



MINORS IN THE *ALGORITHM SOCIETY*: THE ITALIAN -EUROPEAN APPROACH OF CO-REGULATION

Alessia Valongo* and Alessia Redi**¹

Abstract

The essay analyzes the changes introduced by recent interventions of the European Union in the field of the *Information Technology Society* to increase accountability of the *Big Tech* or *Tech Giants*, with particular regard to minors. Currently, online platforms are configured mainly as intermediary services providers in relationships between professional users and consumers, where direct interpersonal contacts have completely disappeared. New business models, such as concluding contracts through *social networks*, have become an important part of the daily life of EU citizens. In order to protect the rights of children and adolescents, it is urgent to elaborate reliable age verification systems, intended to guarantee a transparent, inclusive and non-discriminatory web environment and ensure the removal of illegal content from the web. The paper aims at reviewing the effective scope of the European Regulations not only within the common European single market, but also at a global level, underlining the contribution given by the Italian Data Protection Authority in some decisions issued against digital platforms.

1. Introduction

In recent years, the legal scientific community has shifted focus towards understanding the real nature of the so called *Tech Giants*. The enormous growth of market dominance by online platforms has shed a light on the numerous risk factors for users in general and for minors in particular. Thus, further studies are needed in order to address some issues related to the impact of the European Union interventions in the field of the *Information Technology Society*.

Digitalization and access to the social network platforms has radically changed our habits and our sensitivity to human rights, especially to our right to personal data protection. Finding new ways to prevent and combat threats to children's rights is the biggest challenge. For these reasons, this essay will focus on the conditions applicable to a child's consent in relation to digital services. The first goal is to

* Associate Professor of Private Law at the Department of Political Science of the University of Perugia, author of paragraphs 1-7. (E-mail: alessia.valongo@unipg.it).

** PhD in Private Law, PhD Program 'I problemi civilistici della persona', University of Sannio, Benevento, author of paragraphs 8-9. (E-mail: alessia.redi@unipg.it).

¹ The article represents one of the first results of a research implemented as Associate Investigator of the National Interest Research Project (PRIN 2020), entitled *E-Agorà - Online Platform Contracts: economic efficiency and rights' protection of service users. Technological innovation and service sharing in a social world* - carried out at the Department of Political Science of the University of Perugia. The project tackles the economic and legal relevance of digital platforms as new agoras of the third millennium, which are radically changing the lives of consumers, especially of minors, offering new opportunities but, at the same time, even creating new problems.

question whether informed consent represents a suitable measure against child abuse within the *Algorithm Society*.

The second goal of the paper is to discuss the effectiveness of the current Italian legal system in the area of *Big Tech* services and to debate the efficacy of the integration between public and private regulations, with the objective of evaluating if the European strategies are appropriate tools to create a safer digital space for minors. The final part of the paper will examine significant decisions issued by the Italian Data Protection Authority against some digital platforms. Central to the discussion will be the search for a reliable user' age verification method as an important mechanism to protect children online.

2. Premise: An Unsatisfactory Definition of 'Online Platform'

The global network (www, acronym for *World Wide Web*) allows minors who are able to use a computer to connect with the social community and access an infinite amount of information, news, data, goods and technological services offered by online platforms managed by Internet Service Providers. In some cases, these platforms represent a meeting place among people who decide to share knowledge, commodities, activities, resources for the sole purpose of general interest, free of charge. Platforms, such as Wikipedia, are inspired by this model based on knowledge and can refer to study/work environments or training systems through e-learning or those online services that aim at saving costs, crowdfunding, reducing waste, such as collecting unsold food or medicine; other platforms - essentially operating locally - can also guarantee help and assistance to people in need, or promote and preserve art and fine arts. Undoubtedly, these forms of cooperation and socialization represent a tool for the development of one's personality and can contribute to a minor's intellectual growth.

However, childhood and adolescence, like every other phase of one's life, are now pervaded by other types of online platforms: e-commerce platforms (*E-bay, Zalando, Amazon, Vinted*), online search engines (*Google, Bing*), price comparison sites (*Trivago, Google shopping*), app stores (*Apple store, Microsoft store, Google play*). These are digital business tools that influence the public globally and, in particular, minors, who are vulnerable and fragile users of the web due to their variable degree of maturity, based on their age and their flexible capacity of understanding and judgement.

In most cases, the idea of a 'meeting place' among people is only an illusion of operating outside the logic of the market; that idea, in reality, is a marketing expedient to realize entrepreneurial projects. This is what occurs for social network platforms (*Facebook-Meta, TikTok, Instagram, Twitter, YouTube, ChatGpt*), whose sole purpose seems to be the dissemination and global sharing of knowledge, while their effective role is to act as intermediaries in the net capitalism market, favouring relations both among producers (*Business to Business, B2B*) and between producers and consumers (*Business to Consumer, B2C*). Sometimes, their function is to offer digital goods and services directly to the public, competing with those offered by professional network users.



A definition of ‘online platform’ was recently provided by the Regulation (EU) 2022/2065 of 19 October 2022² - *Digital Service Act* - which merely describes it as ‘a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service’ (art. 3, lett. i, Reg. 2022/2065).

This description is not satisfactory because it is reductive, and vague and does not capture the exact and complete physiognomy of the service. Particular risks - especially related to minors - stem from this definition, as the online platforms do not play the role of a mere collection of personal data and hosting of web pages, but rather they have an extremely active mission in the market through sales and economic transactions. More precisely, a fundamental part of the platform’s assets is represented by the analysis, management and monitoring of personal information based on the type of user in a shared and integrated way among multiple marketing operators. As we will see in the following pages, minors are strongly affected by this phenomenon.

The main aspect of the problems in question is that to obtain goods offered by the online platforms, it is necessary to register, which implies concluding an access contract following the ‘terms and conditions’³ established by the online platforms and applied to all affiliates. These rules are the contractual clauses relating to the service rendered, which are the general conditions of the contract published as ‘terms’ and ‘conditions of use’.

Certainly, numerous positive effects of this activity are the increased circulation of information and the growth of the economy and the digital market. In particular, the enormous amount of cognitive resources made available to the masses can contribute favorably to the upbringing of minors within the family.

Nevertheless, many more challenges derive from the activities of these network infrastructures, for possible harmful consequences.

3. The Problem of the Conditions Applicable to a Child’s Consent in Relation to the *Information Society Services*

The first negative consequence lies in the control - obtained by online platforms - over the flow of information, the so-called ‘big data’, which is provided mostly by users. In exchange for the goods or services offered, the users authorize the Internet Service Providers to collect and manage their personal data. It is evident that the danger of publishing private information increases when the user is a minor, for the large number of risks to which they are exposed, particularly in terms of addictive practices and online harassment. Their personal data also becomes the object of economic exploitation, often without

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (*Digital Services Act*).

³ The ‘terms and conditions’ indicate ‘all clauses, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the service’ (art. 3, lett. u, *Digital Services Act*).



the users' knowledge. Even more so, for minors, there is a lack of awareness regarding the economic value acquired by platforms as a result of the registration.

Another problem, of a more general nature, is that minors are often used to publishing confidential information concerning themselves and/or their family on their social profile without their parent's permission. For all these reasons, the European Union has introduced a general limit with regard to minors, with reference to the conditions applicable to a child's consent in relation to Information Society services⁴: art. 8 of the Regulation (EU) 679/2016 of 27 April 2016 (*General Data Protection Regulation* or *GDPR*)⁵ prohibits the offer of digital services to minors under the age of sixteen, without parental consent⁶. While the consent to 'processing personal data'⁷ can be given personally by those over sixteen. At the same time, art. 8 of the GDPR leaves freedom to the single nations, as it foresees that Member States can establish by law a lower age as long as it is not below thirteen years. The Italian lawmaker has sanctioned lowering the age limit to give consent to minors up to the age limit.

Adapting to the mentioned EU Regulation in the context of services rendered electronically, the Italian law-maker has sanctioned lowering the age limit for the giving of consent by minors to the age of fourteen. In this direction, the Legislative Decree 10 August 2018 no. 101 introduced in the *Italian Code of Privacy* (Legislative Decree 30 June 2003, no. 196) a new provision (art. 2 *quinquies*) which foresees a derogation from the general norm that fixes at the age of eighteen the legal age to make contract⁸ (art. 2 of the *Italian Civil Code*); thus configuring a sort of 'digital majority' at the age of fourteen. In this

⁴ For the purposes of art. 4, no. 25, of the European General Data Protection Regulation (GDPR) [Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Persons with regard to the Processing of Personal Data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)]: 'Information Society service' means 'a service as defined in point (b) of Article 1(1) of Directive 2015 no. 1535 of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical regulations'.

⁵ Reference is made to the European General Data Protection Regulation (GDPR), cited in the previous note 3.

