

## SUMMONS

Today, on the two thousand and twenty-one;

At the request of:

**STICHTING ONDERZOEK MARKTINFORMATIE**, with its registered office in Badhoevedorp, the Netherlands, and its principal place of business at Prins Mauritslaan 37, 1171 LP, Badhoevedorp, the Netherlands, electing as its address for service in this matter the offices of SOLV Attorneys at Anne Frankstraat 121, 1018 BZ, Amsterdam, the Netherlands, of which firm Mr D.M. Linders, Ms Y. van den Winkel and Ms L. Mourcoux will act as counsel in this matter on the Claimant's behalf and have been appointed as such, hereinafter to be referred to as "**SOMI**",

### **I SERVED A WRIT OF SUMMONS ON:**

**TIKTOK TECHNOLOGY LIMITED**, a company incorporated under Irish law with its registered office in Dublin, Ireland and its principal place of business at 10 Earlsfort Terrace, D02 T380, Dublin, Ireland, hereafter to be referred to as "**TikTok**", of which no office address or director's residential address is known in the Netherlands, taking into account that the State in which the respondent is based is a Member State of the European Union, and therefore serving my writ pursuant to Section 56(2) of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering* ("DCCP")) and Regulation (EC) No 1393/2007 of the European Parliament and the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and repealing Regulation (EC) No 1348/2000 (EC Service Regulation), by dispatching today, in my capacity of transmitting agency, to the competent receiving agency:

**Courts Service Centralised Office  
Combined Court Office,  
The Courthouse,  
Castlebar, Co. Mayo  
F23 YA99  
Ireland  
Tel.: (353 -94) 904 38 10  
Email : [serviceofeudocuments@courts.ie](mailto:serviceofeudocuments@courts.ie)**

the following documents by UPS courier:

- two copies of this writ in Dutch;
- two copies of the translation of these documents into English;
- Form F1 as referred to in Article 4(3) of the Regulation, written and completed in English;

with the request to serve these documents in accordance with the laws of the requested state and to send me the certificate of this service, or to forward my request to the agency with territorial jurisdiction;

furthermore, I sent the aforesaid documents by UPS courier today to the aforementioned address of the Defendant for the purpose of service, in accordance with Section 56(3) DCCP and Article 14 of the Regulation, together with the model form referred to in Article 8 of the Regulation written in all the languages of the European Union, stating that and how the documents may be refused if they are not written in or translated into a language which the Defendant understands or the official language of the state addressed;

**TO APPEAR:**

on Wednesday, 15 September 2021 (the “cause-list date”), at 10.00 a.m., not in person but duly represented by counsel, at the open civil session of the District Court of Amsterdam, Civil Law Team, division of commercial matters, to be held on that date on the premises of the court building at Parnassusweg 220, 1076 AV Amsterdam,

**WITH NOTICE THAT:**

- a) if the Defendant fails to appoint counsel or to pay the court fee specified below in time, and the prescribed deadlines and formalities have been observed, the Court will grant leave to proceed in default of appearance against the Defendant and will award the claim described below, unless the Court considers this claim to be unlawful or unfounded;
- b) on appearance at the proceedings, the Defendant will be charged a court fee, payable within four weeks counting from the moment of appearance;
- c) the level of the court fees is specified in the most recent appendix pertaining to the Court Fees (Civil Cases) Act (*Wet griffierechten burgerlijke zaken*), which can be viewed on websites such as [www.kbvg.nl/griffierechtentabel](http://www.kbvg.nl/griffierechtentabel);
- d) a person of limited means will be charged a court fee for persons of limited means set by or pursuant to the law, if that person has submitted the following documents by the time when the court fee is charged:
  - i) a copy of the legal aid ruling referred to in Section 29 of the Legal Aid Act (*Wet op de rechtsbijstand*), or if this is not possible due to circumstances that cannot reasonably be attributed to him, a copy of the application referred to in Section 24(2) of the Legal Aid Act, or
  - ii) a statement from the Board of the Legal Aid Council referred to in Section 7(3)(e) of the Legal Aid Act, attesting to the fact that this person’s income does not exceed the amounts referred to in the order in council pursuant to Section 35(2) of that Act;

e) the exhibits pertaining to this summons will be forwarded shortly,

**STATING THAT:**

the Claimant, on pain of disallowance, will file the writ of summons with the court registry within two days of the date of the summons and simultaneously enter the matter and the summons into the central register of class actions as referred to in Article 3:305a(7) of the Dutch Civil Code (*Burgerlijk Wetboek* ("DCC"), which can be found on [www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen](http://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen). The entry will be accompanied by a copy of the summons,

**IN ORDER:**

to respond to the following claims of the Claimant:

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## DEFINITIONS AND ABBREVIATIONS

### Definitions

<b>Registered Injured Parties</b>	The Injured Parties who registered as participants via SOMI's website and gave SOMI a mandate and power of attorney to conduct these proceedings on their behalf.
<b>Registered Injured Parties Group A</b>	All Registered Injured Parties habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and had not yet reached the age of 13 at the moment of first use after 25 May 2018.
<b>Registered Injured Parties Group B</b>	All Registered Injured Parties habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 13, 14 or 15 at the moment of first use after 25 May 2018.
<b>Registered Injured Parties Group C</b>	All Registered Injured Parties habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 16 or 17 at the moment of first use after 25 May 2018.
<b>Claims Code 2019</b>	The Claims Code is a governance code for foundations and associations whose object is to obtain a collective recovery of loss.
<b>Coins</b>	Virtual currency in the TikTok App.
<b>Cookies Policy</b>	The TikTok Platform Cookies Policy in English to which TikTok refers in its Privacy Policy of November 2020.
<b>Diamonds</b>	Virtual currency which a TikTok user receives from Gifts and which can be exchanged for US dollars.
<b>Terms of Service</b>	TikTok's terms of service for the EEA of July 2020.
<b>Injured Parties</b>	All persons in the Netherlands who used the TikTok App after 25 May 2018 and were under age at the moment of first use after 25 May 2018.
<b>Gifts</b>	Virtual gifts in the TikTok App, which can be purchased with Coins.
<b>Closely Defined Group</b>	All persons in the Netherlands who used the TikTok App after 25 May 2018 and were under age at the moment of first use after 25 May 2018.
<b>Closely Defined Group A</b>	All natural persons habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and had not yet reached the age of 13 at the moment of first use after 25 May 2018.

<b>Closely Defined Group B</b>	All natural persons habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 13, 14 or 15 at the moment of first use after 25 May 2018.
<b>Closely Defined Group C</b>	All natural persons habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 16 or 17 at the moment of first use after 25 May 2018.
<b>Privacy Policy</b>	TikTok's privacy policy for the EEA of July 2020.
<b>Board of Directors</b>	The board of directors of SOMI.
<b>Supervisory Board</b>	The supervisory board of SOMI.
<b>TikTok</b>	TikTok Technology Limited.
<b>TikTok App</b>	TikTok's mobile, desktop or web application, which can be accessed on a smartphone, tablet, laptop or desktop.
<b>Ugly Content Policy</b>	Instruction manual for TikTok moderators to remove particular video content which does not meet particular beauty standards which TikTok applies or pursues.
<b>Virtual Items Policy</b>	TikTok's virtual items policy of December 2019.
<b>Website Cookies Policy</b>	Cookies policy for TikTok's websites of August 2020.

#### Abbreviations

<b>ABRvS</b>	Administrative Jurisdiction Division of the Council of State ( <i>Afdeling Bestuursrechtspraak van de Raad van State</i> )
<b>DDPA</b>	Dutch Data Protection Authority ( <i>Autoriteit Persoonsgegevens</i> )
<b>GDPR</b>	General Data Protection Regulation
<b>Consumer Directive</b>	Directive 2011/83/EU on consumer rights
<b>E-Commerce Directive</b>	Directive 2000/31/EC on electronic commerce
<b>EDPB</b>	European Data Protection Board
<b>EDPS</b>	European Data Protection Supervisor
<b>FTC</b>	Federal Trade Commission
<b>Charter</b>	Charter of Fundamental Rights of the European Union
<b>Revised Audiovisual Media Services Directive</b>	Directive 2018/1808/EU on the provision of audiovisual media services in view of changing market realities
<b>ICO</b>	Information Commissioner's Office
<b>Audiovisual Media Services Directive</b>	Directive 2010/13/EU on the provision of audiovisual media services
<b>Unfair Terms in Consumer Contracts Directive</b>	Directive 93/13/EEC on unfair terms in consumer contracts
<b>Unfair Trading Practices Directive</b>	Directive 2005/29/EC on unfair trading practices
<b>Tw</b>	Telecommunications Act ( <i>Telecommunicatiewet</i> )
<b>UAVG</b>	General Data Protection Regulation (Implementation) Act ( <i>Uitvoeringswet Algemene Verordening Gegevensbescherming</i> )

<b>WAMCA</b>	Settlement of Large-Scale Losses or Damage (Class Actions) Act ( <i>Wet afwikkeling massaschade in collectieve actie</i> )
<b>Wbp</b>	Personal Data Protection Act ( <i>Wet bescherming persoonsgegevens</i> )

## 1 INTRODUCTION

1. This matter concerns a serious breach of the privacy and consumer rights of 1 million Dutch children who use the popular online social video service TikTok. They are deliberately tempted to use TikTok as much as possible, to post as many short videos as possible, to give as many “likes” as possible and to share as much personal data as possible. Based on large quantities of personal data, TikTok builds detailed profiles of the children, which are used to expose them to intrusive, personalised advertisements. Their personal data is processed and shared without a valid basis with third parties in the USA and China. The children and their parents are not informed of this, or not correctly or completely. Without their knowledge and indeed their awareness, the children lose control over their personal data at a very young age, which is an irreversible process with potentially far-reaching consequences.
2. TikTok does not operate a video service aimed at enabling children to share creative videos with their friends. TikTok operates a data and marketing machine aimed at earning as much money as possible in the shortest possible period with as few obstacles as possible.
3. Although many of the TikTok videos are innocuous, TikTok is now being criticised worldwide by governments, authorities and interest groups because of widespread content that is harmful to children’s mental health and sometimes even life-threatening. TikTok is notoriously reluctant to assume responsibility for barring this content from its service. Only after judicial intervention or under heavy government pressure does it make piecemeal adjustments. For example, TikTok regularly features “challenges” in which users are challenged to carry out a particular assignment. A number of these challenges on TikTok have resulted in serious incidents. In 2021, several deadly incidents happened to children who carried out the “blackout challenge”. In this challenge, participants are challenged to choke themselves until they lose consciousness.
4. SOMI is an interest group under Article 3:305a DCC. It stands up for the interests of minors and consumers who go online. SOMI wants to protect them from the dangers entailed by the use of a service such as TikTok. The interest of children is a special and very substantial interest, which is protected explicitly by various international human rights conventions, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Charter of Fundamental Rights of the European Union and the UN Convention on the Rights of the Child.
5. SOMI wants to put a stop to TikTok’s unlawful conduct and obtain compensation for the damage sustained by the children already affected. It is claiming this compensation under the GDPR. It requests the Court to consider in this context that fighting serious and large-scale online privacy breaches by parties such as TikTok involves a major public interest. Therefore, SOMI requests the Court to award compensation which is sufficiently effective and deterrent.
6. SOMI is firmly convinced that minors who used TikTok sustained and still sustain actual damage. This damage is greater for young children, because they are extra vulnerable. SOMI is claiming

compensation of EUR 2,000 for children younger than 13, EUR 1,000 for children aged 13, 14 and 15, and EUR 500 for children aged 16 and 17. Altogether, the compensation claimed comes down to an amount of approximately EUR 1.4 billion.

7. The CJEU has repeatedly confirmed the importance of safeguarding a high level of protection of privacy and personal data, often in cases brought by interest groups and privacy advocates.<sup>1</sup> The requisite high level of protection means that Member States must take all appropriate measures to guarantee full compliance with the GDPR. Accordingly, the GDPR places much stress on civil-law enforcement and explicitly offers space for the representation of collective interests. Article 79 GDPR guarantees the right of an effective judicial remedy and Article 80 GDPR grants data subjects the right to be represented by a not-for-profit organisation. This also includes the option to exercise the right to compensation under Article 82 GDPR. The Dutch system under Article 3:305a DCC and Title 14a DCCP is pre-eminently suitable for that purpose.
8. SOMI's claims in this matter are based on the GDPR, which entered into force on 25 May 2018. For this reason, this matter relates only to facts that occurred after that date and therefore after 15 November 2016, which means that the WAMCA applies to these proceedings.

## 2 THE PARTIES

### 2.1 SOMI

9. SOMI was founded on 31 May 2016, initially with the aim to identify and investigate issues of public interest, in particular with regard to market information concerning property (financing) and senior citizens. By mid-2020, it extended its sphere of activity to privacy and data autonomy, and by extension to promoting the interests of minors whose rights are infringed by online services, specifically the right to privacy and data protection. To this end, it amended its Articles of Association on 31 May 2021 (**exhibit 1**). The objects clause in the Articles of Association includes the following:

*"(...) to promote the interests of natural persons, in particular of consumers and minors, who use online services that breach the rights of those natural persons at any moment, which includes but is not limited to infringements of fundamental rights, such as the right not to be discriminated and the right to protection of privacy and protection of personal data, as well as infringements of consumer rights and laws and regulations intended to protect minors; (...)"*

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<sup>1</sup> CJEU, 19 October 2016, C-582/14, ECLI:EU:C:2016:779 (*Breyer*); CJEU, 6 October 2015, C-362/14, ECLI:EU:C:2015:650 (*Schrems I*); CJEU, 16 July 2020, C-311/18, ECLI:EU:C:2020:559, (*Schrems II*); CJEU, 8 April 2014, C-293/12, ECLI:EU:C:2014:238 (*Digital Rights Ireland*); CJEU, 29 July 2019, C-40/17, ECLI:EU:C:2018:1039 (*Fashion ID*) and CJEU, 1 October 2019, C-673/17, ECLI:EU:C:2019:801 (*Planet49*).

10. SOMI has a Board of Directors and a Supervisory Board that possess the specific (legal and financial) expertise and experience necessary for promoting the interests described in the Articles of Association (see also margin numbers 413-415). SOMI operates on a not-for-profit basis.
11. In these proceedings SOMI is, principally, representing the interests of all persons in the Netherlands who have used the TikTok App after 25 May 2018 and were under age at the time of this use (“**Injured Parties**”). Based on market research into social media usage (margin number 77), this involves approximately 1 million persons. Together, these persons constitute a “closely defined group” within the meaning of the WAMCA (“**Closely Defined Group**”). The Closely Defined Group consists of three sub-groups, based on age. SOMI is claiming higher compensation for younger children (chapter 4 and paragraph 8.7). Alternatively, SOMI is representing the interests of all minors who – via their legal representatives – joined SOMI in respect of this matter (paragraph 4.2).

## 2.2 TikTok

12. The TikTok App is (primarily) a mobile application with which users can make, publish and share short videos. The application offers a range of features, such as music, animations and filters. Many celebrities, brands and influencers are active on TikTok. Partly for this reason, the application is immensely popular among youngsters (see also paragraph 3.3).
13. The TikTok App is provided by (various subsidiaries of) the Chinese company ByteDance Ltd. (“ByteDance”), registered in the Cayman Islands. ByteDance is a major player in the area of social media services. In 2018, it bought the application Musical.ly, which also enabled its users to make short music videos. It subsequently transferred millions of Musical.ly users to TikTok, because it wanted to offer one video service. ByteDance was incorporated in 2012 and was valued at USD 250 billion in March 2021. ByteDance is regarded as one of the most valuable start-ups in the world.<sup>2</sup>
14. The TikTok App became internationally available in 2017 and gained extreme popularity all over the world in a short period. TikTok was the most downloaded app in the world in 2020, with an estimated 850 million new downloads. In the Netherlands, 4.5 million people were using TikTok in October 2020.<sup>3</sup>
15. Along with popularity problems also came about, and TikTok came under fire because of the inadequate way in which it protected the privacy and data of its users, including many children. In August 2020, former president Donald Trump issued an executive order against ByteDance, ordering the company to dispose of its operations in the United States. Trump alleged that the

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<sup>2</sup> Wikipedia <https://en.wikipedia.org/wiki/ByteDance>, consulted on 6 May 2021.

<sup>3</sup> Wikipedia <https://nl.wikipedia.org/wiki/TikTok>, consulted on 7 May 2020.

company processed an excessive amount of personal data of American users and that this personal data ended up with the Chinese government. In September 2020, an agreement was reached about the enforced sale of TikTok's American operations, which were to be transferred to a new company. The sale has not yet taken place and, according to reports, ByteDance is no longer prepared to sell now that Trump has left office.

### **2.3 Attempt at consultation**

16. SOMI contacted TikTok by letter of 8 September 2020. to which TikTok responded negatively, on the whole, in a letter of 9 October 2020. The lawyer of SOMI contacted TikTok by registered letter of 7 May 2021, drawing its attention to its violations of the GDPR and consumer legislation and holding it liable for the damage sustained by its supporters as a result of those violations. On this occasion, he invited TikTok to hold consultations with SOMI about its objections and about compensation of the damage.
17. In a letter of 20 May 2021, TikTok stated that it rejected all SOMI's arguments and claims, but was nevertheless open for consultation. The lawyer of SOMI sent TikTok a response on 21 May 2021. In this response, he indicated that TikTok's letter gave no cause to presume that TikTok had a genuine intention to hold meaningful consultations. Nevertheless, he again gave TikTok the option, without being obliged to do so, to enter into consultations. In that case, however, TikTok would have to demonstrate its goodwill and make a number of promises. TikTok responded on 25 May 2021 that it did not want to make these commitments. SOMI's lawyer then reacted immediately on 25 May 2021 and indicated that SOMI was prepared to make a telephone call at short notice to discuss whether consultation might nevertheless be useful. However, SOMI did not want to wait too long given the urgency of the matter. As TikTok was unable to schedule a telephone conversation within the stipulated period, SOMI decided to issue a summons. SOMI's lawyer has indicated to TikTok that SOMI remains willing to consult. The correspondence is submitted as **exhibit 2**.

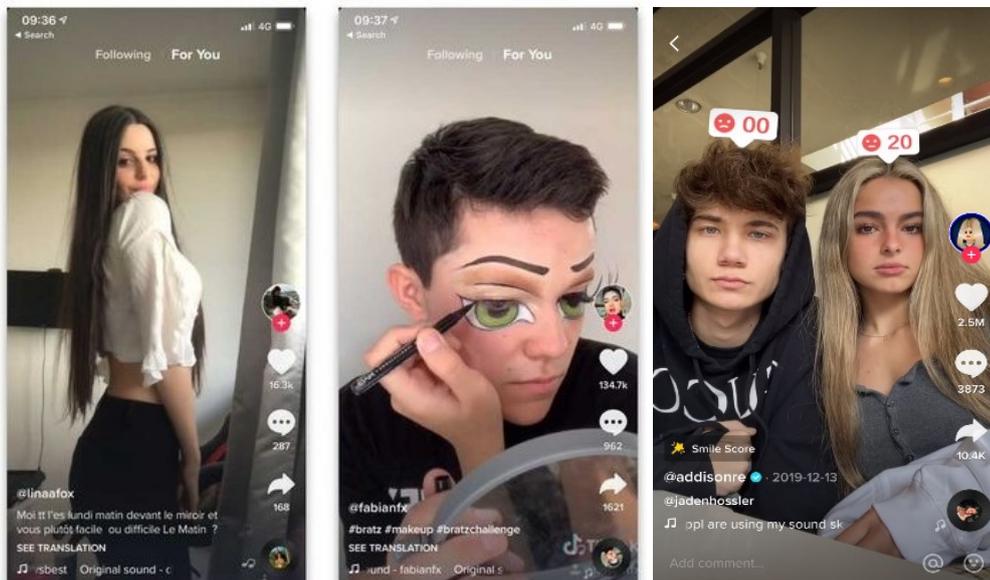
## **3 THE FACTS**

### **3.1 The TikTok App**

18. The TikTok App is a social medium, just like Facebook, Twitter, Instagram or Snapchat. What distinguishes it from other social media is that the TikTok App revolves entirely around (very) short videos. Users can make and edit their own videos, add music and subsequently share them with others. They can also react to other users' videos.
19. The TikTok App can be used in various ways. Most (young) users have installed the mobile app on their smartphones or on a tablet such as an iPad. For children without smartphones or tablets, the TikTok App can also be accessed using a computer and browser via the website [www.tiktok.com](http://www.tiktok.com). In addition, TikTok has a desktop application that can be installed on a

computer or laptop. In this summons, the service will hereafter also be referred to as the “**TikTok App**”. Unless stated otherwise, the arguments put forward also apply to the web and desktop versions.

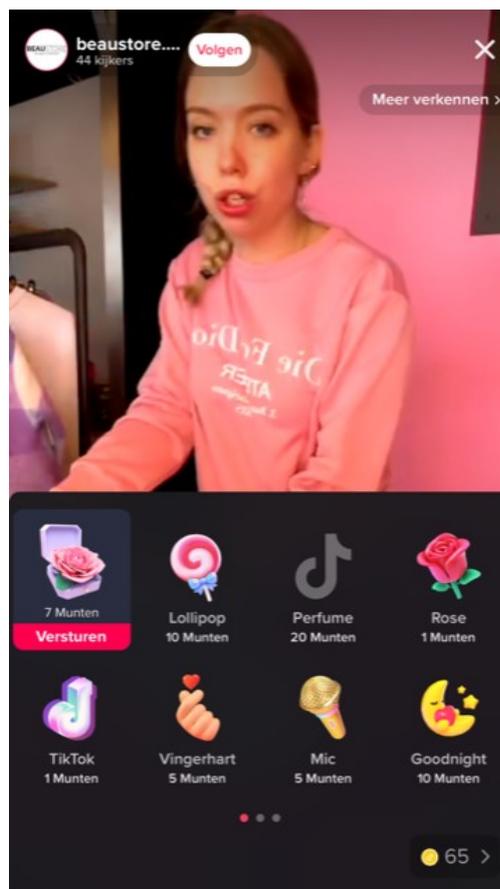
20. Videos made on TikTok last 3 to 60 seconds. In the app, TikTok shows the video across the whole screen. When the user opens the app, a video appears on the start screen straight away. This video keeps playing until the user performs an action in the app. By scrolling down, the user moves to the next short video, which starts playing immediately. The number of short videos that can be watched when scrolling down is endless. The content of the videos is determined by TikTok’s algorithm, based on data such as the user’s browsing history and personal preferences. Accordingly, the content of the videos is in principle geared to the specific user.
21. Popular videos show people dancing, singing or lip syncing, among other things. Users can choose from existing background music or use their own sound. People also like funny videos (sketches, animals doing funny things, parodies) or videos with tips on a wide range of subjects (make-up, school, cooking, specific products). The more controversial videos, such as videos in which people make personal revelations or do something stupid, challenging or dangerous, are popular as well.
22. The popular videos are often linked to well-known users, known as “influencers”. An influencer is a person who, primarily through their own followers on social media, exerts influence via the Internet over the way in which a target group spends its money and time. Some well-known Dutch influencers are Markie Lucas (6.5 million followers), Nina Schotpoort (1.4 million followers) and Glen Fontein (1.3 million followers). Influencers are often used for advertising products, by showing these products to their followers in their videos. This form of marketing is extremely effective.
23. TikTok videos can be enhanced with effects and filters, such as slow motion or fast motion, or a “beauty filter”. With a beauty filter, the user can, for example, add longer eyelashes or create a make-up effect such as lipstick or eyeshadow. As “improvements”, users can make their teeth look whiter, their skin look smoother or themselves look thinner, among other things. Users can also apply other effects to their face, such as cartoon filters. Examples include the Disney filter of the character “Anna” from the animated children’s film “Frozen”.





24. In addition, users can “follow” other users and film their reaction to a video using the “react” function. This reaction is displayed in a small window on top of the original video. Users can also react by giving each other a “like” or “heart” or by commenting below the video. The number of followers, likes, views and comments collected reflects the popularity of the user and their video content.
25. Furthermore, each TikTok user has a “For You” section. This is a list of videos recommended to users based on their activity within the service. The content is generated by TikTok’s artificial intelligence, and depends on factors such as the content which a user likes, a user’s search history and the length of time a user keeps watching a video. Research has shown that, on average, users spend more than 52 minutes per day on TikTok (**exhibit 18**)
26. Users can opt to add videos to their favourites or select “Not Interested”. TikTok combines the videos already watched and other data in order to offer a selection of followers its relevant videos. The algorithm has also been set in such a way that users are tempted to keep watching for as long as possible and takes into account the objectives TikTok wants to achieve, especially for advertisers.
27. TikTok users can also earn money with video content. For this reason, many influencers use the live function. This function is available only to users who have at least 1,000 followers. With this function, users can stream a live video and show what they are doing at that moment. Followers of the user can send virtual gifts (“Gifts”) during such a live video, which the recipient can exchange for money.

28. Each user’s account includes a digital wallet. In the wallet, the user can manage their virtual currency in the app. The user can buy virtual coins (“**Coins**”) in the app, ranging from 65 Coins for EUR 1.09 to 6,607 Coins for EUR 109.99. After Coins have been purchased, they are added to the wallet. Research has shown that in February 2021 TikTok made more than USD 110 million from these in-app purchases (**exhibit 19**)
  
29. Subsequently the user can spend their Coins on Gifts during another user’s live session. Sending Gifts is a feature based on the Chinese custom of exchanging social gifts. While the live session is in progress, a list of various Gifts is displayed which the user can send as a token of their appreciation. The Gifts are shown as (brightly) coloured pictures with an associated name, such as “Lollipop”, “Rose” or “Finger Heart”. Gifts can have different values, ranging from 1 Coin to 5,000 Coins. During the live session, the list only shows how many Coins a particular Gift is worth, not how many euros. After the user has clicked on a Gift, the Gift will be sent immediately at the next click. There is no notification requesting the user to confirm that they want to send this Gift.



30. TikTok automatically converts the Gift in the recipient’s wallet into “diamonds” (“**Diamonds**”). Using the Diamonds which the user receives from Gifts, the user can obtain payment from TikTok.

31. The exchange rate at which Gifts are converted into Diamonds is not known to the user. TikTok determines this rate itself, and may adjust it unilaterally from time to time. The exchange rate at which the recipient exchanges their Diamonds for real money is not known either. TikTok states in this respect that the payment is calculated on the basis of various factors, including the number of Diamonds which the user has accrued (**exhibit 5**).
32. Various sources report that TikTok ultimately creams off at least 50% of the value of the Coins. Media reports also show that young users are often encouraged by influencers to send Gifts, in exchange for things such as an influencer's telephone number, a personal message or a split-screen video with the influencer (**exhibit 24**).

### **3.2 TikTok advertising services**

33. Compared to in-app purchases by TikTok users, it probably earns a multiple of that from advertising services. However, there are no reliable figures. With TikTok Business, TikTok tries to integrate its business partners naturally into the TikTok App (**exhibit 12**):

*“That’s why our business solutions are set up to help you slot naturally into their world. Instead of your brand story being skipped over or ignored, it can be celebrated as part of the TikTok experience.”*

#### **3.2.1 Targeting**

34. In order to achieve this, business partners have the option to target specific target groups directly, for instance the 13-17 age bracket (**exhibit 10**). TikTok can offer advertisers this option because it creates advertising profiles of its users. As TikTok indicates in its Privacy Policy, it uses behavioural, usage and personal data of users to infer interests for the purpose of optimising and personalising content and advertising offerings (**exhibit 4a**).
35. The web page “Advertising on TikTok Ads Manager” describes the characteristics on the basis of which targeted advertisements can be sent (**exhibit 11**):

*“It has never been easier to reach potential customers by precisely targeting your audience. Using TikTok Ads, you can target your audience by gender, location, age, interests, and other unique variables.”*

TikTok Ads Manager supports the following targeting dimension.

<b>Audience</b>	<b>Include</b>	Create a Lookalike or Custom Audience (Customer file, Engagement, App Activity, Website Traffic).
	<b>Exclude</b>	Exclude Lookalike or Custom Audiences.
<b>Demographics</b>	<b>Gender</b>	Male, Female
	<b>Age</b>	13-17, 18-24, 25-34, 35-44, 45-54, 55+
	<b>Location</b>	Country/Region > State/Province
		Select a Designated Marketing Area (DMA®) when targeting the United States.
	<b>Language</b>	Delivery to users based on app language.
<b>Interest</b>	Target users based on the videos they're interested in.	

### 3.2.2 Advertising formats

36. TikTok offers advertisers a number of different advertising formats (**exhibit 12**):

- a) In-Feed ads: in this format, the advertisement appears on the user's personalised For You page, where, according to TikTok, it is "seamlessly" displayed among the created content of other users. The advertisement can be directed at a particular target group;
- b) Topview: in Topview, the advertisement appears for three to 60 seconds with sound all over the users' start screen as soon as they open the app.
- c) Branded Hashtag challenge: in this format, users are encouraged to take part in a challenge presented by the advertiser. The advertiser's initial advertisement calls on users to carry out a particular challenge and to integrate it into their own videos while referring to a (company) specific hashtag (such as #SOLV). The power of the hashtag challenge is that it is the users who act as the marketing channel and who make the advertising videos. They disseminate their own video content, which includes the challenge with the company-specific hashtag, among other users. This results in a domino effect: other users also want to do the challenge and disseminate it via TikTok. The greater the number of users (or influencers) who take part in the challenge, the greater the reach and the interaction with the advertisement;
- d) Branded Effects: by means of Branded Effects, advertisers can present users with their brand in 2D, 3D and in augmented reality. In this way, the user can integrate brand-related filters or stickers into their own content and share this TikTok App. Here, too, it is the user who is the marketing channel.

37. The Branded Hashtag Challenge and Branded Effects revolve around interaction with and dissemination by the user. An example of a Branded Hashtag Challenge in the Netherlands is the Doritos advertising campaign. Doritos came up with a “Truth or Dare” game, consisting of a series of questions put to users by the Google Voice Assistant. In the case of “Truth” questions, the player must truthfully answer the question, while “Dare” questions challenge the player to carry out an activity. In the Netherlands, the game is known as “*Doen, durven of waarheid*” (“Do, dare or truth”). Doritos focused on “Promoting the Doritos Truth or Dare game to a young Dutch audience” (**exhibit 13**). To promote the game, the brand joined forces with influencer Sara Ras. Her account “Saarbaby” has more than 150,000 followers on TikTok. In a 15-second promotional video, she can be seen playing the Doritos Truth or Dare game, dressed in Doritos merchandise and holding a bag of Doritos (**exhibit 14**). The video ends with the following appeal:

*“Want to play? Download the Google Assistant App and say “Truth or Dare” if you dare lol”.*

38. “Lol” is Internet jargon for “laughing out loud”. The promotional video attracted 4.7 million views and 1 million clicks in one day. The Doritos TikTok account acquired 7,000 new followers (**exhibit 13**).
39. All advertising campaigns are subject to TikTok’s Ad Review Process. All advertisements are checked by TikTok’s “dedicated Ad Review team” before they appear in the app (**exhibit 11**).

### 3.3 Popularity and target group

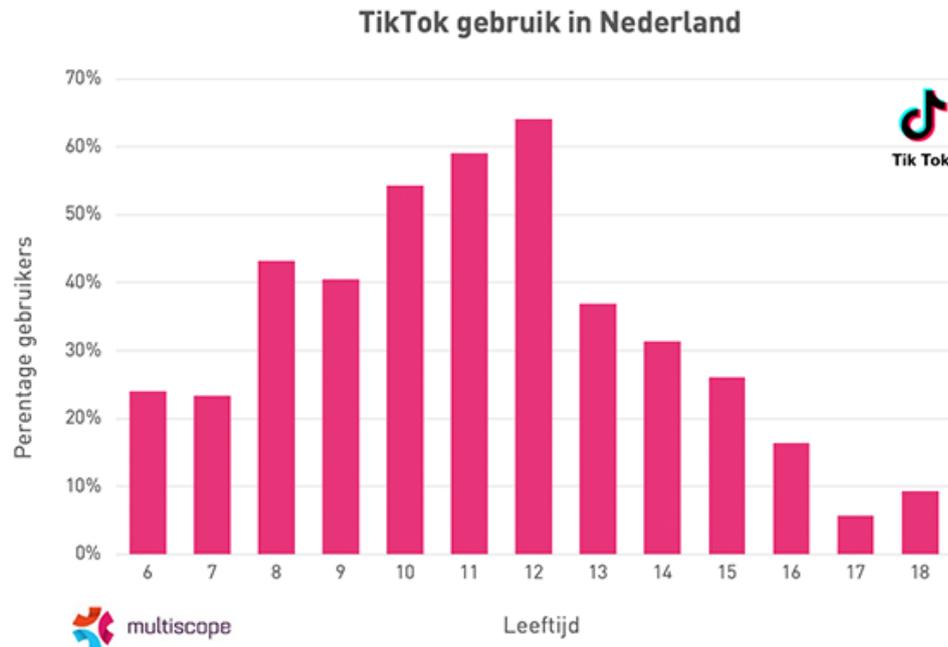
40. TikTok is popular among young people and children in particular. According to the Terms of Service, The TikTok App is intended exclusively for persons aged 13 and older. However, this is not mentioned anywhere else on the website or in the app. The information on the page “About TikTok” is very scanty and only states TikTok’s mission:

*“TikTok is the leading destination for short-form mobile video. Our mission is to inspire creativity and bring joy”*

41. Although the registration process does mention the age limit of 13 (margin number 48), but this can be easily by-passed in practice by entering a different date of birth. The age is not verified.
42. Since the TikTok App became available in the Netherlands in 2018, usage among children and young teenagers has been invariably high. At the end of 2019, Multiscope concluded that usage of the TikTok App was highest among 12-year-olds: 64% of users in this age category were using TikTok.<sup>4</sup> Usage is also high in younger age brackets (**exhibit 20**):

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<sup>4</sup> Multiscope is a market research and polling agency specialised in online market research.

