different eyes, reflecting upon the possibility that minors are able to enter into contracts concerning their non-patrimonial rights. However, this does not means that parents are exempted from their obligations. From this particular point of view, the more minors acquire a larger capacity to express their consent in the digital area, the more parents have a significant duty to monitor their online activities and behaviours, under the liability of parental authority according to art. 316 c.c.. The “minor's interest to her/his correct and balanced psychophysical development” represents the limit of minors' self-determination also in the digital context.