⁶ Art. 8 of the GDPR establishes: 'In relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years' (par. 1). 'The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology' (par. 2). 'Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child' (par. 3).

⁷ For the purposes of the GDPR: 'personal data' means 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person' (art. 4, no. 1 of the GDPR); 'processing' personal data means 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction' (art. 4, no. 2 of the GDPR). Among 'personal data', should be included not only e-mail address and IP address, but also Internet chronology searches and cookies.

⁸ On the issue of the minor's capacity of acting, see: Pasquale Stanzone, '*Potestà dei genitori e diritti fondamentali del minore*' [1980] *I Rassegna diritto civile* 460; Francesca Giardina, *La condizione giuridica del minore* (Jovene 1984); Pietro Rescigno, 'Capacità di agire', *Digesto Enciclopedia, Discipline privatistiche, Sezione civilistica II* (1988) 209; Fernando Bocchini, '*L'interesse del minore nei rapporti patrimoniali*' [2000] *I Rivista diritto civile* 277.



perspective, a fundamental right of minors over fourteen is outlined not only to access the network but also to freely express their thoughts on the Internet and to socialize and interact with the virtual world (see Articles 13 and 21 of the *Italian Constitution*).

On the other hand, there is also the need for specific protection of minors from aggression and other harmful behavior towards their persona.

To summarize, under the age of fourteen, processing data is lawful only under parental or legal guardian consent after consulting the minor, as many national⁹ and international¹⁰ legal instruments provide.

A highly debated aspect concerns the minors' proof of age. Considering the difficulties related to this issue, online platforms are called to elaborate reliable age verification systems.

In an attempt to ensure legitimate online services, art. 8 of GDPR states that Internet Service Providers, as controllers of personal data, must make efforts to verify that parental consent has been given 'taking into consideration available technology' (art. 8, par. 2).

We can question what these 'available technologies' are and what are the tools of obtaining parental consent or verifying the age of the minor in order to protect their rights. Currently, reference is made by legal scholars¹¹ to systems that are not considered completely satisfactory, are expensive, often ineffective and avoidable, such as, for example, using parental intervention through a webcam or upon the presentation of an identity document by e-mail or other means of recognition.

4. The Minor's Capacity to Conclude Online Contracts

A distinction should be made between consent to process personal data and consent to the conclusion of a contract. The Italian legislator seems to keep the two matters separate from each other. However, in the current Information society, an interaction between patrimonial and non-patrimonial levels can be observed, given that personal data are existential interests equally subject to economic evaluation, thus acquiring a dual characterization.¹² The interaction between patrimonial and non-patrimonial levels does

⁹ In the Italian legal system, the child's right to be heard is provided by art. 315 *bis*, par. 3, of the *Italian Civil Code* and by art. 473-*bis*. 4 of the *Italian Civil Procedure Code*, introduced by art. 1, par. 4, lett. e), of the Legislative Decree 10 October 2022, no. 149 (so called 'Cartabia Reform'). According to these norms, in any matter and judicial or administrative procedures concerning them, all children have the right to be heard at the age of twelve and even when they are younger - including in early childhood - if they have the capacity of understanding and willing.

¹⁰ According to Article 3 of the *European Convention of Strasbourg on the Exercise of Children's Rights* (signed on the 25 January 1996, ratified by Italy with Law 20 March 2003 no. 77), every child has the right to receive all relevant information, to be consulted and express his or her views in proceedings and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

¹¹ Among other legal scholars, main reference is given to Pietro Virgadamo, *Minori e nuovi media*, in Alessandra Cordiano, Roberto Senigaglia (eds) *Diritto civile minorile* (Edizioni Scientifiche Italiane 2022) 366. The issue regarding evaluable tools of obtaining parental consent will be explored at paragraph 7.

¹² With reference to the process of legal objectification of data, see Carolina Perlingieri, 'Data as the Object of a Contract and Contract Epistemology' [2019] 2 *The Italian Law Journal* 613, who analyzes some contractual models inherent to data and underlines the different nature of consent to data processing depending on their different use, meaning finalized or not to circulation. According to the A., consent for use of personal data can be granted in order to ensure the exact execution of a contractual obligation. In these cases, personal data are not intended for circulation and are not the object of the contract. Otherwise, the identification of data as goods takes place in contracts for data circulation, where data acquire value not individually but only if aggregated. Regarding the link between patrimonial situations and personal situations in rafting Italian

not mean relinquishing the protection of personal data, as the «exchange of money» serves to satisfy human needs, and the right to personal data protection does not become a «patrimonial» right when signing a contract. Nevertheless, the monetary value acquired by personal data is a result of the ‘profiling’¹³ activity carried out by platforms. In other words, «consent to data processing» can become «consent with a contractual value» when that consent is given to circulate data.

Normally, the Internet Service Providers authorize (commercial and non commercial) users to use the website in order to advertise their offers of goods in exchange for the management of personal data, for the possibility of promoting products by means of ‘cookies’ and sometimes in exchange for a percentage of the sales or in exchange for a remuneration for the services of placing or highlighting the advertising.¹⁴ The Italian legal system has become aware of this new social reality, where the flow of data acquires value not in its singularity but due to its aggregation and where choices by users of digital technologies are made simultaneously in the personal and financial spheres.

Indeed, the modified text of art. 46 of the *Italian Consumer Code*, as amended by the Legislative Decree no. 26 of 7 March 2023, requires that all digital services provided free of charge must be considered *Business to Consumer contracts* - subject to consumer protection regulations - as the acquisition of personal data is equated by the legislator to purchases for consideration.

A core issue remains to be tackled, with regard to the capacity of minors to conclude online contracts. For this purpose, it is necessary not to focus on the minor age as an abstract category of incompetence, but to examine the concrete situation of each minor and the object of contracts taken into consideration. An axiological and systematic reading of the provisions mentioned in the previous par. 2 leads to abandoning the idea that a child is a subject incapable of exercising his rights. This means that, even more so, adolescents close to the age of majority and with a certain level of maturity can execute their fundamental freedoms.

and European legislations, see Lucia Ruggeri, ‘Produzione normativa ed interpretazione assiologica per un diritto contrattuale europeo’ in Pietro Perlingieri and Felice Casucci (eds) *Fonti e tecniche legislative per un diritto contrattuale europeo* (Edizioni Scientifiche Italiane 2004) 109.

¹³ For the purposes of the GDPR, the expression ‘profiling’ means ‘any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements’ (art. 4, no. 4 of the GDPR).

¹⁴ In legal literature, a clear description of the problems concerning agreements between users and Internet service providers, and their interaction with the role of advertising, can be read in: Camilla Crea, ‘Network contracts: rating and evolution of models’ [2013] 2-3 *Foro napoletano* 451; Carolina Perlingieri, *Profili civilistici dei social networks* (Edizioni Scientifiche Italiane 2014) 66; Anna Maria Gambino, *I contratti di accesso*, in Carolina Perlingieri, Lucia Ruggeri (eds) *Internet e diritto civile* (Edizioni Scientifiche Italiane 2015) 191; Stefania Giova, ‘La tutela del consumatore telematico nel d.lgs. n. 21 del 2014’ [2014] 3 *Rivista giuridica Molise Sannio* 109; Pietro Perlingieri, ‘Privacy digitale e protezione dei dati personali tra persona e mercato’ [2018] *Foro napoletano* 3; Daniela Di Sabato, ‘Il ruolo delle piattaforme digitali nello svolgimento delle attività economiche in rete’ [2020] 9 *Annali della Facoltà Giuridica dell’Università di Camerino – Studi* 1.



Following a hermeneutic method based on the central value of the human being, all the minute acts of daily life are deemed accessible to minors by most Italian legal scholars¹⁵, as these kinds of acts express their participation in social relationships and correspond to purchases of basic necessities. Very often, online contracts (e.g. registrations on social networks) can be included in the latter sphere and should not be denied to minors with a minimum of ‘decision-making capacity’, otherwise there would be an obstacle to the exercise of their personal rights. This shared opinion finds a confirmation in the mentioned theory, according to which minors, regardless of reaching a certain age, are allowed to stipulate contracts of little financial importance, necessary to satisfy normal personal needs, provided that those acts are useful for personal development and do not expose them to a significant prejudice.

To summarize, online purchases of law economic value should be considered valid and effective in all cases where minors - even under fourteen years old - have acquired a capacity for understanding and judgement. It happens, for example, when a minor ‘downloads’ a musical compact disc.