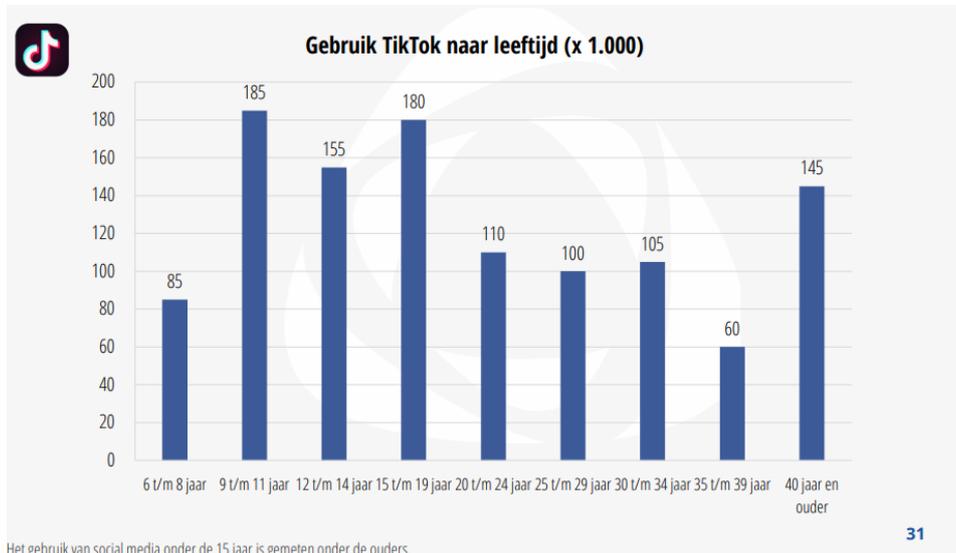


43. Research conducted by Newcom in January 2020 revealed that the popularity of the TikTok App in the Netherlands in 2019 was again greatest among children and young teenagers (**exhibit 21**). The graph below show that the number of users is highest in the 9-11 age bracket:<sup>5</sup>

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<sup>5</sup> Newcom Research & Consultancy B.V. is an independent research agency that carries out market research among various target groups. Since 2010, Newcom has been conducting large-scale nationwide research into trends in social media.

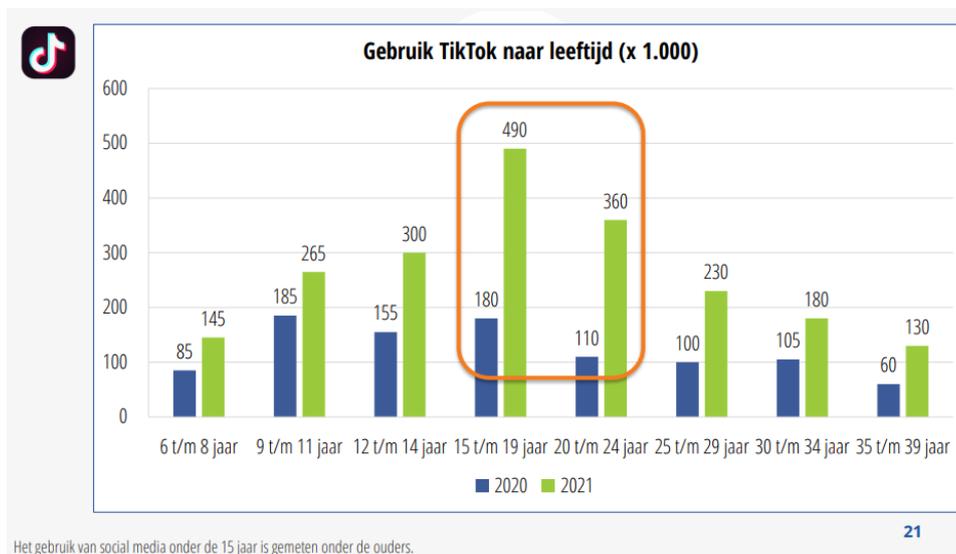
TikTok wordt op dit moment gebruikt door 700.000 gebruikers van 15+, maar ook door 425.000 gebruikers van 6 t/m 14 jaar.



Het gebruik van social media onder de 15 jaar is gemeten onder de ouders.

31

44. Research conducted by Newcom in January 2021 revealed that the number of users in the 9-11 age bracket is no longer the largest number. The number of users in the 6-8, 9-11 and 12-14 age brackets continues to increase. These age brackets together account for 710,000 users in the Netherlands (exhibit 22).



Het gebruik van social media onder de 15 jaar is gemeten onder de ouders.

21

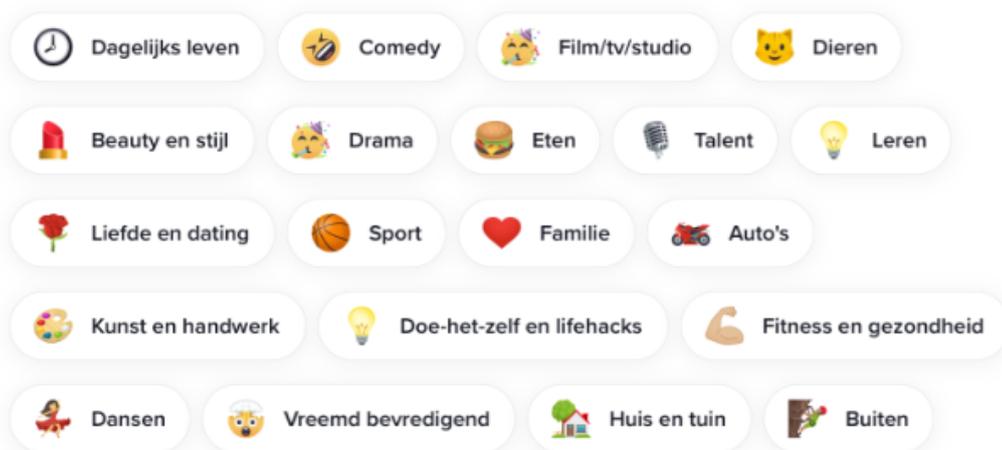
- 45. In July 2020, according to the New York Times, TikTok itself classified one third of its 49 million American users as aged under 14 (**exhibit 23**).
- 46. Therefore, the TikTok App is immensely popular among children and young teenagers all over the world. The age limit does not prevent children younger than 13 from using the service.

### 3.4 Registration

- 47. Visitors to the app and the website [www.tiktok.com](http://www.tiktok.com) can watch videos on TikTok without an account. In addition, videos are exported from TikTok to other platforms and can be viewed there. In order to interact with other users and to make and share videos themselves, users must create an account. The registration process is as follows.
- 48. First, the user must enter their date of birth. Users younger than 13 may not formally create an account, but there is no actual verification when a date of birth is entered. Users can enter an arbitrary date of birth. Users who enter an age younger than 13 can subsequently make a new attempt, where necessary after clearing their browser and cookie history. After entering a date of birth, the user must enter an email address or telephone number and agree to TikTok’s Terms of Service and Privacy Policy. Several versions of the Terms of Service are submitted as **exhibit 3** and of the Privacy Policy as **exhibit 4**.
- 49. The user then enters a password and user name, and possibly their interests for the purpose “better video recommendations”.

## Kies je interesses

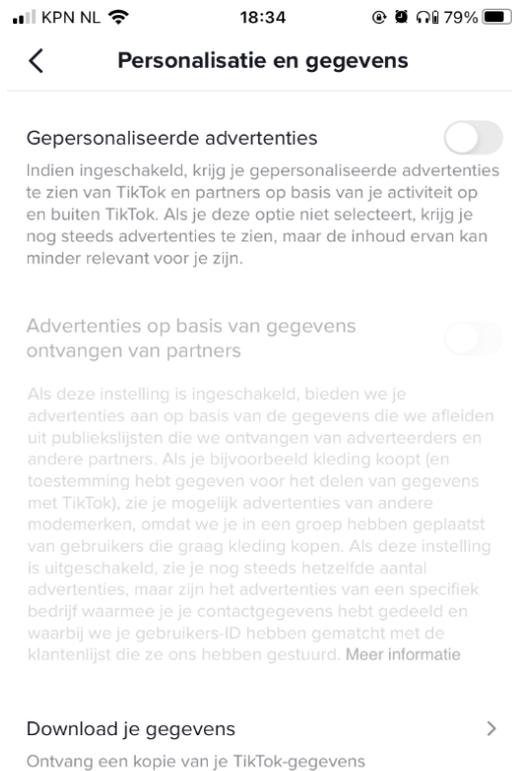
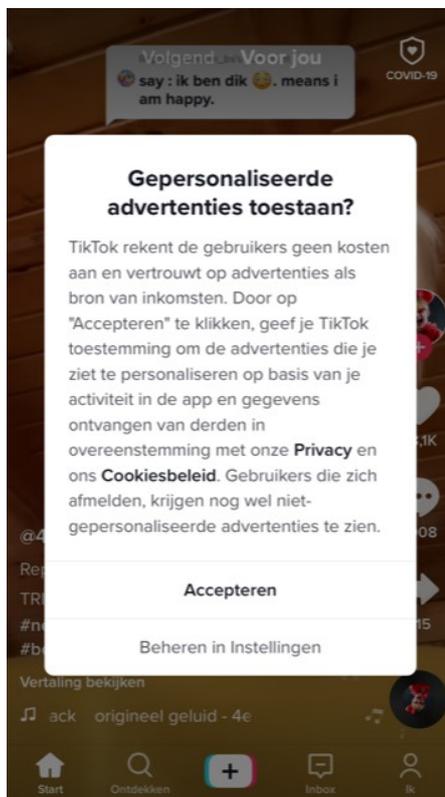
Krijg betere videoaanbevelingen



50. Depending on the age entered, the user is shown a pop-up about private accounts. The account is set to private by default for users who have entered their age as between 13 to 15 years. This means that only users authorised by the user will be able to see this user's content. Users can change this themselves in their account. TikTok states that it does so because privacy is important (**exhibit 43**). However, the fact that the account is set to private by default does not mean that TikTok does not collect and process personal data of these users or does not profile them. For users aged 16 and above, the account is not set to private by default, which means that their video content is public to other users. They have to enable the private-account function themselves if they want that.
51. After the registration process, the user receives a confirmation of registration by email (**exhibit 16**).<sup>6</sup>
52. When the user subsequently logs in and uses the app, a pop-up appears in which TikTok requests consent for personalised advertisements. The "Accept" button is shown in bold in the pop-up window. There is no option of immediate rejection. To make this possible, the user must click on the "Manage in Settings" button, shown in grey rather than bold. Only then will the user be able to amend their settings in such a way that they will receive no personalised advertisements (**exhibit 15**):

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<sup>6</sup> Oddly enough, the confirmation is in Afrikaans while the registration process was completed in Dutch.



### 3.5 Family Pairing and privacy settings

53. After some commotion and criticism, TikTok announced a “Family Pairing” feature for parents in February 2020 (**exhibit 44**). This enables parents to can set the amount of time their child may spend looking at TikTok each day and limit the users with whom the children can exchange private messages, or disable this function completely. Parents can also set the kind of videos their children are allowed or not allowed to watch. Parents can only use this feature if they have a TikTok account themselves and this account is linked to their child’s account. It is relatively easy to by-pass Family Pairing by creating a new account.
  
54. On 13 January 2021 – after SOMI’s first letter to TikTok, dated 8 September 2020 – TikTok made a number of adjustments to the privacy settings for children with an account for the 13-15 age bracket (**exhibit 43**). The adjustments do not affect the collection and processing of personal data, or the adverse consequences of the promotion and dissemination of harmful content in the TikTok App. The following settings have been adjusted in respect of children with an account for the 13-15 age bracket:
  - a) Upon registration, the account is set to private by default. Only followers accepted by the user will be able to see the user’s content. Users can change this setting themselves and make the account public;

- b) Reactions to videos are limited to “Friends” or “Nobody”. The setting “Everybody” has been removed.
- c) It is no longer possible to make Duet or Stitch videos. A Duet videos is made in reaction to another video, both of which are then played side by side. In a Stitch video, you can add your own ending to another user’s video;
- d) Other uses can no longer download videos of these users; and
- e) The option “Suggest Your Account to Others” is disabled by default. This means that the videos are no longer shown on the personal “For You” page of users other than the user themselves. Users can still enable this option themselves.

55. The following settings have been adjusted in respect of children with an account for the 16-17 year-old age bracket:

- a) The Duet and Stitch functions are set to “Friends” by default. Users can themselves open these to “Everybody”; and
- b) Third-party video downloading is set to disabled by default, but can be enabled.

### **3.6 Incidents, lawsuits and investigations worldwide**

56. TikTok is increasingly coming under fire. In particular, the criticism concerns the protection of children and consumers, breaches of privacy rights, security incidents and discrimination of users. There have been various lawsuits. In addition, privacy regulators are conducting a number of investigations while critical reports have been published.

#### **3.6.1 Incidents**

57. TikTok regularly features “challenges” in which users are challenged to carry out a particular assignment. Various news reports are submitted as **exhibit 25**. In 2021, several deadly incidents happened to children who carried out the “blackout challenge”. In this challenge, participants are challenged to choke themselves until they lose consciousness. In January 2021, an Italian girl died from asphyxiation after she had tied a belt around her neck in a challenge. The incident caused minors to be temporarily banned from the TikTok App in Italy. In May 2021, it was announced that TikTok had been ordered by the Italian privacy regulator to close 500,000 accounts of Italian users whom TikTok could identify or presume to be under 13 years of age. In April 2021, a 12-year-old American boy also died as a result of carrying out the blackout challenge. The Benadryl challenge, which spread via the TikTok App in 2020, also led to several hospital admissions and the death of a 15-year-old American girl after an overdose of the antihistamine drug diphenhydramine, better known in the United States as Benadryl”. The challenge instructs participants to film themselves while taking a large dose of the drug, the aim being to trigger hallucinations. Other challenges circulating on TikTok that have led to serious incidents are the blue whale challenge and the skull breaker challenge.

### 3.6.2 *Lawsuits*

58. In 2019, TikTok paid the American Federal Trade Commission a settlement amount of USD 5.7 million after accusations that the earlier version of the app, Musical.ly, was in breach of the Children's Online Privacy Protection Act (appendix #). TikTok had processed personal data of children younger than 13 without the consent of their parents, and had failed to comply with requests from parents that this data be removed. In addition, some of the children's data was set to public by default, and children were able to communicate with all other users via direct messages. The FTC's complaint referred to public reports of adults trying to contact children via the TikTok App. Further to the settlement with the FTC, TikTok removed all videos which it was able to determine had been posted by children younger than 13 (**exhibit 27** and **exhibit 28**).
59. At the end of February 2021, TikTok settled a class action in the USA for USD 92 million. TikTok was accused of selling user data, including data of underage users, to advertisers. Allegedly, it had collected the data using facial recognition and algorithms, among other things. These enabled TikTok to recognise facial features in users' videos and thus determine their age, gender and ethnicity as well (**exhibit 29**).
60. On 21 April 2021, Anne Longfield, the former children's commissioner in the United Kingdom, announced a lawsuit against TikTok for unlawfully processing children's personal data. TikTok was alleged to be processing data such as telephone numbers, location data and biometric data without sufficiently informing them of this (**exhibit 30**).

### 3.6.3 *Investigations and actions by privacy regulators*

61. In addition, various national privacy regulators have conducted investigations into the TikTok App in recent years. These include, but are not limited to the following:
  - a) The British privacy regulator ICO started an investigation in February 2019, prompted by the fine which ByteDance had received from the FTC (margin number 58) and possible violations of the GDPR in that connection;
  - b) Since May 2020, the Dutch Data Protection Authority has been investigating TikTok in relation to the protection of children's privacy (**exhibit 31**);
  - c) The EDPB decided in June 2020 to establish an EU-wide taskforce to coordinate potential actions and to acquire a more comprehensive overview of TikTok's processing and practices across the EU (**exhibit 32**);
  - d) In July 2020, TikTok received a fine of approximately EUR 135,000 from the South-Korean regulator because TikTok had processed the data of children younger than 14 without the consent of their parents (**exhibit 33**); and
  - e) On 22 January 2021, the Italian privacy regulator ordered a block on the use of data of users whose age had not been established (margin number 57).

#### **3.6.4 Investigations into security**

62. In January 2020, cyber research agency Check Point Research detected a security flaw in the TikTok App which enabled hackers to access user accounts and potentially manipulate their content (**exhibit 34**). For example, hackers were able to remove videos, upload unauthorised videos and make the user's private videos publicly available. Check Point Research revealed that hackers were able to do so by taking advantage of TikTok's SMS Service. TikTok has a feature that allows users to send an SMS from a computer to themselves to download the app. Hackers were able to send an SMS from the official TikTok Internet domain to any telephone number. These spoofed SMS messages could be sent with a malicious link which gave hackers access to the user's TikTok account.
63. Check Point Research notified TikTok of the vulnerabilities and TikTok remedied them in the new version of the TikTok App. However, TikTok has not disclosed how many or which users were affected by this hack. Users were merely advised to update the app to the latest version.
64. In April 2020, research agency Penetrum published a security analysis of TikTok (**exhibit 35**) showing that 37.7% of the known IP addresses linked to TikTok are also linked to Alibaba.com, a China-based company that experienced a data breach in 2019. This is an indication that the privacy of TikTok users is not adequately safeguarded. Penetrum also established several other security risks at TikTok, such as the use of insecure hash algorithms, the possibility for hackers to install malware and serious risks relating to webview and the insecure use of SSL/TLS, encryption protocols which protect communication between computers.
65. Penetrum also concluded that the TikTok App processes much more data than is necessary. TikTok collects a range of data for monitoring users, which it claims are for the purpose of improving the app and offering content and advertisements to the user in the best possible way. For example, the TikTok App obtained the model and version of the user's (mobile) device, app data of earlier installations, memory data, GPS location, SMS logs and even the IMEI number of the associated device. Using the IMEI number for the purpose of identifying a telephone is controversial because it involves a detailed "fingerprint" of the telephone which can be used in order to determine what a user has installed. According to Penetrum, the excessive amount of tracking data, combined with the circumstance that the data was stored on Chinese servers of Alibaba, was a major reason for concern (**exhibit 35**, p. 11).

#### **3.6.5 BEUC reports**

66. Finally, the European umbrella consumer organisation BEUC conducted various investigations into the TikTok App.

67. In its report entitled “TikTok without filters” of February 2021, BEUC concluded that TikTok fails to provide young users in particular with clear information on what personal data is collected, for what purpose and for what legal reason (**exhibit 36**). BEUC also considered the other legal documents, including the Terms of Service and the Virtual Items Policy, to be unclear and ambiguous for young children in particular. BEUC found that TikTok thus creates an imbalance between itself and its users, to the detriment of the latter. Furthermore, BEUC concluded that TikTok had not taken sufficient appropriate measures to protect minors from hidden advertising and from harmful content. This meant that TikTok had breached several European consumer protection rules.
68. In the same month, the BEUC report "Confusing By Design" was published. This report concludes that the TikTok App violates many principles and provisions of the AVG (**exhibit 37**).
69. Based on this investigation, BEUC filed a complaint with the European Commission (**exhibit 38**). The report also prompted 15 national consumer organisations, including the *Consumentenbond* in the Netherlands, to urge the national regulators and the European Commission – as SOMI had already done – to take action against TikTok.<sup>7</sup>

### 3.7 Ugly Content Policy

70. In March 2020, *The Guardian* reported that TikTok moderates content in a discriminatory manner. For example, TikTok moderators in several countries blocked content that might be interpreted as LGBT friendly (LGBT stands for Lesbian, Gay, Bisexual and Transgender), such as videos of same-sex couples holding hands. This also happened in countries where homosexuality has never been illegal (**exhibit 40**, **exhibit 41** and **exhibit 42**). Indeed, TikTok moderators have received instructions from TikTok to remove videos made by users looking “ugly, poor or disabled”, as well as videos showing poverty (**exhibit 39**):

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<sup>7</sup> See [www.consumentenbond.nl/acties/tiktok](http://www.consumentenbond.nl/acties/tiktok).

New rules	Reason
Abnormal body shape, chubby, have obvious beer belly, obese, or too thin (not limited to: dwarf, acromegaly)	Unlike diversified videos of which the content itself is the mainly focus, in the non-diversified content, the character himself/herself is basically the only focus of the video, therefore, if the character's appearance or the shooting environment is not good, the video will be much less attractive, not worthing to be recommended to new users.
Ugly facial looks (not limited to: disformatted face, fangs, lack of front teeth, senior people with too many wrinkles, obvious facial scars) or facial deformities (not limited to: eye disorders, crooked mouth disease and other disabilities)	
The shooting environment is shabby and dilapidated, such as, not limited to: slums, rural fields (rural beautiful natural scenery could be exempted), dilapidated housing, construction sites, etc. (For internal housing background which has no obvious slummy character, only those cases as specified should be labelled: crack on the wall, old and disreputable decorations, extremely dirty and messy)	This kind of environment is not that suitable for new users for being less fancy and appealing.
Slide show video with any kinds of picture	Not the ideal video form of our platform.

### 3.8 TikTok's legal documentation

#### 3.8.1 Terms of Service

71. The TikTok App is provided in the Netherlands in accordance with the Terms of Service for the European Economic Area (**exhibit 3a**). The current document consists of 21 pages and does not have a table of contents or summary. In any case, the document is incomprehensible to children and young teenagers because the text is not only long but also full of legal terminology. Under the Terms of Service, the user grants TikTok and other partners and users an extensive and irrevocable licence to the self-generated content, among other things.
72. The latest version dates from July 2020. Previous versions of the Terms of Service are not available in the TikTok App or on the website. Using the Wayback Machine of The Internet Archive, a well-known website archiving old versions of web pages, SOMI found a number of previous versions of the Terms of Service. These are submitted as **exhibit 3**.

#### 3.8.2 Virtual Items Policy

73. The Terms of Service refer to the applicability of other documents, such as the Virtual Items Policy. This document is available only in English, not in Dutch (**exhibit 5**). The Virtual Items Policy, directed at users in the EU, consists of 6 pages and was most recently updated in December 2019. The Virtual Items Policy sets out the conditions applicable to live sessions and associated features, such as the purchase of Coins, the sending of Gifts and the conversion into Diamonds

(see margin numbers 27-31). Because it is in English and uses legal terminology, the document is totally incomprehensible to children and young teenagers. The provisions grant TikTok unilateral and unlimited rights in respect of the purchase of Coins, the conversion of Coins into Gifts, the conversion of Gifts into Diamonds and the pay-out of Diamonds in money.

### 3.8.3 *Privacy Policy*

74. The TikTok App is subject to TikTok's Privacy Policy. The version applicable to Dutch users is the version for residents of the European Economic Area (**exhibit 4a**). It is a 13-page document and it does not include a table of contents. The Privacy Policy contains a summary, which gives a brief explanation per chapter as to how TikTok deals with the privacy of its users. A separate summary for children aged 13-18 was included only in July 2020, i.e. after the start of SOMI's investigation. This summary is available only in the TikTok App and not in the TikTok web version. The Privacy Policy first became available in the Netherlands in July 2020, even though the service had been active in the Netherlands since 2018.
75. The most recent version of the Privacy Policy dates from July 2020. The policy has been updated several times since the August 2018 version, the oldest known version after the GDPR entered into force. TikTok has not published the previous versions or documented the updates. SOMI has found a few previous versions of the Privacy Policy using the Wayback Machine. These are submitted as **exhibit 4**.

## 4 **THE INJURED PARTIES WHO ARE BEING REPRESENTED**

### 4.1 **Principally: all minor age TikTok users in the Netherlands**

76. In these proceedings, SOMI is acting, principally, for all persons in the Netherlands who used the TikTok App after 25 May 2018 and who were minors at the time of their first use after 25 May 2018. Together, these persons form the Closely Defined Group. The Closely Defined Group is divided into three sub-groups based on age (see edge #). SOMI claims greater compensation for younger children:
- a) all natural persons who have their habitual residence in the Netherlands who used the TikTok App after 25 May 2018 and who had not reached the age of 13 at the time of their first use after 25 May 2018 ("**Closely defined Group A**");
  - b) all natural persons who have their habitual residence in the Netherlands who used the TikTok App after 25 May 2018 and who were aged 13, 14 or 15 years at the time of their first use after 25 May 2018 ("**Closely Defined Group B**"); and;
  - c) all natural persons with their habitual residence in the Netherlands who used the TikTok App after 25 May 2018 and who were aged 16 or 17 at the time of their first use after 25 May 2018 ("**Closely Defined Group C**").

77. It is impossible to determine the exact number of Injured Parties. However, an impression can be obtained based on market research into the use of social media. SOMI will submit more detailed studies. Based on Newcom surveys of January 2020 and January 2021, the following numbers were applicable at those points in time (**exhibit 21** and **exhibit 22**):

	January 2019	January 2020	January 2021
<b>6-8 years</b>	unknown	85,000	145,000
<b>9-11 years</b>	unknown	185,000	265,000
<b>12-14 years</b>	unknown	155,000	300,000
<b>15-17 years</b>	unknown	108,000 <sup>8</sup>	294,000 <sup>9</sup>
<b>Total</b>	<b>unknown</b>	<b>533,000</b>	<b>1,004,000</b>

78. On the basis of the above, SOMI assumes that there are approximately 1 million Injured Parties. Based on the numbers estimated in January 2021, their distribution among the various Closely Defined Groups is as follows:

<b>Closely Defined Group A</b>	510.000 <sup>10</sup>
<b>Closely Defined Group B</b>	298.000 <sup>11</sup>
<b>Closely Defined Group C</b>	196.000 <sup>12</sup>
<b>Total</b>	<b>1.004.000</b>

#### 4.2 Alternatively: the Injured Parties Registered with SOMI

79. Alternatively, SOMI is acting in these proceedings on behalf of the Injured Parties who registered as participants via its website ("**Registered Injured Parties**"). These Registered Injured Parties have instructed SOMI and given it a power of attorney to conduct these proceedings on their behalf. There are 17,919 Injured Parties at the time of the summons. The current participation agreement and power of attorney are submitted as **exhibit 51**.

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<sup>8</sup> The report mentions 180,000 users between the ages of 15-19. For the sake of convenience, SOMI has assumed an equal distribution among the five different ages (15, 16, 17, 18 and 19):  $180,000 * 3/5 = 108,000$ .

<sup>9</sup> The report mentions 490,000 users between the ages of 15-19. For the sake of convenience, SOMI has assumed an equal distribution among the five different ages (15, 16, 17, 18 and 19):  $490,000 * 3/5 = 294,000$ .

<sup>10</sup> The report mentions 145,000 users aged 6-8, 265,000 users aged 9-11 and 300,000 users aged 12-14. For the sake of convenience, SOMI has assumed an equal distribution among the three different ages (12, 13 and 14) in the latter group:  $145,000 + 265,000 + (300,000 * 1/3) = 510,000$ .

<sup>11</sup> The report mentions 300,000 users aged 12-14 and 490,000 users aged 15-17. For the sake of convenience, SOMI has assumed an equal distribution among the different ages (12, 13 and 14 / 15, 16, 17, 18 and 19):  $(300,000 * 2/3) + (490,000 * 1/5) = 510,000$ .

<sup>12</sup> The report mentions 490,000 users aged 15-17. For the sake of convenience, SOMI has assumed an equal distribution among the different ages (15, 16, 17, 18 and 19):  $490,000 * 2/5 = 196,000$ .

## 5 TIKTOK'S BREACHES OF LAW

80. TikTok is in breach of data protection legislation and mandatory consumer law on a large scale and it is unlawfully exposing minors, including children under 13, to harmful content, in breach of legislation on audiovisual media services. Non-compliance with this legislation poses a serious risk to children. Because children are less aware of the risks and consequences of using the Internet, or of providing their personal data and registering for services such as those provided by TikTok, they are at greater risk of losing control of their personal data and of becoming the subject of profiling. TikTok fails to take measures against these risks and to protect children effectively.

### 5.1 Breach of the GDPR

#### 5.1.1 Applicability of the GDPR

81. The GDPR applies to the processing of personal data wholly or partly by automatic means within the EEA (Articles 2 and 3 GDPR).

##### 5.1.1.1 Personal data

82. The term “personal data” is defined in Article 4(1) GDPR and includes:

*“any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”*

83. The use of the term 'indirect' means that, to classify as personal data, it is not necessary for the data in question itself to make it possible to identify the person concerned.<sup>13</sup> It is sufficient that the information, in combination with other information, can lead to the identification of a natural person. Nor is it necessary for all identifying information to be held by one and the same party.<sup>14</sup> The question is whether the controller reasonably has the means to access the additional information in order to identify the person concerned. The only instance in which that is not the case is if, given the time, cost and manpower required, the identification of the person concerned involves excessive effort, so that the risk of identification actually appears insignificant.<sup>15</sup>

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<sup>13</sup> CJEU 19 October 2016, C-582/14, ECLI:EU:C:2016:779 (*Breyer*), para. 41.

<sup>14</sup> CJEU 19 October 2016, C-582/14, ECLI:EU:C:2016:779 (*Breyer*), para. 43.

<sup>15</sup> CJEU 19 October 2016, C-582/14, ECLI:EU:C:2016:779 (*Breyer*), paras. 45 and 46.

84. The fact that TikTok processes personal data of its users is evident and it also acknowledges that in its Privacy Policy. TikTok processes the following and other categories of personal data (**exhibit 4a** and **exhibit 6**, Privacy Policy and Cookies Policy, section 1):
- a) Account data: account name, date of birth, telephone number, email address, user profile and profile photo;
  - b) User-generated content: content that the user generates and views, including preferences they set (such as language choice), photos and videos they upload, likes and comments they give and receive, livestreams they create and information about followers;
  - c) Behavioural and Preference Data: how the service is used, including frequency and duration of use, how the user reacts to the content shown by TikTok, the advertisements they view, the videos they watch and the problems they encounter, the content the user likes and saves in "Favourites", the words they search for and the users they follow and the user's interests;
  - d) Information from third parties: information received from advertisers and other partners, including ad ID and whether the user has viewed an ad or purchased the product;;
  - e) Technical information: IP address, instance IDs, mobile provider, time zone settings, identification for advertising purposes, app version, location data and device data, including device model, device system, network type, device ID, screen resolution and operating system, sound settings and connected audio devices. If the user logs in from multiple devices, TikTok uses profile information to identify activity across devices;
  - f) Location data: based on IP address or GPS;
  - g) Information about friends: contact information in the phone book or the Facebook friends list, public Facebook information and the names and profiles of Facebook contacts
  - h) Other information: purchases in the app, information obtained through surveys, challenges and correspondence, proof of identity and age.
85. The minors for whom SOMI is acting are all persons who have used the TikTok App and whose personal data have therefore been processed by TikTok. They therefore qualify as "data subjects" under the GDPR.

#### 5.1.1.2 Processing

86. The above data is, among other things, collected, stored, analysed, retained, shared with third parties and TikTok transfers it to countries outside the EEA. All these operations are covered by the term "processing" as defined in Article 4(2) GDPR. TikTok also records personal interests, preferences and behaviour of its users in order to provide them with personalised advertisements, which qualifies as "profiling" under Article 4(4) GDPR.

#### 5.1.1.3 Territorial scope

87. The scope of the GDPR is also territorial. Article 3(1) GDPR provides that the GDPR applies to processing operations carried out in the context of the activities of an establishment of a controller in the European Union. Recital 22 of the GDPR defines what is meant by "establishment":

*"Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect."*

88. TikTok Technology Limited is established in the EU Member State Ireland. This establishment effectively carries and real activities within the EEA. It follows from the Terms of Services that it is the entity which offers the TikTok App within the EEA (**exhibit 3a**, Terms of Service, Opening Words) and from the Privacy Policy that it is partly responsible for the processing of personal data of data subjects within the EEA (**exhibit 4a**, Privacy Policy, Article x). TikTok has explicitly confirmed this in its letters to SOMI (**exhibit 2b** and **exhibit 2c**).

#### **5.1.2 Fundamental rights context: the rights of the child and Articles 7 and 8 of the Charter**

89. Under the UN Convention on the Rights of the Child (Article 3), the best interests of the child are a primary consideration. This was subsequently confirmed in Convention 192 of the Council of Europe (Article 6). The rationale is that a person who is not yet physically and psychologically mature is more in need of protection than others. The purpose of the rights of the child is to improve the living conditions of the child and to strengthen the possibilities for developing the child's personality.<sup>16</sup> The child's right to protection is so fundamental that it has been incorporated into the Universal Declaration of Human Rights (Article 25), the International Covenant on Civil and Political Rights (Article 24), the International Covenant on Economic, Social and Cultural Rights (Article 10(3)) and the Charter (Article 24).
90. The right to privacy and the right to protection of personal data are laid down in Articles 7 and 8, respectively, of the Charter. The GDPR is an elaboration of the fundamental context, which is confirmed by recital 1 of the GDPR. This fundamental context must be taken into account when interpreting the GDPR and the national implementing legislation.<sup>17</sup> In this case, SOMI requests a review against both the fundamental framework and the GDPR. SOMI is able to directly invoke the fundamental rights provided by the Charter on behalf of minors, because they have horizontal effect.<sup>18</sup>

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<sup>16</sup> Article 29 Working party, *Opinion 2/2009 on the protection of children's personal data (General Guidelines and the special case of schools)*, 398/09/EN, WP 160, p. 4.

<sup>17</sup> CJEU 13 May 2014, C-131/12, ECLI:EU:C:2014:317 (*Google Spain v Costeja*), para. 38.

<sup>18</sup> See for example CJEU 8 April 1976, case 43/75 (*Defrenne*), CJEU 12 July 2011, case C-324/09, ECLI:EU:C:2011:474 (*L'Oréal v eBay*) and CJEU 24 November 2011, case C-70/10, ECLI:EU:C:2011:771 (*Scarlet v SABAM*).

