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## Children and Internet Trade

### 1 Introduction

When children surf the Internet they often visit web sites belonging to big companies with a profile directed towards children. There they enjoy games or other interactive activities. Other web sites could also be of interest, depending on the age and the particular interests of the child concerned.

However, there are many concerns as to what children meet “out there” in cyber space. Thus, children’s safety has been addressed, not only in the Swedish governmental report SOU 1999:106 (“The Consumers and IT”), which has not yet led to legislation, but also in soft law created by the Nordic Consumer Ombudsmen and the International Chamber of Commerce (ICC). The protection of children in relation to their use of IT has also attracted the interest of the European Union, which has addressed these matters mainly through soft law. It might be of interest to take a general look, through the medium of this soft law, at the IT problems which children encounter, but also at some of the possible solutions.

A number of issues appear as possible dangers to children. One first issue concerns the movement as such of children on the Internet. The problems include such questions as whether children should be allowed to access the web in the first place, and what role their parents should play. A second issue is whether children should only be protected from advertising which targets them or whether there should be some sort of protection in other situations as well. This in turn begs two more questions, *viz* at what age such protection should be afforded and, secondly, the relevant level of the protection planned or afforded. A third issue concerns the child’s conclusion of contract and a fourth issue, finally, concerns various privacy aspects.

Before going any further into these issues, let us briefly review the general arguments in connection with children. Perhaps the prime source on this subject is the UN Convention on the Rights of the Child (UNCRC, in the following “the Child Convention”), passed in 1989. That convention includes a number of important rules such as the principle of non-discrimination, the best interests of the child, and participation of children in different decisions affecting them. The convention also includes a number of political and social rights. There appear to be no rules directly relating to children as consumers. The existence of the Child Convention also raises questions about the child itself and its relationship with its parents.

### 2 General remarks on the child and its relationship with its parents

As has already been remarked, the protection of children includes a number of issues. The first question that could be discussed is who the relevant child is. This depends on the

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legislation in question. Article 1 of the Child Convention refers to “every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier”. The age of 18 also applies under Swedish law, although a child of 16 may dispose freely of his/her income from employment.

Hopefully, however, children do not stand alone. The Child Convention requires the parents have to take care of the child in accordance with the principle of the child’s best interests. This means that the parents have the main responsibility for the upbringing of the child, taking into consideration the child’s age, maturity and development. Step by step the child should be prepared for adult life through decision-making and respect for its views. In this connection mention should also be made of Article 12 of the Child Convention, concerning the right of the child to be heard. That provision is considered to include a general requirement as to children’s rights to influence and responsibility.

One problem of fundamental importance facing the legislator or rule maker is to what extent parents should be responsible for rulemaking and the protection of children. One extreme view is not to regulate these questions at all but to leave everything to the parents. Another is to put the whole protection of the child in legislation or soft law. Normally the solutions actually adopted will be somewhere in between, but it is important to recognise the scale, and there are differences. Thus, in Swedish law children may not conclude any contract before the age of 16 without parental (or equivalent) consent. In other countries children may conclude necessary contracts.

Another problem related to the child/parent relationship is the picture of the parents in advertising material of different kinds. This problem has also appeared in relation to TV-advertising and Article 16 of the Television-without-Frontiers Directive<sup>1</sup> thus provides that, as the aim of the rule is that TV advertising should not cause moral or physical detriment to minors, it should not encourage minors to nag parents or others, nor should it exploit the special trust between parents and children. In the soft law regarding children and the Internet, this is not found to be a great problem as yet. However, there are rules to prevent traders in their relation with the child from undermining the relationship and the trust between child and parent. In this connection it might be worth mentioning Article 29 paragraph 1c/ of the Child Convention, which lays down that education should be directed to the development of respect for the child’s parents, although this provision refers to education through the public sector school system.

### 3 The movements of the child on the Internet

There are no signs in the different sets of rules that children should be stopped totally from accessing the web. This is in conformity with the Child Convention, as it expressly provides for a freedom of expression which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice (Article 13). However, there are certainly dangers connected with the child’s surfing the web. The Child convention does provide for some restrictions in the right of the child to gain information, i.e. for the respect of the rights or reputation of others or for the protection of national security, public order or public health or morals. This should include restrictions in relation to children’s possibilities to reach the sites of pornographic traders. The relationship between the child and mass media

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<sup>1</sup> Council directive (89/552/EEC) of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of Television broadcasting activities.

is also dealt with in the Child Convention Article 17, although in a weaker form. Thus the child should be protected from information and material injuries to his or her well-being through guidelines. Such restrictions are also in conformity with the general ambition within the European Union to create confidence towards the net.