Undoubtedly, a minor who buys goods online, is going to satisfy personal or family purposes. As a consequence, all the guarantees and benefits provided by the consumer legislation are applicable, due to the coincidence with the legal definition of ‘consumer’, pursuant to art. 3 of the *Italian Consumer Code*.¹⁶

The *Italian Consumer Code* to ensure the rights of minors, evaluated as members of a particularly vulnerable age group; a strengthened protection is contemplated in the field of buying products advertised on television using phone or the Internet (art. 31, *Consumer Code*). Teleshopping must never ‘exhort minors to enter into contracts for the sale or hire of goods or services’, must not ‘cause moral or physical detriment to minors’, nor ‘exhort minors to purchase a product or service by exploiting their inexperience or credulity’, nor ‘show minors in dangerous situations’.

Surfing the Internet, minors can also become ‘prosumers’ - intermediate figures between ‘professionals’ and ‘consumers’ - by selling used goods and, thus, exercising a productive economic activity. Prosumers are not organized in a traditional business but offer goods and services to the public. Here, a doubt arises as to whether the Italian and European legislation for the protection of consumers can be applied to this special category of minors, considering that the *Italian Consumer Code* gives a definition of ‘consumer’ based on the subjective qualification of the contractual party, but does not define a ‘prosumer’.

According to the mentioned Art. 8 of GDPR, the general contract law of each member State regarding the validity, formation or effect of a contract in relation to a child must still be respected (par. 3). This explicit legislative reference entails the need of observing the provision of the *Italian Civil Code*, which

¹⁵ C.M. Bianca, *La norma giuridica, I soggetti, Diritto civile* (Giuffrè 2002) 237; Pietro Perlingieri, *La persona e i suoi diritti. Problemi del diritto civile* (Edizioni Scientifiche Italiane 2005) 345; Francesco Scaglione, ‘Situazioni giuridiche soggettive e capacità’in Andrea Sassi, Francesco Scaglione, Stefania Stefanelli (eds) *La filiazione e i minori, Trattato di diritto civile Rodolfo Sacco* (Utet giuridica 2018) 560.

¹⁶ For the purposes of art. 3 of the Legislative Decree no. 206 of 6 September 2005 (*Italian Consumer Code*), the ‘consumer’ or ‘user’ is ‘any natural person who is acting for purposes which are outside his trade, business or profession’.



establishes the annulment of contracts undersigned by minors - due to legal incapacity to act, provided by art. 2 of the *Italian Civil Code* - in order to protect them against the risk of possible detrimental acts (art. 1425, *Italian Civil Code*).

A literal interpretation of the cited norm leads some scholars¹⁷ to consider these contracts voidable in all cases where minors simply declare online that they are of legal age without resorting to any deception. This theoretical thesis is not persuasive, as the online method always represents an artificial means capable, in itself, of deceiving and misleading third parties.

More correctly, we have to refer to art. 1426 of the *Italian Civil Code*: it should be considered applicable in any contractual case involving both minors and digital platforms, with the result that online contracts should remain valid and effective, except in cases of acts that expose minors to significant harm. The latter provision intends to protect the good faith of those third parties who have contracted with a minor, relying, without fault, on what they received online. Thus, it aims at creating legal certainty for the entire community.

Similarly, online contracts concluded personally by minors should be always considered valid when they create fake profiles through false documents or through deception, certifying parental consent without their knowledge. In both cases, according to the Italian Law, contracts cannot be deleted for the protection of third parties, as minors deceive their minor age 'with fraud' (art. 1426, *Italian Civil Code*).

5. The Informed Consent as an Inappropriate Measure Against Child Abuse Within the Algorithm Society: The Urgency of a Substantial Protection and the Role of Self-Discipline

Informed consent to platform data processing and informed consent to online contracts do not represent suitable methods against child abuse, as the issue of user protection cannot be resolved simply by guaranteeing the availability and acknowledgment of information; this would only be 'formal' protection, not a 'substantial' one.

Informed consent is never 'truly informed': firstly, due to the difficulty of understanding the high complexity of information in the general conditions of Internet Service Providers, which users generally do not read; secondly, because consent is required as an 'essential condition' for using a service and this implies that the user's choice is never completely free and spontaneous, but always necessary to obtain that service.

Following the implementation of the 2000/31/EC Directive on e-commerce through the Italian Legislative Decree no. 70 of 9 April 2003 (*Italian Law regarding e-commerce*), the spread of innovative digital services that have allowed business users to access information and engage in transactions in novel ways, has generated the onset of new risks. The risk of improper use of online platforms and the dissemination

¹⁷ In this direction: Francesco Galgano, 'Dell'annullabilità del contratto' in Scialoja-Branca (eds) *Commentario* (Zanichelli-Foro Italiano 1998) 274; Maddalena Cinque, 'Il minore e la contrattazione telematica tra esigenze del mercato e necessità di apposite tutele'[2007] 1 *Nuova giurisprudenza civile commentata* 2019.



of fake information, misleading news and other illegal content, such as incitement to hate speech, revenge porn, bullying, and child pornography. Such websites may contain very dangerous messages for minors who, while browsing, can come into contact with unknown users ready to take advantage of their weaknesses.

Digital services are often provided illegally by platforms whose activities are based on the use of 'algorithms', automated means that filter the contents and evaluate the human behavior. In many cases, they cause damage to fundamental rights of minors: not only individual rights (to name, image, honour, reputation, privacy, development and promotion of personality), but also social rights (to health, to the environment, to work).

Artificial intelligence systems catalogue enormous amounts of 'big data', enucleate schemes that allow the selection and manipulation of information, and have powerful predictive abilities, i.e., they can establish in advance what is most interesting for consumers, suggest content, and 'recommend'.¹⁸ certain choices. Minors are involved in these sophisticated commercial strategies implemented by both social platforms and search engines through 'profiling'.

In conclusion, online platforms are not limited to offering a virtual 'showcase' of goods or services, similar to what happens in traditional commercial businesses, but they guide users' choices through algorithms (modelled on the users' profiles) and through the advertising messages sent to the users, in line with their preferences, while surfing the net. This particular business policy determines negotiating imbalances on the market which do not exactly correspond to the usual forms of disparity existing, off-line, between professionals and consumers. The current 'platform economy' impact on net users - particularly children and adolescents - has led to a new intervention by the European and Italian institutions.

The evolution of the *Information technology Society* into an *Algorithm Society*, briefly illustrated, has called for regulations that impose not only formal duties of information, but especially substantial duties of fairness, good faith, honesty, and transparency, in order to protect the competitive market and all its users and, in particular, avoid abuses and any kind of prejudice to minors.

As will be seen in the next paragraphs, the EU legislation is moving in this direction.

Following the implementation of EU Directive No. 1808 of 14 November 2018, the Italian Parliament enacted the Legislative Decree No. 208 of 8 November 2021 (*Single Law on Audiovisual Media Services*), which establishes the general principles for the provision of audiovisual and radio digital media services and video-sharing platform services.

¹⁸ A 'recommender system' means a 'fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service or prioritise that information, including as a result of a search initiated by the recipient of the service or otherwise determining the relative order or prominence of information displayed' (art. 3, lett. s, of the *Digital Services Act*).



Article 42 of the *Single Law on Audiovisual Media Services* defines some *Protection Measures* that video-sharing providers must adopt to protect minors from programmes, user-generated videos and commercial communications that may harm their physical, mental or moral development, such as those that incite hatred or violence. As a result, the ‘profiling’ of minors for commercial purposes is always prohibited. Among other obligations imposed upon the providers are the use of age verification systems and the obligation to adopt parental control systems. Parental control systems are software or device-specific options that allow parents to monitor their children’s internet use, preventing them from accessing unsuitable content online.

The Italian Communications Regulatory Authority (so-called Communications Guarantor or AGCOM) ensures the application of the mentioned *Single Law*. In this direction, this Authority has adopted some Guidelines¹⁹ aimed at imposing on platforms a ‘state parental control system’. It implies that Internet Service Providers must activate suitable tools to filter and block access to inappropriate content for minors, especially violent or pornographic content. As a result, new device manufacturers are required to inform users about the possibility of installing these applications that are offered to parents at no extra cost.

However, according to AGCOM Guidelines, the parental control system is mandatory only in offers intended for minors. Thus a question remains, since frequently the mobile phone accounts actually used by minors are registered in the parents’ name, so that it is up to the parents to activate it.

AGCOM ensures the application of the *Single Law on Audiovisual Media Services*, which is mentioned, also in collaboration with the Italian Committee of the *Internet and Minors Ethical Code*.