91. Depending on the nature, seriousness and duration of the breach, unlawful processing of personal data may infringe both Articles 7 and 8 of the Charter. An infringement of Article 8 usually relates to the processing of 'ordinary personal data', whereas the processing of data that are more related to privacy will result, in particular, in an infringement of Article 7.<sup>19</sup> TikTok processes account and user data on a large scale, creates profiles and shares personal data with third parties on a large scale, including outside the EEA, in violation of the fundamental principles of the GDPR and without informing minors in a comprehensible manner. This conduct towards minors constitutes a serious infringement of the right to the protection of personal data (Article 8 of the Charter). However, this interference also affects the private life of the minors involved and therefore Article 7 of the Charter.

### 5.1.3 *TikTok is the controller*

92. TikTok qualifies as controller within the meaning of AVG in respect of the processing of personal data of the minors involved, as described in this Summons. Article 4(7) GDPR defines the controller as:

*“the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data;”*

93. Under the GDPR, the controller is, among other things, responsible for and must be able to demonstrate compliance with the principles of processing personal data (Article 5(2) GDPR). According to recital 74 GDPR, the responsibility and liability of the controller should be established for each processing of personal data carried out by the controller or on the controller’s behalf. The controller is obliged to implement appropriate and effective measures and must be able to demonstrate the compliance of all processing activities with the GDPR, including the effectiveness of the measures.

94. According to TikTok’s own statement, it is the joint controller together with TikTok Information Technologies UK Limited (**exhibit 4a p.1**):

*“Where we refer to “TikTok”, “we” or “us” in this Privacy Policy, we mean TikTok Technology Limited, an Irish company (“TikTok Ireland”), and TikTok Information Technologies UK Limited (“TikTok UK”), a UK company.(...)”*

*TikTok Ireland and TikTok UK provide the Platform and associated services, and together process personal data in the manner described in this policy and in our Terms of Service. For users of the Platform in the EEA and Switzerland, TikTok Ireland is the service provider in accordance with our Terms of Service and if you are in the UK, the provider of the Platform is TikTok UK. TikTok Ireland and TikTok UK share information as joint controllers*

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<sup>19</sup> Opinion of Advocate General Cruz Villalon of 12 December 2013, case c-293/12, (*Digital Rights Ireland*).

*of your data where it is necessary to do so to operate the Platform efficiently and in line with applicable laws.*

*If you have questions or complaints regarding this policy, or if you wish to reach the TikTok's Data Protection Officer, contact us at: <https://www.tiktok.com/legal/report/privacy>. You can also contact us at the following postal address.*

***For users in the European Union, European Economic Area and Switzerland:*** TikTok Technology Limited, 10 Earlsfort Terrace, Dublin, D02 T380, Ireland.

***For users in the United Kingdom:*** 6th Floor, One London Wall, London, EC2Y 5EB, United Kingdom.”

95. Article 26 GDPR provides that where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall determine their respective responsibilities for compliance with the obligations under the GDPR in a transparent manner. The arrangement must duly reflect the respective roles and the relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement must be made available to the data subject.
96. TikTok's Privacy Policy does not mention any controllers other than TikTok and TikTok Information Technologies UK Limited. Nor does it describe the relationship between the two entities in respect of the data processing. However, it cannot be ruled out that other (Chinese or American) TikTok entities also qualify as (co- or joint) controllers regarding certain types of processing of personal data in, for instance, China or the U.S. Nor can it be ruled out that TikTok and TikTok Information Technologies UK Limited each play their own distinctive role as regards the data processing within the TikTok App.
97. However, in view of the facts set out above and the arrangement stipulated in the GDPR, it can only be concluded that TikTok together with TikTok Information Technologies UK Limited is fully responsible for all processing of personal data of all residents of the EEA who use the TikTok App.
98. Article 26(3) GDPR provides that, irrespective of the division of responsibilities between the joint controllers, the data subject may exercise his or her rights under the GDPR in respect of and against each of the controllers. And according to Article 82 GDPR, if more than one controllers are involved in an infringement, they are jointly and severally liable for the entire damage (see also margin numbers 336 and 337).
99. Accordingly, SOMI decided to bring this action only against TikTok. It is incumbent on the TikTok Group to decide how TikTok will make sure that the TikTok App is organised to comply with the GDPR and how the various TikTok entities regulate their mutual liability and recourse.

#### 5.1.4 No specific protection of children

100. Anyone under the age of 18 qualifies as a “child” within the meaning of the GDPR.<sup>20</sup> Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child:

*“Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data.”<sup>21</sup>*

101. When determining the exact level of specific protection for a child, the child’s age should be considered.<sup>22</sup> Younger children merit different and greater protection than older ones.

102. The foregoing specifically means, within the context of the principles of Article 5 GDPR:<sup>23</sup>

- a) the duty to process personal data in accordance with the principle of fairness must be interpreted strictly when children are involved. Controllers must act with the utmost good faith;
- b) controllers should continuously and meticulously pay attention to the principle of data minimisation where children are involved, as they must respect their best interests at all times;
- c) any information and communication about data processing, where that processing is addressed to a child, should be given in such clear and plain language that the child can easily understand it (the principle of transparency);<sup>24</sup>
- d) in view of children’s constant development, their personal data becomes outdated and irrelevant more quickly than that of adults. Controllers therefore will need to observe shorter retention periods and continuously verify whether personal data needs to be adjusted or deleted.

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<sup>20</sup> “According to the criteria in most relevant international instruments, a child is someone under the age of 18, unless he or she has acquired legal adulthood before that age.” Article 29 Working Party, *Opinion 2/2009 on the protection of children’s personal data (General Guidelines and the special case of schools)*, 398/09/EN, WP 160, p. 3.

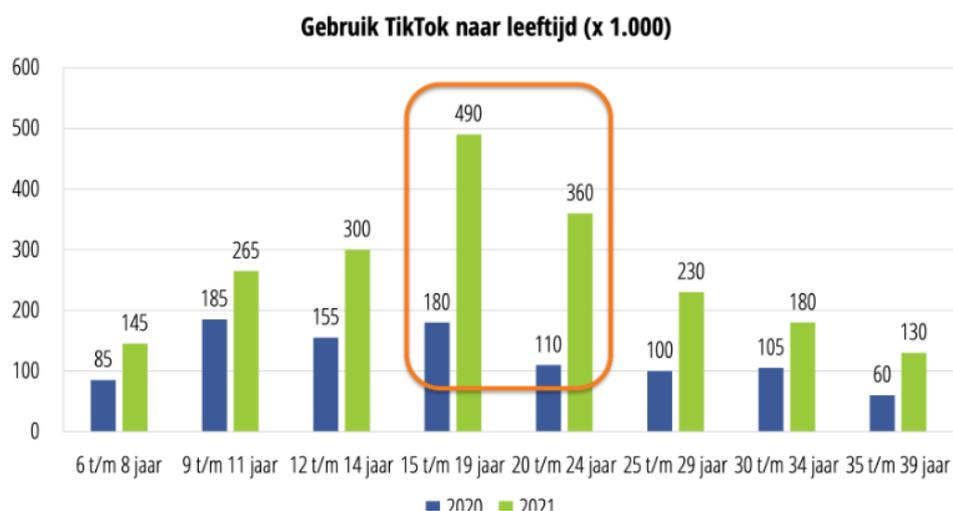
<sup>21</sup> Recital 38 GDPR.

<sup>22</sup> Article 29 Working Party, *Opinion 2/2009 on the protection of children’s personal data (General Guidelines and the special case of schools)*, 398/09/EN, WP 160, p. 6.

<sup>23</sup> Article 29 Working Party, *Opinion 2/2009 on the protection of children’s personal data (General Guidelines and the special case of schools)*, 398/09/EN, WP 160, p. 7 ff.

<sup>24</sup> Recital 58 GDPR.

103. Where the processing of personal data is concerned, TikTok does not distinguish between children and adults in any way and does not offer children specific protection. The fact that the official age limit for using the TikTok App is 13 years, whereas TikTok has not implemented an effective mechanism for verifying the ages of its users (margin number 40 et seq.), is revealing in this regard. The age limit may easily be evaded during registration by simply entering a different date of birth. Nor does TikTok take any other measures to deny children under the age of 13 access to the service. Compared to the features and advertising services TikTok has introduced to earn money, the lack of attention, time and intent shown by TikTok in protecting minors may be classified as highly negligent.
104. Meanwhile, TikTok does actively and purposely focus on young children, for instance by relying on the algorithms it has developed. This appears for instance from the fact that the music library in the app contains a huge number of songs from popular children's films and songs that are highly popular with young children (**exhibit 45**). Furthermore, the app allows the use of filters based on characters from children's animation films, like the well-known Disney film "Frozen" (margin number 23). TikTok moreover actively promotes the fact that the TikTok App targets young children to its business relations. TikTok's business page, for instance, refers to the Doritos campaign, which targets "a young Dutch audience", as a success story and an inspiration for other companies (margin number 37 and **exhibit 13**). Advertisers are also able to target their ads at minors in the 13-17 years age bracket (margin number 34 and **exhibit 10**). There have been numerous investigations into and lawsuits involving the TikTok App and the way in which the app targets young users (paragraph 3.6).
105. Even if it were not a given that TikTok actively and purposely targets children, it is at any event fully aware that its service is overwhelmingly used by young children. And this group's use of the app is only growing. This is for instance evidenced by the various lawsuits and enforcement processes involving TikTok. The age of the users of the TikTok app has also been the focus of a lot of media attention. The New York Times, for instance, reported that TikTok itself classified one third of its 49 million American users in July 2020 as being under the age of 14. This was reported in the New York Times after it had gained access to internal TikTok documents (**exhibit 23**).
106. An annual survey conducted by Newcom into the use of social media in the Netherlands bears out that in aggregate TikTok has 710,000 users in the age groups 6-8 years, 9-11 years, and 12-14 years in the Netherlands (**exhibit 22**)



107. Since TikTok’s official position is and remains that children under the age of 13 do not use the TikTok App, it does not take any specific measures to protect them. TikTok is therefore evidently not acting in the best interests of the child and in accordance with the highest level of good faith.
108. That TikTok fails to offer children special protection is also apparent from the following:
- a) TikTok pays no heed to the fact that parental consent is required for processing activities based on Article 6(1)(a) GDPR and Article 8 GDPR, e.g. for profiling. At no point does TikTok ask for parental consent, nor is this mentioned in the Privacy Policy (see also paragraph 5.1.6.1);
  - b) where processing activities are based on Article 6(1)(f) GDPR, TikTok fails to state how, when weighing the interests, it considers the overriding interests of children. All that it states in its Privacy Policy is: *“Where we process your information to fulfil our legitimate interests, we conduct a balancing test to check that using personal data is really necessary for us to achieve our business purpose. When we carry out this balancing test we also take into account the privacy rights of our users and put in place appropriate safeguards to protect their personal data.”* (exhibit 4a p. 8). This general remark is insufficient to satisfy the requirements of offering children specific protection;
  - c) TikTok processes as much data of children as it does of adults and observes the same general retention periods for them;
  - d) it is not easy to consult the special summary of the Privacy Policy for children and it is only possible to find it if the user actively searches for it (paragraph 3.8.3). Moreover, it is only available in English, even though the TikTok App is used by hundreds of millions of children worldwide who do not speak English;
  - e) the Family Pairing settings are not effective; they only function if parents have a TikTok account themselves (margin number 53). Many children, however, including those under the age of 13, use TikTok without their parents having an account. In this sense, the “digital well-being” of children is illusory. Besides, the requirement that parents must

create an account and consequently provide their personal data to TikTok, for the sole purpose of enabling them to manage their children's settings, breaches the parents' rights under the GDPR, as this would signify that TikTok processes more data of the parents than is necessary;

- f) the default settings modified by TikTok are inadequate (margin numbers 54 and 55). Children may easily change these settings themselves. For instance, children between the age of 13 and 15 may easily change the account to public and children between the age of the 16 and 17 may change the Duet and Stitch function from "Friends" to "All". Besides, these default settings do not affect TikTok's large-scale and unlawful processing of children's personal data.

### 5.1.5 **Unauthorised profiling and automated decision-making**

109. Article 4(4) GDPR defines profiling as follows:

*"any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements"*

110. Profiling comprises three elements: (i) an automated form of processing, (ii) concerning personal data, (iii) with the aim of evaluating personal aspects relating to a natural person. The Article 29 Working Group describes profiling as:

*"Broadly speaking, profiling means gathering information about an individual (or group of individuals) and evaluating their characteristics or behaviour patterns in order to place them into a certain category or group, in particular to analyse and/or make predictions about, for example, their ability to perform a task, interests or likely behaviour."*<sup>25</sup>

111. The CJEU applies the relevant fundamental freedoms and the GDPR strictly in connection with profiling. The mere possibility of profiling already leads to the conclusion that it involves sensitive information, the processing of which touches on the essence of the protection of the fundamental rights protected by Articles 7 and 8 of the Charter.<sup>26</sup>

112. The characteristics that may be visualised through profiling constitute sensitive or special personal data, e.g. regarding ethnic origin, health, political opinions or religious beliefs. The Article 29 Working Group refers in its *"Guidelines on Automated individual decision-making and*

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<sup>25</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 8.

<sup>26</sup> CJEU 21 December 2016, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970 (*Tele2*).

*Profiling* ” to a study in which simple Facebook “likes” were combined with data from other sources. The researchers were able to determine the sexual orientation of male users in 88% of the cases. In 95% of the cases, it was possible to predict the ethnic origin. In 82% of the cases, the researchers correctly predicted whether the internet user was a Christian or a Muslim.<sup>27</sup> It may also be pointed out that at that time, five years ago, this technology was still in its infancy and has since made great strides, including with the help of TikTok,.

113. In its Guidelines, the Article 29 Working Group also discusses various risks of profiling, including that it undermines the subject’s freedom of choice and may lead to discrimination:

*“It can also lock a person into a specific category and restrict them to their suggested preferences. This can undermine their freedom to choose, for example, certain products or services such as books, music or newsfeeds. In some cases, profiling can lead to inaccurate predictions. In other cases it can lead to denial of services and goods and unjustified discrimination.”<sup>28</sup>*

114. Besides, children in particular deserve additional and specific protection where data are processed for marketing purposes and for profiling:

*“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.”<sup>29</sup>*

115. Children are specifically vulnerable in the online environment and are easier to influence with ads based on surfing habits. Profiling may for instance be applied within the context of online gaming to target ads at gamers whom the algorithms have determined are more inclined to spend money and thus to show them personalised ads. Because of their age and lack of maturity, children may not understand the reasons for this type of marketing and the effects it may have on them. According to an EU study on the impact of marketing through social media, online games and mobile applications on children’s behaviour, marketing practices have a marked impact on children’s behaviour.<sup>30</sup> Since children are a vulnerable group, organisations in general

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<sup>27</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 18.

<sup>28</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 6.

<sup>29</sup> Recital 38 GDPR.

<sup>30</sup> *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour*, European Commission: March 2016, available on [https://ec.europa.eu/info/sites/default/files/online\\_marketing\\_children\\_final\\_report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/online_marketing_children_final_report_en.pdf).

should actually refrain from profiling children for marketing purposes.<sup>31</sup> This was already emphasised by the Article 29 Working Group in advice it issued about apps on smart devices.<sup>32</sup>

116. TikTok uses user data to infer interests in order to better optimise and personalise content and advertising offerings (**exhibit 4a**, Privacy Policy 2020, pp. 6 and 7).

*“We infer your interests, gender and age for the purpose of personalising content. We also infer the interests of our users to better optimise [β<sup>3</sup>] advertising across our Platform. If you have consented, we will use this information for the purpose of serving personalised advertising (...)*

*In accordance with, and to perform our contract with you, we will use your information to: (...)*

- *personalise the content you receive and provide you with tailored content that will be of interest to you; (...)*

*In accordance with our legitimate interests to provide an effective and dynamic Platform, we may use your information to: (...)*

- *ensure content is presented in the most effective manner for you and your device; (...)*
- *promote popular topics, hashtags and campaigns on the Platform; (...)*
- *infer your interests for optimising our advertising offerings, which, where you’ve consented to personalised advertising, may be based on the information our advertising partners provide to us; (...)*
- *inform our algorithms so we can deliver the most relevant content to you and to prevent crime and misuse of the Platform; (...)*
- *Where you have consented to personalised advertising, we will match your information e.g. your mobile advertising ID, where it is provided to us by advertisers and other partners, with your TikTok profile to serve you ads. We may*

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<sup>31</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL, WP251rev.01, p. 35.

<sup>32</sup> Article 29 Working Party, *Opinion 02/2013 on apps on smart devices*, 00461/13/NL, WP 202, p. 25.

<sup>33</sup> There seems to be a word missing in TikTok’s Dutch-language Privacy Policy. It probably should include the word ‘optimaliseren’ (‘optimise’) after the word ‘kunnen’ (‘to be able’). It currently reads: *Wij leiden de interesses van onze gebruikers ook af om advertenties beter te kunnen op ons Platform.* (‘We infer the interests of our users to better be able to advertisements across our Platform’).

*also serve you ads based on the information we infer from the data these partners provide. (...)"*

117. With the aid of algorithms, TikTok puts its users into specific categories, based on their personal data, in order for instance to analyse and predict their personal preferences, behaviour and interests. As the text in the fifth indent above bears out, TikTok also applies self-learning algorithms and uses personal data of the TikTok users to keep 'training' the TikTok algorithms.
118. Although the Privacy Policy does not explicitly describe how interests are inferred, it seems obvious that TikTok bases these interests on 'User content and behavioural information', which, according to the Privacy Policy, comprises a wide range of information (**exhibit 4a** chapter 1):

*"We process the content you generate and view on the Platform, including preferences you set (such as choice of language), photographs and videos you upload, comments and live-streams you make ("User Content"). We collect information through surveys, challenges and competitions in which you participate. We also collect information regarding your use of the Platform, e.g. how you engage with the Platform, including how often you use the Platform and how you interact with content we show you, the ads you view, videos you watch and problems encountered, the content you like, the content you save to "Favourites", the words you search and the users you follow. (...)*

*We also process information about your followers, the likes you receive and responses to content you upload, for the purposes of personalising your "For You" Feed, promoting your content to other users and exploring whether your profile presents opportunities for collaboration."*

119. TikTok also uses personal data it receives from advertisers and other partners, although it is not clear exactly what data this is, to link it to the TikTok profile in order to manage personalised ads.
120. It is relatively easy to form an accurate picture of somebody based on his or her interests and preferences through the structural and automated registration and analysis of both the data collected by TikTok, whether or not combined with data (of whatever kind) it obtains from third parties. Such data processing may be classified as profiling within the meaning of Article 4(4) GDPR. According to its Privacy Policy, TikTok does not make a distinction within this context between profiles of children and those of adults in relation to the pervasiveness and scope of the profile. What is more, it is even possible to infer sensitive preferences and characteristics of children from the profiling. For instance, links may be detected that hint at someone's health, political opinion, religious belief or sexual orientation (margin number 112).
121. When TikTok decides to subject children to profiling for marketing purposes, TikTok must – before it does so – take additional measures to protect them. TikTok might for instance adopt or subscribe to a code of conduct. However, TikTok does not make any distinction whatsoever

between the profiling of adults and of children, let alone has it taken adequate additional measures to protect children.

#### 5.1.5.1 Conflict with Article 22 GDPR

122. “Solely automated decision-making” means taking decisions using technological means and without human intervention. Automated decisions may be taken with or without profiling and profiling may take place without automated decisions being taken. Profiling and automated decision-making are not, however, necessarily separate activities. Depending on how the data is used, something that starts out as a simple automated decision-making process may develop into automated decision-making based on profiling.<sup>34</sup>
123. Article 22 GDPR prohibits decisions being taken solely on the basis of automated processing of personal data, including profiling, if those decisions produce a legal effect concerning the data subject or otherwise significantly affect him or her.<sup>35</sup> A legal effect means that the decision, which is solely based on automated processing, impacts someone’s statutory rights. According to the Guidelines, data processing affects someone “significantly” if the effects of the processing are great or important enough to be worthy of attention. The decision must have the potential to significantly affect the circumstances, behaviour or choices of the individuals concerned, have a prolonged or permanent impact on the data subject or, at its most extreme, lead to the exclusion or discrimination of individuals.
124. In its Guidelines, the Article 29 Working Group explicitly mentions that online advertising may significantly affect the data subject and consequently fall under the prohibition if automated tools are used. Some factors mentioned that may be relevant are:
- a) the intrusiveness of the profiling process, including the tracking of individuals across different websites, devices and services;
  - b) the expectations and wishes of the individuals concerned;
  - c) the way the advert is delivered; and
  - d) using knowledge of the vulnerabilities of the data subjects targeted.<sup>36</sup>

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<sup>34</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL, WP251rev.01, p. 9.

<sup>35</sup> Although the text of Article 22(1) is phrased as a right, it really is a prohibition: “The term “right” in the provision does not mean that Article 22(1) applies only when actively invoked by the data subject. Article 22(1) establishes a general prohibition for decision-making based solely on automated processing. This prohibition applies whether or not the data subject takes an action regarding the processing of their personal data, see Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 23.

<sup>36</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 26.

125. As mentioned earlier (margin number 120), TikTok creates precise profiles of its users, including children, through structural and automated registration and analysis of the data it collects, whether or not in combination with data of whatever kind that it obtains from third parties.
126. Typically, children barely, if at all, realise the amount of data TikTok has access to, or the sensitivity of that data, or the degree to which TikTok profiles children for advertising purposes. Nor does TikTok seem to take any heed of a child's possibly limited capacity of understanding and the limited time a child will spend on reading information regarding the processing of its data, especially if this information is contained in long-winded texts that are difficult to comprehend (margin number 269). Children in particular are unaware of the massive scale and extent of the detail of profiling. This detailed and massive profiling makes it possible to target a child very specifically to show it the most relevant ads, exploiting to the fullest extent a child's vulnerable and impressionable position. Due to their vulnerability in general, and taking into account the fact that personal data should be processed fairly and lawfully, TikTok should already apply the principles of minimum data collection and limitation of processing purposes even more strictly when setting up the process of data processing in respect of children.<sup>37</sup>
127. What is more, when they are on the TikTok App, children will not necessarily realise that they are watching an ad, particularly the In-Feed ads discussed above, where the ad appears on the user's personalised "For You" page (margin number 36) and according to TikTok are shown "seamlessly" between the created content of other users. The same applies to Topview, in which the ad appears for three to sixty seconds on the full opening screen of each user as soon as he or she opens the app, and to an even greater extent to the Branded Effects, which show ads made by other TikTok users, possibly even by idols or friends of the data subject. Users who are not aware of this, particularly inattentive and impressionable children, will presume, given the manner in which the ad is presented, that they are watching a "normal" TikTok video, whereas this is really an ad.
128. All things considered, this profiling activity, which is based on an automated decision, constitutes a significant infringement of the privacy of children who use the TikTok App in particular, as well as a breach of Article 22 GDPR.

#### 5.1.5.2 *Exceptions do not apply*

129. Although Article 22(2) GDPR mentions three exceptions to the ban on automated decision-making, including profiling, none of these apply here. It is noted in this regard that exceptions to the GDPR must be interpreted strictly, according to established case law of the CJEU.<sup>38</sup>

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<sup>37</sup> Cf. Article 29 Working Party, *Opinion 02/2013 on apps on smart devices*, WP202, p. 25.

<sup>38</sup> CJEU 14 February 2019, C-345/17, ECLI:EU:C:2019:122, (*Buivids*), para. 41 and the case law cited there.

130. Firstly, the starting point for the GDPR is that automated decision-making may not under any circumstances be applied in respect of children, whether or not the exceptions to the ban apply, as Recital 71 GDPR confirms:

*“However, decision-making based on such processing, including profiling, should be allowed where expressly authorised by Union or Member State law to which the controller is subject, including for fraud and tax-evasion monitoring and prevention purposes conducted in accordance with the regulations, standards and recommendations of Union institutions or national oversight bodies and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision. Such measure should not concern a child.”<sup>39</sup> (underlining added)*

131. Secondly, the exceptions do not apply:
- a) the first exception applies if profiling is necessary to enter into or perform an agreement. TikTok may only invoke this exception if it were to be found that personalising ads is part of the services acquired by minors. SOMI disputes that this is the case;
  - b) the second exception applies if automated decision-making and profiling is explicitly allowed under Union or Member State law. This is not the case here;
  - c) the third exception applies if the data subject has expressly consented to the automated decision-making and profiling. As will be shown below, no valid consent has been given, let alone express consent specifically in respect of automated decision-making and profiling (paragraph 5.1.6).
132. Even if the exceptions might apply, they may only be invoked if the controller has taken appropriate measures to protect the data subject. At any event, specific information must be provided about the processing and the possibility of human intervention must be offered. TikTok satisfies neither of these requirements.
133. Given the invasive degree of profiling applied by TikTok, special personal data is also inherently processed (see margin number 112). Even if one of the exceptions applied, automated decision-making is still not allowed unless the data subject has given his or her explicit consent (Article 9(2)(a) GDPR) or if there is a substantial public interest (Article 9(2)(g) GDPR). These conditions are not met in this case either.

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<sup>39</sup> Recital 71 GDPR.

### 5.1.6 Conflict with Article 6 GDPR: no valid consent

134. Personal data may only be processed for one of the lawful grounds mentioned in Article 6 GDPR: unambiguous consent from the data subject; necessity of the processing for performing an agreement to which the data subject is party; protection of the vital interests of the data subject; compliance with a legal obligation; performance of a task carried out in the public interest or in the exercise of official authority, or for the purposes of a legitimate (commercial) interest.
135. In its Privacy Policy, TikTok invokes all six grounds mentioned above (see also margin number 204). Where it invokes consent (Article 6(1)(a) GDPR) and where it cannot invoke any of the other grounds for its processing, it must be held that it does not obtain valid consent.
136. Consent from the data subject has always been one of the key elements of data protection law. Historically, the term “consent” was linked to the notion that it must be possible for the data subject to exert control over how his personal data is used. From the point of view of fundamental rights, exerting control by giving or withholding consent is an important principle. For this reason, a decision to consent to data processing is subject to strict requirements, especially because giving consent might imply waiving a fundamental right.<sup>40</sup>

#### 5.1.6.1 No parental consent

137. Pursuant to Article 8 GDPR, children under the age of 16 require their parents’ consent before they may accept the offer of information society services. The Dutch UAVG has adopted this 16-year age limit. The reasons for this specific protection are associated with the vulnerable position of children (paragraph 5.1.4 and recital 38 GDPR).
138. Article 8 GDPR applies solely to “an offer of information society services directly to a child”. Pursuant to Article 5(1) UAVG, this age limit is observed in the Netherlands even if Article 8 GDPR does not apply. Thus, irrespective of the nature of the services, controllers that base their data processing on consent require the parents’ consent if the data subject is under the age of 16.
139. Controllers must endeavour to ensure that the user has reached the age of consent or, if this is not the case, that the person granting consent on behalf of the child actually has parental responsibility:

*“If the users state that they are over the age of digital consent then the controller can carry out appropriate checks to verify that this statement is true. Although the need to undertake reasonable efforts to verify age is not explicit in the GDPR it is implicitly*

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<sup>40</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 10.

*required, for if a child gives consent while not old enough to provide valid consent on their own behalf, then this will render the processing of data unlawful.*

*If the user states that he/she is below the age of digital consent then the controller can accept this statement without further checks, but will need to go on to obtain parental authorisation and verify that the person providing that consent is a holder of parental responsibility.”<sup>41</sup>*

140. Where processing is based on consent, the controllers must furthermore be able to demonstrate that the data subject has given consent (Article 7(1) GDPR and recital 42 GDPR). In other words, they must ensure that it is possible to verify the consent.<sup>42</sup>
141. TikTok does not at any time ask for parental consent, even though this is required for users under the age of 16. Nor is this matter addressed in TikTok’s Privacy Policy. Since TikTok bases the processing of personal data for personalised ads (profiling and automated decision-making) on consent (margin number 135 and **exhibit 4a**), but fails to obtain and verify parental consent in respect of children under the age of 16, this processing of personal data by TikTok is unlawful.

#### 5.1.6.2 No valid consent

142. To the extent that parental consent is not required, or that TikTok has obtained parental consent, this consent is not valid within the meaning of Article 4(4) GDPR. This also applies in respect of children aged 16 and 17. Article 4(11) GDPR defines consent as:

*“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.”<sup>43</sup>*

143. Thus, lawful consent may only be said to have been given if it is (i) freely given, (ii) specific, (iii) informed, and (iv) unambiguous. Where TikTok invokes consent as the ground for showing personalised ads, TikTok does not meet these requirements.

#### Sub (i) No freely given consent

144. The element “freely given” implies an actual choice and control on the part of the data subjects. There may be no deception, intimidation or coercion, such as so-called nudging or other types of manipulation. If consent is included as a non-negotiable part of the terms and conditions, it is presumed not to have been given freely. Nor is consent presumed to have been freely given if the data subject cannot withhold or withdraw his consent without adverse effects (e.g. extra

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<sup>41</sup> EDPB, *Guidelines 05/2020 on consent within the meaning of Regulation 2016/67*, p. 31.

<sup>42</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 25.

<sup>43</sup> The basic concept of consent is comparable to that of Directive 95/46/EU.

costs).<sup>44</sup> The controller must be able to demonstrate that the data subject was able to freely decide whether or not to give consent.<sup>45</sup>

145. To ensure that consent is freely given, consent may not provide a valid legal ground for the processing of personal data where there is a clear imbalance between the data subject and the controller and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.<sup>46</sup>

146. TikTok introduces the request for consent for personalised ads as follows (**exhibit 15**):

*“TikTok does not charge the users any costs and relies on ads as source of income”*

*“By clicking on ‘Accept’ you give your consent to TikTok to personalise the ads that are shown to you, based on your activity in the app and data received from third parties (...).”*

147. Children in particular, regardless of their age, will interpret this to mean that the TikTok App is only free of charge if they consent to receiving personalised ads based on profiling. Also, TikTok conceals that its business model is based entirely on exploiting personal data as the basis for personalised ads. The imbalance between TikTok as a tech giant on the one hand and children on the other also plays a part in this regard. Given the importance and the social pressure children experience to participate in social networks such as TikTok, they will more readily be inclined to consent to receiving ads, so as to avoid being excluded from social interactions. TikTok clearly exploits these feelings.

148. A service may comprise several processing activities, for various purposes. If that is the case, the data subjects must be able to decide freely which purposes they accept, rather than having to give consent for a set of processing purposes (“granularity”). Recital 43 GDPR clarifies that the consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations (for instance for certain processing operations but not for others). Recital 32 GDPR states:

*“Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them.”*

149. However, TikTok only asks consent for profiling in combination with personalised ads. If users do not consent, they will only be shown non-personalised ads, even though, according to the Privacy

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<sup>44</sup> Recitals 42 and 43 GDPR and Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 12 and EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 10.

<sup>45</sup> EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 14.

<sup>46</sup> Recital 43 GDPR.

Policy, profiling still takes place. This is because TikTok also bases this processing on the ground of legitimate interest (margin number 174 and **exhibit 4a**). TikTok does this for a purpose other than for showing personalised ads, namely for optimising ads, whatever that may mean (margin number 177), and for showing relevant video content. Thus, TikTok apparently believes that there are two separate data processing exercises for two different purposes: (i) profiling without personalised ads for optimising ads and personalising video content and (ii) profiling for personalised ads. This is not permitted, especially not where children are concerned. Moreover, as will be explained below, the way in which TikTok profiles children is not based on Article 6(1)(f) GDPR (paragraph 5.1.7).

*Sub (ii) No specific consent*

150. Consent must be given in respect of “one or more specific” purposes, and the data subject must be able to choose each of these purposes. The aim of the requirement that consent must be “specific” is to ensure a certain degree of control by and transparency for the data subject.
151. According to Article 5(1)(b) GDPR, obtaining valid consent must always be preceded by establishing a specified, explicit and legitimate purpose for the intended processing activity. This requirement of purpose limitation, combined with specific consent, acts as protection against the gradual broadening or blurring of purposes for which data is processed (*function creep*).
152. For consent to be specific, it must first of all be comprehensible: the extent and consequences of the data processing to which the data subject consents must be fully clear from how the consent is phrased. The consent may not therefore pertain to an open series of processing activities.<sup>47</sup> The consent must be so specific that the data subject knows exactly what he is consenting to:

*“It should be added that the indication of the data subject’s wishes referred to in Article 2(h) of Directive 95/46 must, inter alia, be ‘specific’ in the sense that it must relate specifically to the processing of the data in question and cannot be inferred from an indication of the data subject’s wishes for other purposes.”<sup>48</sup>*

153. TikTok asks for consent for personalised ads “based on your activity in the app and data received from third parties”. Thus, the consent for the processing of personal data of children by TikTok is not specific. Particularly for (young) children, it is entirely unclear what “personalising” means; what behavioural data is involved; how intrusive and extensive the profile is; from which “third parties” TikTok receives personal data; which data TikTok receives from these third parties and how; and what ads the user may be shown. Even after carefully reading the Privacy Policy, the data subject is still mystified.

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<sup>47</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 20.

<sup>48</sup> CJEU 1 October 2019, C-673/17, ECLI:EU:C:2019:801 (*Planet49*).

*Sub (iii) No informed consent*

154. According to recital 60 GDPR, providing information about profiling is one of the controller's transparency obligations within the meaning of Article 5(1)(a) GDPR. Pursuant to Article 5 GDPR, the transparency requirement is one of the fundamental principles and is closely related to the principles of fairness and lawfulness. Information about the existence of automated decision-making, including profiling, as referred to Article 22(1) and (4) GDPR, together with useful information about the underlying logic and the importance and anticipated consequences of that processing for the data subject, forms part of the information that must be provided to the data subject pursuant to Article 13(2)(f) GDPR, and Article 14(2)(g) GDPR.
155. It is necessary for data subjects to receive information prior to giving consent, in order to allow them to take informed decisions, to understand to what they are consenting to, and for instance to exercise their right to withdraw their consent. If the controller does not provide accessible information, the data subjects' possibility of exerting control is merely a sham and consent is an invalid ground for processing.<sup>49</sup>
156. According to the Article 29 Working Group, there are two kinds of requirements that must guarantee that the data subject is properly informed:

*"Quality of the information - The way the information is given (in plain text, without use of jargon, understandable, conspicuous) is crucial in assessing whether the consent is "informed". The way in which this information should be given depends on the context: a regular/average user [in this case a child between 8 and 17 years of age - lawyer] should be able to understand it.*

*Accessibility and visibility of information - information must be given directly to individuals. It is not enough for information to be "available" somewhere. The Court of Justice has insisted on this point in its 2004 judgment<sup>25</sup>, referring to an employment contract including conditions which were not spelt out in the contract but referred to. The information must be clearly visible (type and size of fonts), prominent and comprehensive. Dialogue boxes can be used to give specific information at the time when consent is requested. As mentioned above in relation to "specific consent", on-line information tools are especially useful in relation to social network services, in order to provide sufficient granularity and clarity to privacy settings. Layered notices can also be a useful tool here, as they contribute to giving the right information in an easily accessible way.."<sup>50</sup>(underlining added)*

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<sup>49</sup> EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 16.