One important issue in this regard is the role of the parents. The duty of upbringing includes helping the child to develop its capacity to take part in matters of society. In the relevant soft law the view of the parents' duties varies considerably, and this also affects the duties of the trader. Thus it could be considered a parental duty to sit beside the child in front of the computer. In such a case it might be considered the trader's duty to encourage the parents to do so, which raises questions as to what the traders are obliged to do in order to achieve this. Another view of the parents' role is that they should in other ways take care to ensure that the child does not meet dangerous material while surfing the web. In such a situation the duty of the trader could be to help the parents by means of appropriate hardware or software. A third possibility is to regard the parents as not present at all, which is probably the commonest situation, as many parents still do not have the knowledge to interfere. In such a case, the relevant duty on the side of the trader should be to act in such a way that children are not harmed. It is obvious that the duties of the traders are considerably lower with a competent adult on the other side than with only a child as their opposite number.

#### 4 The protection of children surfing the commercial parts of the Internet

Of fundamental importance for children is the definition of the advertising target group, i.e. whether the target group includes children or exclusively consists of children. There are not many items of legislation in Swedish law concerning the protection of children in connection with marketing, but there is a ban on television advertising directed at children under twelve, and there is an interesting case to illustrate the effects of it.<sup>2</sup> A decision of the Swedish Market Court (MD 2001:5), concerned a television advertisement for the Walt Disney version of Cinderella. The trailer consisted of sequences from the animated film and pictures of children apparently enjoying the movie. The speaker voice, however, used words which were not regarded as particularly directed towards children. Furthermore, the trailer was transmitted at four times which were not believed to be peak viewing hours for children, and in connection with programmes having adults as their presumed primary audience. The relevant times were 15.10, 21.00, 19.30 and 15.35. The advertisements were not considered by the majority to be directed at children and were therefore not covered by the Swedish prohibition of marketing directed towards children. Another case of the Market Court could be mentioned in contrast, namely MD 1981:5, which concerned a whole-page picture in Sweden's biggest morning paper of a child about 10-12 years old eating a hamburger, with a text about unappetising school lunches. The advertising came next to the editorial page, where nothing else of general interest for children is to be found, but the court found that the advertising generally could reach children as well, and this influenced its reasoning. The cases illustrate the difficulties in relation to mixed messages. Legislation that only covers advertisements specifically directed towards children may be a waste of effort.

However, there are also other methods to solve the problems connected with mixed messages. One way is to provide for a minimum protection that all advertising should live up to. Another approach is to require that advertising should be adapted only to one target group.

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<sup>2</sup> Radio- och TV-lag (1996:844) Chap. 7 § 4.

In that case there will be no mixed messages and it is possible to have special requirements for advertising directed towards children. A third approach might be to combine these methods.

All these methods have been used in the relevant soft law to protect children from dangerous material within the commercial parts of the web. Such dangers could involve pornography or violence and could appear in pictures and texts in advertising as well as being a part of products and services of different kinds. A minimum level of protection for children could be to recommend that advertising should not contain any element which might result in harm to children or cause moral, mental or physical detriment to children. A similar solution is also used in connection with television. Thus, Article 22 of the Television-without frontiers directive prohibits TV-programmes which might seriously impair the physical, mental or moral development of minors. Such minimum rules are also used in the different items of soft law. The other solution, i.e. ensuring that advertising is not construed in a mixed form, appears to be used, although in a less clear-cut form. What is required is that the advertising should be adapted to the relevant target group. However, in my view achieving such a goal must be an almost impossible task.

There are also interesting differences as to how the different items of soft law describe the duties of the trader. Such duties could be ascribed the trader or the commercial communication as such (cf. “code subscriber may not...” with “codes should...”). Furthermore, the duties could be described as a positive obligation, (e.g. to encourage young children...), or as a prohibition or something similar (e.g. children should not be tempted... or do not encourage...). The rules could be comparatively precise (e.g. entertainment should not be combined with or punctuated by advertising messages) or very imprecise (e.g. do not encourage children to buy a product by exploiting their sense of loyalty). Even a comparatively precise positive obligation could constitute a weak safeguard for children if the trader’s only duty is to identify material intended for adults only, if it is not also required that such material should be clearly separated from material intended for children or young persons.