The mentioned *Internet and Minors Ethical Code* attests to the important role of the ‘self-discipline’ within the *Algorithm Society*, with special reference to the field of minors; it was first signed on 19 November 2003 - by the major professional associations of digital providers (AIIP, ANFoV, *Assoprovider* and *Federcomin*) - as a deed of a private nature; then it was implemented by the Italian Parliament (through Law no. 112 of 2004), thus obtaining a public nature and legal effects for all network infrastructures. As a result, this code of conduct is not limited to binding the online platforms that freely adhere to the Code but - regardless of their adherence- has now acquired the value of binding legislation.²⁰

The EU regulatory system has now consolidated an approach that favors self-discipline, mostly to identify inappropriate behaviour on the web.²¹

¹⁹ Communications Regulatory Authority (AGCOM), decision of 25 January 2023, no. 9/23/CONS (in force from 21 November 2023) containing ‘Adoption of the guidelines aimed at implementing article 7-bis of the legislative decree of 30 April 2020, n. 28 regarding systems for the protection of minors from the risks of cyberspace’.

²⁰ Regarding the binding value of the professional codes of conduct, see Alessandra Bellelli, ‘Il problema della giuridicità delle regole deontologiche delle professioni?’ in Mario Nuzzo (ed) *Il principio di sussidiarietà nel diritto privato I* (Giappichelli 2014) 83.

²¹ Already art. 18 of the cited Legislative Decree no. 70 of 2003 (*Italian Law regarding e-commerce*) favored the drafting of ethical codes aimed at increasing the trust of users of the information society ‘the protection of minors and the safeguarding of human dignity’ (par. 3).



Significantly, European policy no longer delegates total power to the ‘sovereigns of the network’, as private entities compete with the member States in regulation. Deregulation must operate within a framework defined by national law-makers. The latter must encourage the development of professional codes more strongly than in the past.

The European legislator seems to be aware of the limitations faced by the single member States in governing the *E-agerà* field, thus calling for a cooperation, *rectius* for an integration, between public and private regulations²², not only through the adoption of professional ethics or codes of conduct, but also through the predetermination of ‘terms and conditions’ by the online platforms with the scope of regulating the totality of mass contracts with users.

As we will see in the following paragraphs, important norms have been enacted: regarding the clarity of the ‘terms and conditions’ dictated by Internet Service Providers; regarding the functioning of online advertising, the transparency of the decisions on how online platforms moderate content; regarding the algorithms used by them; regarding risks mitigation and grievance procedures.

6. The Contribution of the European Union in the Field of Digital Services and the Integration Between Public and Private Regulations

The European Union has intervened through various measures, among which the following must be emphasized: the Regulation (EU) 2065/2022 of 19 October 2022²³ (*Digital Services Act*), the EU Regulation (EU) 1925/2022 of 14 September 2022²⁴ (*Digital Markets Act*), the Regulation (EU) 1150/2019 of 20 June 2019 (*Online Intermediation Services Act for Business Users*).

These normative Acts aim to create a safer digital space, where the rights of all users are protected, not only within the single European market but also at a global level. The tendency to extend the effectiveness of the mentioned EU Acts at a universal level is demonstrated by the criterion of their application, based on the same criterion adopted by the Regulation (EU) 2016/679 (GDPR). Indeed, they apply ‘to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment’(art. 2, *Digital Services Act*).

While the mentioned *Internet and Minors Ethical Code* aims at protecting the most vulnerable age group (0-14 years) and is mainly focused on fighting child pornography; the EU regulations have been introduced to address the same topic in a more general dimension and especially to tackle the issue of minors ‘small consumers’ and ‘weak’ contractors.

²² Regarding this vision of an unitary legal system and of a communication between the public and private law spheres, see Pietro Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti I* (Edizioni Scientifiche Italiane 2006) 196.

²³ Regulation already cited at previous footnote no.1.

²⁴ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (*Digital Markets Act*).

In the current context, self-regulation (e.g., professional codes, terms and conditions) and European Regulation complement each other and become cornerstones of the new legal framework, which aims to protect all individuals from risks on the internet.

In accordance with the recent EU Regulations, the promotion of freedom of trade and competition must conform to the need for minors not to be subordinated to technology, but to be an active part of human and scientific progress, away from unfair and aggressive practices.

On this ground, in order to ensure a suitable level of accountability, the intermediary service providers have to make publicly available an annual report (in a machine-readable format) that describes tools used for the purpose of ‘content moderation’²⁵ and measures taken as a result of the application and enforcement of their ‘terms and conditions’ (art. 15, par. 1, lett. b, *Digital Services Act*); in this way, the online platforms set criteria for assessing the legitimacy of the conduct adopted by network users. This point deserves to be emphasized. Art. 15 of the *Digital Services Act* pursues an extremely significant goal, as it attests that ‘terms and conditions’ fixed by *Big Tech* are no longer just voluntary provisions or ‘private clauses’ relating to the services, with effectiveness restricted to the contractual parties, but constitute real norms, similar to the legislative provisions: ‘terms and conditions’ become ‘contractual norms’ that evaluate user behavior and express the governing power of the Internet Service Providers.

According to the traditional literature²⁶, ‘contractual norms’ substantially differ from ‘public norms’, as the first is an expression of private autonomy of a single person or a group and produce effects in the context of specific relationships; while only the second norms are an expression of public authority and represent authentic ‘sources of law’, producing effect for the society as a whole. This traditional theory has been abandoned by the predominant modern School of interpretation and jurisprudence, according to which it is possible to demonstrate the capacity of private regulations to promote important objectives of public policy.²⁷

With reference to the matter in question, a ‘normative’ function is exercised by private subjects - Internet Service Providers – who participate in the creation of norms. Following a new method of drafting standards, these norms are defined *extra ordinem* sources of law, as they do not derive from Parliament, from Government or other public Authorities, but derive from the individuals’ power of self-regulating

²⁵ The so called ‘content moderation’ indicates ‘the activities, whether automated or not, undertaken by providers of intermediary services, that are aimed, in particular, at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility, and accessibility of that illegal content or that information, such as demotion, demonetisation, disabling of access to, or removal thereof, or that affect the ability of the recipients of the service to provide that information, such as the termination or suspension of a recipient’s account’ (art. 3, lett. t, of the *Digital Services Act*).

²⁶ Cesare Massimo Bianca (ed), *Le condizioni generali di contratto*, II (Giuffrè 1981) 35; Claudio Scognamiglio, ‘Condizioni generali di contratto nei rapporti tra imprenditori e la tutela del contraente debole’[1987] *Rivista del diritto commerciale* 418.

²⁷ Pietro Perlingieri, ‘Una lezione agli studenti della «Federico II». Il «diritto privato» nell’unità del sistema ordinamentale’ [2019] 2 *Rassegna di diritto civile* 406.

activities of public interest (e.g. public interest of consumer protection).²⁸ The European law-maker is moving in this direction, through a multi-stakeholder approach characterized by the participation of public and private actors in the platforms' governance. Indeed, a value of authentic regulations to the 'terms and conditions' set by online platforms has been affirmed by the cited EU Digital Acts, in coherence with the Italian constitutional principle of 'horizontal subsidiarity' that is considered the unifying foundation of all expressions of negotiating autonomy (art. 118, last par. of the *Italian Constitution*). This renewed methodology in producing norms reveals the advantage of adapting to rapid technological changes, much more easily than through ordinary legislative procedures.

The application of the 'horizontal subsidiarity principle', however, raises some issues that need to be addressed with special attention, such as controlling the conformity of those 'contractual norms' to the complex of the Italian-European regulatory system and the international standards.²⁹

In practice it happens that the online platforms affect fundamental rights through a para-sanctioning apparatus that allows them to make multiple decisions: to remove illegal content - upon obtaining actual knowledge; to disable access to that content or to suspend the activities of the user who has published that content; to close that user's account. An online platform can obtain such actual knowledge of the harmful nature of the content, through its own-initiative investigations or through notices submitted to it by individuals or entities.

Two critical aspects deserve to be underlined in the analysis of the EU Regulations. The first aspect is that the powers-duties of platforms to 'content moderation' are implemented by the European Union through the use of algorithms that imply relying on the automatism of the decisions; as the second aspect, these powers-duties are exercised only if the platform deems the report of illegality from third parties to be founded; thus, there is a large discretion of the Internet Service Providers in assessing the actual lawfulness of the content and also in identifying the 'right remedy', i.e. the most appropriate measure of reacting to illegality.

7. The Need to Conform the Platforms' Activities - Especially the 'Terms and Conditions' - To the Italian-European Regulatory System

An important issue is to verify if the platforms' activities - and especially their 'terms and conditions'- really implement the fundamental principles of the Italian-European legal system and the international

²⁸ In the academic literature, see: Diego De Felice, *Principio di sussidiarietà ed autonomia negoziale* (Edizioni Scientifiche Italiane 2008) 46; Filippo Maisto, 'Recensione a Nicolò Lipari, Le fonti del diritto' [2009] *Rassegna diritto civile* 298; Pietro Perlingieri, 'Fonti del diritto e ordinamento del caso concreto' [2010] *Rivista diritto privato* 21. On a partial different opinion, Nicolò Lipari, *Le fonti del diritto* (Giuffrè 2008) 166.