<sup>50</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of "consent"*, 01197/11/NL, WP 187, p. 23.

157. According to the EDPB, the following minimum information is also a requisite for obtaining lawful consent:<sup>51</sup>

- a) the identity of the controller;<sup>52</sup>
- b) the purpose of each of the processing activities for which consent is requested;<sup>53</sup>
- c) what data, and what type of data, is collected and used;
- d) the existence of the right to withdraw consent;
- e) information on the use of the data for automated decision-making in accordance with Article 22(2)(c) GDPR; and
- f) information on the transfer outside the EEA and the risks involved.

158. The GDPR furthermore contains stricter requirements for data processing where automated decision-making and/or profiling are used. There are, for instance, specific transparency requirements:

*“Furthermore, the data subject should be informed of the existence of profiling and the consequences of such profiling.”<sup>54</sup>*

*“Every data subject should therefore have the right to know (...) the logic involved in any automatic personal data processing and, at least when based on profiling, the consequences of such processing.”<sup>55</sup>*

159. Data subjects also have the right to object to profiling and specifically to profiling for marketing purposes, a right that must be explicitly stated:

*“Where personal data are processed for the purposes of direct marketing, the data subject should have the right to object to such processing, including profiling to the extent that it is related to such direct marketing, whether with regard to initial or further processing, at any time and free of charge. That right should be explicitly brought to the attention of the data subject and presented clearly and separately from any other information.”<sup>56</sup>*

160. As regards profiling, the EDPB furthermore emphasises the importance of clear and comprehensible information:

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<sup>51</sup> EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 17.

<sup>52</sup> See also recital 42 GDPR: *“For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended”*.

<sup>53</sup> Ibid.

<sup>54</sup> Recital 60 GDPR.

<sup>55</sup> Recital 63 GDPR.

<sup>56</sup> Recital 70 GDPR.

*“Profiling can be opaque. Often it relies upon data that is derived or inferred from other data, rather than data directly provided by the data subject. Controllers seeking to rely upon consent as a basis for profiling will need to show that data subjects understand exactly what they are consenting to, and remember that consent is not always an appropriate basis for the processing. In all cases, data subjects should have enough relevant information about the envisaged use and consequences of the processing to ensure that any consent they provide represents an informed choice..”<sup>57</sup>*

161. The EDPB also advises, by way of best practice, that the consent should be requested again after an appropriate interval.<sup>58</sup> In this context, a controller should realise that doubts may arise over time as to whether a previously given consent is still valid. The Article 29 Working Group remarks in this regard that people might change their minds about a previously given consent:

*“For a variety of reasons, people often change their views, because their initial choices were poorly made, or because of a change in circumstances, such as a child becoming more mature.”<sup>59</sup>*

162. For that reason, the “good practice” is that the controller should check from time to time whether the data subject still upholds his decision, by informing him about his current choices and offering the possibility to reaffirm or reverse those choices.<sup>60</sup>
163. What applies in this context is that the more complex the data processing, the more may be expected of the controller. The more difficult it is for the average person to oversee and comprehend all elements of the data processing, the greater the obligation of the controller to make an endeavour to demonstrate that consent was obtained based on specific and comprehensible information.<sup>61</sup>
164. TikTok does not meet the specific information obligation regarding consent for profiling and automated decision-making. The pop-up contains very little information (margin number 52) and refers to TikTok’s Privacy Policy, which is very difficult to comprehend and furthermore does not include all requisite elements (see also paragraph 5.1.10). Given the key principle of transparency on which the GDPR is founded, TikTok must explain to data subjects clearly and in simple terms how exactly the process of profiling or automated decision-making works.<sup>62</sup> It fails to do so.

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<sup>57</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 14.

<sup>58</sup> EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 26.

<sup>59</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 14-15.

<sup>60</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 14-15.

<sup>61</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 24.

<sup>62</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation (EU) 2016/679*, 17/NL, WP251rev.01, p. 19.

165. It is also unclear to data subjects what information TikTok receives from “third parties” and how it combines this with behavioural information to create personalised information (Article 14(1)(d) GDPR). TikTok’s Privacy Policy only refers to “e.g. your mobile advertising ID” and “We may also send you ads based on the information we infer from the data these partners provide.” This is far too vague. Nor is it clear to data subjects who these “third parties” are (Article 14(2)(f) GDPR).
166. Article 13(2)(f) GDPR also provides that TikTok must inform the data subject about the automated decision-making and profiling and must provide at least “meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject”. None of this information is given. As a result, it is unclear for data subjects what the consequences may be of the data processing, including profiling.
167. Where consent may serve as valid ground for the processing of children’s data that also includes profiling, TikTok must periodically<sup>63</sup> verify whether the data subjects, especially if they are children, maintain their previously given consent, by informing them about their current choices concerning personalised ads, e.g. by showing a pop-up when opening the app and/or by sending a push message. When doing so, TikTok must offer data subjects the possibility of simply confirming these choices or reversing them. TikTok has failed to do this as well.

*Sub (iv) No unambiguous indication of a wish*

168. The GDPR provides that consent requires a statement from the data subject or an unambiguous affirmative action by the data subject. This means that consent must be given by way of a clear, affirmative action, showing that the data subject freely, specifically, in an informed manner and unambiguously agrees to the processing of his personal data. The data subject must take affirmative action to give consent for the specific processing.
169. Controllers must set up mechanisms for consent in a way that they are clear to the data subjects and ensure that the action providing consent may be distinguished from other actions. It should be realised that the risk of ambiguous consent is greater in an online environment than in an offline environment.<sup>64</sup> It is relevant in this regard is that controllers are required to develop means to prevent “click fatigue”:

*“In the digital context, many services need personal data to function, hence, data subjects receive multiple consent requests that need answers through clicks and swipes every day. This may result in a certain degree of click fatigue: when encountered too many times, the actual warning effect of consent mechanisms is diminishing.”*

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<sup>63</sup> Cf. also Article 29 Working Party, *Opinion 2/2010 on online behavioural advertising*, 00909/10/NL WP 171, p. 21.

<sup>64</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of “consent”*, 01197/11/NL, WP 187, p. 27.

*This results in a situation where consent questions are no longer read. This is a particular risk to data subjects, as, typically, consent is asked for actions that are in principle unlawful without their consent. The GDPR places upon controllers the obligation to develop ways to tackle this issue.”<sup>65</sup>*

170. The pop-up that TikTok uses to request consent for personalised ads shows, in bold black type, the word “**Accept**”. Below, in grey type, TikTok offers the possibility to “Manage settings” (margin number 52 and **exhibit 15**). In other words, users can give consent in one click, but are required to continue clicking to refuse consent. Children especially, who are less aware of the risks, consequences, and safeguards and of their rights, and pay little attention to “the small print”, run a considerable risk of click fatigue so that they will automatically click on “Accept”. TikTok presents giving away personal data in the same way children are presented with positive choices, for instance in games, so that they associate giving consent with “continue” or “next level” when playing a game. It was incumbent on TikTok, taking into consideration this category of data subjects, to set up the pop-up in such a way that it is as easy for users to refuse their consent as it is to give it. TikTok has failed to do so.
171. The fact is that the GDPR stipulates that it must be as easy to withdraw consent as to give it (Article 7(3) GDPR). If consent is obtained through electronic means, by means of one single mouse click or one keystroke, the data subject must, in practice, be able to withdraw his consent as easily.<sup>66</sup> It is difficult to see why this principle may not already be applied during an earlier step, at the time when consent is to be given or withheld.

### 5.1.6.3 No necessity

172. Where the data processing is allowed on the ground of consent, there is still a requirement that the processing must be necessary in the specific case in view of the described purpose of the processing.<sup>67</sup> Thus, TikTok should consider the proportionality and subsidiarity principle. The existence of a lawful legitimate ground, such as consent, therefore does not mean that weighing interests on the basis of these principles is a moot point. When weighing these interests, the circumstances of the case should also be considered. In this case, TikTok bases personalised ads (automated decision-making) on profiling. To this end, TikTok collects detailed behavioural information about children and combines this with data it receives from third parties. Bearing in mind their status and their specific interests<sup>68</sup>, the breach of children’s privacy is disproportionate compared to TikTok’s purpose it serves. Besides, TikTok might simply personalise ads in a less

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<sup>65</sup> EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 22.

<sup>66</sup> EDPB, *Guidelines 05/2020 on consent in accordance with Regulation 2016/67*, p. 27.

<sup>67</sup> Article 29 Working Party, *Opinion 15/2011 on the definition of consent*, 01197/11/NL, WP 187, p. 8. HR 9 September 2011, ECLI:NL:HR:2011:BQ8097 (*Santander*), para. 3.3.

<sup>68</sup> See Article 29 Working Party, *Opinion 02/2009 of WP29 on the protection of personal data of children (General guidelines and the special instance of schools)*, 17/NL, WP259, version 01. This advice mentions the specific vulnerability of the child and the necessity to consider the interests of the child.

invasive manner, without extensively profiling children. TikTok could for instance adapt the advertising offerings to its interest group, which consists largely of children, rather than to a specific child based on extensive and detailed profiles, or on contextual advertising.

173. TikTok has processed children's personal data for the purpose of personalised ads, without obtaining the required statutory consent (parental or otherwise). By doing so, TikTok has acted in breach of Article 6 GDPR in conjunction with Article 5(1)(a) GDPR.

#### **5.1.7 Contravention of Article 6 GDPR: no legitimate interest**

174. According to its Privacy Policy, TikTok bases various processing operations on its legitimate interests (Article 6(1)(f) GDPR), namely to:

*“(i) ensure content is presented in the most effective manner for you and your device;*

*(ii) promote popular topics, hashtags and campaigns on the Platform;*

*(iii) inform our algorithms so we can deliver the most relevant content to you and to prevent crime and misuse of the Platform;*

*(vi) infer your interests for optimising our advertising offerings, which, where you’ve consented to personalised advertising, may be based on the information our advertising partners provide to us;*

*(v) measure the effectiveness of the advertising you see on our Platform;”* (numbering added)

175. Article 6(1)(f) GDPR permits processing if:

*“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”*(underlining added by lawyer)

176. Three cumulative conditions are set for the lawfulness of the processing of personal data under Article 6(1)(f) GDPR: the pursuit of (i) a legitimate interest, (ii) the necessity of processing the personal data for the purposes of the legitimate interest, and the condition that the (iii) fundamental rights and freedoms of the data subject are not overridden.<sup>69</sup>

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<sup>69</sup> CJEU 4 May 2017, C/13-16, ECLI:EU:C:2017:336 (*Rigas*), para. 28.

- a) To be considered legitimate, an interest must be legitimate (i.e. in accordance with applicable EU and national law), sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject (i.e. sufficiently specific). This requires a real and present interest (i.e. not be speculative), something that corresponds with present activities or benefits that are expected in the very near future. Interests that are too vague or speculative are not insufficient;<sup>70</sup>
- b) In order to fulfil the necessity requirement, it must be considered whether there are other less invasive means of achieving the identified purpose of the processing, and whether these means serve the legitimate interests of the data controller (proportionality and subsidiarity);
- c) In the eventual balancing of interests, account must be taken of various factors, such as: does this concern a fundamental right, a different kind of interest, or a general interest, what is the potential disadvantage to the data controller, to third parties or for society if the data processing does not take place, what is the nature of the data, what is the status of the data subject (minor, employee, etc.) and of the data controller (e.g. whether a company has a dominant market position), in what way will the data be processed (on a large scale, 'data mining', profiling), what fundamental rights and/or interests of the data subject are at stake that could be affected, what is the reasonable expectation of data subjects and what are the consequences for the data subject compared to the expected benefit for the data controller.<sup>71</sup>

177. The information provided by TikTok in the Privacy Policy about the purposes mentioned above in margin number 174 is very limited (see also margin number 154 et seq.). For example, it is unclear how TikTok processes personal data to ensure that content is presented in the most effective manner 'for you and your device' (item (i)). It is not at all clear how the processing of personal data can contribute to the effective presentation of content and what personal data TikTok processes for that purpose. The same applies to promoting popular topics, hashtags and campaigns (item (ii)). Which personal data TikTok processes for that purpose and in what way campaigns are run using personal data of data subjects is not clear from the Privacy Policy. TikTok also invokes its legitimate interests for data processing to inform algorithms in order to deliver the 'most relevant content' to the user (item (iii)). It is clear that TikTok is profiling users for this purpose in order to show the user content that suits their preferences and interests. Profiling also takes place to infer interests for optimising the advertising offerings (item (iv)), even if the data subject has not given consent to personalised advertising. Again, TikTok fails to specify in what way profiling can contribute to the 'optimisation of advertising offerings'. Moreover, it is not clear what TikTok means by 'optimising' and what kind of advertising offerings are involved. After all, this can refer equally to the user watching as many videos as possible as to the optimal

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<sup>70</sup> Article 29 Working Party, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, 844/14/NL, WP 217, p. 29/30/31 and 66 et seq.

<sup>71</sup> Article 29 Working Party, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, 844/14/NL, WP 217, p. 36 et seq.

provision of personal data to TikTok and its partners and alliances in which it shares or exchanges information. The same applies to measuring the effectiveness of advertisements (item v).

178. TikTok only very briefly describes the purposes of the processing, but fails to name and specify its interests, whereas it is obliged to do so pursuant to Article 13(1)(d) of the GDPR. TikTok does suffice with vaguely described purposes. It is clear that TikTok's intention is to create complex profiles of the personalities and preferences of users, whereas TikTok has no interest in doing so, or at least that interest is so vague that it cannot serve as an interest under Article 6(1)(f) of the GDPR. If there were an interest, it is not justified because it is insufficiently specific and speculative. TikTok therefore has no interest, let alone a legitimate one. In this context, the DDPA confirms that the mere interest in being able to monetise personal data or profit from it does not in itself qualify as a legitimate interest.<sup>72</sup>
179. Moreover, the processing is not necessary because the way in which TikTok collects, combines and profiles personal data is not proportionate. In addition, TikTok could also achieve the abovementioned purposes by processing fewer personal data, or none at all (subsidiarity). To illustrate, if a user does not consent to the processing of their personal data for personalised purposes, the user will be shown non-personalised content, but profiling will still take place to optimise the advertising offerings and to inform algorithms so that users are delivered content relevant to them.
180. In so far as TikTok does have a legitimate interest in the data processing as mentioned above, this is only a starting point. Whether Article 6(1)(f) GDPR can be used depends on the outcome of the balancing of interests that follows.
181. Partly because TikTok does not sufficiently inform children, as stated above in margin numbers 177 and 178, about the processing of their personal data and the consequences thereof for the children's privacy, TikTok's interest in this case certainly does not outweigh the children's right to the protection of their privacy<sup>73</sup> In this context, the following are also relevant:
- a) TikTok collects a lot of data not directly from the children, but indirectly, through automatic and continuous observation of their behaviour and by comparing and ranking that behaviour with that of a large number of other users, on and using the TikTok App (nature of the data);
  - b) TikTok has a purely commercial interest;
  - c) TikTok creates complex profiles of users' personalities and preferences, based at least on detailed user contact and behavioural information (margin number 118) (way in which data are processed);

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<sup>72</sup> Dutch Data Protection Authority, *Order imposing an administrative fine on the KNLTB*, 20 December 2019, p. 44.

<sup>73</sup> Cf. *Investigation by the Dutch Data Protection Authority ("CBP") into the processing of personal data by Snappet. Final Report of 14 July 2014, z2013-00795*, p. 50 et seq.

- d) Data subjects are not aware of profiling if they have not given their consent to personalised advertisements (reasonable expectations of the data subject); and
- e) The data subjects are children while TikTok is a tech giant with a very strong market position, which creates an inequality in the relationship between the data subject and the controller (status of the controller and the data subject).<sup>74</sup>

182. The foregoing means that TikTok cannot rely on Article 6(1)(f) GDPR in respect of the processing of personal data for the aforementioned purposes. TikTok is therefore acting in violation of Article 6 GDPR in conjunction with Article 5(1)(a) GDPR.

#### **5.1.8 *Contravention of Article 6 GDPR: other legal bases***

183. Where TikTok relies on the basis of performance of a contract (Article 6(1)(b) GDPR), a legal obligation (Article 6(1)(c) GDPR), protection of vital interests of the data subject (Article 6(1)(d) GDPR) or a task carried out in the public interest (Article 6(1)(e) GDPR), the necessity of the processing of the data is lacking. Because TikTok does not specify which data is processed for these bases and does not substantiate necessity, data subjects cannot verify compliance with the necessity requirement. TikTok is therefore not entitled to rely on these bases in any case.

#### **5.1.9 *Ugly Content Policy: improper data processing and discrimination***

184. Personal data must be processed in a way that is lawful, fair and transparent in relation to the data subject (Article 5(1)(a) GDPR). The principle of fairness means, in any case, that processing operations must not contravene fundamental legal principles, such as the prohibition of discrimination.<sup>75</sup> The prohibition of discrimination is laid down, inter alia, in Article 21 of the Charter.

##### **5.1.9.1 *Unfair data processing***

185. It is clear that processing is unfair when users are selected on the basis of certain physical characteristics, such as being too fat, too thin or too poor, and their videos are then blocked or restricted because of those characteristics - and without their even knowing about it. The Ugly Content Policy ensures that users are discriminated against by having their videos blocked on public pages (paragraph 3.7). Since as a result, these users do not qualify for influencer status, or qualify less readily or to a lesser extent, or receive less for (exchanging or obtaining) Gifts of Diamonds, for them this also constitutes a direct financial interest. The same applies to blocking LGBT-friendly videos (LGBT stands for Lesbian, Gay, Bisexual and Transgender, paragraph 3.7).

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<sup>74</sup> Based on the key factors in Article 29 Working Party, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, 844/14/NL, WP 217, p. 41 et seq.

<sup>75</sup> Dutch Data Protection Authority, *Investigation Report of the Tax and Customs Administration/Allowances - The processing of the nationality of applicants for childcare benefits*, p. 47.

### 5.1.9.2 Automated decision-making

186. TikTok uses technology to make decisions. However, according to TikTok, the decisions based on the Ugly Content Policy were made by human moderators. Nevertheless, this is purely automated decision-making, including profiling, within the meaning of Article 22 of the GDPR.<sup>76</sup> TikTok also uses automated procedures to pre-select users into categories for the Ugly Content Policy or LGBT category, for example using hashtags such as #gay, #fatwoman and #disabled. In November and December 2019, Netzpolitik already published about investigations that were said to show that TikTok automatically assigns certain users certain tags based on personal characteristics (**exhibit 41** and **exhibit 42**):

*“For users that were considered particularly vulnerable, TikTok had even further-reaching regulations. When their videos popped up on the screens of the TikTok moderation teams in Berlin, Beijing or Barcelona - after 6,000 to 10,000 views - they were automatically tagged as "Auto R”.*

*As a result, if these videos exceeded a certain number of views, they automatically ended up in the "not recommend" category. Such a categorization means that a video no longer appears in the algorithmically compiled For-You-Feed, which the user sees when opening the app. Strictly speaking, such videos are not deleted - but in fact they hardly have an audience. (...)*

*During the moderation, the moderators not only mark content for deletion or throttling, they also classify what they see. "This is done to help build an automated moderation," tells us the source, who has insight into the moderation. To netzpolitik.org, TikTok denied tagging to teach artificial intelligence, but that algorithmic systems are used "to check when posting content.””*

187. In order to achieve effective human intervention, the controller must ensure that all supervision of decision-making is meaningful and not just a token act. This intervention must be carried out by someone who is competent and capable of changing the decision. He must include all relevant data in his analysis.<sup>77</sup> However, TikTok's policy is so detailed that it cannot be said that the moderators actually have any discretion. TikTok has more than a hundred million users worldwide. It would be a pointless exercise to have moderators manually rate videos according to the Ugly Content Policy or the LGBT Guidelines, without applying any form of automated decision-making.

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<sup>76</sup> Automated decision-making has a different scope and may partially overlap or be the result of profiling. It is solely automated decision-making that the EDPB classifies as the taking of decisions by technological means and without human intervention.

<sup>77</sup> Article 29 Working Party, *Guidelines on automated individual decision-making and profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 24/25.

188. In that case, it hardly needs any explanation that this, incidentally surreptitious, processing of personal data and personal characteristics significantly affects users, as their ability to use the TikTok App is significantly restricted on the basis of highly sensitive information. This automated decision-making is thus also in contravention of Article 22 of the GDPR.

#### 5.1.9.3 Profiling

189. The GDPR includes measures to ensure that profiling and automated individual decision-making (with or without profiling) are not used in a way that unjustifiably affects the rights of individuals, including specific transparency and fairness requirements. TikTok does not comply with these measures; the processing is not fair and transparent,<sup>78</sup> TikTok does not have a legal basis for the processing,<sup>79</sup> does not inform users about the existence of the decision-making<sup>80</sup> and does not inform users about their rights, including the right to object.<sup>81</sup> The videos that are rated according to the Ugly Content Policy or in the LGBT category also contain special personal data, such as data on health, race and sexual preference, which TikTok is not allowed to process under Article 9 of the GDPR. TikTok must also prevent the processing through profiling from having discriminatory effects,<sup>82</sup> but has in fact done the opposite.

190. TikTok has thus failed to implement safeguards to ensure fair, proper and transparent processing and to avoid undesirable consequences for data subjects, and has thus breached the GDPR. Even if there were no exclusively automated decision-making and/or profiling, it is evident that ranking and pigeonholing users in this way on the basis of sensitive personal characteristics cannot be based on any of the grounds referred to in Article 6 GDPR and Article 9 GDPR. For example, TikTok does not have consent for the data processing (Article 6(1)(a) and Article 9(2)(a) GDPR), the processing is not necessary for the performance of the contract with the data subject (Article 6(1)(b) GDPR), and data processing that leads to the exclusion or discrimination of data subjects cannot be based on the legitimate interest of TikTok or a third party (Article 6(1)(f) GDPR). All this leaves aside the fact that TikTok has not complied with *inter alia* the processing principles laid down in Article 5 GDPR or its information obligations under Articles 12, 13 and 14 GDPR in that regard.

#### 5.1.10 Contravention of Articles 5, 12, 13, 14 and 25 of the GDPR: insufficient transparency

191. A controller can comply with the GDPR in the most efficient and effective way by taking into account the legal requirements as early as in the design of the processing (*privacy-by-design*, Article 25 GDPR). In addition to the security of personal data, transparency and data minimisation

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<sup>78</sup> Articles 5(1)(a), 12 and 13 GDPR

<sup>79</sup> Article 6 GDPR.

<sup>80</sup> Article 13(2)(f) GDPR.

<sup>81</sup> Articles 13(2)(b) and 21 GDPR.

<sup>82</sup> Recital 71 GDPR.

(paragraph 5.1.11) are important aspects that the controller must take into account when applying privacy-by-design.<sup>83</sup>

192. TikTok does not provide sufficient information to data subjects about the processing of personal data. Moreover, TikTok's Privacy Policy does not meet the requirements that the GDPR imposes on the information obligation of the controller. TikTok is thus acting in contravention of Article 5(1)(a) GDPR, Article 12 GDPR, Articles 13 and 14 GDPR and Article 25 GDPR.
193. Based on Article 5 GDPR, the transparency requirement is one of the fundamental principles and closely related to the principles of fairness and lawfulness. Article 12 GDPR contains the general rules applicable to the provision of information to data subjects (Articles 13 and 14 GDPR). Thus, the information must be provided in a concise, transparent, comprehensible and easily accessible form, and in clear and plain language, particularly if the information is specifically intended for a child (Article 12(1) GDPR).

#### *5.1.10.1 Not concise, transparent, understandable and easily accessible*

194. TikTok must display the information in an efficient and concise manner to avoid information fatigue. In particular, the Article 29 Working Party recommends, in order to avoid information fatigue, the use of layered privacy notices containing links to the different categories of information to be provided to the data subject, rather than displaying all the information in a single on-screen communication.<sup>84</sup> The element 'easily accessible' also means that the data subject does not have to search for the information himself. It must be immediately clear to the data subject where and how this information can be found.<sup>85</sup>
195. TikTok informs users about the processing of their personal data through its Privacy Policy. Also where TikTok requests consent for personalised advertisements, TikTok simply refers to its Privacy Policy in which data subjects apparently have to look for the relevant information themselves. The Privacy Policy itself does not contain a table of contents or links to the eleven chapters. Yet children are among the target group most susceptible to information fatigue. The information provided by TikTok is therefore anything but concise, transparent and easily accessible.
196. The requirement for information to be 'comprehensible' further means that the information must be able to be understood by an average member of the intended audience. In the case of TikTok, this mainly includes children (paragraph 3.3). Moreover, the information TikTok offers should be presented in the simplest possible way, avoiding complicated sentences and language structures. The information should be concrete and definitive, not contain abstract or ambiguous

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<sup>83</sup> Cf. *DDPA Guidelines: Security of Personal Data*, 1 March 2013, *Government Gazette* 2013, no. 5174, p. 8.

<sup>84</sup> Article 29 Working Party, *Guidelines on transparency under Regulation (EU) 2016/679, WP260 rev.01*, p. 7.

<sup>85</sup> Article 29 Working Party, *Guidelines on transparency under Regulation (EU) 2016/679, WP260 rev.01*, p. 8.

formulations and leave no room for different interpretations.<sup>86</sup> Specifically with regard to children, TikTok must ensure that the vocabulary, tone and style of the language used are appropriate and resonate with children, so that the child for whom the information is intended understands that the information is addressed to him or her.<sup>87</sup> TikTok does not meet these requirements either. Even the summary of the Privacy Policy uses the same complex language as the rest of the Privacy Policy.

197. It is also important that the purposes and legal basis for data processing in particular should be clear.<sup>88</sup> By way of illustration, the Article 29 Working Party gives the following examples of sentences that are insufficiently clear about the purposes of the processing:<sup>89</sup>

- a) “We may use your personal data to develop new services” (as it is unclear what the “services” are or how the data will help develop them);
- b) “We may use your personal data for research purposes (as it is unclear what kind of “research” this refers to); and
- c) “We may use your personal data to offer personalised services” (as it is unclear what the “personalisation” entails).

198. Anyone comparing these sentences with the purposes TikTok describes in its Privacy Policy will immediately see that TikTok uses the same vague language. To give just a few examples (**exhibit 4a**):

*“ensure content is presented in the most effective manner for you and your device;*

*understand how people use the Platform so that we can improve, promote and develop it;  
(...)*

*provide non-personalised advertising, which keeps many of our services free;*

*infer your interests for optimising our advertising offerings, which, where you’ve consented to personalised advertising, may be based on the information our advertising partners provide to us;*

*measure the effectiveness of the advertising you see on our Platform;*

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<sup>86</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, *WP260 rev.01*, p. 9.

<sup>87</sup> The WP29 also emphasises that children do not lose their right to transparency as data subjects if the person with parental responsibility has given his or her consent to the data processing.

<sup>88</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, *WP260 rev.01*, p. 9-10.

<sup>89</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, *WP260 rev.01*, p. 10.

*inform our algorithms so we can deliver the most relevant content to you and to prevent crime and misuse of the Platform;” (...)*

199. With regard to location data, TikTok also states that this information is collected ‘to customise your experience’. As also explained in margin number 178, the purposes in the Privacy Policy are described so vaguely that it is impossible for users, let alone children, to understand what TikTok does with their personal data, which personal data are processed for which purposes, on which legal basis and what the consequences of the processing may be.<sup>90</sup> In the Privacy Policy, TikTok also refers to all six legal bases of the GDPR. Different purposes are listed for each of the legal bases. This enumeration is problematic for several reasons.
200. Some of this data is also of a sensitive nature, such as location data and app usage data. Since the use of this data for advertising purposes infringes the privacy of those concerned, TikTok should clarify which categories of personal data it processes for these (advertising) purposes. However, TikTok fails to do so. In this way, TikTok's Privacy Policy is not comprehensible, partly in view of the language used. This applies all the more to children.

#### *5.1.10.2 Content does not comply with the GDPR*

201. The GDPR lists the categories of information that must be provided to a data subject in connection with the processing of their personal data when this data is collected from that data subject (Article 13 GDPR) or obtained from another source (Article 14 GDPR). TikTok's Privacy Policy does not comply with these mandatory elements. The relevant paragraphs are explained in more detail below.

#### *Under (i) Processing purposes, legal basis and personal data*

202. As explained above, TikTok is unclear about the purposes, legal basis and what personal data it processes for what purposes. In addition, if personal data is not obtained from the data subject itself, TikTok is obliged to describe the categories of personal data (Article 14(1)(d) of the GDPR). It is part of the requirements of careful data processing to inform data subjects of which types of personal data are processed for which purposes. This also applies if a controller obtains this data directly from data subjects, but if it is not clear in advance for which purposes the data will be processed.<sup>91</sup>
203. In Article 1 of the Privacy Policy, TikTok states that it may receive personal data from advertisers, ‘for example, your mobile advertising ID’. However, children in particular will not understand

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<sup>90</sup> With regard to complex, technical or unexpected data processing operations, the position of the Article 29 Working Party is that, in addition to providing the information required by Articles 13 and 14, controllers should explain separately, in unambiguous language, the main consequences of the processing.

<sup>91</sup> Dutch Data Protection Authority, *Investigation into the processing of personal data of data subjects in the Netherlands by the Facebook group*, 21 February 2017, p. 96.

what is meant by this and what other information is attached to such an advertising ID. This is particularly relevant as TikTok combines this data with data or behavioural and app use for profiling and automated decision-making ('personalised decision-making').

204. In addition, there is overlap in the Privacy Policy between different purposes and different legal bases. For example, on the basis of contract performance (Article 6(1)(b) GDPR), TikTok processes personal data for the purpose of personalising content and delivering content that is as interesting as possible (**exhibit 4a** - Privacy Policy version July 2020, p. 6):

*“personalise the content you receive and provide you with tailored content that will be of interest to you;”*

205. TikTok also uses this purpose for the basis of legitimate interest (Article 6(1)(f) GDPR) (**exhibit 4a** - Privacy Policy version July 2020, p. 7):

*“ensure content is presented in the most effective manner for you and your device;*

*promote popular topics, hashtags and campaigns on the Platform;*

*inform our algorithms so we can deliver the most relevant content to you and to prevent crime and misuse of the Platform;”*

206. The purpose of preventing crime and abuse is, in addition to the legitimate interest basis, also found in three other bases (Article 6(1)(c), (d) and (e) GDPR) (**exhibit 4a** - Privacy Policy version July 2020, p. 7):

*“In order to comply with our legal obligations and as necessary to perform tasks in the public interest or to protect the vital interests of our users and other people, we use your data to help us prevent and respond to abuse, fraud, illegal activity and other potentially harmful content on the Platform.”*

207. This is problematic because TikTok can rely on different bases to justify the same purposes. This means that it is impossible for data subjects to check whether TikTok is complying with the GDPR. Moreover, the rights of the data subjects become illusory. After all, the rights data subjects may rely on depends on the basis for processing.

*Under (ii) Source of personal data*

208. Because TikTok also obtains personal data from third parties, it must inform the data subjects about the specific source of the data. According to the Privacy Policy, these are 'advertisers and partners'. This information is insufficiently specific. If the specific source is not mentioned, information should at least be provided on the nature of the source or sources (public or private)

and the type of organisation, industry or sector. Particularly with regard to ‘partners’, it remains unclear to data subjects where their personal data comes from.

*Under (iii) Legitimate interests*

209. Where legitimate interests (Article 6(1)(f) GDPR) constitute the legal basis for processing, TikTok must identify the specific interest in question for the benefit of the data subject. As also indicated in margin number 178, TikTok fails to name and specify its interests and suffices with a brief, vague description of its purposes.

*Under (iv) Recipient of the personal data and data transfer*

210. TikTok must provide information on the recipients (Article 13(1)(e) GDPR) that is most meaningful for the data subjects. In practice, these will usually be the recipients referred to, so that data subjects know exactly who has their personal data.<sup>92</sup> If only categories of recipients are mentioned, the information should in any case be as specific as possible by indicating the type of recipients (i.e. by specifying the activities carried out by those recipients) and the industry, sector, subsector and location of the recipients.
211. TikTok does not mention third parties by name in its Privacy Policy, but suffices with naming categories. However, these categories are so broadly defined that the number of potential recipients is effectively unlimited. For example, TikTok states that it shares ‘information and content’ with ‘service providers that support our business’. TikTok gives only two examples ‘such as content monitoring services’. It is therefore not clear to data subjects what other types of service providers are engaged, what role these parties play, where they are based and what personal data they will receive exactly. The same applies to advertisers. TikTok shares ‘aggregate user information with advertisers’. However, TikTok does not make it clear what kind of advertisers are involved, which means that here too, there may be an unlimited number of advertisers.
212. The Privacy Policy also makes it clear that TikTok transfers and stores personal data in countries outside the European Economic Area. However, with regard to the information on transfer (Article 13(1)(f) GDPR), the basic principle is that the third country must be named. This, too, TikTok fails to do, so that data subjects have no idea where their personal data is stored.

