

DATA PROTECTION ACT 2018
ENFORCEMENT POWERS OF THE INFORMATION COMMISSIONER

PENALTY NOTICE

To:

(1) TikTok Inc, of 5800 Bristol PKWY, Culver City, CA, 90230, United States ("**TikTok Inc**"); and

(2) TikTok Information Technologies UK Limited, of One London Wall, 6th Floor, London, England, EC2Y 5EB (previously ByteDance UK Limited) ("**TikTok Limited**")

I. INTRODUCTION

1. This **Penalty Notice** is given pursuant to section 155 of and Schedule 16 to the Data Protection Act 2018 ("**DPA**").
2. It relates to the period 25 May 2018 to 28 July 2020 (the "**Relevant Period**").
3. The Information Commissioner ("**the Commissioner**") has decided to impose a financial penalty on TikTok Inc and TikTok Limited (together "**TikTok**") pursuant to section 155(1) DPA in respect of certain infringements of the DPA and the UK General Data Protection Regulation ("**UK GDPR**")¹.
4. This Penalty Notice sets out the reasons why the Commissioner has decided to impose a financial penalty including the circumstances of the infringements and the nature of the personal data involved. On 23 September

¹ See also section 115(9) DPA and Articles 58(2)(i) and 83 UK GDPR. For the purposes of this penalty notice, the version of the GDPR that is applicable is the GDPR as transposed into and modified by UK law (that is to say, the "UK GDPR"): *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454; [2021] 1 WLR 2545. There is however no material difference for the purposes of this penalty notice between the GDPR and the UK GDPR. If and to the extent that the law applicable is the GDPR as originally enacted rather than the UK GDPR, then references to the UK GDPR are to be read as references to the corresponding provisions of the GDPR.

2022, the Commissioner gave TikTok a Notice of Intent (“**NoI**”), notifying it that he intended to impose a penalty. This Penalty Notice takes into account, and where appropriate makes specific reference to, TikTok’s written representations dated 14 November 2022 in response to the NoI (“**Written Representations**”).

5. The Commissioner has found that during the Relevant Period:
 - a. Each of TikTok Inc and TikTok Limited were controllers (and TikTok was a joint controller) in respect of personal data of users and account holders² located in the UK (“UK users”), within the meaning of section 6 DPA and Article 4(7) UK GDPR. Each of TikTok Inc and TikTok Limited, alone or jointly with others, determined the purposes and means of the processing of such personal data.
 - b. In providing its services, TikTok processed UK users’ personal data, amongst others, to support the provision and functionality of TikTok’s services, and to monetise such services, including by providing targeted advertising to its UK users and by offering in app purchases. The personal data processed by TikTok of individual UK users included the following:
 - i. name and/or username;
 - ii. date of birth;
 - iii. email address;
 - iv. telephone number;
 - v. profile information, photographs and/or profile videos;
 - vi. content generated on the platform (such as comments, ‘likes’, etc.);
 - vii. platform settings~~es~~ preferences;
 - viii. information collected through surveys, challenges and/or competitions in which the user participated;

² See paragraph 16 for the distinction between users and account holders.

- ix. information about how the user interacted with the platform and/or third party platforms, including e.g. interactions with content, ads views, videos watched and problems encountered; content 'liked' and saved by users to 'my favourites'; and users followed;
 - x. internal user profiles detailing, amongst others, the user's preferences and interests, based on factors such as gender and age as well as their use of the platform; and/or
 - xi. information relating to followers of users and their interactions such as 'likes'.
- c. This is personal data within the meaning of Article 4(1) UK GDPR because it is "*information relating to an identified or identifiable natural person*". The provisions of the DPA and UK GDPR apply to the processing of personal data by TikTok by virtue of section 207 DPA and Article 3 UK GDPR.
- d. The Commissioner has found that TikTok failed to process the data of its UK users in accordance with certain requirements of the DPA and the UK GDPR. In particular, the Commissioner has found that TikTok infringed the following Articles of the UK GDPR during the Relevant Period:

Article 8 UK GDPR - offering of information society services to children

- i. TikTok provided its services to UK users under the age of 13 and processed their personal data without consent given or authorised by the holder of parental responsibility over such child users, and without identifying any lawful basis for processing other than consent. Whilst TikTok purports to rely, in part, on contractual necessity as its lawful basis for processing the personal data of children under 13, the Commissioner considers that the legal test for contractual necessity is not met in this case.

- ii. In addition, TikTok failed to make reasonable efforts to ensure that consent was given or authorised for underage child users of its video sharing platform, and/or to prevent children under 13 from accessing its services (in circumstances where it relied upon such services being restricted to users over the age of 13).

Article 12 UK GDPR – Transparent information, communication and modalities for the exercise of the rights of the data subject

- iii. TikTok failed to take appropriate measures to provide the information required under Article 13 UK GDPR to data subjects in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular in relation to information addressed specifically to children.

Article 13 UK GDPR – Information to be provided where personal data are collected from the data subject

- iv. TikTok failed to provide to data subjects with the information required under Articles 13(1) and (2) UK GDPR.

Article 5(1)(a) UK GDPR – Lawfulness, fairness and transparency

- v. In failing to comply with above requirements, TikTok failed to ensure that the personal data of its UK users was processed lawfully, fairly and in a transparent manner, in breach of Article 5 (1) (a).
6. The Commissioner has decided to impose a penalty in respect of the above infringements on the basis that, having regard to the matters listed in Articles 83(1) and (2) UK GDPR, a financial penalty is an effective, proportionate and dissuasive measure.

7. The Commissioner has found TikTok Inc and TikTok Limited jointly and severally liable for the infringements and for the financial penalty. TikTok Inc and TikTok Limited are part of the same corporate group; both are controllers in respect of the personal data of TikTok users and both bear responsibility for the infringements the Commissioner has found.
8. The amount of the penalty that the Commissioner has decided to impose on TikTok is **£12,700,000**.
9. The infringement of Article 9 UK GDPR, in relation to which there was a provisional finding in the Commissioner's Notice of Intent dated 23 September 2022 ("**NoI**"), does not form part of this penalty notice. As set out in the letter to TikTok dated 15 March 2023, the Commissioner has exercised his administrative discretion to de-prioritise the part of the investigation which relates to Article 9 UK GDPR, taking into account TikTok's representations in response to the NoI.

II. FACTUAL BACKGROUND

(1) Corporate background

10. TikTok Inc's head office is in California, US. Its UK office in London (TikTok Limited) is part of the same corporate group and, amongst other activities, carries out activities in relation to the sale of advertising on TikTok's platform and the moderation of content. TikTok also has a number of other offices around the world, including in New York, Paris, Berlin, Dubai, Mumbai, Singapore, Jakarta, Seoul and Tokyo³ as well as Dublin.
11. TikTok Limited's Annual Report for the year ended 2020⁴ states at page 5 that "*The immediate parent of the Company is TikTok Ltd., a company incorporated and registered in the Cayman Islands. Its ultimate parent undertaking is Bytedance Ltd., also incorporated and registered in the Cayman Islands. The Board of the Company comprises Tian Zhao, a sole*

³ [About TikTok | TikTok](#)

⁴ [application-pdf](#)

director appointed by the parent". Tian Zhao is Vice President of Bytedance.⁵ Further, at page 35 of the Annual Report, it states that "*Yiming Zhang is the ultimate controlling party of the Company and the Group*". Yiming Zhang is the founder of Bytedance.⁶ Bytedance's Headquarters is in Beijing.⁷

12. During the Relevant Period, TikTok's corporate structure was as follows:⁸

TikTok Corporate Structure (throughout the Relevant Period)



⁵ [TIAN ZHAO - Vice President - 字节跳动 | LinkedIn](#)

⁶ [Zhang Yiming \(forbes.com\)](#)

⁷ [ByteDance Corporate Headquarters, Office Locations and Addresses | Craft.co](#)

⁸ TikTok letter to ICO dated 5 May 2021, Appendix 2.

13. The company has grown quickly, amassing a significant number of users. In September 2021 TikTok announced that it had 1 billion monthly active users worldwide.⁹ Based on the information provided by TikTok, at the start of the Relevant Period, as at 30 May 2018,¹⁰ it had 2,051,643 monthly active UK users, rising to 17,723,009 monthly active UK users of the TikTok App by 31 July 2020.¹¹
14. The combined turnover figure for TikTok Inc and TikTok Limited for 2020 was US\$702 million, comprising US\$566 million for TikTok Inc and US\$171 million for TikTok Limited (minus US\$35 million of transfer pricing revenue with TikTok Limited).¹² This equates to £547 million (using 2020 Bank of England exchange rates).¹³

(2) The TikTok platform

15. TikTok offers a video-sharing platform that allows users to view and share short-form videos, supported by various features. It is accessed online¹⁴ or through an Application Programme ("**App**").
16. TikTok's services are accessible internationally, including in the UK.¹⁵ The level of access and services provided to users differs, depending on whether a user has a registered TikTok account. Any member of the public with online access to either TikTok or other social media platforms can view content, such as videos, that has been shared publicly on TikTok. However, only those users who have registered as account holders can create and share their own videos, access features such as direct messaging and follow other account holders, and find friends through allowing TikTok access to their phonebook and/or Facebook account.

⁹ <https://newsroom.tiktok.com/en-us/1-billion-people-on-tiktok> (excluding the 'Douyin' platform offered in China).

¹⁰ At the time, the platform was still called musical.ly.

¹¹ TikTok's Response to the Commissioner's Information Notice dated 1 July 2022 ("**IN3**"), 29 July 2022, response 5.

¹² Written Representations, paragraph 4.2.

¹³ GBP exchange rates | Bank of England | Database

¹⁴ As to which, see further paragraph 20 below.

¹⁵ In China it provides a separate user platform, called 'Douyin'.

17. There is no direct monetary charge to users in order to create a TikTok account. TikTok generates income from advertising and in-product purchases. As to the latter, TikTok account holders could purchase 'coins' via the Apple App Store or Google Play. These could then be exchanged for items such as emojis and gifts, which could be used e.g. to demonstrate appreciation for users' content such as a video. In December 2019, TikTok amended its terms for the purchase of coins, so that only users aged 18 or over could access this service in the UK. Prior to that date, however, all account holders including children were able to purchase coins: users aged over 13 years of age could send virtual gifts to other account holders and account holders aged over 16 years of age could receive them.¹⁶
18. Set out below is an overview of the 'user journey' on the desktop site and the mobile app, with illustrative screenshots.

Desktop site

19. During the Relevant Period (described in paragraph 2), the TikTok.com website did not offer the functionality to view videos on the TikTok platform. As illustrated by the screenshot below, it simply included links to where users could download the TikTok app.¹⁷

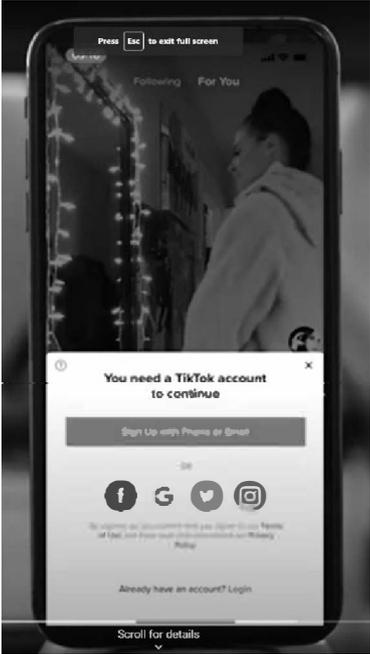
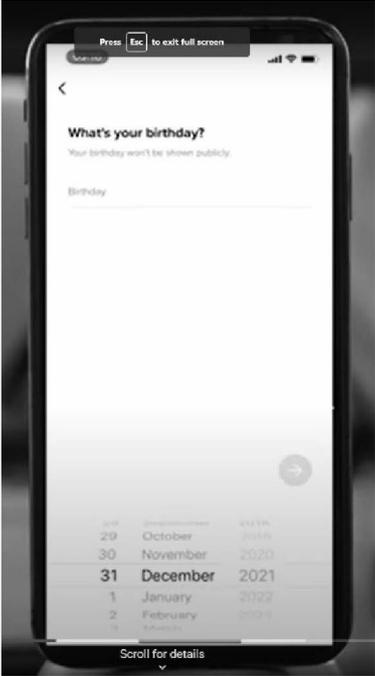
Mobile App

20. The table below uses screenshots from a May 2019 YouTube video to illustrate the process of creating a TikTok account:¹⁸

¹⁶ <https://newsroom.tiktok.com/en-gb/updating-our-gifting-policies>

¹⁷ Image from 3 July 2020, captured using the Wayback machine; see also TikTok - Make Your Day (archive.org).

¹⁸ See the YouTube video: How To Create a TikTok Account; the screenshots are used by way of an illustrative example only.

No	Description	Screenshot
1.	<p>The user is presented with a message telling them they need a TikTok account to take certain actions (such as upload videos).</p>	
2.	<p>On clicking "sign-up", the user is asked to provide their date of birth.</p>	

3. The user is asked to provide their telephone number.



4. The user is sent a text message with a code. By entering the correct code the sign-up process is completed.

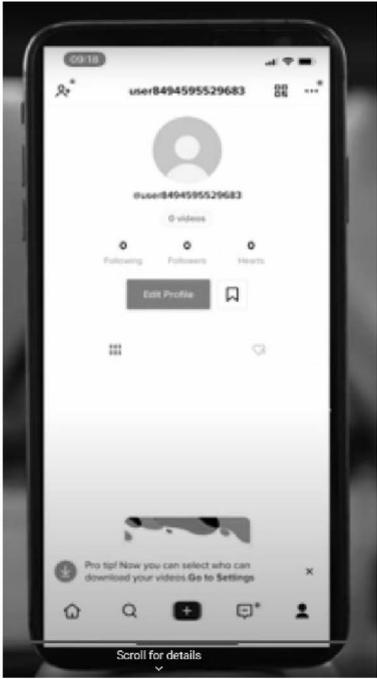


5. The user can then begin using the app.

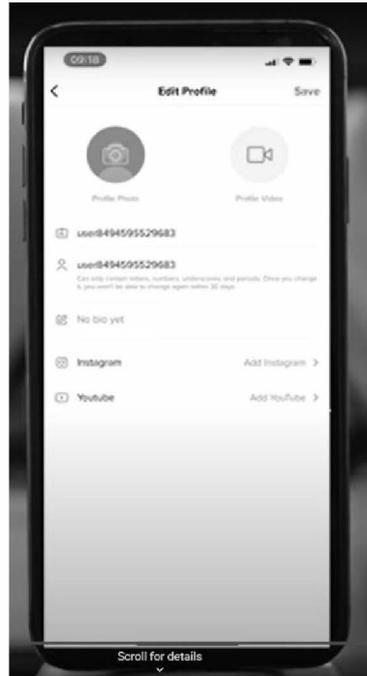


--	--

6. The user now has a profile, also allowing them to follow other users and be followed.



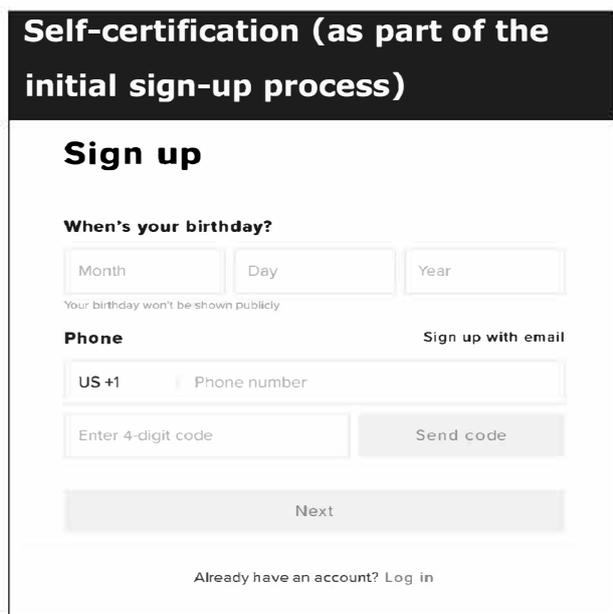
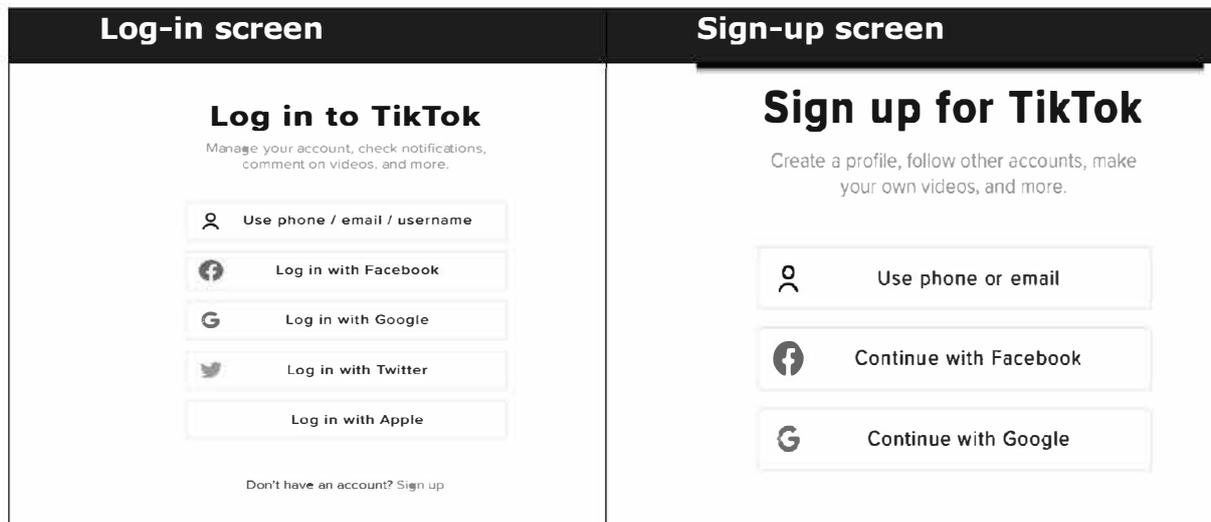
7. The user can edit their profile, including e.g. editing their profile name and adding links to other social media accounts.