²⁹ Among the international standards, it is useful to recall the following Conventions applicable to minors: the *United Nations Convention of New York* signed in New York on 20 November 1989 and ratified by Italy with Law 27 May 1991, no. 176; the *European Convention on the Exercise of the Rights of the Child* (already cited in previous footnote no. 9) approved in Strasbourg by the Council of Europe on 25 January 1996 and ratified by Italy with law no. 77 of 20 March 2003; the *Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse*, approved by the European Council in Lanzarote and ratified by Italy with law no. 172 of 1st October 2012.



standards, which are focused on common needs of protection of human dignity. In accordance with the EU legal framework, all digital platforms must provide means to respect international standards, in order to advocate fundamental rights and freedoms, to promote non-discrimination, gender equality, social and economic justice, development, interconnectedness, inclusiveness sustainability and safeguard the interests of present and future generations.

A significant question arises when we ask whether the European strategies represent suitable measures to effectively counter the risks that minors incur whensurfing the net.

With the objective of conforming to the Italian-European regulatory system, the principle of accountability, which requires attesting the compliance with the norms, is expressed firstly by the availability of specific information in the pre-contractual stage.

However, as already noted, information is not a sufficient means against abuse, as even more effective and substantial protection from pre-formulated unbalanced clauses is necessary.³⁰ For this reason, the Internet Service Providers have a specific duty to explain their ‘terms and conditions’ that must be «set out in clear, plain, intelligible, user-friendly and unambiguous language» and must be «publicly available in an easily accessible and machine-readable format» (art. 14, par. 1, *Digital Services Act*). Furthermore, where an intermediary service is predominantly used by minors, the provider must explain the conditions for the use of the service «in a way that minors can understand» (art. 14, par. 3, *Digital Services Act*). The concepts of «explanation» and «easily understandability» require both transparency - that means actual knowledge of the ‘terms and conditions’ - and the possibility for users to modify the unfair content of clauses.

The aforementioned Regulation (EU) 1150/2019 (Online Intermediation Services Act for Business Users) protects against unbalanced conditions by introducing the remedy of nullity of some contractual clauses imposed by the providers of online intermediation services to promote fairness for business users.³¹ For example, if the ‘terms and conditions’ are not drafted «in plain and intelligible language», they are null and void.

³⁰ We may think about the contractual clause that considers personal data as a remuneration to access to online services. Among unfair terms and conditions, there are clauses that breach transparency requirements, clauses regarding the choice of applicable law, clauses that allow for: unilateral changes of the service or unilateral termination of the contract by the provider, exclusion or limitation of provider’s liability. Regarding the topic, see: Guido Alpa, ‘Sul potere contrattuale delle piattaforme digitali’ [2022] 3 *Contratto e impresa* 721.

³¹ The Regulation (EU) 1150/2019 (*Online Intermediation Services Act for Business Users*) imposes to the providers of online intermediation services to ensure that their ‘terms and conditions’: «a) are drafted in plain and intelligible language; b) are easily available to business users at all stages of their commercial relationship; c) set out the grounds for decisions to suspend or terminate the service; d) include information on any additional distribution channels and potential affiliate programmes through which providers of online intermediation services might market goods and services offered by business users; e) include general information regarding the effects of the terms and conditions on the ownership and control of intellectual property rights of business users» (art. 3, par. 1, Regulation (EU) 1150/2019). The providers of online intermediation services are also obliged to notify to the business users any proposed changes of their contractual conditions and the proposed changes can not be implemented before the expiry of a reasonable and proportionate notice period, pursuant to art. 3, par. 2, Regulation (EU) 1150/2019. If the providers do not comply with these mentioned requirements, the ‘terms and conditions’ must be considered null and void (art. 3, par. 2, Regulation (EU) 1150/2019).



With specific regard to the effective online protection of minors, art. 28 of the *Digital Services Act* foresees that the platforms accessible to minors are required to adopt adequate and proportionate measures to ensure compliance with the Regulation.

Technical and organizational procedures must avoid any harmful content, deception, manipulation or distortion by default; for example, by designing online interfaces to guarantee safe decisions, security and child protection automatically, avoiding online interfaces which exploit the weaknesses and inexperience of minors or which can lead to addictive behaviour.

Online platforms should also provide evidence that they have implemented those technical and organizational measures. In particular, they must certify to manufacturers and other distributors of terminal equipment (for example, computers, smartphones, tablets, and smart televisions) intended to place their products on the market that their operating service includes the required parental control system.

In addition, easy access to grievance mechanisms must be guaranteed to users.

Furthermore, while an appropriate risk mitigation measure can be an online adherence to a certain professional code by an online platform, mere participation in a given professional code does not imply compliance with the Regulation. Evidently, a risk-based strategy has become common to the European Union policy. In particular, the second paragraph of Art. 28 of the *Digital Services Act* prohibits online providers from proposing advertising messages based on the business profile of the user if they are aware, with reasonable certainty, that that user is a minor.

Moreover, best practices and available guidelines must always be taken into consideration, such as those provided by the European Commission Communication entitled ‘A digital decade for children and young people: the new European Strategy for a Better Internet for Kids’, adopted on 11 May 2022.³² In selecting the appropriate risk mitigation measures, the Internet Service Providers should consider, where appropriate, the best practices based on certification mechanisms issued by international bodies that define common standards suitable for guaranteeing the protection of the individual with respect to the use of artificial intelligence.

The ‘terms and conditions’ should comply with the due diligence and fairness obligations provided not only by the *Digital Services Act* but also by the *Digital Markets Act*. These obligations are adapted to the type, size and nature of the intermediary service concerned. Indeed, basic obligations apply to all providers, while a series of differentiated obligations have been introduced for the so-called

³² These guidelines respond to the objectives of the Charter of the Rights of the Child and implements the principle according to which children and young people must always be ‘protected and empowered online’, through an extensive process of media literacy, i.e. the acquisition of digital skills, which includes consultation among young people, targeted meetings with parents, teachers, government bodies, the media industry, civil society, academics and international organizations» (see Recital no. 71 of the *Digital Services Act*).



‘gatekeepers’³³ (*Big Tech* or *Tech Giants*). The reason for this distinction is that advertising schemes used by these *very large online platforms* pose serious risks and require additional public attention due to their ability to target and reach users based on their behavior. The ‘gatekeepers’ are the only platforms subject to the *Digital Markets Act*. Sanctions for the violation of the prescribed obligations, can be imposed by the European Commission - the Authority responsible for applying the *Digital Markets Act* (see Articles 24, 25, 26, *Digital Markets Act*). Among these EU norms, we can highlight the possibility that users have uninstalled pre-installed applications or modified default settings on operating systems, thus avoiding the obligation of using only the gatekeeper's products. In addition, users have the guarantee that deregistering from basic platform services is as easy as registering.

The recent EU Regulations integrate the pre-existing Italian and European legislations in privacy, consumer protection and fair competition. The final result of the EU intervention is the interaction of a complex mechanism of Italian public Authorities (Data Protection Authority or Privacy Guarantor, Communications Guarantor, Competition Guarantor) and European public Authorities (European Commission, Coordinator of digital services), which aims at combating unfair commercial practices in the digital market and ensuring effective enforcement of the new digital users’ rights through the exercise of control functions.³⁴

8. Protecting Children in the Digital Environment Through Effective Age Verification Systems: A Look at Some Italian Data Protection Authority’s Decisions Against Online Platforms

Services and content offered by digital platforms could play an ambivalent role for minors, often depending on their age. For minors who have achieved sufficient capacity for discernment and digital education, they could be useful for exercising fundamental freedoms and rights by promoting social relationships, access to information, and to different cultural contents. For younger users, instead, they could be very harmful and cause them serious personal prejudices.

Due to their young age, children are not able to face digital technologies and understand the importance of protecting their personal data. Moreover, they are particularly vulnerable users, because their personality is in the making. For all these reasons, children cannot comprehend the way their personal data is processed. They could be exposed to inappropriate content for their age. In more serious cases,

³³ For the exact definition of a gatekeeper, see Articles 2 and 3 of the *Digital Markets Act* (EU Regulation no. 1925 of 14 September 2022).

³⁴ With this regard, art. 38 of the Digital Services Act (EU Reg. 2022/2065) provides that the Member States identify one or more national authorities with the role of *Coordinator of digital services*, which must be responsible for implementing the provisions of the Regulation, with appropriate investigative and sanctioning powers (art. 41). At the moment, the Italian Parliament is discussing the conversion into law, with amendments, of the law-decree no. 123 of 15 September 2023, containing ‘*Urgent measures to combat youth hardship, educational poverty and juvenile crime, as well as for the safety of minors in the digital environment*’, which indicates the Communications Guarantor (AGCOM) as *Coordinator of digital services* pursuant to art. 38 of the DSA and requires a collaboration among the various authorities according to their respective competences.



they could also encouraged to adopt unlawful and dangerous behaviours, by harming themselves and often in a vicious circle, other children. This could happen, for example, by promoting and taking part in online extreme challenges.