*Under (v) Retention periods*

213. TikTok must inform data subjects of the period for which personal data will be stored or, only if this is not possible, the criteria for determining that period (Article 13(2)(a) GDPR and Article 14(2)(a) GDPR). It is important that this information is always formulated in such a way that the

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<sup>92</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, WP260rev.01, p. 43-44.

person concerned can, based on his or her own situation, assess the retention period for specific data and purposes.<sup>93</sup> This requirement is also linked to the minimum data processing requirement of Article 5(1)(c) GDPR and the storage limitation requirement of Article 5(1)(e) GDPR.

214. However, TikTok does not mention any specific retention periods nor does it distinguish between different retention periods and purposes (**exhibit 4a** - Privacy Policy version July 2020, Chapter 8). The retention period is only mentioned in general terms:

*“We retain your information for as long as it is necessary to provide you with the service so that we can fulfil our contractual obligations and exercise our rights in relation to the information involved. Where we do not need your information in order to provide the service to you, we retain it only for so long as we have a legitimate business purpose in keeping such data. (...) In each case, there are also occasions where we may need to keep your data for longer in accordance with our legal obligations or where it is necessary for legal claims.”*

215. This wording is insufficient:

*““It is not sufficient for the data controller to generically state that personal data will be kept as long as necessary for the legitimate purposes of the processing. Where relevant, the different storage periods should be stipulated for different categories of personal data and/or different processing purposes, including where appropriate, archiving periods.”<sup>94</sup>*

216. TikTok therefore does not provide sufficient information on the storage period to data subjects. This makes it impossible to assess compliance with the principles of purpose limitation, data minimisation and storage limitation.

#### *Under (vi) Rights of data subjects*

217. TikTok informs users about their rights under the GDPR in Chapter 6 of the Privacy Policy. This chapter contains a brief description of the right to access, right to erasure, right to rectification, right to data portability and (joint) objection, restriction and withdrawal of consent.

218. However, the information on the rights of data subjects (Article 13(2)(b) GDPR and Article 14(2)(c) GDPR), including the right to withdraw consent (Article 13(2)(c) GDPR and Article 14(2)(d) GDPR), must contain a summary of what the right entails, the way in which the data subject can

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<sup>93</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, WP260 rev.01, p. 44-45.

<sup>94</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, WP260 rev.01, p. 45.

take steps to exercise that right and any limitations on the right.<sup>95</sup> The information provided by TikTok is therefore not complete. After all, TikTok gives information about the applicable rights in only one sentence each time, but fails to provide information about any restrictions. The rights to erasure (Article 17 GDPR), restriction (Article 18 GDPR), portability (Article 20 GDPR) and objection (Article 21 GDPR) are not absolute and depend, for example, on the legal basis on which the processing is carried out.

219. In particular, the right to object to a processing operation must also be explicitly brought to the attention of the data subject, no later than the time of first contact with the data subject, and must be clearly displayed separately from other information. TikTok fails to do this, too. Indeed, the Privacy Policy discusses the right to object in a single paragraph along with the right to restrict and withdraw consent. The right to withdraw consent for ‘making automatic individual decisions’ is indicated in a parenthesis. It also fails to give the information that withdrawal does not affect the lawfulness of the processing based on consent before the withdrawal. However, this is obligatory pursuant to Article 13(2)(c) GDPR and Article 14(2)(d) GDPR.
220. Consequently, TikTok is also not complete and transparent with regard to the rights of data subjects.

*Under (vii) Automated decision-making and profiling*

221. TikTok must inform data subjects of the existence of automated decision-making, including profiling, and, where applicable, provide useful information on the underlying logic as well as the significance and the envisaged consequences of such processing for the data subject (Article 13(2)(f) GDPR and Article 14(2)(g) GDPR).<sup>96</sup>
222. TikTok does not comply with this specific information obligation regarding profiling. Given the core principle of transparency underlying the GDPR, controllers must ensure that they explain to data subjects in a clear and simple manner how the process of profiling or automated decision-making works.<sup>97</sup> For example, Article 13(2)(f) of the GDPR requires TikTok to provide information on automated decision-making and profiling and at least ‘useful information about the underlying logic as well as the significance and envisaged consequences of the processing for the data subject’. This information is lacking. Indeed, the words ‘automated decision-making’ do not appear at all and the word ‘profiling’ appears only once in the context of the right to object. As a result, data subjects are also insufficiently informed about, and will probably not be aware of, automated decision-making and profiling taking place, and thus of the fact that they can object to it.

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<sup>95</sup> Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679, WP260 rev.01, p. 45.

<sup>96</sup> See also recitals 60 and 63 GDPR.

<sup>97</sup> Article 29 Working Party, Guidelines on automated individual decision-making and profiling for the purposes of Regulation (EU) 2016/679, 17/NL, WP251rev.01, p. 19.

### 5.1.11 **Contravention of Article 5 GDPR: data minimisation**

223. The principles of proportionality and subsidiarity play a central role in the system of the GDPR. The principle of proportionality means, inter alia, that no more personal data should be processed than is necessary for the purpose of the processing. This principle of data minimisation is also laid down in Article 5(1) o GDPR: data collection must be limited to the minimum (under c) and data must be deleted as soon as it is no longer needed (under e). Personal data must be adequate, relevant and limited to what is necessary for the purposes for which it is processed. Personal data may only be processed if the purpose of the processing cannot reasonably be achieved by other means.<sup>98</sup> Article 6 GDPR should also be seen in connection with the necessity requirement (margin number 172).
224. With regard to profiling, TikTok must ensure accuracy in all steps of the profiling process, in particular in: collecting data; analysing data; creating a profile of an individual; and applying a profile to make a decision concerning the individual:

*“Controllers need to introduce robust measures to verify and ensure on an ongoing basis that data reused or obtained indirectly is accurate and up to date. This reinforces the importance of providing clear information about the personal data being processed, so that the data subject can correct any inaccuracies and improve the quality of the data.”<sup>99</sup>*

225. As set out in margin numbers 65, 172, 179 and 183, TikTok collects detailed (behavioural) information about children and also combines it with data it receives from third parties for the purpose of personalised advertising, while not meeting the necessity requirement. Data that is not necessary is, by definition, excessive.<sup>100</sup> TikTok therefore processes personal data in contravention of the principle of data minimisation and is therefore in breach of Article 5(1)(c) and (e) GDPR, Article 6 GDPR and Article 25 GDPR.

### 5.1.12 **Contravention of Chapter V GDPR: no valid transfer to third countries**

226. TikTok is in breach of Chapter V GDPR by transferring personal data to third countries without adequate safeguards. It follows from margin number 64 that personal data of data subjects is stored in the United States and in China, through Alibaba or otherwise. As a result, TikTok must comply with US and Chinese legislation, which also makes it possible for these governments to access the personal data of Dutch TikTok users.

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<sup>98</sup> Recital 39 GDPR.

<sup>99</sup> Article 29 Working Party, *Guidelines on automated individual decision-making and profiling for the purposes of Regulation (EU) 2016/679*, 17/NL WP251rev.01, p. 13/14.

<sup>100</sup> Dutch Data Protection Authority, *Data processing by the municipality of Zaanstad in the assistance provision process. When using the self-reliance matrix, is the necessity requirement met?* p. 21.

227. In the Privacy Policy, TikTok states that data is stored outside the EEA, but not in which countries. The August 2018 version specifically mentioned the United States, Singapore, Japan and China (**exhibit 4f** - Privacy Policy Version 2018). TikTok also states in the current Privacy Policy that it shares personal data with ‘other members, subsidiaries or affiliates of our group’. It is therefore evident that data is transferred to at least the United States (TikTok Inc., 10100 Venice Blvd, Suite 401, Culver City, CA 90232, USA), Singapore (TikTok Pte. Ltd., 1 Raffles Quay, #26-10, South Tower, Singapore 048583) and China (**exhibit 9**).
228. Chapter V of the GDPR regulates the transfer of personal data to third countries and sets high requirements for this. Pursuant to Article 44 GDPR, the transfer of personal data to a third country must comply with Chapter V of the GDPR and, in addition, with the conditions set out in the other provisions of the GDPR.
229. If the European Commission has not taken an adequacy decision (Article 45(3) GDPR), transfer of personal data to a third country may only take place if the controller provides appropriate safeguards and data subjects have enforceable rights and effective legal remedies. As the CJEU clarified, these appropriate safeguards must be able to ensure that individuals whose personal data is transferred enjoy a level of protection that is broadly equivalent to that guaranteed within the EEA.<sup>101</sup> The provisions of Chapter V aim to ensure the continuity of the high level of such protection in the case of transfer of personal data to a third country<sup>102</sup> and give effect to the explicit obligation in Article 8(1) of the Charter to protect personal data.<sup>103</sup>
230. Appropriate safeguards may be provided, inter alia, on the basis of standard data protection clauses adopted pursuant to Article 46(2)(c) of the GDPR. TikTok states in its Privacy Policy that it transfers personal data to a third country on the basis of these standard contractual clauses in any case.
231. However, in line with the CJEU judgment, it is the responsibility of TikTok, as the data exporter, to verify whether the level of protection required by EU law is met in the relevant third country in order to determine whether the safeguards of the standard contractual clauses can be observed in practice.<sup>104</sup> Where this is not the case, TikTok must assess whether additional measures can be taken to provide a level of protection broadly equivalent to that provided by the EEA, and whether the legislation of the third country will not prevent these additional

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<sup>101</sup> CJEU 16 July 2020, C-311/18, ECLI:EU:C:2020:559 (*Schrems II*), para. 96.

<sup>102</sup> CJEU 16 July 2020, C-311/18, ECLI:EU:C:2020:559 (*Schrems II*), para. 93.

<sup>103</sup> CJEU 6 October 2015, C-362/14, ECLI:EU:C:2015:650 (*Schrems I*), para. 72.

<sup>104</sup> Although the CJEU interpreted Article 46(1) GDPR in the context of the validity of the standard contractual clauses, this interpretation applies to any transfer to third countries using one of the instruments referred to in Article 46 GDPR.

measures from being effective.<sup>105</sup> Additional measures may include encryption, pseudonymisation or separation of data processing operations.<sup>106</sup>

232. The EDPB has also formulated four essential safeguards to assess, in the context of surveillance measures by public authorities in a third country, whether such interference would be acceptable under the Charter: (i) the processing must be based on clear, precise and accessible rules; (ii) the necessity and proportionality of the legitimate objectives pursued must be demonstrated; (iii) there must be an independent oversight mechanism; (iv) individuals must have effective legal remedies.<sup>107</sup>
233. In the case of the United States, the European Court of Justice has already ruled that the level of protection is insufficient.<sup>108</sup> Indeed, certain surveillance programmes entail restrictions on the protection of personal data which are not framed in such a way as to meet requirements that are broadly equivalent to those required under European Union law and do not confer on data subjects any enforceable rights vis-à-vis the US authorities.<sup>109</sup> The same applies to China, where privacy and data protection are virtually non-existent:

*“As the current literature widely reports, although sectoral data protection laws do exist in China and some legal remedies may theoretically apply to EU citizens, in reality, the legal order seems far from ‘adequate’ as prescribed by EU law: democratic conditions for the respect of human rights, such as independent courts, legal certainty and adequate means of enforcement cannot be guaranteed in China today.”<sup>110</sup>*

*“The Chinese government maintains almost unlimited and unfettered access to private sector data, through a variety of regulatory requirements.”<sup>111</sup>*

234. For both the United States and China, the safeguards mentioned in margin number 232 are not met. Local legislation allows for overly broad surveillance measures and data subjects are not adequately protected when accessing personal data of organisations. TikTok may therefore not simply transfer personal data to these countries and must take additional measures to ensure safe transfer. There is no evidence that TikTok has taken these additional measures (margin number 64). TikTok does not mention this either in its Privacy Policy. This means that the

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<sup>105</sup> CJEU 16 July 2020, C-311/18, ECLI:EU:C:2020:559 (*Schrems II*), para. 133.

<sup>106</sup> EDPB, *Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data*.

<sup>107</sup> EDPB, *Recommendations 02/2020 on European Essential Guarantees for surveillance measures*, p. 5.

<sup>108</sup> CJEU 6 October 2015, C-362/14, ECLI:EU:C:2015:650 (*Schrems I*), paras. 184/185 and 192.

<sup>109</sup> Section 702 of the Foreign Intelligence Surveillance Act, Executive Order 12333 and Presidential Policy Directive 28.

<sup>110</sup> European Parliamentary Research Service, *Personal data transfers to China*, PE 583.836, available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2016/583836/EPRS\\_ATA\(2016\)583836\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2016/583836/EPRS_ATA(2016)583836_EN.pdf).

<sup>111</sup> I. Rubinstein, G. Nojeim & R. Lee, ‘Systemic Government Access to Personal Data: A Comparative Analysis’, *International Data Privacy Law*, Volume 4, Issue 2, May 2014, p. 98.

standard contractual clauses cannot provide an adequate safeguard for the transfer of personal data by TikTok. The transfer of personal data by TikTok is therefore contrary to the GDPR and thus unlawful.

### **5.1.13 Contravention of Article 32 GDPR: security of personal data**

235. Pursuant to Article 32 GDPR, TikTok must take appropriate technical and organisational measures to adequately secure personal data. Personal data must be processed in a manner that ensures appropriate security, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage (recital 39 GDPR). This principle of integrity and confidentiality is also laid down in Article 5(1)(f) GDPR.
236. To safeguard security and prevent the processing of personal data from breaching the GDPR, the controller is required, pursuant to Article 32 GDPR, to assess the risks inherent in the processing and implement measures to mitigate the risks. Such measures must safeguard an appropriate level of security, taking into account the state of the art and the cost of implementation, in relation to the risks and the nature of the personal data to be protected. The ‘nature of the personal data to be protected’ must take into account, inter alia, the fact that the personal data concern people from vulnerable groups.<sup>112</sup> TikTok processes (sensitive) personal data of children who, as vulnerable individuals, are entitled to specific protection with respect to their personal data.
237. In order to determine what appropriate measures are as referred to in Article 32 GDPR, the Dutch Data Protection Authority uses the ‘Personal Data Protection’ policy rules<sup>113</sup> in connection with generally accepted security standards within the practice of information security, such as the Code of Practice for Information Security. The Dutch Data Protection Authority also uses the interpretation of open standards by the Standardisation Forum and the Standardisation Board to determine what appropriate measures are.
238. When examining and assessing the security of personal data, the DDPA uses as a starting point a number of security measures that are common and necessary in many situations in one form or another. It concerns the following measures:<sup>114</sup>
- a) Information security policy document;
  - b) Assigning responsibilities for information security;

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<sup>112</sup> Dutch Data Protection Authority, *Policy rules on the protection of personal data*, February 2013, p. 14.

<sup>113</sup> Dutch Data Protection Authority, *Policy rules on the protection of personal data*, February 2013. These guidelines were issued by the College Bescherming Persoonsgegevens, the predecessor of the Dutch Data Protection Authority. Because the security standard in the GDPR does not differ substantially from the standard in the Personal Data Protection Act, these guidelines are still relevant.

<sup>114</sup> Dutch Data Protection Authority, *Policy rules on the protection of personal data*, February 2013, p. 16-18. These measures are based on and further elaborated in NEN-ISO/IEC 27002:2007.

- c) Security awareness;
- d) Physical security and equipment security;
- e) Access security;
- f) Logging and monitoring;
- g) Correct processing in application systems;
- h) Management of technical vulnerabilities;
- i) Incident management;
- j) Handling of data breaches and security incidents;
- k) Continuity management;
- l) Personal data protection and confidentiality; and
- m) Confidentiality agreements.

239. As explained, in 2020, cyber research firm Check Point Research discovered vulnerabilities in TikTok's security that allowed hackers to access user accounts and manipulate their content (margin number 62). The research agency Penetrum also published a security analysis of TikTok which identified various security risks (margin number 64). The security risks included the use of unsafe hash algorithms, the possibility for attackers to install malware and serious risks related to webview and the unsafe use of SSL/TLS, encryption protocols that secure communication between computers.

240. It follows from the above that TikTok has not complied with the security obligation under Article 32 GDPR. As hackers have gained unauthorised access to the personal data of children that TikTok processes, TikTok should also have reported this personal data breach (Article 4(12) GDPR) to the Dutch Data Protection Authority and the data subjects, which does not appear to be the case. In this case, TikTok is also in breach of Articles 33 and 34 GDPR.

## 5.2 Contravention of Section 11.7a Tw

241. In addition to the GDPR, Section 11.7a Tw also applies to the processing of personal data by TikTok, as TikTok stores information from or accesses information in a user's peripherals. TikTok does this by, among other things, placing cookies and using similar technologies (**exhibit 4a**; Privacy Policy Chapter 2. Cookies):

*“Cookies and similar technologies (e.g. pixels and ad tags) (collectively, “Cookies”) are small files which, when placed on your device, enable us to collect certain information, including personal data, from you in order to provide certain features and functionality. We and our service providers and business partners use Cookies to collect data and recognise you and your device(s) on the Platform and elsewhere across your different devices. We do this to better understand the effectiveness of the advertising on the Platform and to enhance your user experience. To learn more about cookies please see our Cookies Policy.”*

242. The Dutch language Privacy Policy refers to an English language 'TikTok Platform Cookies Policy' (**exhibit 6**) (the '**Cookie Policy**'). This is a different cookie policy from the one referred to in the cookie banner of the website: 'Cookies Policy for the Websites of TikTok' (**exhibit 7**) (the '**Website Cookie Policy**'). The Website Cookies Policy 'applies to the Websites, but not to our services, applications, products and content, each of which is subject to its own separate policy/notifications'. The TikTok service can be used via both the app and the website. As the Website Cookie Policy does not apply to 'TikTok services', only the Cookies Policy applies to the use of the TikTok App (including the web and desktop versions).

243. The Cookies Policy shows, among other things, for which purposes TikTok places cookies, whereby in this context similar technologies are meant, such as pixels and ad tags:

*“Identification and security: We recognise you when you return to our Platform to make sure that you are the right user and to prevent activity that violates our policies.*

*For example, we check what country you are using the TikTok app from to detect if someone may be trying to fraudulently access your account.*

*Content personalisation: We use these technologies to ensure that we can serve you with personalised content.*

*For example, each User is given a unique TikTok ID number. We use this to provide you with tailored content that will be of interest to you.*

*Remembering your preferences: We need to remember the settings you have chosen on the Platform so that they work how you want them to.*

*For example, we use these technologies in order to remember what languages you want to see content in, the privacy settings you apply to your account and/or videos and your Digital Wellbeing choices.*

*Functionality: Functionality tracking technologies help to make the Platform work more efficiently and to improve and optimize your experience.*

*For example, we determine which device you use, the software version and the screen dimensions so that we can ensure the TikTok app functions correctly. We also determine whether your battery is running low so that we can optimise the TikTok app and we make sure that content loads and plays correctly.*

*Analytics: We use analytics tracking technologies to analyse how you use the Platform, including which pages you view most often, how you interact with the content, measure any errors that occur and test different design ideas. The information is used to report and evaluate your activities and patterns as a user of the Platform.*

*For example, we may test new video creation features to help us decide which features users prefer.*

*Advertising and measurement: Our Platform uses advertising and measurement tracking technologies. These tracking technologies help us and our advertisers show you relevant advertising and measure the performance of ad campaigns. We also use these technologies to promote TikTok on the other platforms and websites and measure their effectiveness.*

*For example, we will learn from our advertiser about whether you viewed their products or bought something so we can learn how effective the ad was. If you've already shown interest in an ad, we might show you it again, or we might limit the number of times we show it to you."*

244. It should be noted that Section 11.7a(4) Tw contains a presumption of evidence, on the basis of which the use of tracking cookies is considered to constitute processing of personal data. This legal presumption means that TikTok, as the user of tracking cookies, must also comply with the rules of the GDPR, in addition to the rules in Section 11.7a Tw.

### **5.2.1 Territorial applicability**

245. Because the purpose of Section 11.7a Tw is to protect users, this provision applies to anyone who wishes to place data on peripheral equipment of users in the Netherlands, or to read data stored on that equipment, irrespective of where that party is based.<sup>115</sup> Whether the website or application on which the cookies are placed targets Dutch users is therefore relevant for the applicability of Section 11.7a Tw. Whether a website or application targets Dutch users can be inferred from, for example, the nature of the information on it or the availability of the website or application in the Dutch language. The extension of a domain name (such as .com), is not decisive.

246. TikTok obviously focuses on Dutch users when reading information from peripheral equipment. Information is read from the peripheral equipment of users who visit the Dutch website and the application is available in the Dutch App store and in the Dutch language. TikTok consequently falls under the standard of Section 11.7a Tw on the basis of which it must comply with the information and consent requirements arising from it.

### **5.2.2 Information and consent**

247. The basic premise of Section 11.7a(1) Tw is that placing and reading cookies is only permitted on condition that the user concerned (a) has been provided with clear and complete information in

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<sup>115</sup> *Parliamentary papers I 2011/12, 32549, E, p. 7.*

accordance with the GDPR, in any case with regard to the purposes for which this information is being used, and (b) has given his or her consent for this.

248. Only cookies that are technically necessary to carry out the communication or to provide the information society service requested by the internet user are exempt. The background to this exception is that when cookies are used for these purposes, there will be little impact on the privacy of the user.<sup>116</sup> The same exception applies to cookies that are used *solely* to obtain information regarding the quality or effectiveness of an information society service. In order to fall under the exception for this category of cookies, it is also always required that there should be no impact, or only a minor impact, on the personal privacy of the subscriber or user concerned. This is in any event not the case with tracking cookies, which track surfing behaviour in order to create interest profiles of users.<sup>117</sup> Nor is it the case if analytical cookies are used to create a profile of the internet user, even if this is done by a third party.
249. TikTok uses cookies to create interest profiles of users in order to personalise content, display personalised advertisements and optimise its advertising offerings. TikTok creates profiles by using a combination of tracking techniques. The profile based on the analysis of cookies stored on the terminal equipment of the data subjects is enriched with aggregated data that are inferred from the behaviour of the data subjects when using the TikTok App (contextual advertising<sup>118</sup> and segmented advertising<sup>119</sup>) and data that TikTok receives from “advertisers and other partners”. The use of cookies for such purposes falls under Section 11.7a(1) Tw.

#### 5.2.2.1 *Obligation to provide information*

250. Section 11.7a(1) Tw provides that, prior to obtaining consent for placing or reading cookies, the user is provided with clear and complete information in accordance with the GDPR, at any rate regarding the purposes for which this information will be used.
251. The Article 29 Working Party has indicated some examples of information that should at the very least be provided where cookies are used for personalised advertising. Internet users must be clearly informed as to who places and reads cookies and who has access to and is responsible for the data obtained from them. It must also be made clear whether cookies are used to create profiles, what type of information is collected to create such profiles, whether these profiles are used to offer targeted advertising and whether the user's surfing behaviour is monitored because the user can be recognised by the cookie on his computer on several websites.<sup>120</sup> A simple

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<sup>116</sup> *Parliamentary papers II 2013/14*, 33 902, no. 3, p. 6.

<sup>117</sup> *Parliamentary papers II 2013/14*, 33 902, no. 3, p. 8.

<sup>118</sup> Contextual advertising is a targeted form of advertising based on the content that is being viewed at that moment by the data subject.

<sup>119</sup> Segmental advertising is a targeted form of advertising based on data known about the data subject (age, gender, location, etc.) which the data subject provided at the time of registration.

<sup>120</sup> Article 29 Working Party, *Opinion 2/2010 on online behavioural advertising*, 00909/10/NL, WP 171, p. 10.

explanation should be given of the ways in which a cookie is used to create profiles for the purpose of targeted advertising.

252. This information should be “as user-friendly as possible”, “providing a minimum of information on the screen, interactively, highly visible and understandable”. This crucial information may not be hidden in general terms and conditions and/or privacy statements.<sup>121</sup>
253. When opening the TikTok App, TikTok asks the user to agree to the cookie policy (**exhibit 8**). If the user is a child, he or she will see the pop-up shown in margin number 52 after completing the registration procedure. However, the essential, minimum information necessary for asking for consent (margin numbers 164-166) is missing. Furthermore, TikTok does not provide any information at all about the use of tracking cookies, profiling or personalisation of content. Nor does this information appear in the Cookies Policy, or at any rate not in a clear/understandable form.
254. TikTok does say things like “we can serve you with personalised content”, “show you relevant advertising and measure the performance or advertising campaigns”, and “to promote TikTok on the other platforms and websites and measure their effectiveness”. The Cookies Policy does not however contain any concrete information about profiling through the use of cookies, the way in which users are tracked, cookie names or the lifespan of the cookies. It is therefore not clear from the Cookies Policy what data TikTok collects using the cookies. Nor is this information made clear after reading the Privacy Policy because TikTok does not clarify there exactly which data it obtains through the use of cookies.
255. It is only when users manage their settings (margin number 52) that they read that they can be shown personalised ads from TikTok and partners based on their activity on and outside of TikTok. Users are also informed further about advertisements based on data obtained from partners and other advertisers. This information should however be provided to users at the time when consent is sought. TikTok accordingly fails to comply with its obligation to provide information pursuant to Section 11.7a Tw and Articles 12, 13 and 14 GDPR.

#### 5.2.2.2 *Consent*

256. For the definition of consent within the meaning of Section 11.7a Tw, please refer to the definition in Article 4(11) GDPR. As set out in margin number 142, consent is 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. For the legal framework with regard to these requirements, see margin numbers 142-171.

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<sup>121</sup> Article 29 Working Party, *Opinion 2/2010 on online behavioural advertising*, 00909/10/NL, WP 171, p. 21.

257. In addition to the requirements described above for valid consent, the consent of children, also with regard to cookies, must be given by their parents or other legal representative. This means that TikTok must inform parents about the collection and use of children's data and obtain their consent before further using their data to track children's behaviour for commercial purposes. In light of the above, and also taking into account the vulnerability of children, the Article 29 Working Party is of the opinion that organisations should not set up any interest groups at all for the purpose of advertising based on children's surfing behaviour or aimed at influencing children.<sup>122</sup> In this context, the GDPR also prohibits automated decision-making concerning a child (Recital 71). However, TikTok does this in fact whereby it acts in violation of these basic principles. Furthermore, in contravention of the GDPR and UAVG, TikTok does not request any parental consent either (paragraph 5.1.6.1).
258. It has already been noted in margin number 144-149 that consent cannot be given freely. Furthermore, the user can only consent to personalised advertising based on his activity in the app and data received from third parties. Data subjects cannot separately consent to either one of these, although a user can withdraw consent for either one of these separately in his account settings (margin number 52). Accordingly, TikTok does not obtain free consent. In addition to the independent obligation to provide information, prior information is also a requirement for valid consent. As explained above, this information is insufficient, which means that informed consent is also not given. Finally, this consent is neither specific (margin numbers 150-153) nor unambiguous (margin numbers 168-171).
259. TikTok is therefore acting in breach of Article 5(1)(a) GDPR, Article 6 GDPR, Articles 12, 13 and 14 GDPR and Section 11.7a Tw, given that it places and reads cookies without valid consent and does not (adequately) comply with the obligation to provide information.

### 5.3 Consumer Law

260. The set-up of the TikTok App and the content of TikTok's Terms of Service, Virtual Items Policy and Privacy Policy, TikTok are in breach of not only the GDPR and Section 11.7a Tw but also mandatory European and Dutch Consumer Law.

#### 5.3.1 *Unclear and unintelligible terms: violation of obligations to provide information*

261. Section 2b of Title 5 of Book 6 DCC is applicable to the agreements between the Injured Parties and TikTok for the use of the TikTok App. The fact is that TikTok acts as a trader, the Injured Parties as consumers and the contract qualifies as a distance contract (see the definitions in Article 6:230g DCC).

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<sup>122</sup> Article 29 Working Party, *Opinion 2/2010 on online behavioural advertising*, 00909/10/NL, WP 171, p. 20.

262. Article 6:230m DCC obliges the trader to provide the consumer with certain information in a clear and intelligible manner before the consumer is bound by a distance contract, or by an offer made for that purpose. The following information must be provided clearly and intelligibly:
- n) the main characteristics of the goods or services, to the extent that this is appropriate in view of the medium used and of the goods or services (Article 6:230m(1)(a) DCC); and
  - o) the total price of the goods or services, including all taxes, or, if the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated and, where appropriate, any additional freight, delivery or postal charges and any other costs or, if such charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable (Article 6:230m(1)(e) DCC).
263. Section 3A of Title 3 of Book 6 DCC, concerning unfair commercial practices, is also applicable to TikTok's practices. Article 6:193d(2) and (3) DCC provides that the concealment of essential information about the services or the provision of this information in an unclear, unintelligible or ambiguous manner, in so far as this may cause the consumer to take a different decision with regard to the transaction, qualifies as a misleading omission.<sup>123</sup> Article 6:193f(b) DCC provides that the information referred to in Article 6:230m(1)(a) DCC must be regarded as essential within the meaning of Article 6:193d(2) DCC.<sup>124</sup>
264. Article 6:238(2) DCC has a similar provision and provides that terms must be drawn up in a clear and intelligible manner. If there is any doubt, the most favourable interpretation of the term for the consumer will prevail.
265. With regard to the "clear and intelligible" requirement, the CJEU has ruled that contractual terms must not only be linguistically and grammatically intelligible to the consumer, but that a consumer must be able to foresee the economic consequences arising from the term on the basis of clear and intelligible criteria.<sup>125</sup> The terms must also be intelligible and clear to the relevant target group and must be communicated in a manner appropriate to the target group.<sup>126</sup> This basic principle is laid down in Article 6:193a(2) DCC and is likewise referred to in Recital 34 of the Consumer directive:

*"In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or*

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<sup>123</sup> Article 7 of Directive 2005/29/EC on Unfair Commercial Practices.

<sup>124</sup> See also the Guidelines for the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, sections 1.4.10 and 3.4.1.

<sup>125</sup> CJEU 30 April 2014, ECLI:EU:C:2014:282 (*Arpad Kasler and Hajnalka Kaslerne Rabai v OTP Jelzalogbank*) para. 75.

<sup>126</sup> CJEU 23 April 2015, ECLI:EU:C:2015:262 (*van Hove v CNP Assurances*) paras. 40 - 50.

*psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. (...)"*

#### 5.3.1.1 Privacy Policy

266. As described in paragraph 5.1.10, TikTok's Privacy Policy does not comply with TikTok's transparency obligations under the GDPR. The lack of the necessary information and/or incorrect or unclear information about this also results in the average consumer of the TikTok App – minors, particularly children and young teenagers – having insufficient insight into how TikTok handles their personal data. As a result, in the pre-contractual phase (the moment of registration), TikTok does not inform the consumer of the main features of the TikTok App, at any rate not in a sufficiently clear and intelligible manner. This is a breach of Article 6:230m(1)(a) DCC and 6:193d DCC.
267. The fact is that TikTok's use of personal data, which is essential information, is one of the main features of the TikTok App. Specifically, on the basis of personal data, including data such as personal interests, age and gender, TikTok can provide users with targeted video content. The collection of personal data and the profiling of users is moreover an important part of its advertising service. Providing incomplete and unclear information means that the consumer does not have sufficient opportunity to make a well-informed choice: am I going to use the TikTok App or not? The fact that information on the processing of personal data for commercial purposes must be regarded as essential is also recognised in the guidelines to the Unfair Commercial Practices Directive.<sup>127</sup> Failure to provide this essential information may lead the consumer to make a different decision about whether or not to use the app or whether or not to create digital credits on it.

#### 5.3.1.2 Terms of Service and Virtual Items Policy

268. In its Terms of Service and Virtual Items Policy, TikTok also breaches its obligations to provide information under Article 6:230m DCC and Article 6:193d(2) and (3) DCC. These documents contain clear information about the main characteristics of the service and essential information that the consumer needs for making an informed decision, including information about guarantees, liability, IP licences and the purchase and payment of Coins, Gifts and Diamonds.
269. The documents are lengthy and do not contain a summary or table of contents for minors. The Terms of Service and the Virtual Items Policy are 21 pages and 6 pages long, respectively. Both documents also contain a lot of legal text which in itself makes them completely unclear and unintelligible for children and young teenagers, and accordingly voidable.

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<sup>127</sup> Guidelines on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, sections 1.4.10 and 3.4.1.

270. Moreover, TikTok only offers its Open Source Policy, Intellectual Property Policy, Virtual Items Policy and Law Enforcement Policy in English, which also makes them in any event completely unclear and unintelligible for Dutch children and young teenagers, and voidable for this reason too. This view is supported by a judgment of the *Kammergericht* Berlin, the highest judicial authority of the federal state of Berlin. The *Kammergericht* ruled in a case against WhatsApp that its English terms of service and privacy policy were unfair because German consumers could not be expected to understand legal English. The provisions in the English Terms of Service and the Privacy Policy were void on that basis, irrespective of whether the purport and content of the individual clauses would have been valid and enforceable if they had been drafted in German.<sup>128</sup>
271. The fact that these documents are only available in English moreover affects the intelligibility and clarity of the Dutch Terms of Service. For instance, the Virtual Items Policy is an important part of the Terms of Service. In this regard, TikTok also states in its Terms of Service that the purchase of coins in the TikTok App is subject to its "Virtual Items Policy". TikTok then refers to its English version of this (**exhibit 3a**, p. 4). The same goes for the reference to the Open Source Policy on page x of the Terms of Service. Because the Virtual Items Policy is unclear and incomprehensible for young users and is inextricably linked to the Terms of Service, the Terms of Service are also unclear and incomprehensible and are accordingly voidable.
272. The content and scope of the Dutch provisions in the Terms of Service (*Gebruiksvoorwaarden*) in themselves are incomprehensible and unclear. Consequently, Dutch children and young teenagers would not understand whether or not the Terms of Service apply to them at all. The first sentence under the title of Terms of Service actually states the following (**exhibit 3a**):
- "If you are a user having your usual residence in the EEA, Switzerland or the United Kingdom)"*
273. Young users cannot be expected to understand what the acronym EEA stands for, let alone what the European Economic Area is. TikTok therefore already fails immediately to clearly state that the Terms of Service apply to Dutch users, although it does register precisely – and considers it necessary for its own purposes to know – where its users are located and in what language their browser is set.
274. Article 9 of the Terms of Service communicates information in an unclear and unintelligible manner regarding TikTok's - absolutely essential - use of user-generated content, including videos made by the users themselves. The article runs to nearly 6 pages of text and the provisions are mostly a list of complicated legal texts (**exhibit 3a**):

*"(...)Except as expressly provided otherwise in these Terms, you or the owner of your User Content still own the copyright and any other intellectual property rights in User Content*

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<sup>128</sup> Kammergericht Berlin 8 April 2016, Az. 5 U 156/14 (*vzbv v WhatsApp*).