(3) Underage child users of TikTok

21. Throughout the Relevant Period, TikTok's Terms of Service stated that TikTok's service and platform in the UK are offered exclusively to people aged 13 years and older.
22. When signing up to TikTok, new users needed to provide their date of birth. If they stated that they are younger than 13, users would be precluded from creating an account and would be denied access. However, no corroboration or verification was required of the date of birth provided by users, i.e. they essentially "self-certified" that they were 13 years of age or older in order to be allowed to create an account on the TikTok platform. By way of example,

in June 2020, the relevant log-in, sign-up, and self-certification screens on the TikTok website were as follows:¹⁹



23. In the course of the ICO's investigation, TikTok described the self-certification process as follows:²⁰

"In the UK, TikTok does not permit users under the age of 13 to use the App, as specified in our Terms of Service and Community Guidelines.

¹⁹ Images from 14 June 2020, captured using the Wayback machine, using the search string <https://www.tiktok.com/login>.

²⁰ Letter from TikTok to the ICO dated 2 April 2019.

Users registering on the App must go through an age-gating process. Users must enter their date of birth to create an account. If a user, that is under 13, enters their date of birth, they are not allowed to register and will receive a message, as follows: 'Sorry, looks like you're not eligible for TikTok. Thanks for checking us out'.

24. Despite the restriction set out in the Terms of Service, the Commissioner estimates that in 2020 there were between 1.1 million and 1.4 million TikTok account holders, and 1.1 million and 1.75 million TikTok users under the age of 13.²¹ This reflects the ICO's economic analysis of a wide range of sources (see **Annex 2**). Research by Ofcom demonstrates TikTok's popularity in the UK amongst users under the age of 13:

a. Ofcom estimated towards the end of the Relevant Period (in June 2020) that amongst TikTok users who were children aged 8-15, 50% created videos at least weekly²².

b. A subsequent Ofcom report in March 2022 found that TikTok was one of the "*most-used online platforms among children aged 3-15*"²³, and that "*TikTok was the platform used by the most children and for the greatest amount of time.*"²⁴ Its sample included multiple children below 13 who were active TikTok users.²⁵ Ofcom emphasised the "*rise of the 'TikTots' - children defying age restrictions to use social platforms*", with a third of children aged 5-7 and two-thirds of those aged 8-11 having social media profiles, including in particular on TikTok.²⁶

25. TikTok has faced a number of international regulatory investigations regarding child users of its platform. Amongst others:

²¹ See further paras 50-55 below and Annex 2.

²² [Online Nation – 2020 report \(ofcom.org.uk\)](https://www.ofcom.org.uk/online-nation-2020-report), p.121.

²³ https://www.ofcom.org.uk/__data/assets/pdf_file/0023/238361/online-nation-2022-report.pdf, pp. 8 and 61 (Figure 2.10).

²⁴ https://www.ofcom.org.uk/__data/assets/pdf_file/0021/234552/childrens-media-lives-2022-summary-report.pdf, p. 5

²⁵ *Ibid*, pp. 11 ff.

²⁶ <https://www.ofcom.org.uk/news-centre/2022/living-our-lives-online>; see also e.g.

<https://www.bbc.co.uk/news/technology-60854885> and

<https://www.theguardian.com/technology/2022/mar/29/tiktok-being-used-by-16-of-british-toddlers-ofcom-finds>

- a. August–December 2018 (“**Privacy Policy 1**”);³²
 - b. January–September 2019 (“**Privacy Policy 2**”);³³ and
 - c. October 2019 – 28 July 2020 (“**Privacy Policy 3**”).³⁴
27. TikTok adopted a multi-jurisdictional, ‘blended’ approach to its presentation of its Privacy Policies, with versions that applied to the US, the EEA & UK, Switzerland, and other jurisdictions.

(5) Concerns regarding harmful content

28. Under the UK GDPR, children enjoy special protection with respect to the processing of their personal data.³⁵ The Commissioner considers it is relevant briefly to set out that concerns have been raised regarding content on TikTok which may be harmful and unsuitable for children under 13. This is relevant because: (i) TikTok processes data about, *inter alia*, children’s use of its platform in order to deliver bespoke content; (ii) such content may be harmful or inappropriate for children under 13; and (iii) TikTok argues that the special protections under Article 8 did not apply to its processing of the personal data of under 13s.³⁶ Examples of such concerns are as follows:
- a. Ofcom’s 2019 “*Online Nation report*” noted that among 12-15 year-olds, 79% “*had a potentially harmful experience online in the last 12 months*”³⁷.
 - b. A 2020 “*Children’s Media Lives – Wave 6*” report for Ofcom interviewed 18 children aged 8-17, and completed its research in summer 2019. It noted that “*The other [boy] explained that he had been especially upset*

³² [TikTok Privacy Policy August – December 2018.pdf](#)

³³ [TikTok Privacy Policy January – September 2019.pdf](#)

³⁴ [TikTok Privacy Policy October 2019 – 28 July 2020.pdf](#)

³⁵ See Recital 38 UK GDPR, cited in full at paragraph 38 below; see also Article 8.

³⁶ See paragraphs 85-105 below.

³⁷ - Online Nation (ofcom.org.uk) https://www.ofcom.org.uk/__data/assets/pdf_file/0025/149146/online-nation-report.pdf

after stumbling upon videos of animal abuse online. He saw an image of a man punching a dog in the face and another of someone flushing a hamster down the toilet, which made him cry. He said on this occasion he talked to his mum who comforted him, and he did not report any long-standing effects from the seeing the content. The videos were originally posted on TikTok but had subsequently been shared on Instagram”³⁸.

- c. In a December 2019 article headed “*TikTok struggles to protect teenage users from toxic videos*”, the Financial Times cited several researchers expressing concern about “*trends that included violence against women, particularly young girls*”, “*hyper-sexualised content on the app, as well as instances of adults using it to try to groom minors*”, cyber-bullying, and “*white supremacists*” on the platform.³⁹ The article quoted Ms Haley Halverson of The National Center on Sexual Exploitation, stating: “*With TikTok what makes it particularly concerning is their lack of appropriate safety features.*” The Financial Times also included the following screenshot of a staged kidnapping, as an example of potentially harmful content:

³⁸ [Children's Media Lives – Wave 6 \(ofcom.org.uk\)](#)

³⁹ [TikTok struggles to protect teenage users from toxic videos | Financial Times \(ft.com\)](#)



- d. A BBC article from June 2020 identified TikTok content relating to eating disorders as potentially harmful, citing *"fears some of the content glamorises eating disorders such as anorexia and bulimia."*⁴⁰ It quoted James Downs, an eating disorder and mental health campaigner, who said: *"One of the things that worries me most about TikTok is how the environment it provides is not guaranteed to be a safe one. We would never send young people into physical environments that might pose them with threats to their wellbeing, so why would we accept dangers in our digital environments either?"*.
- e. An February 2020 article from the Sun, headed *"Tok shock – In 10 minutes on TikTok I saw self-harm, girls offering sex, boys wielding knives and potentially deadly challenges"*, announced the launch of that newspaper's *"TikTok Time Bomb"* series, intended to *"to make sure parents are aware of the risks their kids are exposed to, and what they can do to better protect them"*.⁴¹

⁴⁰ [TikTok: Fears videos may 'trigger eating disorders' - BBC News](#)

⁴¹ [In 10 minutes on TikTok I saw self-harm, girls offering sex, boys wielding knives and potentially deadly challenges – The Sun | The Sun](#)

29. In its Written Representations, at paragraphs 5.4-5.6, TikTok argues that “*these few egregious examples*” of concerns being raised about harmful content on the TikTok platform are “*irrelevant and unfairly prejudicial to TikTok*” and makes reference to allegedly positive content on TikTok. The concerns regarding harmful content, however, remain pertinent for the reasons set out in paragraph 28 above. Specifically, they are relevant context in respect of the importance of the protections for child users provided by the UK GDPR and DPA and in respect of TikTok’s arguments that such protections do not apply. It is notable that, unlike the normal TikTok experience (as in the UK), all content in TikTok for Younger Users in the US is screened and curated to allow only age-appropriate type content: see para. 52(c) below.

III. LEGAL FRAMEWORK

30. Section 155(1) DPA provides that, if the Commissioner is satisfied that a person has failed, or is failing, as described in section 149(2) DPA, the Commissioner may, by written notice (a penalty notice), require the person to pay to the Commissioner an amount in sterling specified in the notice.

31. Section 149(2) DPA provides materially:

(2) The first type of failure is where a controller or processor has failed, or is failing, to comply with any of the following –

(a) a provision of Chapter II of the UK GDPR or Chapter 2 of part 3 or Chapter 2 of Part 4 of this Act (principles of processing);

(b) a provision of Articles 12 to 22 of the UK GDPR or Part 3 or 4 of this Act conferring rights on a data subject

...

32. The relevant substantive provisions of the UK GDPR are set out below, in the sections dealing with the respective contraventions. The legal framework on setting penalties appears at the start of the penalties section.

IV. REASONS WHY THE COMMISSIONER HAS DECIDED TO ISSUE A PENALTY NOTICE

(1) The Relevant Period

33. The Commissioner has decided to focus the scope of the investigation on the “Relevant Period” as defined at paragraph 2 above:
- a. The start date of 25 May 2018 is the day on which the DPA and UK GDPR came into force.
 - b. The end date of 28 July 2020 reflects the fact that, from 29 July 2020 TikTok operated under a new joint controller model, which included its establishment within Ireland for the purposes of Article 3 GDPR.

(2) TikTok’s status as a controller

34. Each of TikTok Inc and TikTok Limited were controllers (and TikTok was a joint controller) in respect of personal data of UK users for the Relevant Period, in that both TikTok Inc and TikTok Limited, alone or jointly with others, determined the purposes and means of the processing of personal data, of UK users:
- a. Throughout the Relevant Period, TikTok Inc was the designated data controller in respect of its UK users, as identified in the applicable Privacy Policies, and was registered as such with the Commissioner.
 - b. TikTok stated in the course of the ICO investigation that it considered TikTok Limited was a data processor during the Relevant Period.⁴² In practice, however, TikTok Limited played an active role in content moderation, user management, and the sale of online advertising, which went beyond that of a processor and meant it thereby determined

⁴² TikTok’s letter to the ICO, 2 April 2019.

the purposes and means of personal data of at least some UK users and therefore was a (joint) data controller. In particular:

- i. TikTok confirmed that *"the commercial and internal activities of TikTok UK during the relevant period primarily consisted of sales, operations and content moderation"* as well as e.g. *"user growth, marketing, [and] public policy"*.⁴³
- ii. The moderation team *"employed a number of people in the UK. Their role was to screen, monitor and tag content, to ensure content posted on the platform by creators was in accordance with TikTok's policies, Community Guidelines and Terms of Service."*⁴⁴ This involved, *inter alia*, *"reviewing user content, messages and associated metadata"* and *"detecting suspected underage users on the platform"*.⁴⁵ The role thus entailed substantive judgments in relation to the purposes and means of TikTok's processing of the data of individual users, going beyond that of a mere processor.
- iii. The operations team *"were the team involved in recruiting and supporting creators on the platform"*.⁴⁶ To that effect, it *"engage[d] with creators on the platform"* and undertook user analysis on the basis of surveys, feedback, etc.⁴⁷ Again, the Commissioner considers that such a role would have entailed decision making powers sufficient to render TikTok Limited a (joint) controller with TikTok Inc.
- iv. Further or alternatively, marketing activities that determined how user data (individually or collectively) was shared and/or what advertising would be shown to users were also carried out in the UK and would also entail TikTok Limited assuming the role of a (joint) controller.

⁴³ TikTok's Response to IN3, response 1.

⁴⁴ Ibid.

⁴⁵ TikTok's Response to IN3, response 2.

⁴⁶ TikTok's Response to IN3, response 1.

⁴⁷ TikTok's Response to IN3, response 2.

- v. Finally, for at least part of the Relevant Period, TikTok’s Head of Child Safety Public Policy Europe was employed by TikTok Limited and based in the UK. That individual’s role was to “act as a strategic leader, both internally and externally, on child safety for TikTok”, including “by providing strategic guidance to internal teams,”⁴⁸ thereby taking key decisions (alone or jointly with others) in determining the purposes and means of the processing of personal data of UK users.

(3) Jurisdiction

- 35. The provisions of the DPA and UK GDPR applied to the processing of personal data by both TikTok Inc and TikTok Limited during the Relevant Period, on the following basis:
 - a. In respect of TikTok Inc, Article 3(1) applies, in that during the Relevant Period TikTok Inc was a controller which processed personal data in the context of the activities of its establishment in the UK. TikTok Inc’s relevant establishment in the UK was its group company TikTok Limited. TikTok Inc processed personal data in the context of the activities of that establishment, which activities included distributing online advertising (applying the principles established by the Court of Justice of the European Union in *Google Spain*)⁴⁹.
 - b. Alternatively,⁵⁰ Article 3(2) and section 207(3) DPA apply, in that during the Relevant Period TikTok Inc:

⁴⁸ TikTok’s Response to IN3, response 3.

⁴⁹ Case C-131/12 *Google Spain SL and Google Inc v. AEPD and Costeja* (EU:C:2014:317)

⁵⁰ TikTok accepts that both TikTok Inc and TikTok Limited were subject to the UK GDPR by virtue of Article 3(1) UK GDPR, as “during the Relevant Period, TikTok Inc. had a UK establishment (its group company, TikTok Information Technologies UK Limited), and processed personal data in the context of that establishment”. On that basis it considers that “Article 3(2) could not have applied” to TikTok Inc during the relevant period (Written Representations, paragraph 4.3).

- i. Offered (and provided) services to data subjects in the UK, involving the processing of personal data of those data subjects; and/or
 - ii. Monitored the behaviour of UK users taking place in the UK. Specifically, TikTok Inc collected data about users within the UK as a result of their use of the platform, including data submitted by users in relation to their profiles, their interaction with TikTok's services, and/or their interaction with other users.
- c. In respect of TikTok Limited, Article 3(1) applies, in that during the Relevant Period TikTok Limited was a controller established in the UK which processed personal data in the context of its activities in the UK.

(4) Contravention of Article 8 UK GDPR

36. The Commissioner's view is that TikTok was in breach of Article 8 UK GDPR throughout the Relevant Period, for the reasons set out below.

(a) Legal framework – Article 8

37. Article 8 (1) of the UK GDPR, read together with section 9 DPA, imposes a requirement that information society services can be offered directly to a child under the age of 13 only where consent has been given or authorised by the holder of parental responsibility (at least where consent is relied upon as the basis for processing under Article 6 UK GDPR⁵¹). Absent such consent, the processing of the personal data of a child younger than 13 is unlawful.
38. Recital 38 UK GDPR (*Special Protection of Children's Personal Data*) provides:

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

⁵¹ See paragraphs 57-59 below.

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. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.

39. Article 8 UK GDPR states:

- 1. Where point (a) of Article 6(1)⁵² applies, 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.*
- 2. 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.*

40. Article 8 UK GDPR is modified by § 9 DPA, which states:

In Article 8(1) of the UK GDPR (conditions applicable to child's consent in relation to information society services)—

- (a) references to "16 years" are to be read as references to "13 years",*
and
- (b) the reference to "information society services" does not include preventive or counselling services.*

⁵² Article 6(1)(a) states: "Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;..."

41. Consent is defined in Article 4(11) UK GDPR:

'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her

42. Article 7 UK GDPR establishes the "conditions for consent", which must be met for a data subject to have validly consented to the processing in question. In essence, consent must be given freely and expressly on an informed basis, and the data controller must be able to demonstrate that this is the case.⁵³

(b) Offer of information society services

43. The Commissioner has concluded that throughout the Relevant Period TikTok offered information society services, within the meaning of Article 4(25) UK GDPR.

44. TikTok's services are provided at a distance, by electronic means, and at the individual request of its users. While TikTok's users do not have to make direct payments to receive the service, TikTok receives remuneration through targeted advertising as well as in-app purchases by its users.⁵⁴

(c) Directly to a child

45. The Commissioner has concluded that TikTok offered its information society services directly to a child.

⁵³ This reflects requirements that have been developed in EU case law: see, e.g. Case C-673/17 Planet49 (EU:C:2019:80), 1 October 2019.

⁵⁴ See paragraph 17 above.

46. According to TikTok's terms and conditions, TikTok's services are restricted to users over the age of 13. As explained in paragraphs 22-24 above, access to the platform was controlled by a self-declaration age gateway process.
47. Despite this, as explained in paragraph 51 below, a large number of children under 13 years of age created accounts and/or otherwise use TikTok in the UK (i.e. between 1.1 million and 1.75 million UK users as of March/April 2020), and such child users made up a significant part of TikTok's regular users (i.e. 12.0 million visitors in April 2020)⁵⁵.
48. In a letter dated 29 October 2021⁵⁶ and in an Information Notice dated 10 January 2022 ("**IN1**")⁵⁷ the Commissioner asked TikTok to provide its "*current best estimate of the total number of users below the age of 13 in the UK who had a TikTok account (i) at any point during the relevant period, and (ii) broken down for each month during the relevant period.*"⁵⁸
49. In response, TikTok failed to provide this information to the ICO and stated on 8 November 2021 that "*it is not possible for TikTok to provide an accurate number or estimate for the total number of users below the age of 13 in the UK who had a TikTok account during the relevant period.*"⁵⁹ It reiterated that position in its response to IN1⁶⁰ and further stated that "*TikTok has not at any point previously considered or produced an estimate of the total number of underage users in the UK or elsewhere during the relevant period or during part of the relevant period.*"⁶¹
50. The Commissioner has therefore prepared his own estimate of TikTok users, including users who were account holders, under 13 years of age during the Relevant Period, on the basis of the ICO's own analysis of sampling data obtained from TikTok, and from Ofcom's studies, and information available

⁵⁵ <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2020/uk-internet-use-surges>

⁵⁶ ICO's letter to TikTok, 29 October 2021.