Protecting children online is a complex goal that requires a global approach involving different actors and responsibilities.

Parents, as holders of parental responsibility, are certainly responsible for protecting their children's privacy online and controlling and educating them, also with regard to the use of devices, such as smartphones, that facilitate access to the digital environment. Digital platforms' cooperation and responsibility are, however, too required, as confirmed by the most recent European acts for the regulation of the digital space: the *Digital Markets Act* (DMA) (EU Regulation no. 1925 of 14 September 2022) and the *Digital Services Act* (DSA) (EU Regulation no. 2065 of 19 October 2022).

One of the different measures for protecting children online is effective users' age verification by digital platforms, as often underlined by the Italian Data Protection Authority in its decisions against TikTok, Replika and ChatGPT, examined below.

The Italian Data Protection Authority is an independent public authority responsible for monitoring the application, in Italy, of the European and Italian legal framework on personal data protection [EU Regulation no. 679 of 27 April 2016 (*General Data Protection Regulation* or GDPR) and *Italian Personal Data Protection Code* (Legislative Decree no. 196 of 30 June 2003) as amended by Legislative Decree No. 101 of 10 August 2018 for adapting the national legislation to the GDPR provisions].

The Italian Data Protection Authority, as 'supervisory authority' established in Italy, is responsible, according to art. 51 of the GDPR, for monitoring the application of the Regulation 'in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union'. For that purpose, the supervisory authorities established in the different EU Member States shall cooperate with each other and the Commission and shall have, pursuant to art. 57 and 58 of the GDPR, different 'tasks' and 'powers' on their territory. In particular, they shall have investigative, corrective, authorisation and advisory powers.

8.1 The Italian Data Protection Authority's Decisions Against TikTok

TikTok is one of the most popular social media platforms in the world, especially among young people. It describes itself as 'the leading destination for short-form mobile video', with the 'mission' 'to inspire creativity and bring joy'.³⁵ According to TikTok's terms of service, the platform 'allows you and others to create, view, interact with, and share content, and interact with others'.³⁶

³⁵ See TikTok's website <www.tiktok.com/about?lang=en> accessed 23 July 2023.

³⁶ See TikTok's terms of service <www.tiktok.com/legal/page/eea/terms-of-service/en> accessed 23 July 2023.



At the beginning of 2020, the Italian Data Protection Authority called on the European Data Protection Board to set up an ad-hoc task force against risks to TikTok users' personal data, particularly in order to protect children. The Italian Data Protection Authority had already received alerts on alleged vulnerabilities of this social media. Considering the importance of this platform, aimed at younger users, and that other supervisory authorities had started separate investigations, the Italian Data Protection Authority underlined the need for a strong and coordinated action.³⁷

The European Data Protection Board is a body of the European Union established by art. 68 of the GDPR. It is composed of the head of one supervisory authority of each Member State and the European Data Protection Supervisor, or their respective representatives. It has specific tasks, provided for in art. 70 of the GDPR, to ensure the consistent application of this European Regulation.

On March 2020, the Italian Supervisory Authority started investigating TikTok. The investigations showed that TikTok's data processing activities did not comply with the legal framework on personal data protection.

The Italian Data Protection Authority thus felt the urgency of intervening to protect Italian minors and initiated, on December 2020, a separate formal proceeding against TikTok. The social platform was notified of different alleged violations of the European and Italian provisions on personal data protection, especially a lack of attention to the protection of children.³⁸

According to the Italian Data Protection Authority, TikTok's signup mechanism did not adequately protect children. The minimum age limit of thirteen years, provided by TikTok itself on its privacy policy as a condition for using the platform, was easily bypassed by entering a false birth date. The age verification procedure, in fact, was based on the user's declaration.

The minimum age limit of thirteen years, moreover, did not comply with the Italian provisions. According to art. 2 *quinquies* of the *Italian Personal Data Protection Code*, regarding child's consent in relation to Information Society services, the personal data of a child aged below fourteen years may be processed lawfully, if the consent is given by the holder of parental responsibility over the child.

In other words, TikTok did not prevent users under the age of thirteen (the minimum age at which, according to art. 8 of the GDPR, member States can lower the provided limit age of sixteen years for expressing the consent to the processing of their personal data in relation to Information Society services without parental consent) from registering and using the platform. Furthermore, the social platform did not check the Italian privacy legislation's observance.

³⁷ See the Italian Data Protection Authority's press release of 24 January 2020 'TikTok: the Italian DPA calls for an EU taskforce. A co-ordinated action against risks to users' data is needed, especially to protect children' <www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9249681> accessed 23 July 2023.

³⁸ See the Italian Data Protection Authority's press release of 22 December 2020 'Tik Tok Endangers Children's Privacy: Italian Dpa Initiates Proceedings Against the Social Network' <www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9508923#en> accessed 23 July 2023.



TikTok requested and obtained an extension of the deadline for providing a written reply in response to the Italian Data Protection Authority's findings until 29 January 2021, in consideration of the Christmas period and the difficulties created by the ongoing Coronavirus pandemic.

On 22 January 2021, the Italian Data Protection Authority, also following the dismay caused by the tragic event of an Italian ten-year-old girl, thought to have died after taking part in an online viral TikTok challenge, imposed upon TikTok as data controller, an urgent, immediate and temporary ban on personal data processing performed with regard to the users residing in Italy. For TikTok users, in fact, there was no absolute certainty of age and, consequently, of compliance with the European and Italian provisions related to the age requirement for digital consent.³⁹

This decision was issued by the Italian Data Protection Authority pursuant to art. 58, par. 2, lett. f) and art. 66 par. 1 of the GDPR.

According to art. 58, par. 2, lett. f) of the GDPR, each supervisory authority has the corrective specific power to 'impose a temporary or definitive limitation including a ban on processing'. Under art. 66, par. 1 of the GDPR, in 'exceptional circumstances', a supervisory authority concerned, when it considers that 'there is an urgent need to act in order to protect the rights and freedoms of data subjects', may 'immediately adopt provisional measures intended to produce legal effects on its own territory with a specified period of validity which shall not exceed three months'.

In reasoning this decision, the Italian Data Protection Authority considered the recent press articles reporting the news of the death of a ten-year-old girl following emulative practices implemented in relation to her participation in the social platform. Her registration had not yet been denied by TikTok, which also did not provide any written reply to the Italian Data Protection Authority's formal findings or any reassurances regarding the adoption of effective methods for age verification of its users. The Italian Data Protection Authority's preliminary investigation, moreover, had highlighted serious shortcomings regarding the age verification procedure adopted by social media. For all these reasons, the Italian Supervisory Authority considered it necessary to adopt every possible measure to protect users on Italian territory.

In the examined decision, the Italian Data Protection Authority refers to specific provisions, especially for the protection of children. It has regard to art. 24, par. 2, of the Charter of Fundamental Rights of the European Union on the primary consideration of the 'child's best interests' in all actions relating to children⁴⁰ and to the recital no. 38 of the GDPR, on the 'specific protection' of children in relation to the

³⁹ See the Italian Data Protection Authority's decision no. 20 of 22 January 2021 <www.gpdp.it/web/guest/home/docweb/-/docweb-display/docweb/9524194> accessed 23 July 2023. See also the Italian Data Protection Authority's press release of 22 January 2021 'Tik Tok: Italian SA imposes limitation on processing after the death of the girl from Palermo' <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9524224#english_version> accessed 23 July 2023.

⁴⁰ Art. 24, par. 2, of the Charter of Fundamental Rights of the European Union: 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.



processing of personal data.⁴¹ It also referred to art. 25, par. 1, of the GDPR, on the 'appropriate technical and organisational measures' which the controller shall 'implement' in order to 'meet the requirements of this Regulation and protect the rights of data subjects'.⁴²

The temporary restriction on the processing of personal data of users residing in Italy was imposed upon TikTok with immediate effect, and for the time necessary to allow the Italian supervisory authority to receive and examine TikTok's reply in response to the Italia Data Protection's findings. The final deadline was indicated, by the Italian Supervisory Authority itself, on 15 February 2021.

TikTok then communicated its intention to implement the Italian Data Protection Authority's decision with different measures, especially in order to ban access to users aged under thirteen.⁴³

The social platform declared, first of all, a new verification of its users' age, through a self-declaration of the data subject, but without the possibility of making new attempts once an age of less than thirteen years has been declared. It also announced the promotion of an important media campaign for raising awareness among the parents of minors. Other measures indicated by the social platform were the doubling of Italian moderators with the task of evaluating the contents in the platform and the improvement of the reporting function, which allows users to indicate the presence on the platform of users under the age of thirteen or presumed such. The online platform stated, moreover, that it would consider, in perspective, the possibility of using artificial intelligence as an additional tool in supporting age verification.