*sent to us, but by submitting User Content via the Services, you hereby grant (i) to us and our affiliates, agents, services providers, partners and other connected third parties an unconditional irrevocable, non-exclusive, royalty-free, fully transferable (including sub-licensable), perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise others users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented; (ii) to other users of the Services an unconditional irrevocable, non-exclusive, royalty-free, perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, download, publish and/or transmit, and/or distribute some or all of your User Content in any format and on any platform, either now known or hereinafter invented for the purpose of generating other User Content or viewing your User Content for entertainment or other private, non-commercial purposes. (...)"*

275. What rights of use the user actually grants to TikTok here is unintelligible for adults who do not have a legal background, let alone for a child or young teenager.

### **5.3.2 Unreasonably onerous provisions**

276. Furthermore, the content of the Terms of Service and the Virtual Items Policy, or at any rate the content of a number of their provisions, qualifies as unreasonably onerous within the meaning of Article 6:233(a) DCC.

#### *5.3.2.1 Terms of Service*

277. The provisions of Article 6 of the Terms of Service are extremely vague and broadly defined. TikTok hereby grants itself a unilateral right to suspend or terminate the user account and/or access to the TikTok App at its own discretion, without specifying the grounds on which TikTok may do so (**exhibit 3a**):

*"We reserve the right to temporarily or permanently suspend or terminate your user account or impose limits on or restrict your access to parts or all of the Services with or without notice at any time for any or no reason including (...)"*

278. The unilateral right to terminate a user account or access to the TikTok App "for any or no reason" has serious, adverse consequences for the consumer, which is unreasonably onerous pursuant to Article 6:233(a) DCC. Moreover, the power to suspend which TikTok assumes here is considerably broader than the statutory power to suspend provided by Article 6:52 DCC, according to which there has to be a sufficient connection to justify the suspension. Accordingly, the provision in the Terms of Service is also unreasonably onerous pursuant to Article 6:236(c) DCC (the black list).

279. Furthermore, the licence that children and young teenagers grant to TikTok in Article 9 is not only incomprehensible and unclear but also extremely far-reaching and prejudicial for them. They grant TikTok:

*"(...) an unconditional irrevocable, non-exclusive, royalty-free, fully transferable (including sub-licensable), perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise others users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented; (ii) to other users of the Services an unconditional irrevocable, non-exclusive, royalty-free, perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, download, publish and/or transmit, and/or distribute some or all of your User Content in any format and on any platform, either now known or hereinafter invented (...)"*

280. Users accordingly grant a licence that is unlimited in every respect: geographically, in time and in possibilities for use. TikTok is free to adapt and alter the content in any way it sees fit, without the children concerned or their parents being allowed any control over it thereafter. Furthermore, the user does not receive any compensation for this. Moreover, the licence applies not only to TikTok but also to "our affiliates, agents, service providers, partners and other connected third parties". This description has deliberately been kept extremely broad to enable a non-exhaustive list of TikTok's partners to be on this licence. Finally, the licence also applies to other users of the TikTok App.
281. With regard to Facebook and Twitter, the Paris court of first instance has previously ruled that such broad and vague licences significantly disrupts the balance between the rights and obligations of the parties, to the detriment of consumers. In those two cases, Twitter and Facebook had negotiated for themselves an absolute, royalty-free, worldwide licence to transfer and sublicense all the content published by their users.<sup>129</sup>
282. The licensing provision in Article 9 is thus unreasonably onerous and accordingly voidable.
283. The limitation of liability, included in Article 12 of the Terms of Service, is also unreasonably onerous. TikTok excludes its liability as follows:

*"SUBJECT TO THE PARAGRAPH ABOVE, WE SHALL NOT BE LIABLE TO YOU WHETHER IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE), UNDER ANY STATUTE OR OTHERWISE UNDER OR IN CONNECTION WITH THESE TERMS OR THE PROVISION OR RECEIPT OF THE SERVICES FOR : (I) ANY LOSS OF PROFIT (II) ANY LOSS OF GOODWILL; (III) ANY LOSS OF*

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<sup>129</sup> TGI Paris 7 August 2018, 14/07300 (*UFC- Que Choisir v Twitter*) and TGI Paris 9 April 2019, No 14/07298 (*UFC- Que Choisir v Facebook*).

*OPPORTUNITY; (IV) ANY LOSS OF DATA; (V) ANY LOSS OF BUSINESS; (VI) ANY BUSINESS INTERRUPTION; (VII) ANY LOSS OF BUSINESS REPUTATION; OR (VIII) ANY INDIRECT OR CONSEQUENTIAL LOSSES OF WHATEVER NATURE."*

284. All the losses listed are therefore excluded, regardless of whether the act or omission by TikTok qualifies as tort, an event of default or other breach of a legal obligation. Article 12 also provides that this exclusion applies regardless of whether there is negligence.

285. To the extent that TikTok is liable, it limits this loss to a maximum of (i) the amount paid by the user to TikTok in the twelve months preceding the claim or (ii) € 100:

*"SUBJECT TO THE FIRST PARAGRAPH OF THIS SECTION 12, OUR TOTAL AGGREGATE LIABILITY WHETHER IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE), UNDER ANY STATUTE OR OTHERWISE UNDER OR IN CONNECTION WITH THESE TERMS AND THE PROVISION AND RECEIPT OF THE SERVICES WILL BE LIMITED TO THE HIGHER OF: (I) THE AMOUNT PAID BY YOU TO TIKTOK WITHIN THE 12 MONTH PERIOD IMMEDIATELY PRECEDING YOUR CLAIM AGAINST TIKTOK; OR (II) € 100.00."*

286. This limitation of liability also applies to all acts or omissions on the part of TikTok.

287. The provision is extremely prejudicial to the consumer who is thus unable to recover any actual sustained losses from TikTok, and significantly upsets the balance between the contracting parties, also in view of the other content of the Terms of Service, including the exclusion of warranties in Article 11. Such an extensive limitation of liability should be presumed to be unreasonably onerous under Article 6:233a in conjunction with Article 6:237(f) DCC (grey list).<sup>130</sup>

288. To the extent that TikTok disputes the unreasonably onerous nature of the limitation of loss under Article 12 of its Terms of Service, SOMI points out that it is also perfectly clear from the circumstances that this limitation is unreasonably onerous. TikTok is a major, professional global player with colossal revenues. This is in stark contrast to the position of the individual users of the App, who are natural persons, consumers and often minors. TikTok may also be expected to be well insured against claims from its users, while the losses that the users themselves could occur are impossible to insure in this case. It would be unreasonably onerous in that context if the consumer could not recover his actual loss from TikTok.

289. In addition, the limitation clause is part of general terms of service that were drafted unilaterally by TikTok and are therefore highly prejudicial to the consumer. When the Terms of Service were created, the user had no influence at all over the relevant clause. No further evidence is to be

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<sup>130</sup> See also Article 3(3) of the Unfair Terms in Consumer Contracts Directive, under B of the Annex.

found anywhere indicating that the interest of the consumer involved was weighed against TikTok's interest.

- 290. Finally, the wording of the limitation of liability for users, especially young children and teenagers, is also so vague and formulated in such legal terms that they would never be able to foresee its (economic) consequences.
- 291. In view of this, the entire limitation of liability under Article 12 of the Terms of Service must be deemed to be unreasonably onerous. This provision is accordingly voidable.
- 292. Alternatively, to the extent that the limitation of liability is not voidable under Article 6:233(a) in conjunction with Article 6:237(f) DCC, there is in this case wilful intent or wilful recklessness on TikTok's part, meaning that it is not entitled to rely on the provision. As explained in this summons, TikTok has already long been aware of the violations committed by the TikTok App and of the losses consequently caused by it. Yet it is taking little or no action, at any rate, not voluntarily, to cease these violations and limit the loss. As a second alternative, in view of the circumstances set out above, application of the limitation clause must be deemed unacceptable according to the standards of reasonableness and fairness, and it should therefore be deemed not to apply to all the Injured Parties (Article 6:248(2) DCC).

#### 5.3.2.2 *Virtual Items Policy*

- 293. The Virtual Items Policy, available only in English, is also full of vague and ambiguous provisions which significantly disrupt the balance between the parties and have extremely adverse consequences for the consumer and are thus unreasonably onerous (**exhibit 5**).
- 294. With regard to the Coins, TikTok reserves the right “to manage, regulate, control, modify and/or eliminate” the Coins if it has a “valid reason”, including “legal, security or technical reasons”. TikTok accordingly applies a vague and non-exhaustive list of reasons to modify the use of Coins for a particular user or even simply to remove the Coins as it sees fit. In doing so, it excludes any liability in that case.
- 295. With regard to the conversion rate of Coins to Gifts, TikTok reserves the right to modify or even eliminate it in general or in a specific case, as it sees fit:
 

*“You agree that we have the absolute right to manage, regulate, control, modify and/or eliminate such exchange rate as it sees fit to its sole discretion, in any general or specific case (...)”*.
- 296. TikTok does not even need a valid reason for this, but rather it can simply determine this completely independently. In this case too, any liability of TikTok is excluded.

297. The provisions on earning Diamonds are also deliberately vague and formulated highly unilaterally in TikTok's favour. Thus, TikTok once again has the right to change or eliminate the use of Diamonds as it sees fit, as well as the right to change the exchange rate of Gifts to Diamonds as it sees fit, without being liable for this and without notifying the user about this:

*"Diamonds are a measurement of the popularity of the relevant User Content. Diamonds are based on the Gifts a Content Provider receives, at a rate of conversion to be determined by us from time to time in its absolute and sole discretion."*

*"You agree that we have the absolute right to manage, regulate, control, modify and/or eliminate such Diamonds as it sees fit in its sole discretion, in any general or specific case, and that we will have no liability to you based on its exercise of such right."*

298. Finally, TikTok's influence on the exchange rate of Diamonds to US Dollars is also one-sided and arbitrary, as TikTok itself sees fit. The user has no insight into the exchange rate and TikTok may change or discontinue the possibility of exchanging Diamonds at its own discretion, as well as eliminate the compensation scheme for Diamonds at any time, without being liable in any way:

*"A Content Provider can choose, by selecting the relevant options in their user account, to withdraw Diamonds in exchange for monetary compensation (to be denominated in US dollars). The applicable monetary compensation will be calculated by us based on various factors including the number of Diamonds a user has accrued."*

*"You agree that we have the right to manage, regulate, control, modify and/or eliminate such withdrawal feature where we have a valid reason to do so such as where we reasonably believe you have violated this Policy, you are in breach of any applicable law or regulation or for legal, security or technical reasons, and that we will have no liability to you based on our exercise of such right."*

*"We may cancel the operation of the Diamond incentive at any time. If we cancel the Diamond incentive, we shall make reasonable efforts to provide you with prior notice to enable you to convert your Diamonds into cash. Where we have a valid reason (such as where we reasonably believe you have violated this Policy, you are in breach of any applicable law or regulation or for legal, security or technical reasons), we may cancel the operation of the Diamond incentive without notice. In either case, you shall have no right or entitlement to any financial compensation in respect of any Diamond accrued prior to the date of cancellation of the incentive that has not been converted into cash using the mechanism set out in this Policy."*

299. The aforementioned provisions constitute an attempt by TikTok to maintain unilateral and complete control over important conditions under which it offers its TikTok App. Accordingly, in addition to the fact that these unilateral provisions are incomprehensible and unclear for children

and young teenagers, they qualify as unreasonably onerous. They are contrary to Article 6:233(a) DCC and to the so-called blue list provided in Article 3(3) of the Unfair Terms in Consumer Contracts Directive under b, i, j, k, l and q of the Annex. Based on this, the Virtual Items Policy is voidable, or at any rate the provisions referred to above are voidable.

### 5.3.3 *Misleading commercial practices*

300. TikTok is also guilty of misleading commercial practices. TikTok's revenue model, based on Coins, Gifts, and Diamonds, is set up in such a way that the user, children and teens in particular, loses any sense of the value of money. While the value of Coins is still expressed in euros when they are being purchased, this is no longer the case when the user converts Coins into a Gift for another user: the value of a Gift is then expressed solely in Coins.
301. Using a TikTok account, SOMI purchased 65 Coins, for which it paid EUR 1.09. During a live session, SOMI then used the same account to send a random user a Gift. The value of the Gift was 7 Coins. TikTok did not state the value of the Gift in euros, either in the overview, or when the Gift was actually sent (**exhibit 17**). As a result, children and teens run the risk of spending much more money than they want to, without realising it.
302. This business practice constitutes an omission in pre-contractual information about the price of the product and thus qualifies as a misleading omission within the meaning of Section 6:230m(1)(e) DCC and Section 6:193e(c) DCC.<sup>131</sup>

### 5.3.4 *Protection against (hidden) ads in the app*

303. The TikTok App regularly shows content whose promotional nature is obscure, particularly for children (margin number 127). As a result, the average consumer – children and teens – is unable to distinguish the ad from non-commercial content in the app. Although the ads are provided by the advertisers, TikTok to a very large extent controls which users receive which ads and how. However, TikTok does not take sufficient measures to protect this vulnerable group against hidden ads. On the contrary, TikTok appears to encourage the use of hidden ads targeted at children.
304. Firstly, it is TikTok itself that facilitates the ads in the app and that generates revenue from them. It has enormous influence over the way in which advertisers may advertise. Its aim in this regard will be clear. It wants to offer its advertisers the possibility of integrating ads into the regular user content as “naturally” as possible, to prevent the ad from being “skipped” or “ignored” (margin number 33). This principle may also be clearly inferred from the various forms of advertising it offers (margin number 36). For instance, the Branded Hashtag Challenge and Branded Effects are presented to young users as a kind of game, including in the Netherlands. The young target group

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<sup>131</sup> Cf. Article 6(1)(e) Consumer Rights Directive and Article 7(4)(c) Unfair Commercial Practices Directive.

is encouraged to join and unsuspectingly integrate the ad into their own videos. TikTok does not inform its users that the use of brand filters or playing hashtag challenges is often advertising-related. Nor does it create the impression for its corporate advertisers that it is inclined to do so.

305. Secondly, TikTok decides the rules for ads in its Advertising Policy. The policy does not contain any restrictions for targeting ads at children. On the contrary, TikTok deliberately targets the ads at young users. TikTok’s “inspiration page” mentions the Doritos advertising campaign in the Netherlands as an example and upholds it as a “success story”. This despite the fact that Doritos clearly targets a young target group, by using a well-known influencer and without mentioning anywhere that it is in fact an ad (**exhibit 13** and **exhibit 14**).
306. Thirdly, using its Ad Review Process, TikTok controls and screens the content of ads before they are displayed in the app (**exhibit 11**). It has a dedicated “Ad Review team” that must ensure that the content of an ad is in line with TikTok’s policy. In other words, TikTok is aware of the content of ads and the fact that many advertisers target young users, without clearly stating the nature of the commercial communication. What is more, by screening and exerting control, TikTok is able to decide which ads are displayed in the app.
307. Fourthly, TikTok allows advertisers to target an audience in the 13-17 age bracket directly and specifically (**exhibit 10**).
308. This means that TikTok is exposing its users, including children and teenagers, to hidden ads without taking the careful measures it may be expected to take. It fails to clearly identify commercial communication as such, and does not encourage its advertisers to do so. Thus, TikTok is not acting according to its professional purpose, which may disrupt the economic behaviour of the average consumer. In doing so, TikTok is acting in breach of Section 3:15e DCC<sup>132</sup> and Sections 6:193b and 6:193g(1)(k) DCC.<sup>133</sup>

#### **5.4 Breach of the Media Act: obligations of video platform services**

309. TikTok is also acting in breach of the obligations that apply to video platform services under the Media Act as regards advertising and harmful content.<sup>134</sup>

##### **5.4.1 Video platform service**

310. The TikTok App qualifies as a video platform service within the meaning of Section 3a.1 of the Media Act. TikTok’s main purpose is to make user-generated videos available to the general public. TikTok does not accept editorial responsibility for the content, although it does

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<sup>132</sup> Cf. Article 6 of the E-commerce Directive.

<sup>133</sup> Articles 5(2) and 7 Unfair Commercial Practices Directive; sections 11, 22 and 28 of the Annex.

<sup>134</sup> Cf. Directive 2010/13/EU (“Audiovisual Media Services Directive”) and Directive 2018/1808/EU (“Revised Audiovisual Media Services Directive”).

determine, through algorithms, how the video content is organised. The TikTok App is offered via public electronic communication networks. The European regulators agree that TikTok must be deemed to be a video platform service under the Amended Audiovisual Media Services Directive.<sup>135</sup>

#### **5.4.2 Ads in the TikTok App**

311. As set out in margin numbers 37 and 127, advertising content is available in the TikTok App without it being clear that this is commercial communication. By failing to make commercial communication easily recognisable as such in the app, TikTok is acting in breach of Section 3a.5(1) of the Media Act.<sup>136</sup> Since TikTok is also aware that user-generated videos also contain advertising, it should communicate this clearly as well. The fact that it does not do so is for instance apparent from the Doritos campaign (**exhibit 13** and **exhibit 14**), so that it is acting in breach of Section 3a.5(4) of the Media Act.

#### **5.4.3 Content that is harmful to minors**

312. Section 3a.3 of the Media Act provides in respect of content that may be harmful to minors that a video platform service provider must adopt a code of conduct that prescribes taking measures as referred to in Articles 28 *ter*(1) and(2), paragraphs (2) and (4), of the Amended Audiovisual Media Services Directive. Article 28 *ter* provides for instance:

*“1. Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect:*

*a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6 bis(1); (...)*

313. TikTok has not adopted such a code of conduct, or at any event has not published one, which means that it is in breach of Section 3a.3 Media Act.

314. Pursuant to Section 3a.3 of the Media Act, a video platform service provider is obliged to take appropriate measures to ensure that minors are protected against videos that may impair their physical, mental or moral development. In this respect, the more harmful the content, the stricter the access control measures to be taken. Article 28 *ter*(3) of the Amended Audiovisual Media Services Directive lists the possible appropriate measures. These include that a video

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<sup>135</sup> Minutes of the ERGA Subgroup 3, Taskforce 2 on ‘Video-Sharing Platforms (VSPs) under the new AVMS Directive’, 9 April 2019, see [https://erga-online.eu/wp-content/uploads/2019/08/2019-04-09\\_Minutes-SG3-TF2-1-6.pdf](https://erga-online.eu/wp-content/uploads/2019/08/2019-04-09_Minutes-SG3-TF2-1-6.pdf).

<sup>136</sup> Article 9(1)(a) of the Revised Audiovisual Media Services Directive.

platform service provider uses systems to verify the user's age and parental control with respect to content which may impair the physical, mental or moral development of minors. The listed measures are not intended to be exhaustive. Depending on the nature of the video platform service, the nature and harmfulness of the videos placed on them, and the age and other properties of the users, farther-reaching measures may be deemed appropriate.

315. As discussed in margin number 57, highly harmful challenge videos have circulated on TikTok, which were easily found using a "hashtag". An investigation carried out by SOMI shows that the TikTok App still contains harmful content, albeit of a less serious nature. For instance, mere minutes after registering a test account for a 13-year old, videos of a sexual nature already appeared, as well as videos showing (horror) images meant to scare, and videos containing fake news. The TikTok App also contains a lot of content that promotes unrealistic beauty ideals and unhealthy eating habits (**exhibit 26**), which may impair the mental health of children and teenagers. All this even though it should not be difficult for a video platform service of the size and revenues of TikTok to bar such content. At the very least, TikTok may be expected to be able to make adequate risk assessments, take appropriate measures promptly, and then continuously adjust these based on experiences worldwide.
316. The target group using the TikTok App is very young and consequently highly vulnerable (margin numbers 42, 43, 44, 45 and 46). Young and very young users of the TikTok App are consequently exposed by TikTok (through its algorithm) to (highly) harmful content, purely to serve TikTok and its commercial interests.
317. SOMI believes that TikTok should do much more to ensure that minors are not exposed to harmful content in the TikTok App. At the very least, TikTok should implement effective age verification and parental control systems. However, SOMI reserves the right to seek other measures in these proceedings, by means of an additional brief.

## **6 ANNULMENT OF LEGAL ACTS AND CLAUSES**

318. As set out in paragraph 5.3.1, TikTok's legal documents, in particular its Privacy Policy, Terms of Service and Virtual Items Policy, are contrary to European and national consumer legislation. TikTok primarily fails to comply with its obligations to provide information and, as a result, it is in breach of Articles 6:230m(1)(a), 6:193d(1) and (2), 6:238(2) and 6:233(a) DCC. For that reason, the legal act entailing the conclusion of the agreement between TikTok and the Injured Parties qualifies for annulment in full.
319. If any declaratory judgments are awarded in this case stipulating that the agreement between the Injured Parties and TikTok is subject to full or partial annulment, SOMI will reasonably endeavour to inform the Injured Parties accordingly and the way in which they can rely on annulment, should they so desire. If they are clearly informed of this, SOMI believes that the

Injured Parties aged 16 and over are capable of deciding for themselves whether they wish to proceed to annulment.

320. In respect of the Injured Parties under the age of 16, however, under the circumstances of this case SOMI believes it is justified and necessary that SOMI proceeds to annulment for this group. The breaches of their rights are particularly serious, their personal data are currently being processed without any valid basis and they are not protected from harmful content in the TikTok App. Annulment of the agreement means that TikTok must close the accounts of these Injured Parties. Once it changes its service and documentation and complies with all applicable rules, the Injured Parties aged 13 to 16 will be able to create their own accounts again.
321. SOMI would note that, as a collective interest group in Article 3:305a DCC proceedings, it may rely on annulment of legal acts and unreasonably onerous clauses on behalf of the persons it represents.<sup>137</sup>

#### **6.1 Annulment of the licence provision, limitation of liability and Virtual Items Policy**

322. SOMI does seek for all Injured Parties – irrespective of their age – annulment of the unilateral termination clause, the licence provision and the limitation of liability in Articles 6, 9 and 12 of the Terms of Service and of the complete Virtual Items Policy, alternatively of the specific clauses of the Virtual Items Policy as discussed above. Their annulment will not have any practical consequences for the Injured Parties, such as closure of their accounts. As described in paragraph 5.3.2, these specific provisions are unreasonably onerous for consumers and, for that reason, are subject to annulment pursuant to Article 6:233(a) DCC. In this regard, SOMI also relies on the grounds for annulment stated below.

#### **6.2 Annulment of the agreement for Injured Parties under the age of 16**

323. In respect of the Injured Parties under the age of 16, SOMI is seeking annulment of the entire agreement they have concluded with TikTok, specifically on the following grounds.
324. Firstly, Article 6:193j(3) DCC provides that any agreement formed as a result of an unfair trading practice is subject to annulment.
325. Secondly, any legal act that is contrary to a mandatory statutory provision is subject to annulment pursuant to Article 3:40(2) DCC if the breached provision exclusively serves to protect one of the parties to a multilateral legal act, all to the extent that the purport of the provision does not dictate otherwise. In this case, both the legal act (the conclusion of the agreement) and its content and purport are contrary to mandatory consumer legislation. It is an established fact that

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<sup>137</sup> See, for example, Dutch Supreme Court 29 April 2016, ECLI:NL:HR:2016:769, para. 4.6.2, with reference to *Parliamentary papers II 1992/93, 22486, 3, p. 25.*

the provisions TikTok has breached exclusively serve to protect consumers. Both the parliamentary history and the case law show that any infringement of Section 6.5.2B DCC justifies annulment, whether or not pursuant to Article 3:40(2) DCC.<sup>138</sup>

326. The legislature reached the same conclusion in respect of unfair commercial practices. Although reliance on annulment is less obvious,<sup>139</sup> the legislature believes that consumers can successfully rely on Article 3:40(2) DCC if a commercial operator acts contrary to professional diligence “because it uses general terms and conditions that are contrary to the law”. However, not only with its Terms of Service but also with its Privacy Policy and its Virtual Items Policy does TikTok act contrary to the professional diligence that may be expected of it towards young consumers. Consequently, full annulment of the agreement between TikTok and the Injured Parties is justified here.
327. Thirdly, the error doctrine also provides the Injured Parties with a ground for annulling the agreement (6:228 DCC). This is because when they concluded the agreement, they assumed they could use the TikTok App “free of charge”, without any large-scale and unlawful collection and use of their personal data, including for profiling purposes.
328. Based on the information that TikTok provided in the legal documents, the Injured Parties could not be aware that TikTok would determine, based on these personal data, what would be shown to them, which may have serious and harmful consequences. Their ideas and perspective in respect of several topics, such as food and beauty ideals, may unconsciously be influenced in a negative way (margin number 315 and **exhibit 26**). This is particularly objectionable where children are concerned. Adult users are not as susceptible and are able to put this digital reality into perspective; they may be aware of the earnings models of social media platforms such as TikTok and of how algorithms work. Children lack this knowledge and also lack this sense of perspective that adult users have. If children had had this knowledge and this sense, it is highly likely that this would have affected their answer to the question whether they would want to use the app and, if so, how they would use the app, for example without registering an account.
329. Furthermore, when children enter into the agreement, it is not clear to them that they are providing TikTok or third parties with an extensive licence to use their own video content, nor do they intend to provide such a licence. Children believe it is “their video”, while in reality TikTok can do anything with their content.
330. If children had in fact understood the consequences of the use of the app as outlined above, they would probably not have used the TikTok App or would have used it in another way (for example, without an account). TikTok knows this. It knows that children have a false sense of being able to

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<sup>138</sup> *Parliamentary papers II 2012/13*, 33520, 3, p. 11 and Gelderland District Court, 29 November 2017, ECLI:NL:RBGEL:2017:6235, para. 3.4.

<sup>139</sup> *Parliamentary papers II 2012/13*, 33520, 3, p. 21.

use the app free of charge, whereas they are actually paying with their personal data and content. TikTok should have provided users with more complete and clearer information about why it is collecting personal data and the consequences this has.

331. Fourthly, the agreement is subject to annulment on the ground of undue influence by TikTok. As outlined above, TikTok knows, or at least should know, that children cannot comprehend the consequences and impact of using the app because of their immaturity and dependency. Therefore, TikTok should have taken effective measures to prevent these children from concluding the agreement. In any event, TikTok should not have shown these users personalised content and/or advertising.

## **7 ERASURE OF PERSONAL DATA**

332. It follows from paragraph 5.1 that TikTok has processed and stored personal data contrary to the GDPR and without a valid legal basis. As a result, it is not entitled to process or retain these personal data any further. TikTok is acting unlawfully by further processing the personal data, including by retaining them.

333. Consequently, for the same reason as that phrased above (margin numbers 319 and 320), SOMI is seeking an order for TikTok to irreversibly erase or cause the irreversible erasure of all personal data of the Injured Parties under the age of 16 and to provide proof of the same. This pertains to all data associated with the relevant Injured Parties, including all account details and all videos.

334. To the extent necessary, this claim is partly based on Article 17 GDPR. Article 17(1)(d) GDPR obliges TikTok to erase personal data without undue delay if they have been unlawfully processed. To the extent that annulment of the agreement between TikTok and the relevant Injured Parties is awarded, this also constitutes a ground for requiring TikTok to erase or cause the erasure of the personal data being processed. After all, annulment of the agreement also entails that TikTok no longer has a legal basis for processing these personal data.

## **8 LIABILITY AND DAMAGE**

335. Article 80 GDPR gives data subjects the option to be represented by not-for-profit organisations to exercise certain rights and seek compensation. Article 82 GDPR gives any person who has suffered material or non-material damage as a result of a breach of the GDPR the right to receive compensation from the controller or processor. Paragraphs 1 to 5 of Article 82 GDPR read as follows:

*“1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered..*

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject.

5. Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2.”

## 8.1 Strict liability/joint and several liability

336. Article 82(1), (2) and (3) GDPR shows that the GDPR provides for strict liability; the controller is liable for any unlawful processing of personal data, irrespective of whether the controller has acted imputably.<sup>140</sup> This means that SOMI is not required to demonstrate a causal relationship.

337. Article 82(4) GDPR provides that where more than one controller is involved in the same infringing processing operation, the controllers are jointly and severally liable. They may have recourse against one another on the basis of paragraph 5.

## 8.2 The concept of non-material damage in the GDPR

338. The GDPR does not specify how non-material damage is to be determined or calculated. In the absence of Community rules, it is for the domestic legal system of each Member State to lay down the rules governing the exercise of the right to receive compensation, provided that they are not less favourable than those governing domestic actions (equivalence) and that they do not

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<sup>140</sup> Noord-Nederland District Court 12 January 2021, ECLI:NL:RBNNE:2021:106 (*X v Oldambt*), para. 4.15. See also F.C. van der Jagt-Vink, ‘Schadevergoeding onder de Algemene Verordening Gegevensbescherming’, *MvV* 2019/7.9, p. 290 [in Dutch].

render practically impossible or excessively difficult the exercise of rights ensuing from Community law (effectiveness).<sup>141</sup>

339. However, recital 146 GDPR must be considered. This recital states that the controller should compensate “any damage” as a result of an infringement and that data subjects should receive “full and effective compensation” for the damage they suffer. It also states that the concept of damage should be “broadly interpreted in the light of the case-law of the Court of Justice” and in a manner that fully reflects the objectives of the GDPR.
340. The relevant CJEU case law will first be discussed below; then a major objective of the GDPR will be dealt with: the data subjects’ right to retain control of their personal data.

### **8.2.1 Case law of the Court of Justice**

341. The CJEU has not explained the concept of damage in the GDPR. According to established case law in other fields of law, however, non-material damage must be “actual and certain”.<sup>142</sup> That is a low threshold. In CJEU case law, the threshold was already met by a “feeling of psychological harm” that was experienced as a result of the way in which the Ombudsman dealt with a complaint,<sup>143</sup> and by a “prolonged state of uncertainty” as a result of the failure to adjudicate within a reasonable time.<sup>144</sup>
342. However, the CJEU also accepted that unlawful conduct may be so serious under special circumstances that non-material damage can be assumed to exist based on mere conduct.<sup>145</sup>
343. A case before the CJEU that did pertain to the protection of personal data was *HJ v EMA*. In that case, an employee’s personnel file was accessible to colleagues for a full month. The CJEU ruled that the employee did not have to prove that her colleagues had actually read her file. The fact that they had access to it and the possibility that they had read it was sufficient to establish the existence of non-material damage.<sup>146</sup>
344. The *HJ v EMA* judgment shows similarities to the ECtHR’s *I. v Finland* judgment.<sup>147</sup> In that case, a patient record of a former hospital employee (who was also a patient) had been accessible to

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<sup>141</sup> CJEU, 13 July 2006, C-295/04-C-298/04, ECLI:EU:C:2006:461 (*Manfredi*), para. 64 and the case law cited there.

<sup>142</sup> CJEU, 4 April 2017, C-337/15 P, ECLI:EU:C:2017:256 (*European Ombudsman v Staelen*), para. 91.

<sup>143</sup> CJEU, 4 April 2017, C-337/15 P, ECLI:EU:C:2017:256 (*European Ombudsman v Staelen*), paras. 129-131.

<sup>144</sup> General Court, 10 November 2017, T-577/14, ECLI:EU:T:2017:1, (*Gasconne v European Union*) para. 157.

<sup>145</sup> CJEU, 6 February 1986, C-173/82, C-157/83 and C-186/84, ECLI:EU:C:1986:54, (*Castille v European Commission*); CJEU, 17 December 1998, T-203/96, ECLI:EU:T:1998:302, para. 108 (*Embassy v European Parliament*); CJEU, 8 January 1999, T-230/95, ECLI:EU:T:1999:11, para. 39 (*BAI v European Commission*); CJEU, 16 July 2009, C-481/07, ECLI:EU:C:2009:461, para. 38 (*SELEX Sistemi Integrati v European Commission*); General Court, 10 January 2017, T-577/14, ECLI:EU:T:2017:1, para. 151 (*Gasconne v European Union*).

<sup>146</sup> General Court, 15 January 2019, T-881/16, ECLI:EU:T:2019:5 (*HJ v EMA*).

<sup>147</sup> ECtHR, 17 July 2008, 20511/03, ECLI:CE:ECHR:2008:0717JUD002051103, P&I 2009/60 (*I. v Finland*).

other employees. National courts had dismissed the claim because of a lack of evidence that the record had been accessed. The ECtHR reversed the reasoning: the hospital was unable to prove who had had access to the file, so it was also unable to prove that there had been no unlawful access. Its failure to take adequate security measures constituted a breach of Article 8 ECHR. The right to receive compensation was based on this failure and the victim was awarded compensation in the amount of EUR 33,771.

### **8.2.2 Control over personal data**

345. Control over personal data is a major objective of the GDPR that is prominently stated in recital 7. Recital 75 states that unlawful data processing could lead to material or non-material damage for natural persons, in particular where the data subject might be prevented from exercising control over his personal data or where processing involves a large amount of personal data and a large number of data subjects. Recital 85 lists loss of control as an example of damage that may result from a personal data breach.

346. The GDPR does not explain what “loss of control” means. A narrow interpretation is that it occurs where an unauthorised party processes a data subject’s personal data. However, such a narrow interpretation does not do justice to the high level of protection the GDPR seeks to provide.<sup>148</sup>

347. A broader interpretation is the following. If the controller fails to observe the main principles of the GDPR (including a lawful basis, transparency, purpose limitation, data minimisation, accuracy, integrity, storage limitation and confidentiality), the data subject will be unable to effectively verify whether his personal data are lawfully being processed, and the exercise and enforcement of his rights may be seriously impaired.<sup>149</sup> In that sense, the data subject will lose control over his personal data due to the mere fact that the controller has failed to observe the GDPR principles.<sup>150</sup> In this connection, recital 63 states that data subjects should be given the opportunity to become aware of any processing of their data and to verify the lawfulness of the processing.