⁵⁷ Information Notice, 10 January 2022.

⁵⁸ Ibid, question 2.

⁵⁹ TikTok's letter to the ICO, 8 November 2021.

⁶⁰ TikTok's Response to IN1, Part 1, 1 March 2022, response 2.

⁶¹ TikTok's Response to IN1, Part 2, 11 March 2022, response 1.

from the Office for National Statistics. The details of this analysis are set out in **Annex 2** to this Notice, which has been updated to address TikTok's Written Representations⁶².

51. The Commissioner's best estimate derived from consideration of the available evidence is that in the UK there were between 1.1 million to 1.4 million users in 2020 who were children under the age of 13 who were registered TikTok account holders during the Relevant Period. This amounts to between 11% and 14% of the total number of children under 13 years old in the UK in 2020.⁶³ The Commissioner further estimates that there were between 1.1 million and 1.75 million UK users between 8 and 12 years old (i.e. including both account holders and other users) as of March/April 2020.⁶⁴ In contrast, TikTok has explained that it deleted only 152,978 user accounts during the period 6 December 2018 to 28 July 2020, on suspicion of the account holders being under 13.⁶⁵ TikTok has acknowledged that the number of accounts it removed on suspicion of being underage was less than 1% of TikTok's total users during the Relevant Period⁶⁶.

52. This estimate is corroborated by the information TikTok provided in response to the Commissioner's informal requests and Information Notices. In particular:
 - a. From August 2021, TikTok undertook an exercise that involved sampling a 'target population' of UK user accounts for underage users, with the aim of calculating a "*UK (GB) Underage badness score*".⁶⁷ TikTok has stated that this denotes "*content that potentially violates TikTok's Terms of Service or Community Guidelines, including but not limited to suspected underage accounts*", although has not indicated what other content is captured by the "*underage badness score*" or how material a

⁶² See paragraphs 53-55 below.

⁶³ See Annex 2, para 1.3.

⁶⁴ That estimate is a conservative one, in that it partially omits users younger than 8 years old: see Annex 2, para 4.19.

⁶⁵ TikTok Response to IN1, Part 2, 11 March 2022, response 30.

⁶⁶ See paragraph 72, below.

⁶⁷ TikTok's Response to IN2, 20 May 2022, response 2.

contribution that makes.⁶⁸ In essence, the sampling exercise found that:

- i. In four samples between 24 August 2021 and 5 October 2021, in respect of users whose profile had been viewed at least once in the preceding 7 days or who had published at least one video viewed by other users in the preceding 7 days, the “*underage badness score*” was on average 7.1% of users.
 - ii. In five further samples between 19 October 2021 and 28 December 2021, in respect of users who had published at least one video viewed by other users in the preceding 7 days, the “*underage badness score*” was on average 14.4% of users.
 - iii. TikTok’s own sampling of active users thus suggests that at around 7-14% of these are likely to be younger than 13 years old.
- b. Prior to June 2017, users were able to sign up to TikTok without giving any indication of their age, although they were still required to be over 13 years of age⁶⁹ When TikTok requested these users “*to validate that they met TikTok’s minimum age requirement via the age gate*” (by entering a date of birth), around 5% of these “*legacy users ... subsequently failed to pass through this age gate when required to do so*”, i.e. declared that they were under 13 years of age.⁷⁰
- c. TikTok offers a separate, more limited, sub-platform for users aged under 13 in the US. In its response to the Commissioner’s second Information Notice dated 11 April 2022 (“**IN2**”) TikTok explained that “*unlike the normal TikTok experience (as in the UK), all content in TikTok for Younger Users is screened and curated to allow only age-appropriate type content. No ads are shown in TikTok for Younger Users, and the TikTok for Younger Users experience does not have any social*

⁶⁸ Ibid.

⁶⁹ TikTok’s Response to IN1, Part 2, 11 March 2022, response 4.

⁷⁰ TikTok’s Response to IN1, Part 2, 11 March 2022, response 4.

or interactive features. For example, TikTok for Younger Users users cannot post videos, share videos, comment on videos, create a profile, watch LIVE streams, message with others, or have followers, as one could on the standard TikTok experience.”⁷¹ TikTok therefore holds some data concerning the number of such users in the US.⁷² Despite an express request by the Commissioner, TikTok initially failed to provide that data.⁷³ Following a further request, it eventually confirmed that “the total cumulative number of registered U.S. users in Kids Mode was 10,396,526 on 31 December 2019, and 21,430,950 on 31 July 2020.”⁷⁴ The Commissioner accepts that the availability of a designated young User platform is likely to have a material impact on the number of child users. Nonetheless, the fact that TikTok can sustain a popular stripped-down version of its main product for child users is indicative of the demand by such users for TikTok’s services. In the absence of a child-specific version of the platform, it is to be expected that at least some users will seek to meet that demand by using general version of TikTok that is the only platform available in the UK. Overall, the US child user figures corroborate that the Commissioner’s best estimate of UK TikTok users under 13 is far from unrealistic.

53. In its Written Representations responding to the NoI, (at paragraphs 11.5 to 11.40 and Annex 2) TikTok argues that the Commissioner’s estimates should be disregarded, and makes a series of detailed criticisms of the sources of evidence, the methodology and presentation of the results. However, TikTok presents no new evidence of its own, does not argue that the estimates presented are excessive, and does not seek to deny that there were considerable numbers of TikTok users under the age of 13 during the Relevant Period. Instead it reiterates its position that it is unable to provide its own estimate, and simply seeks to cast doubt on ICO figures.

54. After taking into consideration TikTok’s Written Representations, the Commissioner concludes that the estimation approach, as explained in Annex

⁷¹ TikTok’s Response to IN2, 20 May 2022, response 6.

⁷² TikTok’s Response to IN1, Part 2, 11 March 2022, response 1.

⁷³ Ibid.

⁷⁴ TikTok’s Response to IN3, response 4.

2 of the MPN, is reasonable and proportionate, given the uncertainty involved, not least due to TikTok's refusal to provide its own best estimate of the number of underage TikTok users, and appropriate in order to establish the scale of the issue.

55. In all the circumstances, the Commissioner has found that a significant proportion of active TikTok users in the UK were younger than 13, likely comprising between 1.1 million to 1.4 million users who were account holders, under the age of 13 in 2020. Further, it is estimated that there were between 1.1 million and 1.75 million users (with or without an account) between 7 and 12 years old as of March/April 2020. TikTok therefore offers information society services directly to children under the age of 13, within the meaning of Article 8.

(d) Processing of the personal data of a child

56. As set out at paragraph 5, above, TikTok processes extensive personal data of its users, including underage child users.

(e) Failure to obtain consent

57. Where a child is below the age of 13, Article 8(1) UK GDPR stipulates that processing of their personal data on the basis of consent is lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.
58. Given TikTok's stated policy of limiting its platform to users over the age of 13 only, the requisite consent was not obtained in respect of any of its underage users. TikTok had no process for obtaining consent from, or authorised by, the holders of parental responsibility over children under the age of 13. TikTok stated in its letter to the Commissioner dated 8 November 2021: "*TikTok are of the view that the question of obtaining consent from,*

or authorised by, the holders of parental responsibility does not arise and has never arisen”,⁷⁵ a view it reiterated in its Written Representations.⁷⁶

59. For the reasons set out above, the Commissioner has found that TikTok’s processing of the personal data of children under 13 was in breach of Article 8, and therefore unlawful, at least insofar as such processing was based on consent.⁷⁷

(f) No reasonable efforts under Article 8(2) UK GDPR

60. In addition, the Commissioner has found that TikTok as the controller did not make reasonable efforts to verify that consent was given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.
61. As set out at paragraph 23 above, TikTok accepted that, in the light of its policy of limiting the platform to over 13s, it did not try to obtain the requisite consent in respect of users under 13. TikTok therefore did not make any efforts at all to verify consent in respect of underage users.

(g) No reasonable efforts to prevent children under 13 from accessing its services

62. Given TikTok’s reliance upon its Terms of Service prohibiting children under the age of 13 from using its platform,⁷⁸ the Commissioner has further considered whether TikTok made any reasonable efforts to prevent children under 13 from accessing its services. The Commissioner has found that during the Relevant Period TikTok failed to make any such reasonable efforts.
63. TikTok has acknowledged that during the Relevant Period (i) it did not have any estimate of the number of its UK users under 13, and (ii) the number of

⁷⁵ TikTok’s letter to the ICO, 8 November 2021.

⁷⁶ Written Representations, Section 4, addressed further at paragraphs 85-105 below.

⁷⁷ TikTok’s arguments that such processing was partly based in contractual necessity is addressed at paragraphs 87-105, below.

⁷⁸ See paragraphs 21-23, above.

accounts it removed on suspicion of users being underage was less than 1% of TikTok's total UK users during the Relevant Period.⁷⁹

64. The Commissioner has found that there was ample information to make TikTok aware that it had at least a considerable number of users younger than 13. That concern also ought to have been highlighted by TikTok's own monitoring processes⁸⁰ and/or by the substantive content available on the platform, a considerable amount of which is aimed at young children. Examples of this are set out in **Annex 4**.
65. In the light of such indicators, and given its size, available resources and sophistication (see paragraphs 10-14 above), TikTok should have investigated the issue of underage users in much more detail. Yet, in the Commissioner's view, it failed to do so.
66. Further and in and event, the issue regarding underage child users was raised at a senior level by at least two TikTok employees, but failed to precipitate any adequate investigation or response by TikTok.⁸¹

TikTok's efforts to prevent child users under 13 from signing up to its platform

67. The only age gateway or age verification process in place at the point of entry to the platform, was a self-declaration of age by the user.⁸²
68. As a result, individuals were able to set up an account just by entering a date of birth, without any further details and without any form of corroboration or verification being required. While UK users were precluded from access if they stated they were younger than 13, there was nothing stopping children from making a false declaration of age and thus being able to create an account.

⁷⁹ See paragraph 72, below.

⁸⁰ See paragraph 34(b), above.

⁸¹ See paragraphs 81-84, below.

⁸² See paragraph 22, above.

TikTok's efforts to remove children under 13 from its platform

69. TikTok stated that, during the Relevant Period, it took steps to remove from the platform any UK users who were identified post registration as being younger than 13.⁸³ The ICO has identified a number of failings in relation to these steps to remove underage users, as set out below.

Failure to carry out adequate checks

70. Throughout the Relevant Period, and until August 2021, TikTok did not conduct any random checks for underage users.⁸⁴

71. In 2020, only 207,046 accounts were proactively reviewed on suspicion of belonging to an underage user, around 1.3% of total monthly active users.⁸⁵ TikTok does not retain data for earlier years.

72. TikTok stated that *"for the period 6 December 2018 to 28 July 2020, our records indicate that 152,078 suspected underage accounts were removed in the UK."*⁸⁶ It acknowledged that *"these removal figures represent under 1% of TikTok's total UK users during the relevant period"*, i.e. only a small subset of TikTok's likely UK users under the age of 13.

73. In the circumstances, the Commissioner has found that TikTok failed to carry out adequate checks to identify underage users of its platform.

Late introduction of 'word lists'

74. As part of its underage account banning policies,⁸⁷ TikTok identified examples of words or word combinations a user might include in their profile, or in content uploaded to the platform, where these may indicate that the user

⁸³ TikTok letter to the ICO dated 12 November 2021.

⁸⁴ TikTok response to IN 2, 20 May 2022, response 2.

⁸⁵ TikTok response to IN 2, 20 May 2022, response 3.

⁸⁶ TikTok response to IN 1, Part 2, 11 March 2022, response 30; no data is available in respect of periods prior to that.

⁸⁷ December 2018; March/April 2019; July 2019; and March 2020

was underage.⁸⁸ Such words were collated in so called 'word lists' which TikTok used to help identify potentially underage users. Examples of the 'word lists' have been provided to the ICO⁸⁹ and have been considered as part of the Commissioner's investigation.

75. However, such 'word lists' were not introduced until January 2019, some eight months after the introduction of the UK GDPR. TikTok has not identified any good reason why no equivalent processes were in place for the earlier part of the Relevant Period.

Excessively strict requirements for removal of user accounts

76. The Commissioner has found that, throughout the relevant period, TikTok applied excessively strict requirements for the removal of any user account on the grounds that a user was underage.
77. TikTok's document "Account Deletions Pertaining to Children"⁹⁰ states that deletions were undertaken when:

"musical.ly [TikTok] obtains actual knowledge that an account holder is under 13 or a parent/guardian requests the deletion of their child's account".

...

"Actual knowledge includes the following scenarios:

- A. musical.ly [TikTok] receives information from a user or the parent of a user that an account holder is under the age of 13.*
- B. musical.ly [TikTok] is told by a child or a parent that an account holder is under 13 (e.g., parent emails musical.ly and states that the user is in 2nd grade)*
- C. where we [TikTok] receive information as part of a survey submission*
- D. musical.ly [TikTok] Receives a law enforcement request that states that a user is under 13*

⁸⁸ For example 'age6'; 'sixyearsold'; '6 years old'; '6yrd'; '6yrs'; '6yo'; 'I am 6'; and similar iterations for other ages under 13.

⁸⁹ TikTok letter to the ICO dated 20 May 2022.

⁹⁰ TikTok's letter to ICO dated 12 November 2021, Appendix 1, Document 1.

E. The content moderation team identify a user that is clearly under the age of 13.”

78. As regards E., i.e. a user being identified as “*clearly under the age of 13*”, from April 2019 until October 2020 (i.e. during the latter half of the infringement period), TikTok’s approach was that an account would only be deleted if two conditions were both met:
- a. The account biography expressly stated that the user was between 3 and 13 years old; and
 - b. The account’s video content included at least 4 videos meeting the underage Tagging Guideline Ban (i.e. featured individuals who “*looked very young*”).⁹¹
79. TikTok stated that the condition regarding multiple videos “*was intended to reduce the margin of error associated with subjective assessment of user age based on visual signals and therefore mitigate the risk of an account holder aged over 13 wrongly being removed. This was also intended to avoid the erroneous removal of users over 13 ...*”⁹²
80. For instance, applying the conditions to an account explicitly stating that the user was 10 years old and hosting three recent videos of an individual looking that age would still not have met the criteria for removal. The Commissioner considers that each of the two conditions was in itself sufficient to alert TikTok to the real risk of the account holder being underage, and ought to have prompted TikTok to take action, such as at the very least contacting the account holder for the purposes of verifying his or her age. This was all the more important given the widespread concerns about the potentially harmful nature of some of the content on TikTok’s platform and the potentially serious consequences of young children being exposed to such content.⁹³ Yet, the corollary to this strict approach to removals is that a significant number of

⁹¹ TikTok’s letter to ICO dated 12 November 2021, Appendix 1, Document 3; see further IN1, question 16 and the documents referred to therein.

⁹² TikTok response to IN 1, Part 2, 11 March 2022, response 16.

⁹³ See paragraph 28 above.

UK users aged under 13 are likely to have been permitted to continue using TikTok when they should not have been.⁹⁴

Concerns raised by TikTok Staff Members

81. TikTok supplied the Commissioner with several documents showing that staff members raised concerns regarding its approach to children under 13 using its platform. The Commissioner has found that it did not respond adequately to such concerns.

82. For example, in a document of 17 June 2020, entitled "*Issues in Underage Account Ban*,"⁹⁵ a senior TikTok staff member raised a concern that "after reviewing some videos depicting minors it came to my attention that some accounts of users under 13 years old ... are not being banned." The author goes on to give a specific example but emphasises that they "believe it is a much larger issue" and that "we risk not banning underage users due to SOP [standard operating procedures], interpretation and/or policy loophole[s]". TikTok has confirmed that the author of the document was [REDACTED], who was the [REDACTED] [Senior employee] for [REDACTED] and [REDACTED] and was located in [REDACTED], [REDACTED]. The document was provided to senior employees shortly after it was created.⁹⁶

83. A further undated document, entitled "*EU Child Safety Public Policy - Risks and Opportunities H2 2020*",⁹⁷ states:

"We [TikTok] have too many underage users on our platform and there is no easy solution to this problem"

⁹⁴ See also e.g. Document 51-15 for an example of a likely underage user not being banned.

⁹⁵ Document 51-15; TikTok response to IN 2, 20 May 2022, responses 12-16.

⁹⁶ Ibid. [REDACTED] who at the time was the [REDACTED] [Senior employee]; [REDACTED] who at the time was a [REDACTED] [Senior employee]; [REDACTED] who at the time was [REDACTED] [Senior employee]; [REDACTED] who at the time was [REDACTED] [Senior employee]; and [REDACTED] who at the time was the [REDACTED] [Senior employee].

⁹⁷ TikTok response to IN 1, 11 March 2022, Document 51-07.

"Livestream comments directed to minors are frequently sexualised and inappropriate"

"The number of minors on TikTok makes it attractive to predators"

"A significant percentage of our users are underage".