In order to verify the appropriateness and effectiveness of the measures adopted by the social platform, the Italian Supervisory Authority extended the final deadline of the ban on personal data processing originally established against TikTok.⁴⁴

In a subsequent and different case, the Italian Data Protection Authority issued TikTok a formal warning that its decision to process its users' personal data, in order to give them personalized ads, no longer on

⁴¹ Recital n. 38, of the GDPR: 'Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child'.

⁴² Art. 25, par. 1, of the GDPR: 'Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.'

⁴³ See the Italian Data Protection Authority's press release of 3 February 2021 'Tik Tok to comply with the requests by the Italian Garante. The Italian SA will monitor effectiveness of the measures put in place' <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9533424?ref=techliv.dk#english_version> accessed 23 July 2023.

⁴⁴ See the Italian Data Protection Authority's decision no. 61 of 11 February 2021 <www.gpdp.it/web/guest/home/docweb/-/docweb-display/docweb/9554603> accessed 23 July 2023. With this decision the ban originally established against TikTok had been extended until 15 of March 2021.



the basis of specific consent of users, but on the different basis of legitimate interest, would have been in contrast with the European and Italian current legal framework.⁴⁵

In June 2022, TikTok announced a modification of its privacy policy and communicated to its users, also with specific messages, the intention to initiate, starting from the following 13 July 2022, an activity of supplying personalized advertising only to users aged eighteen and over, by showing them personalized ads based on their behaviour on the platform.

On 22 June 2022, the Italian Data Protection Authority started an investigation by sending to TikTok a request for information. It had asked, in particular, to know the legal basis of this profiling activity and the measures adopted in order to verify the majority age of users whose data will be processed for profiled advertising purposes, also in consideration of the social platform's current difficulties in identifying users under the age of thirteen and fourteen.

On 30 June 2022, TikTok responded to the Italian Supervisory Authority's request. The online platform specified that the profiling activity based on users' behaviour on the platform, for users over the age of eighteen only, would have found its legal basis, not on the consent of users, under art. 6, par. 1, lett. a) of the GDPR, but on legitimate interests of the platform itself, of its partners and of its users, according to art. 6, par. 1, letter. f) of the GDPR.⁴⁶ The social platform also underlined that it had adopted technical and human processes and procedures to verify the age of users.

The Italian Supervisory Authority considered inadequate TikTok's answers and in July 2022, used the specific power given by the combined provisions of art. 58, par. 2, lett. a), of the GDPR and art. 154, par. 1, lett. f), of the *Italian Personal Data Protection Code*.⁴⁷ It warned TikTok, in particular, that the use of personal data stored in users' devices for profiling them and sending personalised ads without their explicit consent would have been in contrast with art. 5, par. 3, of the directive 2002/58/EC (*Directive on privacy and electronic communications*) and art. 122 of the *Italian Personal Data Protection Code*. In both provisions, the only legal basis for the storing of information, or the gaining of access to information already stored in the terminal equipment of a subscriber or user, is the informed consent given by the subscriber or user.

⁴⁵ See the Italian Data Protection Authority's decision no. 248 of 7 July 2022 <www.gdpr.it/web/guest/home/docweb/-/docweb-display/docweb/9788429> accessed 23 July 2023. See also the Italian Data Protection Authority's press release of 11 July 2022 'Tik Tok: Italian SA warns against 'personalised' ads based on legitimate interest. The legal basis is inadequate and there is the risk for the ads to also target children' <www.gdpr.it/web/guest/home/docweb/-/docweb-display/docweb/9788342#english> accessed 23 July 2023.

⁴⁶ Art. 6 of the GDPR establishes the lawful basis for processing personal data. According to par. 1, lett. a), processing shall be lawful if 'the data subject has given consent to the processing of his or her personal data for one or more specific purposes'. Under par. 1, lett. f), processing shall be lawful if 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.

⁴⁷ According to art. 58, par. 2, lett. a), of the GDPR, each supervisory authority shall have the corrective power 'to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation'. Under art 154, par. 1, lett. f), of the *Italian Personal Data Protection Code* the Garante shall 'ensure the protection of the fundamental rights and freedoms of the individuals by implementing the Regulation and this Code as appropriate'.



In the same decision, the Italian Data Protection Authority demonstrated particular attention to the protection of children. It underlined, in particular, the risk of involving minors in TikTok's personalised advertising activity. Personalised ads, including unsuitable content, could have been received not only by minors under the age of eighteen, but also by minors under the age of fourteen, for whom would requires the consent of those exercising parental responsibility, and under the age of thirteen, for whom the access to the platform would be prohibited. The Italian Supervisory Authority explicitly recognized, in fact, the lack of certain elements for user age verification, also in the light of the negative tests on the ability of TikTok and other social networks to do this evaluation.

Following the Italian Supervisory Authority's formal warning, TikTok decided to suspend the announced switch from the user's specific consent to the legitimate interest as the legal basis for data processing and personalised advertising. The Italian Data Protection Authority consequently communicated its appreciation for TikTok's responsible decision and its availability to a dialogue with the social platform in order to find a balance between economic interests and users' rights.⁴⁸

8.2 The Italian Data Protection Authority's Decisions Against Replika and ChatGPT

The Italian Data Protection Authority has recently focused its attention also on the risks for younger users of relational AI (artificial intelligence) digital platforms, in particular AI-powered chatbots such as Replika and ChatGPT, both able to interact with its users in a human way.

On February 2023, the Italian Data Protection Authority imposed upon the company that has developed and operates Replika, under art. 58, par. 2, lett. f) of the GDPR, a temporary and urgent limitation on the processing of personal data relating to users in the Italian territory, especially in order to protect children from the risk of being served 'utterly inappropriate replies', 'by having regard to their degree of development and self-conscience'.⁴⁹

In this decision the Italian Data Protection Authority describes Replika as 'an AI-powered chatbot equipped with a text and voice interface generating a 'virtual friend' users can configure as a friend, partner or mentor'. It also refers that it 'is presented both on the developer's website and in the two main App Stores as a chatbot that can improve users' mood and emotional welfare by helping them understand their thoughts and feelings, keep track of their mood, learn coping skills (i.e., to control stress), calm their

⁴⁸ See the Italian Data Protection Authority's press release of 12 July 2022 'TikTok rinvia la pubblicità basata sul legittimo interesse. Per il Garante privacy 'una decisione responsabile' <www.gdpd.it/web/guest/home/docweb/-/docweb-display/docweb/9789143> accessed 23 July 2023.

⁴⁹ See the Italian Data Protection Authority's decision no. 39 of 2 February 2023 <www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9852214#english> accessed 23 July 2023. See also the Italian Data Protection Authority's press release of 3 February 2023 'Artificial intelligence: italian SA clamps down on 'Replika' chatbot. Too many risks to children and emotionally vulnerable individuals' <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9852506#english> accessed 23 July 2023.



anxiety and work towards goals such as positive thinking, stress management, socialisation and the search for love'.⁵⁰

In the decision under consideration are also indicated the service provider's declarations on privacy policy and the platform's terms of service concerning the measures adopted for the protection of younger users, including the minimum age for using the service.

The service provider declares, on privacy policy, that personal data relating to users below thirteen years are not collected knowingly. It also states that parents and legal guardians are encouraged to control children in their use of the Internet, to instruct them never to provide personal data without their authorization and to contact the platform in case they have reason to believe that a child below thirteen years has given personal data, in order to remove them from databases.

According to the platform's terms of service, children below thirteen years are banned from using the service and parents or legal guardians' authorization is required for users below eighteen years. In the two main App Stores the service is classified as suitable for users aged above seventeen.

The Italian Authority found different breaches of the GDPR in users' personal data processing by the platform, especially referring to vulnerable and underage users, also in consideration of the lack of effective age verification systems. It noted, in particular, how some tests carried out on the platform and reported by media outlets showed that no age verification or control procedures were in place during account creation. The system, in fact, only required users to provide name, email account and gender. No banning or blocking mechanisms were triggered, even where a user declared explicitly to be underage. According to several users' reviews of the platform on the main App Stores, inappropriate replies for children were served, including sexual content.⁵¹

In the same decision the Italian Data Protection Authority underlined that the service provider's privacy policy was not to be considered compliant with the principles and obligations set out in the GDPR on the personal data processing transparency. This privacy policy, in fact, did not reveal any essential elements of personal data processing, in particular with regard to the use of the personal data of minors. The Italian Supervisory Authority noted accordingly the impossibility of identifying the legal basis of the chatbot's data processing activities. It, however, excluded that this legal basis 'may be traced back, also implicitly, to contractual performance especially as regards children, since children are legally incapacitated under Italian law to enter into a contract for the supply of services such as the one at hand - which entails making available a substantial amount of one's personal data'.⁵²

ChatGPT (an acronym for Chat Generative Pre-Trained Transformer) is an online platform capable of emulating and elaborating human conversations by generating human-like responses following textual

⁵⁰ See the Italian Data Protection Authority's decision no. 39 of 2 February 2023 already cited in the previous note.