### **8.3 Non-material damage under Dutch law**

348. According to Article 6:106(1)(b) DCC, an injured party has the right to receive compensation for non-material damage if he has suffered bodily injury or defamation of character or “if his person has been otherwise afflicted”. The parliamentary history to Article 6:106 DCC expressly states that invasion of privacy may fall in this category. This “other” personal affliction may be

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<sup>148</sup> See, for example, T.F. Walree, ‘De onrechtmatige verwerking van persoonsgegevens: geen concrete gevolgen, wel schadevergoeding?’ *RM Themis* 2020/4, p. 170. See also Court of Appeal, 2 October 2019, [2019] EWCA Civ. 1599, 46, 56 (*Lloyd v Google*).

<sup>149</sup> O. Lynsky, *The Foundation of EU Data Protection Law*, New York: Oxford University Press 2015, 179-185.

<sup>150</sup> T.F. Walree, ‘De onrechtmatige verwerking van persoonsgegevens: geen concrete gevolgen, wel schadevergoeding?’ *RM Themis* 2020/4, p. 171.

subdivided into two categories. The first category is where mental injury can be demonstrated. The second category involves any other personal harm where no mental injury can be demonstrated. The present case relates to the second residual category.<sup>151</sup>

### 8.3.1 EBI judgment

349. In the *EBI* case concerning a maximum security institution (*extra beveiligde inrichting*, EBI), the Supreme Court ruled that in some cases the adverse effects of unlawful conduct are so evident that personal affliction can be assumed to exist.<sup>152</sup> In the “EBI formula”, the main rule in the residual category is that the claimant must be able to demonstrate using “concrete data” that his person has been harmed. It may be argued as a coordinate basis that the claimant is not required to demonstrate that he has indeed suffered adverse effects.<sup>153</sup> This rule applies if the nature and gravity of the breach of a standard are of such a nature that the adverse effects are so obvious that personal harm can be assumed to exist. The EBI judgment is found to give more room to award compensation for non-material damage under the residual category than was previously the case.<sup>154</sup>

### 8.3.2 ABRvS decisions

350. In April 2020, the ABRvS gave four decisions on non-material damage resulting from GDPR infringements.

351. Three of the four decisions related to municipal councils exchanging personal data of persons who had submitted a request pursuant to the Government Information (Public Access) Act (*Wet openbaarheid van bestuur*; “**Wob**”).

352. In the virtually identical cases that resulted in two of these decisions, the claimants had submitted a Wob request to the municipal councils of Borsele and Harderwijk. Both municipal councils subsequently shared the claimants’ personal details on the online forum of the Association of Netherlands Municipalities (*Vereniging van Nederlandse Gemeenten*; “**VNG**”). According to the ABRvS, this was not unlawful as the purpose was to safeguard the proper

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<sup>151</sup> E.F.D. Engelhard, ‘Ruimer baan voor smartengeld bij “persoonsaantastingen op andere wijze” zonder dat er sprake is van geestelijk letsel’, *AV&S* 2019/37, no. 6, pp. 205-212; S.D. Lindenbergh, ‘Smartengeld wegens spanning, frustratie, ergernis en (ander) onbehagen? Over het begrip “persoonsaantasting” buiten lichamelijk en geestelijk letsel’, *NTBR* 2019/20, no. 6, p. 122.

<sup>152</sup> Supreme Court, 19 March 2019, ECLI:NL:HR:2019:376, NJ 2019/162 (*X v EBI*).

<sup>153</sup> In his note with the judgment, Lindenbergh indicates that the Supreme Court has not phrased this category as an exception, but rather as a subsidiary basis: Supreme Court, 15 March 2019, ECLI:NL:HR:2019:376 (*X v EBI*), NJ 2019/162, annotated by S.D. Lindenbergh, para. 11.

<sup>154</sup> E.F.D. Engelhard, ‘Ruimer baan voor smartengeld bij “persoonsaantastingen op andere wijze” zonder dat er sprake is van geestelijk letsel’, *AV&S* 2019/37, no. 6, pp. 205-212 [in Dutch]; S.D. Lindenbergh, ‘Smartengeld wegens spanning, frustratie, ergernis en (ander) onbehagen? Over het begrip “persoonsaantasting” buiten lichamelijk en geestelijk letsel’, *NTBR* 2019/20, no. 6, p. 122 [in Dutch].

execution of the Wob and prevent abuse. However, the fact that the claimants had not been given a timely overview of their personal data on the VNG forum was considered lawful. The adverse effects of this breach of the standard were not so evident that personal harm could be assumed to exist. In both cases, the claimants had not produced any concrete evidence substantiating the alleged damage.<sup>155</sup>

353. In the case resulting in the third decision, a municipal council shared the claimant's name and address with another municipal council, including the information that "he had submitted two Wob requests". According to the ABRvS, here too, no situation existed in which adverse effects of the breach of the standard were evident. The ABRvS did find in an obiter dictum that "loss of control" over personal data can be regarded as infringement of a personal right.<sup>156</sup>
354. In all three decisions, the ABRvS has found that the relevant breaches did not involve "seriously culpable behaviour having consequences that are so serious that it must be qualified as infringement of a fundamental right".
355. The ABRvS did award compensation for non-material damage in the fourth decision.<sup>157</sup> In that case, a director of forensic psychiatric observation clinic Pieter Baan Centrum had shared medical information of the data subject with the disciplinary court in disciplinary proceedings that the data subject had initiated against him:

*"35. [appellant] states that his person has been afflicted. He states that his privacy has been breached as the reports contain strictly confidential and sensitive personal data and he has not consented to the data processing.*

*36. The Division agrees with the District Court that [appellant] is entitled to compensation for non-material damage. The Minister has acted contrary to Section 16 Wbp and, as a result, has breached [appellant]'s right to respect for privacy. Any invasion of [appellant]'s privacy can be regarded as personal affliction as referred to in Article 6:106(1) and (b) DCC, which gives entitlement to compensation for non-material damage."*

356. The ABRvS did not impose the condition that the data subject had to demonstrate adverse effects, finding that the data were privacy-sensitive health data and that the gravity and duration of the infringement were limited:

*"36. [...] To that end, the Division considers the particular sensitivity of the nature of the personal data that were processed without [appellant]'s consent in this case. The GDPR lays down a higher level of protection for the processing of special (sensitive) personal data*

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<sup>155</sup> ABRvS, 1 April 2020, ECLI:NL:RVS:2020:900 (*X v Borsele*); ABRvS, 1 April 2020, ECLI:NL:RVS:2020:901 (*X v Harderwijk*).

<sup>156</sup> ABRvS, 1 April 2020, ECLI:NL:RVS:2020:899 (*Deventer v X*).

<sup>157</sup> ABRvS, 1 April 2020, ECLI:NL:RVS:2020:898 (*Pieter Baan Centrum*).

*as referred to in Article 9 GDPR than for ordinary personal data. The adverse effects of the provision of the sensitive personal data are obvious. Furthermore, what is relevant is that the director submitted the data in the context of a complaints procedure against him, without there being any justification as referred to in Article 9(2) GDPR. As regards the gravity of the infringement, the Division finds that the privacy-sensitive personal data ended up with a small group of professionals and that the members of the disciplinary tribunal are subject to a duty of confidentiality because of their position. As regards the duration of the infringement, it is relevant that Pieter Baan Centrum, after the sensitive data were submitted on 15 January 2018, took action to reverse the provision of the data. In a letter of 22 January 2018, the disciplinary tribunal subsequently indicated that it would disregard the reports that had been sent and would not add them to the file. To the extent that [appellant] disputes that this happened, in view of the questions put to the director during the hearing before the disciplinary tribunal, it is relevant that, when asked, [appellant] did not convincingly argue at the hearing that this had resulted in adverse effects.”*

357. In view of these circumstances, the ABRvS set the compensation at a fair amount of EUR 500, as opposed to the amount of EUR 300 that the District Court had awarded.
358. The four EBI decisions adhere to the EBI formula and, when answering the question of whether a right to compensation exists, assign great weight to the nature of the right, i.e. the right to protection of privacy. With its fourth decision, the ABRvS did not put up a high barrier for awarding compensation on account of privacy breaches.
359. The DDPA Chairman, Aleid Wolfsen, argued that the ABRvS decisions mean that a breach of a standard must automatically be deemed sufficiently serious if it is due to culpable or negligent conduct or where special personal data have been processed. According to him, compensation does not need to be awarded only if the breaches are of minor significance.<sup>158</sup>

### **8.3.3 Decisions of lower courts**

360. Lower courts have also applied the ABRvS’s broad interpretation of Article 6:106(1)(b) DCC, both before and after the ABRvS judgments.
361. In a case between a data subject and the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*; “**UWV**”), the Amsterdam District Court ruled that there was a loss of

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<sup>158</sup> A. Wolfsen, ‘Smartengeld moet de regel zijn, geen uitzondering’, *Privacyblog Aleid Wolfsen* at [www.autoriteitpersoonsgegevens.nl](https://www.autoriteitpersoonsgegevens.nl), 22 February 2021, available via <https://autoriteitpersoonsgegevens.nl/nl/nieuws/privacyblog-aleid-wolfesen-smartengeld>.

control over personal data. UWV had provided the claimant's new employer with information about an earlier illness without having any legal basis for doing so:

*"18. [...] As a result of this breach, [claimant] has suffered actual and material harm. The interests affected are those that the GDPR provisions actually seek to protect. Article 82 GDPR provides that any person who has suffered material or non-material damage as a result of an infringement of this Regulation has the right to receive compensation from the controller or processor for the damage suffered. All damage must be compensated and – in accordance with the GDPR objectives – the concept of damage should be broadly interpreted (para. 146 of the preamble), which means that the mere fact that the damage – although actual – is of relatively small size cannot constitute a ground for rejecting any and all entitlement to such compensation. An interpretation of Article 6:106(1) DCC in line with the GDPR entails that [claimant] is entitled to compensation of its damage, to be determined fairly."<sup>159</sup>*

362. The District Court expressly assessed the EBI formula against the GDPR requirements. The District Court was of the opinion that, according to the EBI formula, only serious breaches could lead to compensation of non-material damage without any adverse effects being demonstrated. The District Court concluded that the facts in this case were sufficiently serious. The court awarded EUR 250 rather than the EUR 500 sought. Although the employee had suffered actual damage, the damage had not fully materialised because the employment relationship was ultimately continued.
363. In a case between a journalist and a landlord about whom the journalist had written a critical article, in the counterclaim action the journalist sought compensation because the landlord had provided an extract from the municipal personal records database to two parties who were not entitled to receive the extract. The extract only contained the claimant's name and address. The claimant indicated that he had experienced adverse effects, but failed to substantiate this. Nevertheless, the District Court considered it likely that the claimant had experienced adverse effects, such as anxiety and stress, as a result of the disclosure of his personal data. Compensation amounting to EUR 250 was deemed appropriate and fair:

*"4.106. The District Court is of the opinion that a fundamental right has been breached, the nature and gravity of which entail that the damage is to be compensated. The latter also follows from the GDPR. Article 82 GDPR provides that any person who has suffered material or non-material damage as a result of an infringement of the Regulation has the right to receive compensation from the controller or processor for the damage suffered. All damage must be compensated and – in accordance with the GDPR objectives – the concept of damage should be broadly interpreted (para. 146 of the preamble to the GDPR), which means that the mere fact that the damage cannot be precisely quantified and*

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<sup>159</sup> Amsterdam District Court 2 September 2019, ECLI:NL:RBAMS:2019:6490 (X v UWV) para. 18.

*possibly is of relatively small size cannot constitute a ground for rejecting any and all entitlement to such compensation.*

*4.107. [Defendant 2]’s loss of control over his personal data is permanent. On the other hand, for the time being the loss of control is limited to an employee of [claimant 1] ([name A]) and one third party. Although [defendant 2] states that he has suffered adverse effects due to [claimant 1]’s conduct, the precise nature of these adverse effects is unclear. In view of his claim to that effect, it was up to [defendant 2] to clarify this. Since [defendant 2] has failed to do so but since the concept of damage must be interpreted broadly and the District Court considers it likely that [defendant 2] has experienced adverse effects due to [claimant 1]’s conduct, such as anxiety and stress, compensation in the amount of EUR 250 is deemed appropriate and fair. Consequently, [claimant 1] will be ordered to pay [defendant 2] this amount.”<sup>160</sup>*

364. In a case between a data subject and the municipal council of Oldambt, the municipal council had erroneously published the claimant’s name, address, telephone number, email address and citizen service number on its website rather than just his name and address, as required for the disclosure of a decision granting an environmental permit. The municipal council had removed the data within five days. The District Court ruled that the GDPR had been breached and that, as a result, the municipal council was liable for the damage. Referring to the EBI formula, the District Court arrived at the opinion that the adverse effects were obvious and awarded an amount of EUR 500 in view of the nature, duration, frequency and gravity of the infringement:

*“4.28 The subdistrict court is in fact of the opinion that [claimant]’s person has been otherwise afflicted. The municipal council has repeatedly breached [claimant]’s privacy as – contrary to the GDPR – it has published [claimant]’s citizen service number, email address and telephone number on the municipal website on several occasions, without [claimant] having consented to the municipal council doing so (cf. para. 36 of the Division’s decision). The data involved are sensitive by their nature, especially [claimant]’s citizen service number. The adverse effects ensuing when these data are leaked, such as identity fraud, are obvious. Therefore, in the subdistrict court’s opinion, [claimant] is entitled to compensation, to be determined fairly, for the non-material damage it has suffered. In view of the circumstances of the present case, including the nature, duration, frequency and gravity of the infringement, compared with the circumstance that there has been no evidence of the data breaches having had any concrete adverse effects, the subdistrict court will set this compensation at a fair amount of EUR 500. This amount will be awarded below.”<sup>161</sup>*

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<sup>160</sup> Noord-Nederland District Court, 15 January 2020, ECLI:NL:RBNNE:2020:247 (X v Y) paras. 4.106-4.107.

<sup>161</sup> Noord-Nederland District Court, 12 January 2021, ECLI:NL:RBNNE:2021:106 (X v Oldambt), para. 4.28.

### 8.3.4 Foreign case law

365. A broad interpretation was also applied in a case currently pending before the UK Supreme Court: *Lloyd v Google*. In that case, Lloyd is seeking compensation from Google on account of its internet activity tracking without permission. The London Court of Appeal ruled that there is no requirement for damage to be asserted and proven separately in addition to the establishment of loss of control over personal data.<sup>162</sup>
366. The Constitutional Court of Germany, the *Bundesverfassungsgericht*, also recently stressed that – in de minimis cases, too – the concept of damage should be broadly interpreted in the light of the CJEU case law and in a manner that fully reflects the objectives of the GDPR. The background to this was a decision by the Goslar *Amtsgericht* in which the *Amtsgericht* had dismissed a claim for compensation of non-material damage.<sup>163</sup> In that case, a lawyer sought an amount of EUR 500 in compensation for non-material damage as he had received one advertising email without prior consent. The *Amtsgericht* ruled that there was no damage pursuant to Article 82 GDPR since the matter involved just a single unsolicited advertising email that evidently contained advertising and since the data subject was only temporarily inconvenienced. The *Bundesverfassungsgericht* found that the *Amtsgericht* should not have dismissed the claim based on its own interpretation of the law, which interpretation did not follow directly from the GDPR and was not argued in the literature or used by the CJEU. The *Amtsgericht* could not have decided without a reference for a preliminary ruling that the transmission of a single email did not give rise to the claimant’s claim for compensation pursuant to Article 82 GDPR.<sup>164</sup>

## 8.4 Enforcement under private law as a function of compensation

367. The background to the right to receive compensation as it ensues from the GDPR should be considered both in the assessment of the gravity of the violations and in the establishment of the existence and extent of the damage. It follows from recital 146 GDPR that data subjects must receive “full and effective” compensation for damage. It follows from Article 84 GDPR that penalties must be “effective, proportionate and dissuasive”.<sup>165</sup>
368. Since compensation under the GDPR is partly intended to protect personal data and privacy in general, account should be taken of the interest of enforcement under private law and the punitive effect of compensation. The ability to enforce the main principles of the GDPR and data subjects’ rights is essential for the effective protection of personal data. Consequently, enforcement is an important component of the GDPR. Recital 7 states that the data protection framework must be “backed by strong enforcement”. The importance of strong enforcement is also reflected in the wide range of enforcement instruments in the GDPR. Any violation may

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<sup>162</sup> Court of Appeal, London, 2 October 2019, [2019] EWCA Civ. 1599, 46, 56 (*Lloyd v Google*).

<sup>163</sup> Goslar *Amtsgericht*, 27 September 2019, 28 C 7/19.

<sup>164</sup> *Bundesverfassungsgericht*, 14 January 2021, 1 BvR 2853119.

<sup>165</sup> See also recitals 151 and 152 GDPR.

result in fines of up to EUR 10,000,000 or EUR 20,000,000, or 2% or 4% of the worldwide annual turnover (Article 83 GDPR).

369. However, national regulators, including the Dutch DDPA, do not have sufficient capacity to respond to breaches.<sup>166</sup> This was a well-known problem before the GDPR entered into force, and the problem has only become more urgent since then. Serious fines are rarely imposed, whereas the DDPA received more than 27,800 complaints in 2019.<sup>167</sup> The DDPA itself also indicated that it had insufficient capacity.<sup>168</sup> In a GDPR evaluation report drafted by the European Commission, the Commission expresses its concerns about the adverse effect this has on the enforcement of the GDPR.<sup>169</sup>
370. Partly for this reason, enforcement under civil law occupies a prominent place in the GDPR and an increasing number of actors are insisting on strong civil enforcement action against breaches.<sup>170</sup>
371. The CJEU has also emphasised that the right to receive compensation may contribute to the “full effect” of Union law.<sup>171</sup> In a number of cases regarding infringements of competition law, the CJEU has ruled that the right to receive compensation “discourages” infringements and may

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<sup>166</sup> N. Vinocur, “*We hebben een enorm probleem*”: Europese toezichthouder wanhoopt over gebrek aan handhaving, Politico.eu, 27 December 2019. For an example of the widespread media reports about the lack of capacity at the DDPA, see: <https://nos.nl/nieuwsuur/artikel/2374135-de-privacywet-wordt-amper-gehandhaafd-is-meer-geld-de-oplossing>.

<sup>167</sup> Dutch Data Protection Authority, *Forse stijging privacyklachten in 2019*, 14 February 2020, available via: <https://autoriteitpersoonsgegevens.nl/nl/nieuws/forse-stijging-privacyklachten-2019>. [in Dutch]

<sup>168</sup> See, for example, RTLZ, *Privacyautoriteit kan drukte niet aan: grove privacyschendingen dreigen*, 14 February 2020, available via: <https://www.rtlnieuws.nl/tech/artikel/5020511/autoriteit-persoonsgegevens-tekort-drukte-privacyklachten-avg-d66-sp>. [in Dutch]

<sup>169</sup> European Commission, 27 June 2020, ‘Staff Working Document: accompanying the Communication - two years of application of the General Data Protection Regulation (COM(2020) 264 final).

<sup>170</sup> T.F. Walree, ‘De vergoedbare schade bij een onrechtmatige verwerking van persoonsgegevens’, *WPNR* 2017/7172, p. 921; E. O’Dell, ‘Compensation for Breach of the General Data Protection Regulation’, *Dublin: Dublin University Law Journal* 2017/40(1), 97-164; E. Truli, ‘The General Data Protection Regulation and Civil Liability’, in: *Persoonsgegevens in het mededingings-, consumentenbeschermings- en intellectuele eigendomsrecht*, M. Bakhom et al. (ed.), Springer-Verlag 2018, p. 310; E.F.D. Engelhard, ‘Immateriële schade als gevolg van data-inbreuken: het ondergeschoven kindje van de AVG’, *NTBR* 2019/30, no. 9/10, p. 194.

<sup>171</sup> ECJ, 20 September 2001, C-453/99, ECLI:EU:C:2001:465, paras. 25-27 (*Courage/Crehan*); ECJ, 13 July 2006, C-295/04-C-298/04, ECLI:EU:C:2006:461, paras. 89-91 (*Manfredi*); ECJ, 6 November 2012, C-199/11, ECLI:EU:C:2012:684, paras. 41-42 (*European Community/Otis and Others*); ECJ, 6 June 2013, C-536/11, ECLI:EU:C:2013:366, paras. 22-23 (*Donau Chemie and Others*); CJEU, 5 June 2014, C-557/12, ECLI:EU:C:2014:1317, paras. 21-23 (*Kone*); CJEU, 14 March 2019, C-724/17, ECLI:EU:C:2019:204, paras. 43-45 (*Skanska*); CJEU, 12 December 2019, C-435/18, ECLI:EU:C:2019:1069, paras. 22-24 (*Otis and Others/Land Oberösterreich and Others*).

contribute to “effective competition”. The possibility to demand compensation will discourage breaches of the GDPR and contribute to its enforcement in a similar way.<sup>172</sup>

372. A high threshold for compensating damage in the event of a breach of the GDPR would not reduce the “enforcement shortfall”.<sup>173</sup> In his opinion on the EBI judgment, A-G Hartlief - referring extensively to literature - therefore discusses the development of the right to immaterial compensation, partly in the light of enforcement as one of the functions of the right to compensation. He argues that it is not compatible with the nature of fundamental rights if a violation would only lead to compensation if the injured party suffered (concrete, identifiable) consequences. After all, fundamental rights regard values and interests which are rather “intangible”, so that the consequences of violation are difficult to objectify and which (therefore) require protection in themselves.<sup>174</sup> Due to their nature, GDPR infringements often do not have any concrete, provable consequences. Therefore, for Union law to be fully effective, the threshold must not be too high, also because of an excessively narrow definition of the concept of non-material damage given in Article 82 GDPR. Hartlief also emphasizes that the suggestion is that damages for violation of fundamental rights should always concern serious violations and serious consequences for the entitled party. However, he thinks that it may well also concern cases in which this bar is not set so high, as in the case of the reasonable period jurisprudence.<sup>175</sup>

## 8.5 Fixed compensation

373. In this action, SOMI is claiming fixed sums of EUR 500, EUR 1,000 and EUR 2,000 for each individual Injured Party, depending on their age. Even though it was not expressly stated in their judgments, the ABRvS and the District Courts also awarded fixed compensation in the case law referred to above. In principle, it is not in accordance with Dutch compensation law to award compensation as an estimated lump sum. According to Dutch law, only damage actually incurred is subject to compensation, and such damage must be based on a specific estimation, taking into account all circumstances of the case. In July 2019, however, the Dutch Supreme Court ruled that it legally possible to determine “minimum” compensation and award that amount as a fixed sum if the adverse effects are obvious, given the nature and gravity of the event from which the liability ensues.<sup>176</sup>

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<sup>172</sup> E. Truli, ‘De Algemene verordening gegevensbescherming en civielrechtelijke aansprakelijkheid’, in: *Persoonsgegevens in Mededinging, Consumentenbescherming en Intellectueel Eigendomsrecht*, M. Bakhout et al. (ed.), Springer-Verlag 2018, p. 310; T.F. Walree & P.T.J. Wolters, ‘Het recht op schadevergoeding van een concurrent bij een schending van de AVG’, *SEW 2020/1*, p. 7. See also M.M.A. Janssen, *Persoonsgegevens en immateriële schade*, Weert: Celsus 2021, p. 21, where she sets out the functions underlying the provision of a right to receive compensation, including the preventive function.

<sup>173</sup> T.E. van der Linden & T.F. Walree, ‘De collectieve procedure als oplossing voor het privaatrechtelijke handhavingstekort bij een datalek?’, *AV&S 2018/20*, no. 4, pp. 105-113.

<sup>174</sup> Opinion of the A-G, 16 October 2018, ECLI:NL:PHR:2018:1295, para. 4.1 t/m 4.60 en met name 4.49.

<sup>175</sup> Opinion of the A-G, 16 October 2018, ECLI:NL:PHR:2018:1295, par. 4.49.

<sup>176</sup> DSC 19 July 2019, ECLI:NL:HR:2019:1278 (*Groningen Earthquake damage*).

374. In his commentary to the EBI judgment, Lindenberg writes that in the event of a violation of fundamental rights - unlike, for example, in the case of damage due to injury - it is much more obvious to relate the amount of the compensation to the nature and seriousness of the violation of the norms, since this often concerns assumed consequences. According to him, this also allows the application of fixed amounts. For example, in the event of a massive invasion of privacy as a result of a data leak of important private data, it would be obvious to allocate the same amount to all injured parties.<sup>177</sup>
375. Equally so, in this case, it is only obvious to award each Injured Party the same minimum amount of compensation. This case involves serious and large-scale, massive breaches of standards, resulting in major risks for the data subjects. To facilitate the settlement of such large-scale damage, fixed sums are applied. Accordingly, the Explanatory Memorandum to the WAMCA notes that courts should ensure that they categorize collective damages whenever possible. This system has also been adopted in Section 1018i of the Dutch Code of Civil Procedure.<sup>178</sup>

#### **8.6 Aspects determining the amount of the compensation**

376. As for the amount of the compensation, the GDPR provides that, once the court has found that non-material compensation must be awarded, the data subject should receive "full and effective" compensation. This means that, in any event, the amount may not be so limited that it would be merely symbolic. In this respect, SOMI points out that the court is not bound by the rules relating to the obligation to furnish facts or the burden of proof when assessing the damage. If the court has determined that damage has been sustained, the compensation of that damage may not be rejected for want of information substantiating the amount of it. When assessing the damage, Article 6:97 DCC should be interpreted in accordance with the GDPR to reflect the objectives of the GDPR, and the basic principle that the concept of damage should be broadly interpreted.
377. In the cases referred to above, the ABRvS and the lower courts considered the following aspects relevant to determining the amount of the compensation:
- a) the nature of the data, for example sensitive or special personal data;
  - b) the gravity of the violation;
  - c) the duration of the infringement and the action taken to reverse that infringement;
  - d) the number of data subjects; and
  - e) the irreversibility of the damage.
378. The aspects referred to above are in line with the categories of fines listed in Article 83 GDPR. That article also mentions the following aspects:

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<sup>177</sup> DSC 15 March 2019, ECLI:NL:HR:2019:376 (*X/EBI*), *NJ* 2019/162 with commentary by S.D. Lindenberg, para. 18.

<sup>178</sup> *Parliamentary papers II*, session year 2016–2017, 34608, No. 3 5 pages 5/6 and 52.

- f) the intentional or negligent character of the infringement;
- g) any action taken by the controller to mitigate the damage;
- h) relevant previous infringements;
- i) any other aggravating or mitigating factor applicable to the circumstances of the case.

379. The following also applies:

- j) any breach of the foremost principles of Article 5 GDPR is considered a serious breach, which may be subject to a higher fine (Article 83(4) GDPR). This is also in keeping with the policy rules of the Dutch Data Protection Authority.<sup>179</sup> Additionally, the fining policy rules impose higher fines for, inter alia, infringements relating to special personal data, data subjects' rights and the (prohibited) transfer of personal data to third countries, and lower fines for breaching more formal obligations.

380. Where a connection must be sought with Article 6:106 DCC for determining the amount of the compensation, all circumstances of the case must also be taken into consideration. For example, the following may be taken into account as well:

- k) the economic relationship between the parties.

## 8.7 Applying the above to this case

381. Below, each of these aspects will be applied to this case:

### a) **the nature of the data**

As regards TikTok, a long list of personal data is at issue, more specifically personal data of minors, which must be considered sensitive for that reason alone. TikTok creates profiles of its users, which are used to display personalised advertisements. These profiles include the following information: name, place of residence, gender, age and technical information, but also more sensitive information such as social connections and viewing, scrolling and clicking behaviour. Preferences and interests are derived from these data. A combination of all of these data may provide an accurate and invasive image of the data subject. This is another reason why the nature of the data must be considered sensitive, all the more so because it is part and parcel of the TikTok App that, as a result, special personal data are processed as well, due to the display of personalised advertisements (margin number 112). In addition, specific categories of special personal data are processed, which include health information (margin number 189), biometric data and information on sexual orientation (margin number 59, 60 and paragraph 3.7).

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<sup>179</sup> Policy Rules of the Dutch Data Protection Authority dated 19 February 2019 on determining the amounts of administrative fines (Fining Policy Rules of the Dutch Data Protection Authority 2019).

- b) **the gravity of the violation**

The violations are particularly serious. TikTok infringes children's privacy rights and accepts that they run considerable risks, i.e. the risk of losing control over their personal data, as well as risks with regard to their mental and even physical health. TikTok is profiling young users with a view to (misleadingly) inducing them to spend money within the App and showing them personalised advertisements, exclusively for commercial gain. The mere fact that profiling is involved makes the infringement particularly serious, with an increased risk for the rights of data subjects. What is more, TikTok is in breach of not just one provision of the GDPR but several.
- c) **the duration of the infringement**

The infringements are continuous and have been going on since the GDPR came into effect.
- d) **the number of data subjects**

This case involves an enormous number of data subjects: more than 1 million Injured Parties.
- e) **the irreversibility of the damage**

The GDPR-related damage is due to the fact that the underage users of TikTok have lost control over their personal data. This damage is irreversible, inter alia because these data have been transmitted to the US and China. Also, the Injured Parties are suffering mental injury due to the addictive effect of the profiling and algorithms of the TikTok App and the low self-esteem induced in them by being confronted with the unrealistic beauty ideals that TikTok promotes.
- f) **the intentional or negligent character of the infringement**

As already explained above, TikTok's course of action may be considered extremely negligent. Knowing perfectly well that its service is primarily being used by young children, it has almost entirely failed to take action to protect these children. For years now, TikTok has been called to account for its violations, also by SOMI ever since September 2020, but it has so far failed to reverse these violations. Any action taken by TikTok in this respect is "too little, too late".
- g) **action taken by the controller to mitigate the damage**

TikTok has taken scant measures to provide more protection for children and underage teenagers using its service. However, these measures are far from adequate and TikTok only took them after having been compelled to do so as result of judicial or government intervention.
- h) **relevant previous infringements**

More than once, TikTok has been called to account by public authorities and courts all over the world for breaching data protection laws (paragraphs 3.6.2 and 3.6.3).

i) **aggravating or mitigating factors**

The first aggravating factor in this case – in addition to the circumstances referred to above – is the fact that TikTok transfers personal data to the US and China, neither of which provides an adequate level of protection in the slightest. The second aggravating factor is that TikTok has implemented amendments to reverse infringements in certain countries (in each individual case after having been forced to do so, for that matter, by judicial or government intervention), but that it has so far failed to implement those amendments in other countries as well. A third aggravating factor, finally, is that TikTok makes millions of euro in profit at the expense of young children.

j) **categories of breaches**

TikTok's breaches come under the most severe fining category of Article 83(5) GDPR. TikTok processes personal data without a legitimate basis and violates the fundamental GDPR principles of transparency, fair processing, data minimisation, the conditions for valid consent and the conditions for processing special personal data.

k) **the economic relationship between the parties**

TikTok is a global enterprise worth billions of euro, meaning that it bears social responsibility and has considerable obligations of due care towards its underage users.

382. TikTok's violations of the GDPR in respect of children are therefore very serious. The adverse effects are so obvious extent that personal disadvantage may be assumed. If compensation is denied in this case, the effectiveness and enforceability of the GDPR would be gravely undermined.

383. Besides, given the circumstances of the case, SOMI is of the opinion that this case justifies higher amounts of compensation than have been awarded so far in Dutch case-law. The ABRvS found that a sum of EUR 500 was fair, where the case involved just *one* data subject, a limited amount of personal data, shared in the secluded circle of a disciplinary procedure during a limited period of time, in which case immediate action had been taken to protect the data subject's rights. This case, however, involves the profiling and exploitation of at least 1 million mostly young children and at least ten categories of personal data, including profiles, which are transferred to the US and China. The violations have been going on for years and, in spite of being very well aware of this, TikTok has barely taken any action to end these violations.

384. Additionally, SOMI is of the opinion that TikTok's violations must be considered more severe and the damage must be considered greater if young children are involved. Profiling 8 year olds and 9 year olds and subjecting them to damaging advertisements is more severe and results in more damage than in the case of a 17 year old, who will be somewhat more – but definitely not fully –

able to grasp what goes on in a service like TikTok's, and to be aware of the potential risks and consequences. Children aged 8 and 9 have no notion of that. They would be confident that a service such as TikTok's, which looks attractive and is being used by their friends and idols, is a perfectly safe environment and that the person offering that service is a responsible grown-up who knows what is best for them.

385. On that ground, SOMI argues that the Injured Parties who are under 13 years of age are entitled to compensation of EUR 2,000, Injured Parties aged 13, 14 and 15 to compensation of EUR 1,000 and 16 and 17-year-olds to compensation of EUR 500.
386. SOMI reserves the right to further substantiate the damage of the Injured Parties during the course of this action.

## **9 CLAIM SETTLEMENT AND (LEGAL) COSTS**

### **9.1 Claim settlement**

387. This case involves approximately 1 million Injured Parties (margin number 11), for whom, depending on their age at the time when they first started using the TikTok App after 25 May 2018, compensation of EUR 2,000, EUR 1,000 or EUR 500 for each Injured Party is being claimed. The total sum of these claims is EUR 1,416,000,000 (margin number 6). A meticulous procedure is needed to divide this vast amount of money among so many Injured Parties. SOMI's claims XV to XIX are geared towards establishing such a procedure.
388. In this case, SOMI is claiming, principally, compensation pursuant to Article 3:305a DCC and Title 14a DCCP. In the case of such a claim, it is efficient to order the defendant to pay the full amount of the compensation to the representing entity, and order the representing entity to divide that sum between the injured parties.
389. In the event that not all Injured Parties entitled to compensation report to SOMI within 24 months for payment thereof, SOMI proposes that any remaining sum of the compensation paid by TikTok to SOMI be donated to an ANBI (Institution for General Public Advancement) that supports the protection of minors, consumers and/or privacy, – in line with Article 15.5 of its Articles of Association and the Claimcode 2019 – and not be returned to TikTok (claim XV.b).
390. SOMI furthermore asks this Court to rule that SOMI, with a view to the settlement of the claim, must engage a professional third party experienced in the settlement of class actions to settle the damage. The role of such professional party is primarily to identify the persons claiming compensation, determining that these persons fall within any one of the Closely Defined Groups (on the basis of further evidence to be provided by those persons, such as an e-mail from TikTok to confirm their account registration) and paying compensation to the Injured Parties entitled to those compensation (claim XVII).