84. Despite these concerns, TikTok only undertook a limited investigation of the wider issues, which left its account removals policy broadly unchanged (save for how explicit the age statement in the user profile had to be).⁹⁸

(h) TikTok's Written Representations

85. In its Written Representations, TikTok raised a number of reasons why it claims there was no contravention of Article 8 UK GDPR. It argued that:

a. Article 8 does not apply as (i) the requirements under Article 8 are only applicable where consent, under Article 6(1)(a) UK GDPR, is the lawful basis for the processing, and (ii) TikTok in fact relied on contractual necessity as the *"lawful basis for providing the core TikTok service to users"*.⁹⁹

b. In any event, TikTok was *"entitled to take the view that its measures for keeping children under 13 off the platform during the Relevant Period were reasonable in all the circumstances."*¹⁰⁰

86. In summary, the Commissioner rejects TikTok's arguments for the following reasons:

a. TikTok's main argument is factually inaccurate, as it did in fact rely on consent as its lawful basis for processing the personal data of under 13s

⁹⁸ TikTok response to IN 2, 20 May 2022, response 17.

⁹⁹ Written Representations, paragraph 10.10 and footnote 31.

¹⁰⁰ Ibid.

for the purposes of personalised advertising. Whilst this was, regrettably, not immediately obvious from the body of TikTok's representations, TikTok conceded the point in the footnotes.¹⁰¹

- b. TikTok cannot rely on contractual necessity as a lawful basis for processing the data of children under 13 as it does not have a valid contract with children under 13.

- c. In any event, even to the extent TikTok did have a valid contract in place with under 13s (which is not the case for the reasons set out below), it is by no means clear that the entirety of the processing activities which it defines as its "core services" can be considered "necessary for the performance of [the] contract" such that TikTok could rely on Article 6(1)(b) as its lawful basis for processing. Contractual necessity as a legal basis must be interpreted strictly.

TikTok does rely on consent as a lawful basis for processing for the purposes of personalised advertising

87. TikTok acknowledges (as noted above, in a footnote to its Written Representations), that during the Relevant Period, it did rely on "*consent when processing personal data for the purpose of personalised advertising.*"¹⁰² It is thus wrong for the Written Representations to suggest that "*as a matter of law Article 8 is entirely inapplicable*".¹⁰³

88. TikTok has not specified in its Written Representations, and the Commissioner has not been able to quantify, the exact amount of personal data that were processed by TikTok on the basis of consent. However, given the considerable proportion of TikTok's revenues that is derived from personalised advertising, and the intrusive nature of processing required in

¹⁰¹ See footnote 31 to the Written Representations

¹⁰² Written Representations, paragraph 10.10, footnote 31. Annex 3 to the Written Representations further states that consent was also relied upon as the basis for TikTok's processing of users' location data and the use of cookies.

¹⁰³ Written Representations, pages 4 and 18.

that context,¹⁰⁴ the Commissioner considers that a significant amount of TikTok users' personal data has been processed by TikTok "for the purpose of personalised advertising". In the circumstances, TikTok relies on consent for a significant part of the processing that it undertakes, including in relation to underage users.

89. The reasons given by TikTok for relegating this important issue to a mere footnote in its Written Representations is that processing for purposes such as personalised advertising is "not the focus of the NOI".¹⁰⁵ However, this is misguided. The NOI explicitly covered TikTok's processing of UK users' personal data "to support the provision and functionality of TikTok's services, and to monetise such services, including by providing targeted advertising to its users and by offering in app purchases."¹⁰⁶
90. Therefore, contrary to TikTok's submission that "as a matter of law Article 8 is entirely inapplicable"¹⁰⁷ the Commissioner's findings on Article 8 apply, at a minimum, to the significant amount of processing of underage children's personal data that TikTok carried out for the purposes of personalised advertising, irrespective of the further arguments advanced by TikTok in respect of other bases for processing on which it purports to rely (addressed below).

TikTok cannot rely on contractual necessity as a lawful basis for processing the personal data of children under the age of 13

91. TikTok cannot rely on contractual necessity as a lawful basis for processing the personal data of under 13s, as there is no contract in place between TikTok and under 13s. For the reasons set out below, TikTok did not make a valid offer to contract with under 13s, nor did the under 13s have the legal capacity to accept such an offer, had it been validly made.

¹⁰⁴ See e.g. paragraphs 17 and 44 above and Update report into adtech and real time bidding (20 June 2019) (ico.org.uk), for example at paragraph 3.4.

¹⁰⁵ Written Representations, paragraph 10.10.

¹⁰⁶ Nol, paragraph 5(b) (emphasis added).

¹⁰⁷ Written Representations, page 18.

No contract between TikTok and under 13s – no valid offer by TikTok

92. TikTok did not make a valid offer to contract with under 13s, which was capable of being accepted by them.¹⁰⁸
93. Throughout the Relevant Period, TikTok’s offer to provide its video sharing services was made subject to the conditions and restrictions set out in its Terms of Service. According to TikTok’s submissions, the Terms of Service prohibited under 13s from using the platform.¹⁰⁹ This means that TikTok’s offer was not addressed to children under the age of 13 – on the contrary, such children were expressly excluded from the group of persons to whom the offer was addressed in the Terms of Service.¹¹⁰ The Terms of Service make clear that TikTok did not intend to make a legally binding offer to children under the age of 13.
94. It follows that it was not open to a child younger than 13 to accept the Terms of Service. Indeed, TikTok’s position was that as soon as it realised an Account Holder was below 13 years of age, it would disable or delete their account.¹¹¹ Neither would a child under the age of 13 reasonably have believed that TikTok intended to be so bound. Since June 2017, when the TikTok’s ‘age gate’ was introduced, any child who has purported to accept the Terms of Use did so by knowingly misstating their age.¹¹² That generally entails that they understood the need to do so, i.e. the understood that TikTok would not provide services to them if they are under 13 years old.
95. TikTok’s position that a contract was nonetheless formed with all individuals who agreed to the Terms of Service is wrong as a matter of law.¹¹³ Contrary

¹⁰⁸ In this section, the term “offer” is used to refer to whether there was a valid contractual offer under English law, as opposed to “the offer of information society services directly to a child” under Article 8 UK GDPR, which bears an autonomous meaning (see Article 8(3) UK GDPR) and is addressed at paragraphs 43-55 above.

¹⁰⁹ Written Representations, paragraph 10.3.

¹¹⁰ July 2016 Terms of Service, section 1(e); August 2018 Terms of Service, section 5 (which excludes children under 16 years of age, rather than 13); October 2018 Terms of Service, section 5; Feb 2019 Terms of Service, section 5; Feb 2020 Terms of Service, section 5; and July 2020 Terms of Service, sections 2 and 3.

¹¹¹ Written Representations, paragraph 10.3.

¹¹² See paragraphs 23 and 52(b) above.

¹¹³ Written Representations, paragraph 10.3.

to TikTok's submissions, the deletion of the account of a child under the age of 13 did not terminate any contract with that child, simply because that contract never existed.¹¹⁴

96. In conclusion, TikTok cannot rely on contractual necessity as a lawful basis for the processing of the personal data of children under the age of 13 that were on the TikTok platform contrary to TikTok's Terms of Service.

No contract between TikTok and under 13s – no acceptance due to lack of capacity

97. Even if TikTok had made a valid offer to under 13s, which was not the case, such children did not have the capacity to enter into a fully binding contract with TikTok. At most, any such contract would be voidable, with the children able to enforce it against TikTok, but TikTok unable to enforce it against them unless they ratified the contract on attaining the age of 18.
98. Furthermore, and even though it is not necessary to come to a final view on the point (see above), on the facts of the present case, the Commissioner considers that children under the age of 13 would not have had the mental capacity to enter into a contract of this nature with TikTok,¹¹⁵ given:
- a. The inherent complexity of the transaction which Account Holders enter into with TikTok and the specific terms they agree to;
 - b. The inadequacy of the information provided to the child regarding the continuing obligations to which they would become subject under the Terms of Service;
 - c. The opacity of the language used in the Terms of Service to communicate such information as was provided; and/or

¹¹⁴ Written Representations, paragraph 10.3.

¹¹⁵ See *R v Oldham Metropolitan BC ex p Garlick* [1993] 1 FLR 645

d. The need to evaluate and manage the risks of being exposed to harmful content as a result of entering into the contract (as to which see paragraph 28 above)

99. The choice of law clause addressed below is illustrative of the point made at paragraph 98(a) above. A child under the age of 13 cannot reasonably be expected to understand what a choice of law clause means, let alone what the implications are of agreeing to the applicable law being that of California or Singapore.

Foreign law

100. For completeness, the Commissioner notes that certain versions of the Terms of Service refer to the law of California¹¹⁶ or Singapore¹¹⁷ as the applicable law (at least prior to July 2020¹¹⁸). However, as the case concerns consumer contracts with individuals located in the UK, the choice of law provisions do not have the result of depriving TikTok's users of the mandatory protections afforded to them by UK law.¹¹⁹ Furthermore, if the laws of these jurisdictions provide any lesser protection to under 13s, the consequence of including applicable law provisions would be that platforms could exclude applicable child protection legislation. This would be manifestly incompatible with UK public policy and their application should therefore be refused.¹²⁰

101. In any event, absent an argument that the legal position is any different under the law of California or under the law of Singapore, the presumption of similarity therefore applies, it being reasonable to expect that the foreign law is likely to be materially similar to English law on the matter in issue.¹²¹

¹¹⁶ July 2016 Terms of Service, section 7.

¹¹⁷ August 2018 Terms of Service, section 11; October 2018 Terms of Service, section 11; Feb 2019 Terms of Service, section 11; and Feb 2020 Terms of Service, section 11.

¹¹⁸ July 2020 Terms of Service, section 13.

¹¹⁹ Articles 3(3) and 6(2) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**"), as applicable from 1 January 2020 by virtue of section 3 of the European Union (Withdrawal) Act 2018, as amended and the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019.

¹²⁰ Article 21 of Rome I; see also Article 9(1).

¹²¹ See e.g. *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45, paragraphs 112 and 119-126.

Conclusion on TikTok's reliance on contractual necessity as a basis for processing

102. In light of the above, the Commissioner concludes that TikTok cannot rely on Article 6(1)(b) UK GDPR (contractual necessity) as a lawful basis for processing the data of children under the age of 13.

Narrow scope of Article 6(1)(b) UK GDPR

103. For completeness, the Commissioner makes the following observations in relation to the contract legal basis.

104. Even if TikTok had a contract in place with under 13s (which is evidently not the case for the reasons set out above), it is by no means clear that the entirety of the processing activities which TikTok defines as its "core services" could be considered "necessary for the performance of [the] contract", such that TikTok could rely on Article 6(1)(b) as its lawful basis for processing.

105. Contractual necessity as a legal basis for processing is to be interpreted strictly. The EDPB Guidelines note that "*a contract cannot artificially expand the categories of personal data or the types of processing operation that the controller needs to carry out for the performance of contract.*"¹²² In its Binding Decision in relation to the Irish DPC's Meta (Facebook) case, the EDPB found that the UK GDPR "*treats personal data as a fundamental right inherent to a data subject and his/her dignity, and not as a commodity data subjects can trade away through a contract.*"¹²³

106. Where contractual necessity is relied upon as the lawful basis for processing, the intended processing should not go beyond what is "*objectively necessary*

¹²² EDPB, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) UK GDPR in the context of the provision of online services to data subjects, Version 2.0, 8 October 2019, paragraph 31.

¹²³ EDPB, Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 UK GDPR), 5 December 2022,, paragraph 101.

*for the performance of contract*¹²⁴ and *“the controller should be able to justify the necessity of its processing by reference to the fundamental and mutually understood contractual purpose. This depends not only on the controller’s perspective, but also on a reasonable data subject’s perspective when entering into the contract”*.¹²⁵ In addition the EDPB supports *“a strict interpretation of the Article 6(1)(b) GDPR among other legal basis, particularly to avoid any circumvention of the requirement for consent”*¹²⁶. This is all the more important in this case which involves the processing of the personal data of children under the age of 13.

107. Furthermore, even if TikTok had a contract in place with under 13s (which, as noted above, is evidently not the case), to the extent TikTok wished to rely on contractual necessity as its lawful basis for processing, it would be for TikTok as the controller to *“justify the necessity of its processing by reference to the fundamental and mutually understood contractual purpose.”*¹²⁷ It failed to do so:¹²⁸

108. Firstly, the term *“core services”* is not clearly defined in TikTok’s written representations, with paragraph 10.1.3 referring only to *“activities which are core to the provision of the TikTok service (e.g. receiving personalised content and enabling users to participate on the platform or share their content, amongst other activities)”*.

109. Secondly, in its written representations, TikTok has failed to provide sufficient detail of the extent to which it relies on contractual necessity and consent as the bases for its processing of personal data, especially as to:

¹²⁴ EDPB, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) UK GDPR in the context of the provision of online services to data subjects, Version 2.0, 8 October 2019, paragraph 34.

¹²⁵ EDPB, Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 UK GDPR), 5 December 2022, paragraph 113.

¹²⁶ EDPB, Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 UK GDPR), 5 December 2022, paragraph 116. See also the opinion of AG Rantos in *Meta v Bundeskartellamt* EU:C:2022:704, paragraphs 53-66.

¹²⁷ EDPB, Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 UK GDPR), 5 December 2022, paragraph 113

¹²⁸ See further the Commissioner’s findings in respect of the contravention of Article 5(1)(a) at paragraphs 155-159 below.

- a. What processing activities it carries out “*for the purpose of personalised advertising*” as compared with what processing activities it carries out “*for the provision of its core services*”.
- b. How processing of personal data relating to these activities are separated and/or overlap in practice.
- c. on what basis the various processing of child users’ data carried out by TikTok is said to be “*necessary*” to the performance of any contract with them.

Efforts to prevent children under 13 from accessing TikTok’s services

110. The nature and extent of TikTok’s efforts to prevent children under 13 from accessing its services¹²⁹ are relevant to the assessment of breaches of Articles 5 and/or 8 UK GDPR, as well as the penalty to be imposed in respect of these. TikTok has relied on the alleged inability of young children to access its services. Yet, it was in fact offering information society services to such children (within the meaning of Article 8 UK GDPR) and was, or ought to have been, aware of that. Contrary to what TikTok suggested in its Written Representations, there is no issue of retrospectivity. The Commissioner’s assessment of TikTok’s efforts has not been by retrospective reference to any of relevant guidance or standards cited in TikTok’s Written Representations.¹³⁰

111. As regards the Commissioner’s best estimate of the number of TikTok users in the UK under the age of 13, TikTok’s specific criticisms of the methodology are addressed in **Annex 2** to this Notice. The fact that “*there is an inevitable degree of uncertainty*” in deriving “*best estimates*”,¹³¹ however, does not mean that it is unnecessary – much less inappropriate – to calculate such an

¹²⁹ As considered at paragraphs 62-84 above.

¹³⁰ Written Representations, paragraph 11.11.

¹³¹ Nol Annex 2, paragraph 1.2.2, cited in the Written Representations, paragraph 11.6.

estimate. Indeed, this should have been done by TikTok, in order to appreciate the scale of the issue and address it more effectively.

(5) Contravention of Articles 12 and 13 UK GDPR

112. Under Article 12 UK GDPR, controllers are required to provide information about their processing activities in a clear and accessible form, *“in particular for any information addressed specifically to a child”*. Article 13 describes the specific information that a controller must provide to data subjects where personal data are collected from them. It follows that, while Article 13 sets out the specific information requirements, Article 12 provides for the way in which such information must be communicated.

113. The Commissioner has found that, throughout the Relevant Period, TikTok did not comply with the requirements under Article 12 and 13 UK GDPR in relation to its UK users, and particularly child users. Specifically, the Commissioner considers that TikTok failed to take appropriate measures to provide the requisite information to its users in a concise, transparent, intelligible, and easily accessible form, using clear and plain language.

114. **Annex 3** provides further detail on the breaches of Article 13 summarised below, including relevant text of the various Privacy Policies, as applicable. In respect of the breaches of Articles 12 and 13 UK GDPR, the Commissioner’s investigation has been confined to the three Privacy Policies which were (collectively) in place from August 2018 to 28 July 2020. Accordingly, a shorter period of 23 months applies in respect of these infringements, rather than the 26 months of the Relevant Period that applies in respect of the remainder of the Commissioner’s findings. This is reflected in the penalty relating to Articles 12 and 13, as set out further below.

(a) Legal framework – Articles 12 and 13 UK GDPR

115. Recital 58 UK GDPR provides:

The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualisation be used. Such information could be provided in electronic form, for example, when addressed to the public, through a website. This is of particular relevance in situations where the proliferation of actors and the technological complexity of practice make it difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected, such as in the case of online advertising. Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand.

116. Article 12 UK GDPR sets out the principles relating to the provision of *Transparent information, communication and modalities for the exercise of the rights of the data subject*, including that:

1. The controller shall take appropriate measures to provide any information referred to in Articles 13 ... relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child.e..

117. Article 12 UK GDPR sets out the information to be provided where personal data are collected from the data subject. It states, insofar as material:

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;

- (b) the contact details of the data protection officer, where applicable;*
- (c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;*
- (d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;*
- (e) the recipients or categories of recipients of the personal data, if any;*
- (f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.*

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:

- (a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;*
- (b) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;*
- (c) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;*

...

3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further

processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

...

(b) Failure to provide the information required under Article 13(1)(a)–(f) and of Article 13(2)(a)–(c) UK GDPR

Article 13(1)(a) the identity and the contact details of the controller and, where applicable, of the controller’s representative

118. The Commissioner has decided, in the light of TikTok’s Written Representations, that there was no infringement in respect of Article 13(1)(a).