⁵¹ See the Italian Data Protection Authority's decision no. 39 of 2 February 2023 already cited in the previous note 48.

⁵² Ibid.



queries. It is developed and managed by OpenAI, ‘an AI research and deployment company’ with the ‘mission’ to ‘ensure that artificial general intelligence benefits all of humanity’.⁵³ This chatbot interacts with its users through text messages ‘in a conversational way’, so that it’s possible, for it, ‘to answer follow-up questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests’.⁵⁴ The Italian Data Protection Authority, on 30 March 2023, imposed upon the company OpenAI, under art. 58, par. 2, lett. f), of the GDPR, an immediate temporary limitation on personal data’s processing, relating to users in Italy, in consideration of different GDPR’s violations. The Italian Supervisory Authority underlined in particular that no information was provided to users and other data subjects whose data was collected and processed by ChatGPT. It noted that personal data collection and processing activities for training the algorithms underlying ChatGPT’s operations did not have a legal basis. It considered, moreover, the absence of any mechanism for verifying the age of users which, however, according to OpenAI’s terms of use, must be at least thirteen years old. Users could thus be exposed to inappropriate responses with regard to their age, degree of development and self-awareness.⁵⁵ OpenAI immediately expressed its intention to collaborate in order to comply with Italian and European data protection regulations.⁵⁶ The Italian Supervisory Authority decided consequently to suspend enforcement of the temporary limitation decision adopted, starting from the fulfilment of the different specific measures set out by the Italian Authority itself, under art. 58, par. 2, lett. d), of the GDPR.⁵⁷ The Italian Data Protection Authority ordered, in particular, OpenAI ‘to include a request to all users connecting from Italy, whether already registered or not, to go through an age gate upon their initial access following the possible reactivation of the service for Italy to filter out underage users based on the inputted age’.⁵⁸ In the same decision, the Italian Supervisory Authority ordered OpenAI ‘to submit a plan

⁵³ This is the mission outlined by OpenAI itself in its website <<https://openai.com/about>> accessed 23 July 2023. See also the ‘Planning for AGI and beyond’ <<https://openai.com/blog/planning-for-agi-and-beyond>> accessed 23 July 2023 and the ‘OpenAI Charter’ <<https://openai.com/charter>> accessed 23 July 2023.

⁵⁴ This description of the product is given by OpenAI <<https://openai.com/blog/chatgpt>> accessed 23 July 2023.

⁵⁵ See the Italian Data Protection Authority’s decision no. 112 of 30 March 2023 adopted with emergency resolution by the President of the Authority <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870832> accessed 23 July 2023. See also the Italian Data Protection Authority’s press release of 31 March 2023 ‘Artificial intelligence: stop to ChatGPT by the Italian SA. Personal data is collected unlawfully, no age verification system is in place for children’ <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870847#english> accessed 23 July 2023.

⁵⁶ See the following Italian Data Protection Authority’s press releases: 4 April 2023 ‘ChatGPT: Meeting Tomorrow Between OpenAI and Italian SA’ <www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9872284#english> accessed 23 July 2023; 6 April 2023 ‘ChatGPT: OpenAI collaborating with Italian SA on commitments for protecting italian users’ <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9872832#english> accessed 23 July 2023; 8 April 2023 ‘ChatGPT: Garante privacy, iniziato l’esame delle misure proposte da OpenAI’ <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9873602> accessed 23 July 2023.

⁵⁷ According to art. 58, par. 2, lett. d), of the GDPR each supervisory authority shall have the corrective power ‘to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period’.

⁵⁸ See the Italian Data Protection Authority’s decision no. 114 of 11 April 2023 <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9874702#english> accessed 23 July 2023. See also the Italian Data Protection Authority’s press release of 12 April 2023 ‘ChatGPT: Italian SA to lift temporary limitation if OpenAI implements measures. 30 April set as deadline for compliance’ <www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9874751#english> accessed 23 July 2023.



for the deployment of age verification tools’ ‘whereby users aged under 13 should be prevented from accessing the service along with users aged under 18 in the absence of an express indication of consent by the person exercising parental authority over the latter’.⁵⁹

All the different examined decisions demonstrate the Italian Data Protection Authority’s deep action in protecting children in the digital space and its capacity to favor the implementation of European and Italian dispositions on personal data protection by digital platforms. This is also due to increasing attention to the need for effective user age verification systems.

The Italian Data Protection Authority and the Italian Communications Regulatory Authority (AGCOM) have recently also set a joint working group in order to promote the adoption of a code of conduct that should guide digital platforms in deploying age verification systems for minors accessing online services.

⁶⁰ This step fits coherently within the new European legal framework on the regulation of digital services, both in consideration of the specific provision for providers of very large online platforms, as ‘mitigation measures, tailored to the specific systemic risks’, of ‘age verification and parental control tools’ among the ‘targeted measures to protect the rights of the child’ (art. 35, par. 1, lett. j, *Digital Services Act*) and according to the general relevance of codes of conduct as instruments of digital platforms’ co-regulation (art. 45 *Digital Services Act*).

9. Final Considerations

In the current *Algorithm Society* and *Platform Economy*, the necessity of reliable protection of the competitive digital market and digital platforms’ users has recently led the European Union legislator to introduce important provisions in order to increase the digital platforms’ cooperation and responsibility.

The European Union’s purpose is to create a safer digital space at a global level since the new Acts apply to users of intermediary services that have their place of establishment or are located in the Union, irrespective of where the providers of those services have their place of establishment, following the same criterion already adopted by the European Regulation on personal data protection.

Deep attention is reserved to the need for effective protection of minors from the risks of different digital environments, in particular the risk of being exposed to inappropriate content for their age.

The European and Italian legislations on personal data protection provide a minimum age (of fourteen years in the Italian legal system) at which a minor can express personally, without the need of parents’ or legal guardians’ authorization, the consent for processing personal data in relation to the offer of Information Society services. In this way, it is recognized as a sort of ‘digital majority’ to minors over

⁵⁹ See the Italian Data Protection Authority’s decision no. 114 of 11 April 2023 already cited in the previous note.

⁶⁰ See the Italian Data Protection Authority’s press release of 12 April 2023 ‘Garante privacy e Agcom insieme per tutelare i minori online. Istituito un tavolo di lavoro per elaborare un codice di condotta nell’ambito del protocollo d’intesa’ <www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9874988> accessed 23 July 2023.



fourteen. These minors can access the virtual world in order to exercise their fundamental rights, in particular for obtaining information, expressing their thoughts, socializing.

This digital consent, however, cannot be considered really spontaneous and informed, and, especially with regard to minors, doesn't represent a sufficient protective measure, since minors have to be properly protected online, because of their vulnerability and fragility. Thus, any harmful content should be prohibited to them by default.

The new European provisions, specifically those in the *Digital Services Act*, impose upon the digital platforms accessible to minors not only formal duties of information, such as the explanation of their general terms and conditions in an understandable way for children (art. 14, par. 3, *Digital Services Act*) but also due diligence obligations. Digital platforms, in particular, shall adopt 'appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors, on their service' (art. 28, par. 1, *Digital Services Act*) and shall not 'present advertisements on their interface based on profiling' of the user if they are aware, with reasonable certainty, that that user is a minor (art. 28, par. 2, *Digital Services Act*).

The European legislator, aware of the difficulties in governing a very complex phenomenon and in adapting to rapid technological changes, recognizes the importance of integrating between public and private regulations, a co-regulation, not only through professional ethics or codes of conduct but also through the terms and conditions established by the online platforms themselves for regulating the contracts with their users.

Providers of intermediary services have to make publicly available, at least once a year, reports on any content moderation that they engaged in, including different information, in particular specifying 'whether the action was taken on the basis of the law or the terms and conditions of the provider' (art. 15, par. 1, lett. b, *Digital Services Act*). A particular importance is thus explicitly recognized by the European legislator to the providers of online intermediation services' terms and conditions as contractual norms established by private subjects but with a 'normative' function.

This particular system of co-regulation, which also implements the Italian constitutional principle of 'horizontal subsidiarity' (art. 118, last par. of the Italian Constitution), however, requires a strict control to verify the conformity of the online platforms' activities and terms and conditions to the fundamental principles of the Italian-European legal system.

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