In this connection it is also important to mention the risk of the trader having links to unsuitable material from his web site. This is particularly dangerous when the web site is directed towards young persons. But in other situations too, such links could be highly inappropriate. One way to regulate this is perhaps to consider such a link as an encouragement to enter such pages. However, it is still debatable whether a mere link is sufficient proof of encouragement.

Protection could be more difficult to achieve when pornography or violence is used as a marketing device for other products, considering that such means could be quite effective marketing in relation to teenage boys. However, this is more of a general marketing problem and is preferably solved by such rules. Generally, according to Swedish law, it is required that marketing, also in relation to children, is of good standard and does not exploit children’s or young persons’ natural credulity or inexperience. Even children’s illusions are protected in one of the soft law systems. Generally, there is also a requirement that advertising should be clearly identifiable as such, which could involve a difficulty in connection with the construction of a web site. What is advertising and what is general information about the company? It is not acceptable for games or other forms of entertainment to be interrupted by advertising messages.

## 5 Children’s conclusion of contracts

National legal system generally develop forms to keep children from concluding contracts they are not allowed to conclude. However, as we have now seen, the national rules as to the capacity of children vary considerably. It might also be difficult to ascertain which legal system should be applied. Thus general EC rules concerning legal signatures are one measure which also protects children.<sup>3</sup> However, these are still at the implementing stage and it is still impossible to evaluate the result. By comparison with the present situation it could involve an important change for the better. Another measure to protect children is to have the same soft law regulating the problem. In the soft law discussed there are suggestions that traders should not accept orders from minors without the explicit and verifiable consent of the parents/guardians. This might in my opinion be going too far even if it perhaps may be justified through the particular dangers to children which Internet contracting entails. However, it is a good solution for those countries where children are hardly allowed to conclude any contracts at all without their parents' consent. It might also be a good solution as a precaution to ensure that children do not pretend to be someone else, which might be an important problem, given the anonymity of Internet.

So far we have been dealing with the situation when a contract is about to be concluded. But another interesting point is how the child reaches that point. Not seldom it has been encouraged to do so by marketing. This matter is also dealt with in the relevant soft law, although in varying ways. Generally, minors should not be encouraged to buy, and, more specifically, should not be encouraged to conclude a contract of credit. It is unclear what kind of encouragement is covered by such provisions. Probably their main target is web sites aimed at children and including special offers or using hidden techniques as an inducement for children to buy or to conclude other contracts.

## 6 Privacy aspects

The privacy of the child or the family as a whole could be endangered if the child is lured into providing the trader with information of different kinds as to the habits of the family, who does the shopping and so on. Dangers in relation to privacy are recognised, for example, in Article 8 of the European Convention on Human Rights, and they have also been realised in the different items of soft law. Thus traders are recommended not to encourage children or young persons to give information about themselves, the household or any other person. It is also recommended that the provision of information should not be made a condition for gaining access to certain content. However, also on this point there are different views as to the role of the parents. Thus traders recommend that the parental consent should be obtained and that the relevant traders should take reasonable steps to ensure this. However, there seems little point in any such requirement if no particular proof of consent is necessary.

## 7 Conclusions

A number of conclusions may be drawn. First, the Child Convention is an interesting piece of legislation, even though it does not expressly deal with the consumer market at all. The provisions concerning the best interests of the child, the right to be heard, freedom of expression and the right to information may specifically be mentioned in this regard. Secondly, the Internet may to some extent be compared with television, and the problems

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<sup>3</sup> Directive 1999/93/EC on a Community framework for electronic signatures.

concerning children and e-commerce have a great deal in common with the problems occurring in connection with television advertising. One such problem is connected with mixed messages, and on this point it is important to continue discussing the best ways of protecting children while also giving them a fair opportunity of searching for information on subjects that interest them. However, there are also differences compared with television advertising, in particular the mobility of the child in different spheres of the web, interactivity, and the particularly anonymous situation of the child, together with the possibilities of concluding contracts on the web. This problem also appears to have been the most difficult one on which to achieve general agreement. Another problem generally connected with the Internet is the disappearance of geographical boundaries. However, such problems generally affect only older children, due to the language difficulties. One measure in this regard is probably the use of such items of soft law as have been discussed above. However, in my view we are only at the beginning of development in this respect. Many problems for children on the Internet could be eased through different technical measures. It is also important that at least some level of common agreement be reached, for example, as to the role of the parents. It thus remains to be seen what problems remain or will be added in the future versions of the soft law produced by the Nordic Consumer Agencies, ICC and the European guidelines.