Article 13(1)(b) the contact details of the data protection officer, where applicable

119. TikTok did not provide contact details for its Data Protection Officer in any of its Privacy Policies.

Article 13(1)(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing

120. The Privacy Policies fail to provide sufficient information to clearly identify and link the specified category of personal data, the purpose of the specified processing operation(s), and the legal basis being relied upon to support the relevant processing operation(s).

Article 13(1)(d) - where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party

121. In the Privacy Policies, insufficient information was provided in respect of TikTok’s reliance on legitimate interests as a lawful basis of processing under Article 6(1)(f).

Article 13(1)(e) the recipients or categories of recipients of the personal data, if any

122. In the Privacy Policies, TikTok provided a high-level description of the way in which it shared its users' personal data. However, the policies did not provide a full list of clearly articulated categories, and named recipients, of personal data shared by TikTok with third parties.¹³² They thus failed to provide a sufficient level of detail as to the extent to which personal data was being provided to third party recipients and the identity of those recipients.

123. Where descriptors were provided, specifically in relation to '*business partners*', '*advertisers and advertising networks*', and '*analytics and search engine providers*' these were still not adequately explained, resulting in a lack of transparency as to whom data had been shared with.

Article 13(1)(f) transfers of personal data to a third country or international organisation

124. The Privacy Policies did not clearly specify which jurisdictions, either within or beyond the EEA, personal data would be transferred to.¹³³ Notably, TikTok provided some information in this respect in versions of the Privacy Policies applicable in other territories.

125. Given that user information was shared by TikTok with parts of the corporate structure outside of the UK/EEA – including e.g. TikTok in the US– and with third party companies outside the UK/EEA, the information that was provided to UK users between January 2019 and 29 July 2020 was inadequate. It did not allow data subjects to make informed choices about whether to provide their personal data to TikTok for processing.

¹³² Only Privacy Policy 1, although still non-compliant with Article 13(1)(e) for the reasons set out in Annex 3, provides some limited information relating to named third-party recipients.

¹³³ Only Privacy Policy 1, although still non-compliant with Article 13(1)(f) for the reasons set out in Annex 3, listed specific countries by name.

126. Moreover, while TikTok has publicly stated that no UK user data processing is undertaken in China,¹³⁴ this was not the case throughout the Relevant Period. In respect of that:

a. TikTok advised the Commissioner, by letter dated 27 April 2020, that:

"TikTok user data is only processed in China for the purpose of providing the TikTok platform. To the extent employees in China are in a function or team supporting or providing services to TikTok Inc, they may have access to data of UK users. The sharing and processing of this data is governed by the Intra-Group Agreement (attached at answer 2). Our personnel in China work alongside their colleagues in other jurisdictions such as the UK, ROI and USA. We are currently working on expanding the teams in these other locations and, as we do so, the volume and amount of UK user data accessed within ByteDance's premises in China will reduce. For example, as we further expand our trust and safety hub in Ireland, the wider user safety function for the EMEA region will transition to being operated from Dublin."

b. Companies incorporated in China are listed in TikTok's 'Intragroup Agreement for transfers of data between Bytedance entities' dated 28 March 2019 and in relation to the processing taking place at that time.

127. Reference to Standard Contractual Clauses (SCCs) may, to some degree, have intimated to users how transfers to countries outside of the UK/EEA are dealt with. However, this is far from "easily intelligible" and a non-privacy professional is unlikely to understand the potential implications of this.

128. In particular, users aged 13-17 are unlikely to be in position to understand the potential consequences of providing personal data to TikTok that is then shared with entities in third countries, including China. The absence of appropriate detail about this in the Privacy Policies means that users, and

¹³⁴ <https://committees.parliament.uk/oralevidence/906/pdf/>

particularly children, are unlikely to be able to make an informed choice about providing their personal data to the platform in advance.

Article 13(2)(a) - the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period

129. The information provided in the Privacy Policies is insufficient in their description of what information is retained, why, and for how long. They require additional detail in order to support data subjects in making informed decisions about whether to provide personal data to TikTok.

Article 13(2)(b) - the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability

130. Whilst the data protection rights of TikTok's UK users are set out in general terms in the Privacy Policies, there is insufficient information about the lawful bases on which TikTok relies in respect of its various processing activities. In practice, this undermines data subjects' abilities to exercise their rights as they cannot readily determine where, for example, an absolute (as opposed to a qualified) right to object may apply.

Article 13(2)(c) - where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal

131. The Privacy Policies referenced data subjects' rights to withdraw consent. However, due to the lack of clarity as to which legal basis applies to which aspect of the processing, data subjects' rights in this regard were not clearly communicated.

(c) Article 12 UK GDPR

132. The Commissioner has found that the way in which the information was provided in the Privacy Policies did not comply with the requirements of Article 12(1). The language used is not clear or plain, and is difficult to understand, in particular for child users (whether under the age of 13 or older).

133. The Commissioner's view is therefore that the Privacy Policies fail to convey the required information in a lawful and appropriate manner, even where such information is not omitted from the Privacy Policies *per se*.

134. By way of example, a user, and especially a child, would find it difficult to understand:

- a. That their data will be used to *"administer the Platform (i.e. to improve our Website and services to you) and for internal operations, including troubleshooting, data analysis, testing, research, statistical and survey purposes (i.e. to guarantee the website's stability and security) and to solicit your feedback."*¹³⁵ In contrast, TikTok's simplified privacy policy for the App, in place from 29 July 2020 (the "**New Privacy Policy**") states:

"Improve TikTok – This includes using your information to understand how you use TikTok and to make it work well.

Carry out surveys – We may sometimes offer you the chance to take part in surveys about TikTok."

- b. In relation to reliance on 'legitimate interests', Privacy Policy 3 refers to *"associated metadata"*, with no explanation of what metadata is. It also states that *"we will use your information to ...carry out data analysis and to test the Platform to ensure stability and security"*, with no explanation as to what data is to be analysed, or how, or what personal data is used to test the platform to ensure stability and security, or how

¹³⁵ See Privacy Policies 1-3, under the heading "*Legitimate Interests*".

it is used (e.g. what tests are carried out).¹³⁶ In contrast, the New Privacy Policy makes no mention of metadata or tests.

- c. Privacy Policy 3 refers to “*model contracts*” and how to obtain a copy. However, the information is not presented in a way that can be readily understood by a data subject, and in particular younger users aged 13-17. For example, excessively legalistic language is used, such as “*pursuant to 2004/915/EC or 2010/87/EU (as appropriate)*”. Further, it is not made clear that the “*model contract*” is a ‘safeguard’ in respect of the transfer of personal data and therefore important.¹³⁷ In contrast, the New Privacy Policy states:

“Where does your information go?”

Your personal information is sent and stored outside Europe.

Other countries do not always have as much protection for personal information but we have put in place legal agreements which include wording known as ‘standard contractual clauses’ to keep your information as safe as possible when it is sent outside of Europe.”

- d. In all of the Privacy Policies, there was a lack of clear and meaningful information about how long data would be retained. For example, in Privacy Policy 1, the criteria used to determine the period do not enable a user to understand for how long their personal data will be kept. The language used is broad and general and does not provide sufficient detail to understand, for example, how “*our contractual obligations and rights in relation to the information involved*” impact on retention periods, or indeed what those contractual obligations and rights these are. The meaning and significance of each criterion is not clear, and there are no practical examples of how each of the above criteria would impact on the period of retention. No explanation is given as to what is meant by an “*aggregated and anonymised format*”. Further, the link to

¹³⁶ Annex 3, paragraph 23.

¹³⁷ Annex 3, paragraph 93.

another part of the policy which essentially provides the same information is confusing.¹³⁸

- e. To the extent that limited references to the lawful bases for processing are included in the Privacy Policies,¹³⁹ the language used does not allow the user to understand how their personal data will be processed for each such purpose.¹⁴⁰

(d) TikTok's Written Representations

135. In its Written Representations, TikTok raised a number of reasons why it claims there was no contravention of Articles 12 or 13 UK GDPR. In particular, it argued that:

- a. It enjoys a margin of discretion in relation to its application of the requirements of Articles 12 and 13.
- b. There is an inherent tension between Articles 12 and 13, with a need to balance "*the competing requirements*" (e.g. by the Privacy Policies focusing on fully explaining the "*most significant*" points while minimising extraneous detail in relation to the "*less significant*" points).
- c. The Commissioner's approach is "*highly subjective*" and/or his findings on Article 12 are "*unsubstantiated*".
- d. The Commissioner should not use the fact that TikTok made improvements to its Privacy Policies as evidence that earlier versions did not comply.
- e. It did in fact comply with the requirements of Articles 12 and 13.

136. These arguments are addressed in turn, below.

¹³⁸ Annex 3, paragraph 114.

¹³⁹ See paragraph 120, above.

¹⁴⁰ See further Annex 3, paragraphs 13-43.

(i) Margin of discretion in relation to application of the requirements of Articles 12 and 13 UK GDPR.

137. TikTok has no “*margin of discretion*” to decide whether or not to comply with Articles 12 and/or 13 *per se*, as both impose binding legal obligations:

- a. Article 12(1) requires TikTok to take “*appropriate measures*” to provide any information referred to in Article 13 “*in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specially to a child*”. The purpose of this transparency obligation is to enable data subjects to effectively understand and exercise their rights under the UK GDPR.
- b. Article 13 sets out clear and specific requirements as to categories of information that TikTok “*shall*” provide.

138. The precise form of the wording by which a controller complies with Articles 12 and 13 may vary, and there is correspondingly a certain discretion in that respect. However, that does not detract from the legal requirements to (i) provide all of the categories of information set out in Article 13 and (ii) do so in an “*appropriate*” manner, in accordance with Article 12. Any discretion has to be exercised within those boundaries imposed by law.

139. As for TikTok’s argument that the Commissioner “*should afford TikTok a margin of discretion*” due to “*a lack of regulatory guidance*”, not only was there regulatory guidance available to TikTok throughout the Relevant Period, but that guidance expressly stated that certain wording (later used by TikTok in its Privacy Policies) was insufficient to comply with Articles 12 and 13.

140. On 16 May 2018, the ICO issued regulatory guidance entitled “*The General Data Protection Regulation: Individual rights – The right to be informed*”¹⁴¹

¹⁴¹ <https://ico.org.uk/media/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/the-right-to-be-informed-1-0.pdf>

(the “**2018 Guidance**”), which was in place throughout the Relevant Period. This provided:

- a. In relation to Article 12 UK GDPR (emphasis added):

***“You won’t be able to meet these requirements simply by listing all the necessary information in a lengthy and legalistic notice. You must take appropriate measures to provide the information in such a way that the intended audience can easily read and understand it.*”**

In order to achieve this the GDPR says that, as well as writing, you can use other techniques to provide this information to individuals. For instance, visualisation tools and standardised icons to help give individuals a meaningful overview of how you use their personal data.

*Currently, the 1998 Act allows you to make privacy information “readily available”, but **under the GDPR you must actively provide people with the information in a way that is easy for them to access.***

Putting a notice on your website without letting people know it’s there is not good enough.”

- b. In relation to Article 13 UK GDPR, it included a table setting out each of the categories of information the controller was required to provide.
- c. A link to the Article 29 Working Party Guidelines on Transparency adopted on 29 November 2017 and last revised and adopted on 11 April 2018 (the “**Guidelines on Transparency**”), as endorsed by the EDPB,¹⁴² providing further detail on what is required for compliance with

¹⁴² <https://ec.europa.eu/newsroom/article29/items/622227>.

Articles 12 and 13 UK GDPR.¹⁴³ For example, at page 9, the Guidelines on Transparency give three examples of poor practice. One of these is “*We may use your personal data to offer personalised services.*”, which the Guidelines on Transparency point out leaves unclear what any “*personalisation*” entails. This example of poor practice is comparable to the wording in all three of TikTok’s Privacy Policies which states that TikTok would use users’ data to “*personalise the content you receive and provide you with tailored content that will be of interest to you*”.

141. Neither do the two authorities relied upon by TikTok support its arguments on “*margin of discretion*”:

- a. As regards *DB v GMC* [2018] EWCA Civ 1497 (“**DB v GMC**”), Arden LJ held at [105]: “[i]t is... significant that Parliament has used the word “reasonable” and not some other word such as “appropriate”. The word “reasonable” conveys that there may be one or more courses open to the data controller”. Article 12, however, does not require “reasonable” but “appropriate” measures, and Article 13 imposes a specific list of mandatory requirements.
- b. In *DSG Retail v Information Commissioner* EA/2020/0048 (“**DSG Retail**”), the First Tier Tribunal (Information Rights) pointed out that “[a]t heart, the issues in this case concern technical matters of law and judgment relating to the appropriateness of various IT security measures”.¹⁴⁴ Given the “technical complexity” of the case, the Tribunal noted that there were pitfalls to the Commissioner “substituting his own judgment as to the appropriateness of certain measures for that of DSG”.¹⁴⁵ In contrast, there is no technical complexity involved in the application of Article 12. What is “appropriate” in this context hinges on the straightforward question of whether the plain language of TikTok’s Privacy Policies provided the information required by Article 13 in the manner required by Article 12.

¹⁴³ See, in particular, paras. 9-10 on page 7 and para. 11 on page 8.

¹⁴⁴ See *DSG Retail*, paragraph 105.

¹⁴⁵ See *DSG Retail*, paragraph 106.

(ii) Alleged tension between Articles 12 and 13 UK GDPR – balancing of “competing requirements”

142. The Commissioner does not accept that any tension between the requirements of Articles 12 and 13 UK GDPR justifies or requires non-compliance with either provision. The UK GDPR does not afford any discretion to “*balance between*” the requirements of Articles 12 and 13. Article 13 sets out what information needs to be provided, while Article 12 stipulates how this should be done.

143. TikTok was thus required to incorporate “*information which must be provided*” (i.e. all of the categories identified in Article 13) in its Privacy Policies, while ensuring this was done with “*the appropriate levels of detail and methods for conveying the information*” (i.e. in compliance with Article 12). Paragraph 34 of the Guidelines of Transparency¹⁴⁶ does not change that position as it makes clear that a controller’s own analysis and decision on how to prioritise information must be conducted “*within the legal requirements of the GDPR*”.

144. TikTok has not pointed to any consideration of – or rationale for – how to distinguish between ‘more’ and ‘less’ significant information. On the provisions of the UK GDPR, there is no basis for such a hierarchy of information within Article 12.

145. Finally, TikTok suggests that the 2018 Guidance permits a “*layered approach*” by which key privacy information is provided immediately and more detailed information is available elsewhere for those who want it.¹⁴⁷ However, TikTok does not suggest that it in fact adopted a “*layered approach*”. In any event, such an approach still requires that all of the information required by Article 13 be provided in the various “*layers*” considered cumulatively, which the Privacy Policies fail to do.

¹⁴⁶ Cited in the Written Representations, paragraph 23.3.

¹⁴⁷ Written Representations, paragraphs 24.2-24.3.

(iii) Whether the Commissioner's approach was too subjective/ his findings on Article 12 UK GDPR are unsubstantiated

146. TikTok alleges that *"a number of the ICO's provisional findings relate to subjective, minor points, and arise in relation to disclosures which are highly technical or legal in nature and therefore which would likely have had little to no effect on the cohort of users with whom the ICO is predominantly concerned (i.e. children between 13 and 17)"*.¹⁴⁸ It emphasises that having *"to have to explain each and every concept"*, such as *"platform administration"* and *"security"*, would result in *"a very lengthy and inaccessible privacy policy"*.¹⁴⁹
147. The Commissioner's decision concerns whether or not the Privacy Policies complied with Articles 12 and 13 UK GDPR. The requirements under Article 12 apply to *"any information referred to"* under Article 13. TikTok was therefore required to comply with Article 12 in respect of any concepts used in the Privacy Policies in order to provide the requisite information under Article 13 (including e.g. to explain that users' data would be used to *"administer the Platform"*, *"guarantee the website's stability and security"* and *"solicit [users'] feedback"*).
148. Requiring such concepts to be explained in a *"in a concise, transparent, intelligible and easily accessible form, using clear and plain language"* simply applies the legal test under Article 12. In deciding whether that test is met, the Commissioner has been conscious that there is a certain margin of discretion,¹⁵⁰ but concluded that TikTok's approach fell short of the minimum requirements.
149. The Commissioner has reached this conclusion by reference to numerous specific examples of language that were insufficiently clear or plain and that would be difficult for data subjects, and in particular children, to understand.

¹⁴⁸ Written Representations, paragraph 26.1.

¹⁴⁹ Written Representations, paragraph 26.2.

¹⁵⁰ See paragraph 138 above.

The shortcomings illustrated by those examples (e.g. phrases such as “*associated metadata*”, used without further explanation) are sufficiently apparent that it would be neither necessary nor proportionate to obtain detailed further evidence to “*confirm that such phrases are in fact difficult for ‘child users’ between the ages of 13 and 17 to understand*”.¹⁵¹

(iv) Whether reliance can be placed on the fact that TikTok made improvements to its Privacy Policies as evidence that earlier versions did not comply.

150. While the NOI references a simplified privacy policy introduced by TikTok in July 2020, this is not relied upon as evidence of “*earlier non-compliance*” on TikTok’s part. Rather, it illustrates – by reference to a readily accessible example – language that would be more likely to comply with Article 12 and thus the shortcomings of the earlier Privacy Policies.

(v) Whether TikTok complied with the requirements of Articles 12 and 13 UK GDPR.

151. Annex 3 sets out detailed reasons as to why the Commissioner has rejected this submission by TikTok. These are not repeated here.

152. TikTok further relies on a December 2019 ‘Summary of Privacy Policy for younger users’ (the “**Summary Policy**”) which it alleges “*achieved an appropriate balance between intelligible to users in their early teens... and those approaching early adulthood*”.¹⁵² Whilst it does not have screenshots of the Summary Policy as it appeared in-app as of December 2019, TikTok states that it was able to reconstitute its contents using records of the internal change log and a short video demonstrating how the Summary Policy would have been experienced by users at the relevant time.

153. The Commissioner has carefully considered the Summary Policy alongside Privacy Policy 3 to determine its impact, if any, on the breaches of Articles

¹⁵¹ Written Representations, paragraph 27.2.

¹⁵² Written Representations, paragraph 29.2.2.

12 and 13 that he has identified. While the Summary Policy provided somewhat more information than the Summary section of Privacy Policy 3, there is significant overlap between the Summary Policy, Summary section of Privacy Policy 3, and the more detailed parts of Privacy Policy 3.

154. Overall, the Commissioner has found that, whether taken individually or together, the Summary Policy and Privacy Policy 3 still do not present the information required by Article 12 *"in a concise, transparent, intelligible and easily accessible form"*. As such, the Summary Policy does not alter the conclusion that TikTok was in breach of Articles 12 and 13 during the period it applied.

(6) Contravention of Article 5(1)(a) UK GDPR

155. In order to comply with Article 5(1)(a) UK GDPR, a data controller is required to process data *"lawfully, fairly and in a transparent manner in relation to the data subject"*. Article 5(1)(a) must be interpreted, *inter alia*, in light of Recitals 38 and 58 UK GDPR¹⁵³ which emphasise the special protections required in relation to children's personal data, including in respect of transparency.

156. Article 5(2) UK GDPR states:

"The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')."

157. For the reasons explained above, the Commissioner has found that TikTok failed to fairly and lawfully process the data of users during the Relevant Period, with particular reference to child users. In particular, TikTok failed adequately to restrict access its platform to users under 13 years of age, meaning that children who were too young to use TikTok without parental consent were able to do just that.

¹⁵³ Cited at, respectively, paragraphs 38 and 115 above.

158. Insofar as TikTok relied on contractual necessity as a basis for its processing of the personal data of UK users under the Age of 13, it failed to have in place a lawful basis for such processing, which was therefore in breach of Article 5(1)(a).¹⁵⁴

159. Moreover, TikTok's Privacy Policies and transparency information, and the communication of such information to its users – including child users – fell short of the standards required under UK GDPR. In particular, TikTok failed to provide requisite information about the way in which users' personal data was processed in a manner that could be understood by data subjects. Especially for child users this meant that they were provided with insufficient and inadequate information suited to their age and ability to allow them to make informed choices about whether and how to engage with the platform. Similar shortcomings affected TikTok's Terms of Service, which throughout the Relevant Period were so difficult for user (and particularly child users) to access / understand as to render the processing of such users' data unfair, in breach of Article 5(1)(a) UK GDPR.

(7) The Special Purposes

160. In its written representations, TikTok argued TikTok's processing was for the "special purposes" (namely journalistic and artistic/literary purposes).

161. On this basis, TikTok argues that the Commissioner is bound to follow the requirements of s.156(1) DPA as a precondition for issuing a monetary penalty notice: i.e. the Commissioner must make a written determination (under s.174 DPA), and must obtain leave of the court to serve a monetary penalty notice. Absent these steps, TikTok argues that the Commissioner is not lawfully entitled to issue a penalty in this case. The Commissioner has dealt with this argument in separate decisions addressed to TikTok.¹⁵⁵

¹⁵⁴ See paragraphs 91-96 above.

¹⁵⁵ See letters dated 15 March and 30 March 2023.

162. Further, TikTok relies on the Special Purposes Exemption set out in para 26, Part 5, Schedule 2 DPA, both in respect of the Commissioner's provisional finding of an Article 9 UK GDPR infringement and "*more broadly to TikTok's processing of UGC [user-generated content]*".¹⁵⁶
163. The Commissioner considers that the processing in issue in this case is not for the special purposes.
164. In reaching this conclusion the Commissioner has considered both (a) whether TikTok's processing is for the TikTok's own journalistic, artistic or literary purposes, or (b) whether TikTok's processing is to facilitate the journalistic, artistic or literary purposes of third parties (that is, users of the TikTok platform). This twofold approach reflects the analysis adopted by the High Court in *NT1 & NT2 v Google LLC and ICO* [2018] EWHC 799 (QB) at paragraphs 95-102.
165. The Commissioner considers that TikTok was not processing personal data for its own artistic, literary or journalistic purposes, as it did not exercise the requisite degree of control, including editorial control, over the content posted on the TikTok platform. In this context, editorial control is not to be equated with mere screening or content moderation.
166. The Commissioner notes that the relevance of 'editorial control' for determining journalistic purposes in relation to user-generated content is also addressed in the Ofcom Guidance note: [Video-sharing platforms – who needs to notify to Ofcom?](#) (the "**Ofcom Guidance**").
167. The Ofcom Guidance is intended to help clarify, *inter alia*, who falls within the definition of a video-sharing platforms ("**VSP**") for the purposes of the Communications Act 2003. Under this Act, VSP providers are required to take measures to protect users of their services from harmful material.

¹⁵⁶ Written Representations, paragraphs 18.11 and 18.13.

168. Paras. 3.45-3.57 of the Ofcom Guidance cover the definition of a VSP. Para. 3.45 states that one of the defining criteria of a VSP¹⁵⁷ is that *“the person providing the service does not have general control over what videos are available on it, but does have general control over the manner in which videos are organised on it”*. ‘Organisation’ includes automatic organisation or organisation by way of algorithms, in particular displaying, tagging and sequencing.

169. Para. 3.48 of the Ofcom Guidance notes that a unique feature of a VSP Service is that it generally *“allows users to upload content without prior approval or intervention, and to share that content (subject to it being in line with that platform’s terms of use).”*¹⁵⁸ Para. 3.50 of the Guidance states that as a VSP does not have general control over what videos are available, *“the VSP provider is not considered to have ‘editorial responsibility’.”*

170. At para 3.51, the relationship between content moderation and control is discussed:

“Undertaking content moderation will generally not be considered as exercising control over what videos are available for the purposes of the Act. The key determinant will be the role the service plays in actively choosing the selection of videos that is available on the service. While they may make checks on content provided by uploaders, generally VSPs do not play a role in choosing the videos that are available. Again, Ofcom recognises that this assessment may not always be straightforward. If, for example, a VSP chooses to ‘screen’ user-generated video for content, in line with its moderation standards, before it is surfaced to other users, this should not meaningfully affect the ‘range’ or ‘catalogue’ of content any more than checking for this content after the video has been surfaced

¹⁵⁷ Under section 368S(2)(c) of the Communications Act 2003.

¹⁵⁸ European Audiovisual Observatory, The legal framework for video-sharing platforms (2018), p.1: the principal features of VSPs include “the algorithmic or human curation of content; funding through advertising; and ex-post checks on the initiative of rightsholders or the platform itself”. [IRIS plus 2018en1 \(coe.int\)](#)

and therefore would not ordinarily constitute exercising control over what videos are available within this framework.”

171. In summary, Ofcom considers that VSPs generally do not have editorial control¹⁵⁹ responsibility, even if they screen content before it is uploaded. As under the CCA, the mere fact that a VSP may still be responsible for protecting users from harmful material (i.e. content moderation) does not change that position.

172. Both the CCA and the Ofcom Guidance therefore support the view that, as a VSP,¹⁵⁹ TikTok is not processing personal data for its own journalistic, artistic or literary purposes, as it does not exercise editorial control. This is consistent with TikTok’s own submission that it “*does not review UGC [i.e. user generated content] prior to making it available on the platform*” (para. 18.40) and does not even have “*the power or capability to review and assess, at the point of uploading, the content that users decide to share*” (para. 16.12).

173. Ss.34-42 of the Crime and Courts Act 2013 (the “**CCA**”) corroborates the Commissioner’s view as to the distinction between content moderation and editorial control. The concept of “*Relevant publisher*” is defined at s.41(1) CCA as any person who, in the course of a business, publishes news-related material which is written by different authors and “*which is to any extent subject to editorial control.*”. Under s.41(2) CCA, news-related material is ‘subject to editorial control’ if there is a person with editorial or equivalent responsibility for the content of the material, how it is presented, and the decision to publish it. Pursuant to s.41(3)-(4) CCA, that definition expressly excludes the operator of a website “*if the person did not post the material on the site*”, regardless of whether “*the operator of the website may moderate statements posted on it by others.*” These provisions therefore make clear that mere content moderation does not amount to editorial control.

¹⁵⁹ TikTok is deemed a VSP as per the flowchart at Figure 1 on page 7 of the Ofcom Guidance.

174. As to whether TikTok is processing personal data for the journalistic, artistic or literary purposes of third parties (i.e. the users of its platform), the Commissioner considers that the answer is no. In this context the Commissioner has considered the analysis of this issue in *NT1 and NT2*, above, especially at paragraph 100. The Commissioner makes the following points by reference to that analysis.

- (a) *NT1 and NT2*, at paragraph 100, refers to processing by a printer to which a newspaper has outsourced its production, as being a possible example case where a party's processing will be for the journalistic purposes of third parties. The relationship between TikTok and its users is not remotely analogous to the relationship between a newspaper and an outsourced printer. Unlike in the case of the printer, TikTok's activities are not merely subservient or ancillary to those of its users.
- (b) As with an internet search engine (the case with which *NT1 and NT2* is concerned), TikTok's processing of personal data is automated, and does not distinguish between (i) user-generated content that constitutes journalistic, artistic or literary material, and (ii) user-generated content which does not constitute such material.
- (c) Likewise, as with an internet search engine, TikTok's processing is for its own commercial purposes rather than for the journalistic, artistic or literary purposes of third parties.
- (d) In the circumstances, TikTok's processing is not for the journalistic, artistic or literary purposes of its users, any more than Google's processing (as considered in *NT1 and NT2*) was for the journalistic, artistic or literary purposes of those who produced the content that featured in Google's search results.

175. In the circumstances, and for the reasons set out above, the Commissioner considers that TikTok's relevant processing does not fall

within any Special Purposes Exemption and that the statutory process as set out in sections 156 and 174 DPA is not applicable.

(8) Article 10 of the European Convention on Human Rights (“ECHR”)

176. TikTok argues¹⁶⁰ that the Commissioner has failed to consider the right to freedom of expression under Article 10 ECHR. It alleges that, in making user-generated content available on its platform, TikTok was (i) facilitating the exercise of Article 10 rights by its users and (ii) exercising its own rights under Article 10.¹⁶¹ It claims that therefore any penalty imposed on it would be an interference with such Article 10 rights, and that the Commissioner is required to justify both the decision to impose a penalty and the amount of any penalty under Article 10(2).¹⁶²

177. The imposition of a penalty for the breaches set out in this Penalty Notice does not interfere with the Article 10 ECHR rights of either TikTok or its users:

- a. As regards the penalty for the contravention of Article 8 UK GDPR, children under the age of 13 are not permitted to use TikTok’s services or platform.¹⁶³ TikTok acknowledges and avers that it has taken active steps to remove such child users.¹⁶⁴ Imposing a penalty on TikTok for failing properly to obtain parental consent in respect of the processing of personal data of under 13s who nonetheless use its platform:
 - i. Does not curtail TikTok’s own rights under Article 10 ECHR, as its stated policy is not to permit such users in any event; and
 - ii. Does not interfere with the Article 10 ECHR rights of UK users under 13 either, as it does not impose any additional restrictions on them. Indeed, as set out in the ICO’s letter dated 15 March

¹⁶⁰ Written Representations, paragraphs 6-8.

¹⁶¹ Written Representations, paragraph 6.7.

¹⁶² Written Representations, paragraph 7.1.

¹⁶³ See paragraphs 21-23 above.

¹⁶⁴ See e.g. paragraph 69 above.

2023, any restriction on the freedom of expression of children under 13 is imposed by TikTok itself (and not the ICO), and undoubtedly for good reasons given the concerns that have been raised regarding harmful and unsuitable content on TikTok which could be viewed by underage children. As a result, the free expression rights of children under 13 are not impacted by the ICO's findings in relation to Article 8 in this case.

- b. As regards the penalty for the contravention of Articles 12 and 13 UK GDPR, the transparency requirements imposed by these requirements are there to protect users of platforms such as TikTok by helping them understand the way in which their personal data is processed and exercise their UK GDPR rights. Articles 12 and 13 are procedural in nature. They enable fundamental rights without restricting users' (or TikTok's) ability to exercise their right to freedom of expression. It follows that a penalty imposed on TikTok for failing to comply with those requirements does not interfere with the Article 10 ECHR rights of either TikTok or its users.

178. In any event, insofar as Article 10 ECHR is engaged, this Penalty Notice sets out comprehensive reasons for why the imposition of a penalty on TikTok (and the amount of that penalty) is in accordance with the law, necessary, and proportionate in all the circumstances. The penalty is therefore justified under Article 10(2) ECHR.

(9) Alleged delay

179. TikTok argues in its Written Representations¹⁶⁵ that the three and a half year time period between the ICO commencing its investigation and issuing the NOI has caused "*significant prejudice to TikTok in terms of its ability to defend its position.*" TikTok also argues that this alleged prejudice should be reflected in the ICO's determination of whether to issue a penalty and/or the amount of any such penalty.

¹⁶⁵ Written Representations, paragraphs 3.1-3.3.

180. The legal principles applicable to an allegation that there has been delay in a regulatory process are set out below.

181. Article 6 ECHR states that in the determination of a person's civil rights and *obligations* or of any criminal charge, a person is entitled to a fair and public hearing "*within a reasonable time*". For a delay to be unreasonable it must be "*inordinate and inexcusable*" which is "*a high threshold*".¹⁶⁶

182. Even if a delay can be considered unreasonable, the final decision would only be tainted if that delay can be shown to have compromised the rights of defence and the appellant can show that there is no reason to believe that the content of the decision would have been different but for the delay.

183. As the *General Court* stated in *Treuhand*:¹⁶⁷

"[T]here is no need to annul a Commission decision, even where the procedure has been excessively long, where it has not been shown in detail that the rights of defence of the undertakings concerned have been impaired and there is thus no reason to believe that the excessive length of the procedure had an impact on the content of the Commission's decision."

184. In *FP McCann*, the Competition Appeal Tribunal considered the circumstances in which a penalty should be reduced on account of delay. It held that, if a party were able to establish a contravention of Article 6 ECHR, then it would be open to the Tribunal to consider whether it *would* be appropriate to reflect that fact in a reduction of the penalty. However, for that purpose a party would have to show that *both* (i) the CMA had been guilty of inordinate and inexcusable delay; and (ii) the right response to that finding is that it is

¹⁶⁶ *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379; *FP McCann Limited v Competition and Markets Authority* ("*FP McCann*") [2020] CAT 28, paras. 258, 265.

¹⁶⁷ Case T-27/10 AC *Treuhand v Commission* EU:T:2014:59 ("*Treuhand*"), para. 204.

appropriate to reduce the penalty on that account. The Competition Appeal Tribunal noted that it would be open to the Tribunal to find that there had been inordinate and inexcusable delay but that the penalty should not be reduced on that account.

185. Ultimately, the Tribunal in *FP McCann* held that “*even though portions of the work may not have proceeded as swiftly as the authorities had hoped or intended*”, the investigations were not subject to inordinate or inexcusable delay.¹⁶⁸

186. Applying the above principles to the facts of this case, the Commissioner considers that there was no “*inordinate or inexcusable delay*”.

187. This is a complex case, covering numerous issues and infringements which required detailed investigation. In the circumstances, the Commissioner considers that the time that has passed between the commencement of the investigation and the issuance of the NOI and subsequently this penalty notice has been reasonable and was the necessary amount of time to consider carefully the relevant evidence in order to come to a reasoned decision. In no circumstances could the length of time that has passed be classed as “*inordinate or inexcusable delay*”. The Commissioner does not therefore consider that TikTok’s arguments on delay should lead the Commissioner to impose a reduced penalty.

188. Furthermore, TikTok has not provided any persuasive explanation as to how any delay has prejudiced its ability to defend its position. TikTok argued that a number of key individuals who had knowledge of the relevant issues no longer work for TikTok. However, that the fact that an individual has left an organisation does not mean that they cannot be contacted. Companies regularly have to contact ex-employees to deal with regulatory requests. TikTok has provided no other evidence of any prejudice it has suffered as a result of the elapsed time. In fact, TikTok has been able to provide 162 pages of written representations, responding in detail to all aspects of the NOI.

¹⁶⁸ *FP McCann*, para. 306.

189. By reason of the above, there has been no prejudice to TikTok's ability to defend itself against the Commissioner's provisional views as set out in the NOI.

V. PENALTY

190. For the reasons set out below, the Commissioner has decided to impose a penalty of £12,700,000 on TikTok in accordance with section 155 DPA. The Commissioner has found TikTok Inc and TikTok Limited jointly and severally liable for the infringements and for the financial penalty.

(1) Legal framework - penalties

191. When deciding whether to issue a penalty notice to a person and determining the appropriate amount of that penalty, section 155(2)(a) DPA requires the Commissioner to have regard to the matters listed in Articles 83 UK GDPR, so far as they are relevant in the circumstances of the case.

192. Article 83(1) UK GDPR requires any penalty to be "*effective, proportionate and dissuasive*".

193. Article 83(2) UK GDPR requires the Commissioner to have due regard to the following factors when determining whether to issue a penalty notice and the appropriate amount of any such penalty in each individual case:

(a) The nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;

(b) the intentional or negligent character of the infringement;

(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;

- (d) *the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;*
- (e) *any relevant previous infringements by the controller or processor;*
- (f) *the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;*
- (g) *the categories of personal data affected by the infringement;*
- (h) *the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;*
- (i) *where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;*
- (j) *adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and*
- (k) *any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.*

(2) The Commissioner’s decision on whether to impose a penalty

194. Having regard to the factors listed in Article 83(1) and (2) UK GDPR (which are further addressed at paragraphs 204-263 below), the Commissioner is satisfied that the imposition of a penalty is appropriate in respect of the contraventions of the UK GDPR he has found.

195. In its Written Representations, TikTok submitted that the ICO should not impose a penalty at all, for the following reasons:

- a. The ICO is restricted from imposing a penalty by section 156 DPA (because TikTok was processing for the “*special purposes*”)¹⁶⁹;

¹⁶⁹ Written Representations, paragraph 32.

- b. A decision to impose a penalty would be incompatible with Article 10 ECHR¹⁷⁰;
- c. There is no basis for issuing a penalty in respect of Article 8 given the serious errors in law and fundamental omissions made by the ICO¹⁷¹;
- d. Any infringements of Articles 12 and 13 UK GDPR would be technical and limited only, such that, when applying the Regulatory Action Policy (RAP), should not attract a penalty¹⁷²; and
- e. The ICO's decision to impose a penalty is not in accordance with his Regulatory Action Policy ("**RAP**")¹⁷³.

196. As to point (a), the Commissioner's conclusions in relation to the "*special purposes*" are set out at paragraphs 157-172 above. In short, the Commissioner has found that the processing in issue in this case was not "*for the special purposes*" and, as such, the requirements of section 156 DPA do not apply.

197. As to point (b), the Commissioner's conclusions in respect of Article 10 ECHR are set out at paragraphs 173-175. For the reasons set out in those paragraphs, this Penalty Notice does not interfere with any Article 10(1) rights, or is in any event justified under Article 10(2) ECHR, including by reference to the factors set out in Article 83(1) and (2) UK GDPR, as considered in this section.

198. As to point (c), the Commissioner's substantive findings in relation to Article 8 are set out in paragraphs 36-108 above. The Commissioner disagrees with TikTok's representations and finds that there was a contravention of Article 8. Further details regarding the seriousness of this breach are set out in paragraphs 205-218 below.

¹⁷⁰ Written Representations, paragraph 33.

¹⁷¹ Written Representations, paragraph 9.

¹⁷² Written Representations, Section 6.

¹⁷³ Written Representations, paragraph 35.

199. As to point (d), the Commissioner does not accept that the contravention of Articles 12 and 13 UK GDPR is only a “*technical*” breach for the reasons set out in paragraphs 112-151 above and 219-229 below.

200. As to point (e), TikTok referred to the following points in the RAP and argued that, when they are taken into account, this is not a case in which it was appropriate for the ICO to issue a penalty at all:

- a. In the “*majority of cases*” the ICO will impose a penalty “*for the most serious cases, representing the most severe breaches of information rights obligations*”;
- b. These “*typically involve wilful, deliberate or negligent acts, or repeated breaches of information rights obligations, causing harm or damage to individuals*”; and
- c. The ICO’s “*decision whether to impose a penalty at all*” involves consideration of, inter alia, “*the nature, gravity and duration of the failure*” and the “*categories of personal data affected by the failure*”.

201. In respect of these arguments on point (e), the Commissioner has concluded that the imposition of a penalty is appropriate under the RAP:

- a. TikTok’s breaches of the UK GDPR were of sufficient seriousness to warrant issuing a penalty, and indeed amongst the most serious breaches of information rights obligations. As noted by the Irish DPC and the EDPB, lawfulness of processing is one of the “*fundamental pillars of data protection law ... processing of personal data without a legal basis is a clear violation of the data subjects’ fundamental right to data protection.*”¹⁷⁴ More specifically:

¹⁷⁴ Irish DPC, *Meta (Instagram)*, 2 September 2022, paragraph 543 (citing the EDPB’s corresponding decision, paragraph 239)

- i. The breach of Article 8 UK GDPR involved the processing of the data of young children without a lawful basis. The particular seriousness of breaches involving children's data is apparent from the special protection given to children by the UK GDPR.¹⁷⁵
 - ii. The scale of the processing and number of young children affected by the breach was significant (1.1–1.4 million children under 13, i.e. between 11% and 14% of the total number of children under 13 in the UK in 2020).
 - iii. As regards the breaches of Articles 12 and 13 UK GDPR, the right to information is fundamental to the rights of data subjects. Without it, individuals are deprived of being able to make fully informed decisions about whether and how they use TikTok's service.
 - iv. TikTok's Privacy Policies had serious shortcomings, both in terms of the content and the manner in which they were presented. They failed to provide essential information, such as on the purposes of the processing, the basis on which data was being processed, and the recipients of the personal data and transfers. Failures in relation to Articles 12 and 13 are particularly concerning where the data subjects involved are children.
- b. As further addressed at paragraphs 228-233 below, the Commissioner has found that the breaches were negligent and had the potential to result in harm (in particular to young children):
- i. TikTok was negligent in that it ought to have been aware that it was processing the data of under 13s without consent given or authorised by the holder of parental responsibility over such child

¹⁷⁵ See e.g. paragraph 38 above.

users. In addition, it ought to have been aware that it was inappropriate to rely on contractual necessity as a lawful basis for processing the data of under 13s, in particular because there was no valid contract in place with under 13s, who, in line with TikTok's Terms of Service were not permitted to be on the platform. Further, an organisation of TikTok's size and sophistication ought to have been aware that its Privacy Policies were inadequate.

- ii. The Article 8 UK GDPR breach resulted in harm to children under the age of 13. A user's young age warrants particular parental oversight in respect of the quantity and nature of personal data they share on a platform such as TikTok. The breach of Article 8 deprived underage users of that important oversight. Furthermore, and as noted above in paragraphs 28-29, concerns have been raised regarding content on TikTok which may be harmful and unsuitable for children under 13.
 - iii. It is also important to note that some of the Relevant Period covered the first lockdown, when children were particularly exposed to social media and VSPs such as TikTok, and the numbers of very young children using the platform was increasing significantly, and hence TikTok ought to have been especially vigilant.
- c. The nature, gravity and duration of the failures, and the categories of personal data affected by them mean that the imposition of a penalty is appropriate:
- i. The nature and gravity of the breaches, together with the categories of data affected, are addressed in points (a) and (b), at paragraph 198 above.

- ii. The duration of the breaches was significant, with the Relevant Period covering more than 2 years.¹⁷⁶

202. In light of the above, the Commissioner considers that it is appropriate to impose a penalty in this case.

(3) The Commissioner’s decision on the appropriate amount of the penalty

203. As regards the amount of the penalty, the Commissioner has decided that this should be determined by:

- a. Calculating a separate amount for each (i) Article 8 and (ii) jointly Articles 12 and 13 UK GDPR;
- b. Having regard to his finding on Article 5(1)(a) UK GDPR, but not imposing an additional separate penalty in respect of that;
- c. Considering whether the overall penalty is effective, proportionate and dissuasive; and
- d. In the light of the above, reaching a final figure.

204. The Commissioner has considered each of the criteria under Article 83(2) UK GDPR in respect of the infringements of both (i) Article 8 and (ii) Articles 12 and 13 UK GDPR.

205. The penalty setting process has been conducted in line with the five step process set out in the RAP; namely:

Step 1. An ‘initial element’ removing any financial gain from the breach

¹⁷⁶ The Irish DPC found in *Meta (Instagram)*, 2 September 2022, paragraph 564 that “the factual reality is that a period of at least two years is a lengthy period of time.”

Step 2. Adding in an element to censure the breach based on its scale and severity, taking into account the considerations identified at section 155(2)-(4) of the DPA

Step 3. Adding in an element to reflect any aggravating factors

Step 4. Adding in an amount for deterrent effect to others

Step 5. Reducing the amount (save that in the initial element) to reflect any mitigating factors, including ability to pay (financial hardship)

(a) Step 1 – ‘initial element’

206. The Commissioner has found that TikTok is likely to have made financial gain as a result of the infringements, but that there is insufficient evidence available to him to calculate the exact amount of the financial gain. For this reason, the Commissioner has not attempted to quantify an initial element under Step 1 to be included in the calculation of the financial penalty. However, in responding to TikTok’s Written Representations under Step 2 below, the Commissioner has had regard to the fact that TikTok is likely to have made a financial gain from the processing in issue in this case (see paragraphs 211 and 220 below).

(b) Step 2 – scale and severity

207. In determining the appropriate element to censure the breaches based on its scale and severity, the Commissioner has had regard, so far as relevant, to the matters listed in Articles 83(1) and (2) UK GDPR. These are addressed in turn below.

Article 83(2)(a): Nature, gravity and duration of the infringement

Infringement of Article 8 UK GDPR

208. In respect of the infringement of Article 8 UK GDPR, the Commissioner has found that:

- a. The infringement covered a 26-month period (25 May 2018 to 28 July 2020), i.e. more than two years.
- b. The failings identified by the Commissioner’s investigation, as detailed above, involved the processing of young children’s personal data.¹⁷⁷
- c. The Commissioner’s best estimate is that in the UK in 2020 there were between 1.1 million and 1.4 million registered TikTok account holders who were children under the age of 13. This amounts to between 11% and 14% of the total number of children under 13 years old in the UK in 2020.
- d. The number of underage users and the nature and gravity of the shortcomings identified above amount to a serious failing for a digital platform, particularly one of the scale of TikTok.¹⁷⁸ As set out in the Commissioner’s Regulatory Action Policy, the amount of a penalty will generally be higher where vulnerable individuals, in this case children, are affected.

209. For these reasons, the Commissioner has decided that a figure of £7,000,000 is appropriate to reflect the nature, gravity and duration of the infringement.

210. In its Written Representations on the amount of the penalty, TikTok argued that the figure of £7,000,000 appeared to be arbitrary in nature. The Commissioner does not agree. When exercising his wide margin of discretion to decide the appropriate amount of a penalty, the Commissioner is mindful of the fact that the setting of a penalty is not an “*arithmetically precise exercise*”. Rather, and as the Competition Appeal Tribunal has found, the level of a financial penalty is based on “*evaluation and judgment*” and the reasoning “*will not lend itself to elaborate exposition*”.¹⁷⁹

¹⁷⁷ See paragraph 55 above.

¹⁷⁸ See paragraphs 10-14 above.

¹⁷⁹ *FP McCann v CMA* [2020] CAT 28, paragraph 347.

211. In the light of this case law, and of all the factors set out above, the Commissioner remains of the view that a figure of £7,000,000 is appropriate at this stage of the calculation. In response to TikTok's Written Representations the Commissioner also notes that:

- a. As indicated above under Step 1, the Commissioner has not calculated an "initial element" in respect of financial gain made by TikTok as a result of the infringements. The Commissioner notes, however, that TikTok derives a significant part of its revenues from personalised advertising to its users. For example, TikTok Limited made revenues of approximately \$152 million in respect of personalised advertising in 2020. As such, the increased number of users resulting from the presence of under 13s on the platform would have led to a financial gain to TikTok.
- b. The relevant processing was part of TikTok's main business and commercial activities. The more central the processing is to the controller's or processor's core activities, the more severe irregularities in this processing will be.¹⁸⁰
- c. TikTok and its parent company, ByteDance made very significant revenues during the Relevant Period, which in turn reflect the large number of users of the platform, including the 1.1 – 1.4 million under age children using the platform. The figure of £7,000,000 would amount to just 1.28% of the combined turnover of TikTok Ltd and TikTok Inc, and only 0.02% of the turnover of ByteDance.¹⁸¹

212. In its Written Representations, TikTok argued that any infringement of Article 8 was "technical" in nature because it "relate[d] solely to the allegation that

¹⁸⁰ See draft EDPB Guidelines 04/2022 on the calculation of administrative fines, paragraph 54(b)(iii).

¹⁸¹ Whilst total turnover is also considered later in the calculation, in relation to proportionality and deterrence, the Commissioner notes the EDPB draft guidelines 04/2022 on the calculation of administrative fines under the UK GDPR ("the EDPB Draft Guidelines") which state as follows: "the EDPB considers that it is fair to reflect a distinction of the size of the undertaking in the starting points identified below and therefore takes into account its turnover. However, this does not dismiss a supervisory authority from the responsibility to carry out a review of effectiveness, dissuasiveness and proportionality at the end of the calculation". (EDPB Draft Guidelines, para 65)".

*TikTok did not obtain parental consent in circumstances where the user misrepresented that they were above an age at which such parental consent could ever be required*¹⁸². TikTok also did not accept that children under the age of 13 who gained access to the TikTok platform would “*necessarily have been exposed to harm as a result.*”¹⁸³

213. The Commissioner does not accept that the breach of Article 8 is a mere “*technical*” breach. For the reasons set out in paragraphs 195-198 and 208 - 211 above, it was a substantive and very serious breach of the UK GDPR. The requirement for parental consent set out in Article 8 is not a mere “*technical*” requirement but fundamental to the protection of underage children. As set out at paragraph 28 above, under the UK GDPR, children enjoy special protection with respect to the processing of their personal data. The need for parental consent is at the heart of the effective protection of children. This is because a user’s young age warrants particular parental oversight in respect of the quantity and nature of personal data they share on a platform such as TikTok – which is dependent on effective compliance with Article 8. Furthermore, concerns have been raised regarding content on TikTok which may be harmful and unsuitable for children under 13. This is relevant because: TikTok processes data about, inter alia, children’s use of its platform in order to deliver bespoke content; such content may be harmful or inappropriate for children under 13.

214. For the avoidance of doubt, the Commissioner does not assert that children under the age of 13 will *necessarily* be exposed to harmful content on the platform, as TikTok argues. Rather, the concern is with the *potential* for children under the age of 13 to be exposed to harmful content (see paragraphs 28-29). Parental consent is vital to guard against risks of this nature.

¹⁸² Written Representations, Annex 4, paragraph 1.4.

¹⁸³ Written Representations, Annex 4, paragraph 1.6.

215. As regards TikTok's submission that the Commissioner's estimate of the number of registered TikTok users under the age of 13 is unreliable, this is addressed at paragraph 53 above and in Annex 2.

216. TikTok also argued that its user numbers were not consistent across the Relevant Period but that it grew substantially over that time.¹⁸⁴ TikTok therefore argued that the gravity of the infringement should not be based on the number of users at the end of the period, but should take into account the growth of user numbers. The Commissioner agrees that the number of UK users increased throughout the Relevant Period, and this was one of the factors that was taken into account when considering the nature and gravity of the infringement. Furthermore, given the scale of the growth in user numbers, TikTok ought to have been particularly vigilant to the risks that it was infringing Article 8, by processing the personal data of under 13s without the requisite consent.

Infringement of Articles 12 and 13 UK GDPR

217. The Commissioner has had regard to the following factors in respect of the nature, gravity and duration of the breaches of Articles 12 and 13 UK GDPR:

- a. The infringements covered a 23-month period (August 2018 to 28 July 2020) during which time the Privacy Policies were (collectively) in place.
- b. As set out above:
 - i. In respect of Article 12 UK GDPR, TikTok failed to take appropriate measures to provide required information to data subjects in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular in relation to information addressed specifically to children.

¹⁸⁴ From 2.1m in May 2018, to 8.9m in December 2019, and 17.7m in July 2020.

- ii. In respect of Article 13 UK GDPR, there were multiple failures involved, as set out in paragraphs 115-128 above and Annex 3.
- c. Considering the number of users of the platform, a large number of data subjects were impacted by this infringement, including (for the reasons explained in relation to Article 8) a significant number of children.

218. In the NOI, the Commissioner provisionally found that a penalty of £4,000,000 was an appropriate figure to reflect the nature, gravity and duration of the infringements of Articles 12 and 13 UK GDPR. The Commissioner has decided to reduce that figure by £50,000 to reflect the fact that the provisional finding in respect of Article 13(1)(a) has not been maintained in the Penalty Notice (see paragraphs 115 above). The level of the reduction reflects the fact that the provisional finding in respect of Article 13(1)(a) was only a minor part of the Article 12 and 13 provisional findings, and was not the Commissioner's core concern in relation to transparency. The revised figure is therefore £3,950,000.

219. TikTok argued that the figure of £4,000,000 (now reduced to £3,950,000 as above) applied at this stage of the penalty calculation appeared to be arbitrary in nature.

220. In the light of the case law, and of all the factors set out above, the Commissioner remains of the view that a figure of £3,950,000 is appropriate at this stage. In response to TikTok's Written Representations the Commissioner also notes that:

- a. As indicated above under Step 1, the Commissioner has not calculated an "initial element" in respect of financial gain made by TikTok as a result of the infringements. The Commissioner notes, however, that TikTok derives a significant part of its revenues from personalised advertising to its users. For example, TikTok Limited made revenues of approximately \$152 million in respect of personalised advertising in

2020. The Commissioner has found that TikTok was not sufficiently transparent about the way in which users personal data would be processed, including with respect to personalised advertising. As such, TikTok made a financial gain from the processing to which its lack of transparency pertained.

- b. The relevant processing was part of TikTok's main business and commercial activities. The more central the processing is to the controller's or processor's core activities, the more severe irregularities in this processing will be.¹⁸⁵
- c. TikTok and its parent company, ByteDance made very significant revenues during the Relevant Period, which in turn reflects the large number of users of the platform. The starting point of £3,950,000 would amount to just 0.72% of the combined turnover of TikTok Ltd and TikTok Inc, and only 0.01% of the turnover of ByteDance.¹⁸⁶

221. In its Written Representations, TikTok argued that the breaches of Articles 12 and 13 UK GDPR were "*technical*" in nature. In particular, TikTok submitted that "*most of the alleged infringements under Article 13 ... would have had no material impact or bearing on the data subject.*"¹⁸⁷

222. The Commissioner does not accept that the breaches of Articles 12 and 13 UK GDPR were mere "*technical*" breaches. For the reasons set out in paragraphs 115-151 above, they were substantive and serious breaches of the UK GDPR.

223. TikTok's Privacy Policies had serious shortcomings, both in terms of the content and the manner in which that content was presented. In particular,

¹⁸⁵ See draft EDPB Guidelines 04/2022 on the calculation of administrative fines, paragraph 54(b)(iii).

¹⁸⁶ Whilst total turnover is also considered later in the calculation, in relation to proportionality and deterrence, the Commissioner notes that the EDPB Draft Guidelines which state as follows : "*the EDPB considers that it is fair to reflect a distinction of the size of the undertaking in the starting points identified below and therefore takes into account its turnover. However, this does not dismiss a supervisory authority from the responsibility to carry out a review of effectiveness, dissuasiveness and proportionality at the end of the calculation*". (EDPB Draft Guidelines, para 65)".

¹⁸⁷ Written Representations, Annex 4, paragraph 3.6.

there were serious failings in the provision of information about: the purposes of the processing, the lawful basis on which data was being processed, the legitimate interests pursued, the recipients of the personal data and transfers.

224. The right to information, as set out in Articles 12 & 13 UK GDPR, is fundamental to the rights of data subjects and, without it, individuals are deprived of being able to make fully informed decisions about whether and how they use TikTok's service. As the Irish DPC stated in the Meta (Facebook) case:

"The right to information – is a cornerstone of the rights of the data subject. Indeed, the provision of the information concerned goes to the very heart of the fundamental right of the individual to protection of personal data which stems from the free will and autonomy of the individual to share their personal data in a voluntary situation such as this. If the required information has not been provided, the data subject has been deprived of the ability to make a fully informed decision as to whether they wish to use a service that involves the processing of their personal data and engages their associated rights. Furthermore, the extent to which a data controller has complied with its transparency obligations has a direct impact on the effectiveness of the other data subject rights. If data subjects have not been provided with the prescribed information, they may be deprived of the knowledge they need in order to consider exercising one of the other data subject rights".¹⁸⁸

225. Similarly, the First Tier Tribunal, in the recent *Experian* case, held that *"the right to transparency in the processing of personal data is foundational as it enables data subjects to access and exercise their own GDPR rights"* and that *"it is essential to affording data subjects autonomy and to achieving the*

¹⁸⁸ Irish DPC Decision, Facebook, 31 December 2022, paragraph 9.17.

*purpose of the GDPR that a person should have control of their own personal data.*¹⁸⁹

226. Failures in relation to Articles 12 and 13 UK GDPR are particularly concerning where the data subjects involved are children. As noted in the Irish DPC Meta (Instagram) case, such failures when they relate to children are *"even more likely to deny those data subjects an understanding of the processing and the risks associated with it."*¹⁹⁰
227. TikTok also submitted in its Written Representations that different elements of the infringements of Articles 12 and 13 UK GDPR arose at different times and so the ICO should not rely on a duration of 23 months¹⁹¹ to justify the penalty¹⁹². However, the Commissioner does not agree. The penalty is imposed for the totality of the transparency failings, the majority and most serious of which were in place throughout the entirety of the Relevant Period (i.e. the breaches of Article 12 (requiring that information be provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language) and Articles 13(1)(b), (c), (d) (covering the purposes of processing, the lawful bases and the recipients of the data)).

Article 83(2)(b): The intentional or negligent character of the infringement

228. The Commissioner has not found that TikTok acted intentionally in committing the infringements of the UK GDPR set out above. No uplift has therefore been made to the penalty on that basis.
229. TikTok's infringements of the UK GDPR were negligent: TikTok ought to have been aware that it was processing the data of under 13s without consent given or authorised by the holder of parental responsibility over such child users. In addition, it ought to have been aware that it was inappropriate to

¹⁸⁹ Experian Limited EA-2020-0317 FP (17.02.23).pdf (tribunals.gov.uk), paragraph 119.

¹⁹⁰ Irish DPC, Meta (Instagram), paragraph 515.

¹⁹¹ August 2018 to 28 July 2020, during which time the Privacy Policies were (collectively) in place.

¹⁹² Written Representations, Annex 4, paragraph 3.7.

rely on contractual necessity as a lawful basis for processing the data of under 13s, in particular because there was no valid contract in place with under 13s, who, in line with TikTok's Terms of Service were not permitted to be on the platform. Further, an organisation of TikTok's size and sophistication ought to have been aware that its Privacy Policies were inadequate.

230. While a finding of intention may be good reason to uplift a penalty, a finding of negligence is not a reason to reduce a penalty. The Commissioner therefore makes no change to the above starting figures for the infringements.

231. In its Written Representations, TikTok submitted that it was not negligent because:

- a. In relation to Article 8, it could not have been negligent because Article 8 was not applicable¹⁹³; and
- b. In relation to Article 12 and 13, the fact that its implementation of three versions of its Privacy Policy over the 23 month period shows that it was looking to continuously improve the transparency and granularity of its Privacy Policies¹⁹⁴.

232. The Commissioner's substantive findings in relation to Article 8 are set out above. TikTok ought to have been aware that a significant number of under 13s were on the platform during the Relevant Period, indeed TikTok's internal documents show that its staff raised serious concerns about the number of underage children on the platform (see paragraphs 81-84 above). Nonetheless TikTok did not seek parental consent (because under 13s should not have been on the platform), nor did TikTok put in place adequate measures to prevent under 13s from accessing the platform or remove them once they had.

¹⁹³ Written Representations, Annex 4, paragraph 1.13.

¹⁹⁴ Written Representations, Annex 4, paragraph 3.9.

233. In respect of Articles 12 and 13 UK GDPR, despite TikTok making changes to its policies, all three policies have been found to be deficient, for the reasons set out above (and in Annex 3). An organisation of TikTok's size and importance ought to have known that its Privacy Policies were inadequate.

Article 83(2)(c): Any action taken by the controller to mitigate the damage or distress suffered by the data subjects

234. As to Article 8 UK GDPR:

- a. The Commissioner acknowledged that TikTok made some attempts to identify users under the age of 13 and to remove some of them from the platform, with there being a process and a team in place to do so.
- b. However, as set out above, these measures were inadequate and TikTok did not go far enough in respect of taking action on underage accounts. The number of deleted accounts (152,978) was only a small proportion of the number of estimated underage account holders (1.1m-1.4m) and there were material shortcomings in the policies and processes relied upon (as pointed out by TikTok's own employees).
- c. The Commissioner nonetheless has found it appropriate to reduce by £250,000 the starting figure of £7,000,000, in order to reflect the action taken by TikTok, resulting in a figure of £6,750,000 for the Article 8 infringement.

235. As to Articles 12 and 13 UK GDPR:

- a. The Commissioner has found that, while TikTok has made improvements to its Privacy Policies during the Relevant Period, the changes made were insufficient to address the infringements.
- b. The Commissioner expects an organisation of TikTok's size to have basic requirements, including a fully compliant privacy policy, in place.

- c. In the circumstances, the figure of £3,950,000 for the Article 12 and 13 UK GDPR infringements remains unchanged.

Article 83(2)(d): The degree of responsibility of the controller or processor

236. The Commissioner has found that the steps taken by TikTok as the data controller were not commensurate to its size and resources or to the seriousness of the issues. This applies both in respect of the failures to identify the matters giving rise to the infringements and the failures to take prompt and adequate steps to address them.

237. As to Article 8 UK GDPR:

- a. In its Written Representations, TikTok argues that the ICO should take into account the fact that it *"reasonably relied on the representations given by the user that they were at least 13 years old"*, and that TikTok did *"implement a range of reasonable and proportionate measures designed to keep children under 13 off the platform."*¹⁹⁵
- b. However, while there were some limited processes in place during the Relevant Period in order to prevent under 13s from using TikTok, these were not as effective as they should have been. Moreover, warning signs, including those raised by TikTok staff, were not properly acted upon.
- c. The Commissioner has found that this is adequately reflected in the penalty of £6,750,000 for the Article 8 infringement and that this should remain unchanged.

238. As to Articles 12 and 13 UK GDPR:

- a. The Commissioner has found that basic personal data requirements and a privacy policy were in place and TikTok did take some steps to improve this.

¹⁹⁵ Written Representations, Annex 4, §1.17 et seq

- b. However, the Commissioner does not consider that these steps were sufficient to merit any change to the penalty of £3,950,000 for these infringements, and that amount therefore remains unchanged.

Article 83(2)(e): Any relevant previous infringements

239. The Commissioner is not aware of any relevant previous infringements by TikTok. There is therefore no change to the penalties.

Article 83(2)(f): Degree of cooperation with the Commissioner

240. In respect of all infringements, the Commissioner has found that TikTok has demonstrated a level of cooperation. He notes that there has been sustained communication and voluntary provision of some information.

241. However, the Commissioner did find it necessary during the course of this investigation to issue repeated Information Notices to TikTok requesting, *inter alia*, certain information and documents. For example, he repeatedly requested TikTok's best estimate as to how many underage users were on the platform during the Relevant Period. TikTok consistently refused to provide this, simply reiterating that it did not know and could not provide a such an estimate. That response was surprising, given the size of the company and the resources available to it and noting the fact that the Commissioner has been able to calculate such an estimate.

242. TikTok made a series of representations about the ICO's decision not to reduce the penalty based on the level of cooperation.¹⁹⁶ There is, however, a general obligation to cooperate incumbent on the controller, and the Commissioner regards that as neutral. A reduction would only be appropriate where the cooperation went beyond responding to information requests and attending meetings.

¹⁹⁶ Written Representations, Annex 4, §1.23 et seq

243. The Commissioner has concluded that it is appropriate to make no change to the penalties.

Article 83(2)(g): Categories of personal data affected

244. As set out above, the personal data affected by the breaches is wide-ranging, pertains to both TikTok users and third parties. However, the Commissioner has found that this was already properly reflected at Step 2 of the penalties calculation.

245. No additional amount was therefore added to the penalties.

Article 83(2)(h): Manner in which the infringement became known to the Commissioner

246. The infringements were not reported to the Commissioner by TikTok. The investigation was instigated by the Commissioner. The Commissioner has therefore decided not to make any reduction to the penalties.

Article 83(2)(i): Where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures

247. Given that no previous measures have been ordered against TikTok by the Commissioner, there is no change to the penalties.

Article 83(2)(j): Adherence to approved codes of conduct pursuant to Article 40 UK GDPR or approved certification mechanisms pursuant to Article 42 UK GDPR

248. There are no applicable codes of conduct for the period of infringement.

249. In the circumstances, the penalties remain unchanged.

Article 83(2)(k): Any other aggravating or mitigating factors applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement

250. The penalties for the Article 8 and Article 12 and 13 UK GDPR infringements are unchanged.

Article 83(2)(l): Whether the penalty would be effective, proportionate and dissuasive

251. The total amount of the penalty for the various infringements as set out above is £10,700,000, made up of the following elements:

- a. Article 8 UK GDPR - £6,750,000
- b. Articles 12 & 13 UK GDPR - £3,950,000

252. The Commissioner received account figures for TikTok in respect of the Relevant Period:

- a. In respect of TikTok Inc's full financial year ended December 2020, the accounts show that TikTok Inc's turnover was \$566 million (£441 million, using 2020 Bank of England exchange rates).
- b. In respect of TikTok Limited the 2020 management accounts show turnover of \$171 million (£133 million, using 2020 Bank of England exchange rates).
- c. The combined turnover of the above entities was \$737million. However, there was \$35million of transfer pricing revenue between the two entities and therefore the combined turnover was \$702million (£547 million, using 2020 Bank of England exchange rates).

d. The global turnover of TikTok's parent company, ByteDance, was in the region of \$35 billion in 2020.¹⁹⁷

253. TikTok's platform not only grew in size and revenue during the Relevant Period, but has continued on that upward growth trajectory.

254. In all the circumstances, the Commissioner has decided that the penalty of £10,700,000 is too low, and is neither effective nor sufficiently dissuasive when considered in the context of the overall size and financial resources of TikTok (see paragraph 157 above).

255. Taking matters in the round, the Commissioner has concluded that the infringements set out above were of a sufficiently serious nature to warrant a higher penalty relative to TikTok's size, market position, and financial resources.

256. In all the circumstances, and in order to ensure that the penalty is effective, and dissuasive, the Commissioner considers it appropriate to increase the final penalty amount by £2,000,000 to £12,700,000.¹⁹⁸

257. The Commissioner considers that a penalty of this amount is proportionate when considered in light of the financial indicators set out above.

258. TikTok has argued that the uplift is arbitrary and it is not clear whether it is intended to apply equally across all of the breaches. As the Competition Appeal Tribunal held in *Royal Mail v Ofcom*, however, "*proportionality assessments are by their nature subjective and discretionary*" and are "*an area better reserved for the regulator's margin of discretion.*"¹⁹⁹ The Commissioner has considered the total penalty, in light of the gravity of the infringements and the financial indicators set out above. Having done so, the

¹⁹⁷ The Wall Street Journal, TikTok Owner ByteDance's Annual Revenue Jumps to \$34.3 Billion, 17 June 2021.

¹⁹⁸ The Commissioner's provisional view in the Nol was that the penalty of £22.75 million he was minded to impose should be increased by £4.25 million. In the light of the de-prioritisation of the investigation in relation to Article 9 UK GDPR, and the corresponding reduction in the penalty, the Commissioner has decided that the uplift should also be reduced in proportion to this. The proportions of the uplift attributable to the infringements of Articles 8, 12 and 13 is £2,008,241.76, rounded down to £2million.

¹⁹⁹ *Royal Mail v Ofcom* [2019] CAT 27 at 809

Commissioner has found it necessary to uplift the penalty to ensure that it is sufficient to dissuade both TikTok and other companies from committing similar breaches of the UK GDPR in future.

259. Even with the uplift, the total penalty amounts to just 2.32% of the combined turnover of TikTok Ltd and TikTok Inc (£547 million), and only 0.036% of the turnover of ByteDance (estimated £35 billion). As such, there can be no basis for suggesting that the penalty is disproportionate.

260. By way of comparison, very large fines have recently been imposed in similar contexts under the GDPR. For example,

- a. The Irish DPC in the Meta Instagram case (where the data of children between the ages of 13 and 17 was processed unlawfully) imposed penalties of €20 million for the breach of Article 6 GDPR and €25 million for the breach of Article 5(1)(a).
- b. The Irish DPC also imposed penalties of €100 million and €70 million for Meta's infringements of Article 12(1) in relation to Instagram.²⁰⁰
- c. The Irish DPC imposed penalties of €80 million for Meta's infringement of Article 13(1)(c) and €70 million for Meta's infringement of Article 12(1) in relation to Facebook.²⁰¹
- d. The French CNIL fined Google €50 million for infringements of Articles 5, 6 and 13/14 GDPR in relation to the creation of a Google account on Android mobile phones.²⁰²

²⁰⁰ Irish DPC Instagram Decision September 2022, para. 690: 02.09.22 Decision IN 09-09-22 Instagram.pdf (dataprotection.ie)

²⁰¹ Irish DPC Meta Decision December 2022, para. 10.45: facebook-18-5-5_final_decision_redacted_en.pdf (europa.eu)

²⁰² GDPR: the Council of State rejects the appeal against the penalty of 50 million euros imposed on Google by the CNIL (conseil-etat.fr)

- e. The Luxembourg CNPD fined Amazon a total of €746 million for carrying out behavioural advertising without a valid legal basis and for transparency infringements in breach of Articles 6, 12 and 13 GDPR.²⁰³

(c) Step 3 – aggravating factors

261. The Commissioner has not identified any aggravating factors, beyond those considered above, which would warrant further increasing the penalty.

(d) Step 4 – deterrent effect

262. The Commissioner considers that deterrence has been adequately reflected in Step 2, above. He therefore does not add any additional amount to the penalties, to increase their deterrent effect to others.

(e) Step 5 – mitigating factors

263. The Commissioner has not identified any mitigating factors, beyond those considered above, which would warrant further reducing the penalty.

264. In particular, the Commissioner has found that the penalty is unlikely to cause TikTok any undue financial hardship. On the basis of the financial information available to the Commissioner, there is nothing to suggest there is an issue affecting TikTok's ability to pay this level of penalty.

(4) Conclusion - Penalty

265. For the reasons detailed above, the Commissioner has decided to impose an administrative fine in the amount of **£12,700,000**.

²⁰³ EDPB Facebook Decision 3/2022 December 2022 para. 389.

VI. PAYMENT OF THE PENALTY

266. The penalty must be paid to the Commissioner's office by BACS transfer or cheque by **4 May 2023** at the latest.

267. The penalty is recoverable by Order of the County Court or the High Court.

268. The Commissioner will not take action to enforce a penalty unless:

- a. The period within which a penalty must be paid has expired and all or any of the penalty has not been paid;
- b. All relevant appeals against the penalty and any variation of it have either been decided or withdrawn; and
- c. The period for appealing against the penalty and any variation of it has expired.

VII. APPEAL

269. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

- d. The imposition of the penalty, and/or.
- e. The amount of the penalty specified in the Penalty Notice.

270. Any notice of appeal should be received by the Tribunal within 28 days of the date of this Penalty Notice.

271. Your attention is drawn to Annex 1 to this Penalty Notice, which sets out details of your rights of appeal under s.162 DPA.

Dated the **4** day of **April 2023**

Signed..........

John Edwards
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
SK9 5AF

ANNEX 1

Rights of appeal against decisions of the Commissioner

1. Section 162(1) of the Data Protection Act 2018 gives any person upon whom a penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.
3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

 - a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:
 - a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;

- g) you must provide with the notice of appeal a copy of the penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 162 and 163 of, and Schedule 16 to, the Data Protection Act 2018, and Tribunal 30 Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).