391. All of this will take a lot of effort and will entail substantial costs. Based on a rough estimate, the claim settlement in this action could easily cost EUR 5,000,000. In order to be able to pay these costs, SOMI's claim XV.c includes an advance in the amount of that sum. If it turns out that the claim settlement costs less in the end, SOMI will return the remaining sum to TikTok. Should this Court find that TikTok cannot be ordered to pay these costs, then SOMI alternatively claims to be allowed to deduct the costs of distributing the compensation from that compensation to be paid (claim XVI).
392. A dispute may arise between SOMI and/or the claims settler on the one hand and a person claiming compensation on the other hand, for example about whether or not that person falls within one of the Closely Defined Groups. To prevent this disputes of this sort from leading to protracted judicial proceedings, causing the claim settlement to be delayed, SOMI asks this Court to determine that anyone who wishes to claim compensation must agree to dispute resolution on the basis of binding advice (claim XVIII).
393. SOMI is a not-for-profit foundation that is bringing this suit in the interests of the Injured Parties it represents. This service takes a lot of effort and SOMI has assumed financial obligations and risks to provide its services. SOMI intends to conduct more class actions in the future and promote the interests of the individuals it represents in other ways as well. To make this possible it needs some form of revenue. As it has now made efforts and provided services to enable compensation to be awarded to the Injured Parties, which those Injured Parties would otherwise most likely never have obtained, it is only justified that SOMI will receive certain compensation. In keeping with Principle II, specification 2 of the Claimcode 2019, it therefore claims permission to deduct from the compensation to be awarded payment for services provided, to be further specified and in line with market conditions, including a reasonable surcharge for (future) class actions and for the costs of using equity capital or borrowed capital (claim XVI).

## 9.2 (Procedural) costs

394. SOMI already incurred substantial costs in the run-up to these proceedings, and it will incur many more costs, including notarial, marketing, administrative, bank and IT costs, remuneration of its Board members and of its Supervisory Board members, as well as interest and (possibly) financing and translation costs as well as, process servers' and lawyers' fees. SOMI will also be forced to incur substantial costs to properly manage the settlement of claims – together with the claim settler.
395. If the claim is fully or partly awarded, this Court may deviate from the usual rules applicable to the order of costs provided by Article 1018i(2) DCCP. By using the wording “a decision pursuant to Article 1018i”, the deviating rules for the costs order will apply only if the decision contains a settlement for collective damage, and not if the claim is dismissed. The legislator has thus created the possibility to pass on to the defendant all costs that the interest group has actually

incurred.<sup>180</sup> Any compensation due to a claims financier, if applicable, may also be imposed on the defendant.<sup>181</sup>

396. Accordingly, SOMI asks this Court, pursuant to Article 1018I(2) DCCP, to order TikTok to pay any and all reasonable and proportional court costs and any other costs, including the fee due to an external claim financier yet to be engaged (to date no external financier has been engaged), any experts' fees yet to be incurred, any present and future costs for legal advice and the costs incurred for obtaining an out-of-court settlement. Alternatively, SOMI claims that it should be allowed to deduct its costs from the damages to be paid (claim XX and XXI).
397. At a later stage, SOMI will submit a statement to this Court specifying and substantiating the costs of the proceedings, extrajudicial costs and further costs it has incurred and has yet to incur, together with the requisite evidence.

## **10 BURDEN OF PROOF AND EVIDENCE**

### **10.1 Burden of proof in respect of GDPR violations**

398. Article 5(2) GDPR determines that the controller is responsible for compliance with the principles provided in Article 5(1) GDPR, including the principles of legitimacy, transparency, minimal processing of data and integrity and reliability. The controller must be able to demonstrate that it complies with these principles. This is referred to as accountability. The principles are further specified in the other articles of the GDPR, which implies that accountability in fact applies to all obligations under the GDPR. This is confirmed in Article 24 GDPR, according to which a controller must be able to demonstrate that the data are processed in accordance with the GDPR. It follows from recitals 74 and 79 GDPR that for each individual processing it must be determined who the controller is and that this party can prove that it complies with the GDPR.
399. Finally, Article 7(1) GDPR provides that if a data are processed on the basis of consent, the controller must be able to demonstrate that the data subject has given their consent.<sup>182</sup>
400. The above involves a reversal of the burden of proof. TikTok, being the controller, must be able to prove that it has complied with the principles of the GDPR and that it has obtained a valid consent. SOMI is not required to demonstrate that TikTok has violated the principles of the GDPR or that it has not obtained a valid consent.

### **10.2 Burden of proof in respect of consumer law violations**

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<sup>180</sup> *Parliamentary papers II 2016/17*, 34 608, nr. 3, p. 54.

<sup>181</sup> *Parliamentary papers II 2017/18*, 34 608, nr. 9, p. 14.

<sup>182</sup> See also EDPB, *Guidelines 05/2020 on consent under Regulations 2016/679*, paras. 36 and 104.

401. With regard to the obligations to provide information under Article 6:230m DCC, Article 6:230n(4) DCC provides that the commercial operator must prove that the information mentioned in Article 6:230m DCC was provided in a timely and correct manner. As SOMI argues that the Injured Parties did not receive the information (in a timely and correct manner), TikTok, being the commercial operator, will need to prove that this information was indeed provided in a timely and correct manner.<sup>183</sup>
402. With regard to the obligations to provide evidence within the framework of the unfair commercial practices, Article 6:193j DCC provides that the burden of proof lies with TikTok. The trader must “provide evidence for the material correctness and completeness of the information provided by it”.<sup>184</sup>
403. Finally, with regard to unreasonably onerous terms under Article 6:233(a) DCC, this Court must investigate of its own accord whether a term is unreasonably onerous. Stipulations on the black list (6:236 DCC) must be considered unreasonably onerous and, as regards those on the grey list (6:237 DCC), there is a reasonable suspicion that they are unreasonably onerous. If a term appears on the grey list, the burden of proof is thus legally reversed; TikTok must provide evidence that the term in that specific case is not unreasonably onerous. If there is any suspicion that a term is unfair pursuant to the blue list (appendix to Article 3(3) of the Directive on unfair terms in consumer contracts) the Court must also assess this of its own accord.<sup>185</sup>
404. The division of the burden of proof described above also applies to claims filed by an interest group in a class action.

### 10.3 Evidence

405. In this Summons, SOMI has complied with its obligation to furnish facts and has made a plausible argument demonstrating the facts in this matter. If and insofar as this Court should find that SOMI has failed to provide necessary evidence, it hereby offers evidence of all its submissions by all means available to it, without voluntarily assuming any burden of proof that does not lie with it by operation of law. SOMI offers to produce evidence by, among other things, the hearing of witnesses and the submission of further documents. However, SOMI especially offers to produce evidence by means of expert statements, inter alia with regard to:

- a) the psychological effects of the TikTok App on (young) children, including the effect of losing control over personal data, of unrealistic ideals of beauty, of the practice of inciting young children to continue using the service as long as possible and to continue watching

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<sup>183</sup> See also Article 6(9) of Directive 2011/83/EU on Consumers' Rights and *Parliamentary papers II 2012/13*, 33520, 3, p. 36

<sup>184</sup> *Parliamentary papers II 2006/07*, 30 928, No. 3, p. 17-18

<sup>185</sup> Dutch Supreme Court 13 August 2013, ECLI:NL:HR:2013:691 (*Heesakkers v Voets*).

- short videos, of peer pressure experienced by children due to a social media service such as the TikTok service and of TikTok's advertising practices;
- b) the precise personal data processed by TikTok;
  - c) the algorithms used by TikTok to influence its users and keep them within the app as long as possible (“user retention”);
  - d) the use of cookies and other tracking technologies by TikTok;
  - e) the security of the TikTok App;
  - f) the transfer of personal data to third countries, including the US and China, and of the protection levels in those countries; and
  - g) the extent of the damage suffered by the Injured Parties.

406. As for the matters under b), c), d), e) and f), however, the facts that might require evidence for them are largely beyond SOMI's and any experts' reach and sight. For example: TikTok is the only one that has an actual, full view of the personal data processed by it, the way its algorithms work and the data that it transmits to third countries.

407. As regards these matters, and if and insofar this Court finds that the burden of proof lies with SOMI, it asks this Court to grant this objection and acknowledge its inability to provide evidence in that case, for example by assuming an actual suspicion, by dividing or reversing the burden of proof, by imposing a strengthened obligation to furnish facts or a strengthened obligation to provide reasons on TikTok, by applying the reversal rule to the causal link between unlawful act and damage (insofar as this should be assessed on the basis of Article 6:162 DCC and insofar as Article 6:162 DCC should not be interpreted in accordance with the GDPR) or by ordering TikTok to provide all vital and relevant facts, fully and truthfully, explain its defences or submit certain documents relating to the case, all of this pursuant to Article 21 and Article 22 DCCP.

## **11 ADMISSIBILITY OF THIS ACTION BY SOMI**

408. SOMI files this class action pursuant to Article 3:305a DCC. When the WAMCA entered into force, the requirements for the admissibility of actions by interest groups under Article 3:305a were tightened, primarily to avoid improper use of the class action proceedings.<sup>186</sup> For this reasons, the courts must review the admissibility requirements with reticence. The fact is that interest groups are free to set up their organisation as they please. The right of access to the courts may not be restricted rashly. Objections of admissibility, often aimed at escaping the main action, must on the other hand be dealt with critically.

409. Article 3:305a(1) DCC provides that an interest group:

- a) may file a legal claim to protect similar interests of other persons; insofar as it promotes these interests pursuant to its articles of association; and

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<sup>186</sup> *Parliamentary papers II 2017/18*, 34 608, 9, p.1.

- b) insofar the legal claim sufficiently safeguards the interests of the persons for whose benefit the claim has been filed. This last requirement is further detailed in Article 3:305a(2) DCC.

410. Article 3:305a(3) DCC contains a set of additional requirements of admissibility:

- a) directors involved in the incorporation of an interest group and their successors may not have a direct or indirect profit motive which is realised by means of the interest group;
- b) the collective claim must have sufficient connection with the jurisdiction of the Dutch courts; and
- c) the interest group must, given the circumstances of the case, have made sufficient attempts to achieve the claimed outcome by entering into consultations with the defendants.

### 11.1 Similar interests

411. It follows from settled case law of the Dutch Supreme Court that the requirement of similarity has been complied with if the interests which the claim seeks to protect are suitable for pooling, in order to promote an efficient and effective legal protection for the benefit of the interested parties. The claims are suitable for pooling if they can be the subject of one legal action without considering special circumstances of individual interested person.<sup>187</sup>

412. The interests of the Injured Parties in this case are similar or, at any rate, they are similar within each Closely Defined Group. SOMI challenges the unlawful processing of their personal data by TikTok, which processing has caused the Injured Parties to suffer damage. TikTok's basic principles and possible defences are the same for each Injured Party and the claims filed by SOMI merely require an abstract review against applicable laws, without an assessment of individual circumstances being necessary to award those claims. The claims are therefore suitable for pooling and a combined assessment in a class action.

### 11.2 SOMI's Articles of Association

413. Promoting the interests of the Injured Parties in this action falls within SOMI's objects according to its Articles of Association. Article 2 (1)(a), (c) and (f) of the Articles of Association read as follows (**exhibit 1**):

*“2.1 SOMI's objects are:*

*(a) to promote the interests of natural persons, in particular of consumers and minors, who use online services that breach the rights of those natural persons at any moment,*

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<sup>187</sup> Dutch Supreme Court HR 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Stichting Baas in Eigen Huis v Plazacasa*).

*which includes but is not limited to infringements of fundamental rights, such as the right not to be discriminated and the right to protection of privacy and protection of personal data, as well as infringements of consumer rights and laws and regulations intended to protect minors; (...)*

*(c) to conduct (class action or individual) proceedings and legal actions and to claim compensation for the benefit of the individuals referred to in (a) and (b) and especially of the (legal) persons, injured parties, principals or participants registered or affiliated with SOMI, at law and otherwise, including but not limited to proceedings referred to in Article 3:305a of the Dutch Civil Code, and to carry out investigations or cause investigations to be carried out in that context; (...)*

*(f) to negotiate, enter into, elaborate on and execute (collective or individual) agreements for the benefit of (the interests of) the persons for whose benefit SOMI acts, including (collective or individual) settlements.”*

414. Article 2(2)(b) and (e) of the Articles of Association list the relevant activities:

*“2.2 SOMI seeks to realise its objects, inter alia, by: (...)*

*(b) attracting participants to join SOMI's activities and actions, to maintain contact via (social) media and newsletters, to attract contributors of financial means, knowledge or relations to support SOMI's activities, directly or indirectly for SOMI or for (the interests of) persons for whom SOMI is or may become active;*

*(c) filing claims at law and otherwise and entering into settlements and other (legal) measures for the benefit of (the interests of) the persons on whose behalf SOMI acts, or directly or indirectly for the benefit of SOMI or its affiliates (legal) persons;(...)*

*(e) collecting, managing and dividing compensation and expense allowances or other revenues, financial means or benefits derived from the investigation, activities, actions or claims by SOMI or the persons whose interests its promotes, by engaging third parties or otherwise;”*

415. SOMI also actually promotes the interests of the Injured Parties. To that end, it has, among other things, carried out the following activities:

- a) SOMI has procured the development of a mobile app by which data subjects may make GDPR requests to controllers, such as requests to inspect their personal data or requests to delete personal data. In the future, controllers should also be able to respond to the requests and share personal data with the data subjects via the app. Eventually, the app will become a tool for data subjects to manage all their personal data. Also, injured parties will be able to use the app to sign up for actions led by SOMI (**exhibit 46**);

- b) SOMI operates several campaigning websites where it informs the public and its supporters on the various class actions and on the practices and risks of large-scale online data processing for children and youngsters and in general terms (**exhibit 47**);
- c) SOMI operates a website where it provides information on SOMI, its working method and activities, and where people who are interested may contact SOMI (**exhibit 48**);
- d) SOMI publishes articles and blogs on privacy-related subjects on a regular basis, also on the online processing of personal data of children, youngsters and other users of the Internet (**exhibit 49**);
- e) SOMI organises media attention for the problems and risks presented by the use of TikTok by children and youngsters (**exhibit 50**);
- f) SOMI conducts investigations into large-scale collection and processing of personal data of Internet users, by TikTok but also by other parties such as Zoom and Palantir;
- g) SOMI maintains contacts with politicians, scientists and other interested parties on online privacy and large-scale processing of personal data by parties such as TikTok;
- h) SOMI is preparing class actions against Zoom and Palantir.

### 11.3 The interests of the Injured Parties have been safeguarded

416. Article 3:305a(1) DCC provides that the interests of the individuals whose interests are promoted by the interest group must be sufficiently safeguarded. Article 3:305a(2) DCC provides that the interests are sufficiently safeguarded if (i) the interest group is sufficiently representative, with a view to those represented and the extent of the claims, and (ii) has:

- a) a *supervisory body*, unless Article 9a(1) of Book 2 of the Dutch Civil Code has been implemented;
- b) appropriate and effective mechanisms for participation in or representation at the decision-making of the persons whose protection is sought by the legal action;
- c) sufficient means to bear the costs of filing a legal action, while control over the legal action is, to a sufficient extent, vested in the legal person,;
- d) a generally accessible web page with the following available information:
  - the legal person's articles of association;
  - the legal person's management structure;
  - the most recently adopted outline of the annual report of the supervisory body on its supervision over the past year;
  - the most recently adopted management report;
  - the remuneration of officers and of the members of the supervisory body;
  - the legal person's objects and working methods;
  - an overview of the current situation in pending proceedings;
  - if a contribution is requested from the persons whose interests are to be protected by the legal action: insight into the calculation of that contribution;

- an overview of the manner in which individuals whose interests are to be protected by the legal action may sign up with the legal person and the manner in which they may terminate their registration;
- e) sufficient experience and expertise in filing and conducting the legal action.

### **11.3.1 SOMI is representative for the group of Injured Parties**

417. The question to be answered here is to what extent an interest group may be considered representative for the group of Injured Parties. Being representative is of vital importance to prevent that an interest group might file a legal action without the requisite support of those represented. Indications for being representative are the number of participating injured parties and the size of their claims in relation to the total number of injured parties of a mass event and the compensation that they have claimed.<sup>188</sup> It must be clear in advance that the interest group promotes the interests of a sufficiently large part, in quantitative terms, of the group of injured parties. What a sufficiently large part is may differ per case and may be determined only in relation to the total number of injured parties. This may be assessed by means of the number of injured parties that actively registered to participate in the claim.<sup>189</sup>
418. In these proceedings, SOMI is representing the interests of all individuals in the Netherlands who used the TikTok App after 25 May 2018 and who were under age when they first used it. On the basis of market investigations into the use of social media, this amounts to approximately 1 million individuals (margin number 11).
419. On the date of this Summons, approximately 81,000 individuals from various European countries had registered with SOMI for this class action; some 16,500 of them are from the Netherlands. Early in April 2021, SOMI decided to represent only Dutch minors in this class action (also with a view to the scope rule, see paragraph 11.5.2). It then started a new campaign with a new registration form on the campaigning website and a new Participant's Agreement (**exhibit 47** and **exhibit 51**). On the basis of that new campaign, another 1,285 new Injured Parties registered between 7 May 2021 and the date of the Summons (a period of 19 days). SOMI's campaign is still ongoing and SOMI expects that many more participants will join the class action after this Summons is issued. Without even running an active marketing campaign, some 175 people are signing up every day. SOMI will provide this Court with further information by means of a Statement.

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<sup>188</sup> *Parliamentary papers II 2016/17*, 34608, 3, pp. 18 and 19.

<sup>189</sup> *Parliamentary papers II 2016/17*, 34608, 3, p. 19.

420. In what follows, SOMI will explain that it has sufficient expertise and experience to represent the interests of the Injured Parties. This may also serve as evidence that SOMI is sufficiently representative.<sup>190</sup>

### **11.3.2 Composition of the Board of Directors and the Supervisory Board**

421. The members of SOMI's Board of Directors and Supervisory Board are all experts and experienced professionals in their own field and, together, they represent an excellent combination of both legal and financial expertise to pursue the interests of the Injured Parties in this case.

422. The Board of Directors consists of Mr Hans Franke, Mr Jan van den Broek and Mr Philip Vromen.

423. Hans Franke is the chairman of the Board of Directors. He studied Business Administration (financial management) and Law (company law) at the University of Rotterdam. After graduating he spent seven years working as a lawyer in Amsterdam (Stibbe) and The Hague (*Vereniging van Effectenbezitters*). He undertook post-graduate studies in Corporate Litigation at the University of Nijmegen's Grotius Academie. During his career he has been engaged in, among other things, pursuing group interests for securities holders. In recent years he has become increasingly committed to social interests and has gone into privacy law in more depth.

424. Mr Jan van den Broek is an all-round financial specialist. His career to date spans 45 years, 15 of which were spent with Deloitte accountancy. He has worked for numerous large and small companies including Centric, Woningcorporatie De Key, British Telecom, KPN and De Telegraaf. Currently, he has his own financial advisory firm. With his background in financial expertise and his skills as a coach, in recent years he has been committed to the interests of children. He is treasurer of the Gastoudercoöperatie U.A. and Stichting Adiona, a foundation for child coaches. In the past he has been treasurer for several other foundations.

425. Mr Philip Vromen has spent many years working in education, as primary school head and later as trainer, adviser and coach for school leaderships. He has taken various courses including ones on communication and conflict management. Mr Vromen is experienced in the management of foundations. For ten years he was general manager of the Stichting Lek en IJssel. The Stichting Lek en IJssel is a cooperation between a number of schools in primary education. In his role as general manager he led a large-scale reorganisation with, inter alia, five boards cooperating in a remote board and their own financial and payroll department being set up.

426. The Supervisory Board currently consists of Mr Cor Wijtvliet, Mr Wijnand Prins and Mr Jan Huijnk. A selection procedure with a privacy lawyer is ongoing.

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<sup>190</sup> *Parliamentary papers II 2003/04, 29414, 3, p. 15.*

427. Mr Cor Wijtvliet is an analytical expert in finance. Over the past 36 years his main areas of work have been advice and investigations in the financial sector; since 2000 this work has included subjects in the social and economic domain. He has undertaken such investigations for Van Lanschot Bankiers for 11 years. At the moment he has his own investigations bureau that provides services to small and medium-sized enterprises in the financial sector, such as ER Capital Rotterdam and IEX Amsterdam. Mr Wijtvliet has been involved in SOMI since its formation, first as a member of the board and now as a member of the *supervisory body*. He regularly publishes on the present case in blogs and newsletters.
428. Mr Wijnand Prins is an education professional and socially very involved. He is currently policy adviser at MBO Rijnland. He is sympathetic to the welfare of young people, inter alia in the context of their positioning in the labour market. Mr Prins is actively committed to the development of (senior) vocational education (HBO/MBO/ROC). He is the initiator of a number of different projects and advises the management of various organisations on vocational education. Mr Prins is and has been involved with a number of different foundations as founder, chairman, board member or adviser. He is currently CEO of the Stichting Kwalificatiekamer and adviser in vocational education for the interest group Nederlandse belangenvereniging van Professionele Organizers.
429. Mr Jan Huijnk has been a lecturer, among other things, for fifteen years. He currently manages his own enterprises, including one that delivers distance learning in Eastern Europe for 35,000 students. In 1997, this won him the East Europe prize for social and economic activities in Ukraine.
430. The Supervisory Board provides SOMI with internal supervision of the board and SOMI therefore satisfies Article 3:305a(2)(a) DCC.<sup>191</sup>

### **11.3.3 Participation or representation in the decision-making process**

431. Article 3:305a(2)(b) DCC obliges any interest group that brings a class action to have effective and appropriate mechanisms in place for the participation or representation in the decision-making process of persons for whom the legal action has been brought. Interest groups are free to determine the way in which this is implemented. If an interest group is set up pursuant to the Claims Code 2019, it can be assumed that this requirement has been met.<sup>192</sup> SOMI shall explain in paragraph 11.4 that it complies with the Claims Code 2019. In addition, SOMI will advise the Injured Parties via its app and the secure login section of its website, should it consider reaching or supporting an out-of-court settlement with TikTok. SOMI will determine the way that is done

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<sup>191</sup> *Parliamentary papers* 2016/17, 34608, 3, p. 19 and Principle VI of the Claims Code 2019.

<sup>192</sup> *Parliamentary papers* 2016/17, 34608, 3, p. 20.

based on the settlement under discussion and the state of play at that time. SOMI satisfies Article 3:305a(2)(b) DCC.

#### **11.3.4 SOMI has sufficient financial resources**

432. Article 3:305a(2)(c) DCC imposes requirements on the financial resources an interest group must have at its disposal. This gives the courts the opportunity to assess, but only to a limited extent, whether a legal entity bringing a class action has sufficient resources to be able to conduct legal proceedings. What suffices is that the pursuer of the interests is able to demonstrate that, at the time of assessment, he has or can avail himself of sufficient resources to conduct the legal proceedings.<sup>193</sup>
433. SOMI has paid all costs of this case to date using funds from donations and loans provided by one of the companies of its chairman, Mr Hans Franke, and for which there are underlying agreements. For the loans, only market-level and not performance-related interest rates have been agreed. The loans only need to be repaid once compensation is actually paid in these proceedings or in a settlement.
434. The current loans already cover a significant part of both the legal costs in the first instance and the costs for the management and marketing of the campaign. In addition, Mr Franke's company is prepared to provide further loans, again only at market-level and not performance-related interest rates. SOMI also has an agreement in principle – partly on the basis of this underlying guarantee – with a Dutch-based crowdfunding organisation to attract a maximum of five million euros in legal financing. If this form of financing is to be used, SOMI will provide this court with further details by deed, to include terms and conditions and costs. SOMI is also in discussion with potential external legal financiers. If it comes to an agreement with them, SOMI will also provide this court with further details by submitting a statement for the record.
435. Lastly, up until the moment of summons SOMI has not asked the joined Injured Parties for any fees. However, from the date of summons, it will be doing so. It will be asking them for a sum of €17.50. Some of SOMI's administrative fees and some of its marketing, management and IT costs can be paid with the proceeds.
436. This satisfies the requirement of Article 3:305a(2)(c) DCC.

#### **11.3.5 SOMI has an accessible website with the necessary information**

437. SOMI maintains a website which contains information including SOMI's articles of association, SOMI's management structure, the most recently adopted outline annual report from the supervisory body on its supervision (as soon as available), the most recently adopted

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<sup>193</sup> *Parliamentary papers* 2016/17, 34608, 3, p. 11/12 and 20.

management report (as soon as available), the remuneration of officers and the members of the Supervisory Board, SOMI's objectives and working methods, an overview of the state of play in ongoing proceedings (as soon as relevant), information about the calculation of the participation fee and information on the way in which Injured Parties can join and terminate this joining (**exhibit 46**). SOMI satisfies the terms set out in Article 3:305a(2)(d) DCC.

#### **11.3.6 Experience and expertise**

438. SOMI's board members and members of the Supervisory Board have the experience and expertise necessary to bring this class action, as further detailed above in paragraph 11.3.2. They have legal experience and expertise, including in class actions and data protection, knowledge of online services and the necessary financial expertise and experience. In addition, SOMI uses a team of specialist lawyers with a wealth of experience in class actions, data protection law and online services.

#### **11.4 SOMI complies with the Claims Code 2019**

439. SOMI has explained above that the interests of the Injured Parties it is standing up for are sufficiently guaranteed, as required by law. In addition, SOMI also complies with the major principles and tenets of the Claims Code 2019.

##### ***Principle I – Compliance with and enforcement of the code***

440. The Board of Directors and the Supervisory Board of SOMI are responsible for compliance with the Claims Code 2019 and the governance structure. The main features of the governance structure with effect from the amendment to the articles of association in May 2021 are set out on SOMI's website. In these, SOMI explains how it adheres to the Claims Code 2019 and the extent to which it derogates from it. This information will remain on the website for as long as SOMI is active. SOMI satisfies Principle I.

##### ***Principle II – SOMI is non-profit-making***

441. SOMI is a not-for-profit entity, as also laid down in Article 2.3 of its articles of association. The fact that SOMI is a not-for-profit entity also follows from its objects. In accordance with the elaboration of Principle II of the Claims Code 2019, Article 6.2 of SOMI's articles of association states that two officers are jointly authorised to represent SOMI. Article 15.5 of the articles of association also provides that the use of any positive liquidation balance will be in accordance with SOMI's objects as far as possible and may benefit its participants or a suitable charitable organisation. Principle II is satisfied.

##### ***Principle III – External financing***

442. SOMI is not currently working with an external financier. As soon as this situation changes, SOMI will inform this court by submitting a statement for the record, and also explain the extent to which it satisfies Principle III of the Claims Code 2019.

***Principle IV – Independence and avoidance of conflict of interests***

443. Articles 4.1 and 9.1 of SOMI's articles of association state that the Board of Directors or the Supervisory Board is composed in such a way, and where necessary has made arrangements to this end, that the members can act critically and independently of each other, the Supervisory Board or the Board of Directors, any potential external financier and the Injured Parties. SOMI has not entered into an agreement with any of the officers or members of the Supervisory Board, save for the loan agreements with a company of Mr Franke (see paragraph 11.3.4). Principle IV is satisfied.

***Principle V – The composition, task and working method of the Board of Directors***

444. SOMI's Board of Directors has a balanced composition and consists of experts in the legal field, specifically with regard to class actions, and in the financial field, who are all demonstrably committed to the interests of young persons. Paragraph 11.3.2 gives further details on the experience and attributes of the board members. The Board of Directors has specific legal and financial expertise, as also set out in Article 4.1. of the articles of association.
445. The Board of Directors' representative authority pursuant to Article 6 of the articles of association is vested in the Board of Directors as a whole or in two officers acting jointly. Furthermore, the Board of Directors will submit important decisions to the Supervisory Board as provided in Article 5.6 of the articles of association and will consult regularly with the Supervisory Board and always provide it with relevant information (Articles 11.3 and 12.6). The Board of Directors will inform the Supervisory Board annually, in writing, of the strategic policy, the general and financial risks and the management and control systems used (Article 11.3 of the articles of association). The Board of Directors also maintains a universally accessible website for SOMI on which at least the information required under Article 3:305a DCC and the Claims Code 2019 appears. This satisfies Principle V of the Claims Code 2019.

***Principle VI – Officers' fees***

446. The Supervisory Board determines a remuneration for the members of the Board of Directors that is in reasonable proportion to the nature and intensity of the activities (Article 5.5 of the articles of association). The expense allowance is also determined by the Supervisory Board (Article 5.3 of the articles of association). Officers receive no other fee for their activities for SOMI. The annual report and accounts include the agreed fees and the outline remuneration policy is published SOMI's website. SOMI satisfies Principle VI of the Claims Code 2019.

***Principle VII – The Supervisory Board***

447. Paragraph 11.3.2 describes the profiles of the members of SOMI’s Supervisory Board. This shows that the members have the financial experience to be able to properly supervise the Board of Directors and the pursuit of the interests as described in the objects according to the articles of association. SOMI is still looking for a lawyer for the Supervisory Board. It is currently conducting a selection procedure with a well-known privacy lawyer.
448. Article 9.1 of the articles of association provides that the members of the Supervisory Board are independent of the other bodies of, and involved in, SOMI. Pursuant to Article 11.3 of the articles of association, the Supervisory Board is provided with all necessary information by the Board of Directors and, under Article 11.2, is entitled to inspect all SOMI’s books and records. The Supervisory Board meets at least three times a year (Article 12.1 of the articles of association) and meets with the Board of Directors once a year in a joint meeting (Article 12.6 of the articles of association). In the joint meeting a reasonable and not excessive remuneration and attendance fee scheme will be adopted (Article 11.5 of the articles of association). Every year, the Supervisory Board draws up a report rendering account for their supervision (Article 11.1 of the articles of association). The remuneration scheme and the report are published on SOMI’s website. The Supervisory Board may also instruct the Board of Directors to allow the balance sheet and the P&L to be examined by its appointed registered accountant or other expert (Article 13.3 of the articles of association).

**11.5 Additional requirements for allowance**

449. Article 3:305a(3) DCC contains a number of additional requirements for allowance for interest groups. SOMI will explain below that it also satisfies these requirements: the Board of Directors has no profit motive, the class actions have a sufficiently close link to the Dutch legal sphere and SOMI has invited TikTok to consultations.

**11.5.1 *Not-for-profit***

450. Article 3:305a(3)(a) DCC provides that officers involved in the formation of an interest group and their successors may not have a direct or indirect profit motive that is realised via the interest group. There is no question of that in this case. One of Mr Frank’s companies provides loans to SOMI, but only receives a market-level and no performance-related rate of interest.

**11.5.2 *Sufficiently close link to the Dutch legal sphere***

451. Article 3:305a(3)(b) DCC requires that the class action has a sufficiently close link to the Dutch legal sphere. This is the case if:
- i) The majority of the people whose interests the actions seek to protect have their habitual residence in the Netherlands;

- ii) Those against whom the action is directed, are domiciled in the Netherlands and additional circumstances point to a sufficient link to the Dutch legal sphere; or
- iii) The incident or incidents to which the action relates took place in the Netherlands.

452. In these proceedings, SOMI is exclusively standing up for Dutch minors, so sub-paragraph i) is satisfied. Additionally, the incidents occurred in the Netherlands because the rights of Dutch minors were infringed, so sub-paragraph iii) is also satisfied. The class actions therefore have a sufficiently close link to the Dutch legal sphere.

#### **11.6 SOMI has invited TikTok to consultations**

453. SOMI has invited TikTok to hold mutual consultations with SOMI regarding its objections and the compensation of the damage, with a two-week deadline (paragraph 2.3). SOMI has therefore satisfied Article 3:305a(3)(c) DCC.

### **12 JURISDICTION AND APPLICABLE LAW**

454. This dispute has an international character: SOMI and the natural persons for whom it is acting are resident in the Netherlands and TikTok is established in Ireland.

#### **12.1 Jurisdiction**

455. The Dutch courts have jurisdiction to take cognisance of this dispute. As far as the claims under the GDPR are concerned, this jurisdiction is conferred by Article 79(2) GDPR and for the claims under consumer law, the Dutch Telecommunications Act and the Dutch Media Act, it is conferred by Article 18(1) of the Brussels I bis Regulation and Article 6(d) DCCP.

##### **12.1.1 Article 79(2) GDPR**

456. Article 79 GDPR provides for the data subject's right to effective judicial remedy if they believe that their rights under the GDPR have been infringed. Paragraph 2 contains a jurisdiction arrangement in that context:

*“Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.”*

457. The two bases for jurisdiction are alternatives, so the data subject may choose. Recital 145 GDPR emphasises this choice:

*“For proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member States where the controller or processor has an establishment or where the data subject resides, unless the controller is a public authority of a Member State acting in the exercise of its public powers.”*

458. SOMI is therefore free to bring this case before the courts of the Member State where the data subjects it represents have their residence. The Injured Parties whose rights SOMI is pursuing in this case all have their habitual residence in the Netherlands. The Dutch courts therefore have international jurisdiction in this case.
459. The choice of forum clause included in the Terms of Use in favour of the Irish courts cannot be held applicable. This was formulated by TikTok non-exclusively and, furthermore, it does not affect the imperative jurisdiction arrangement in the GDPR.

#### **12.1.2 Article 18(1) Recast Brussels I Regulation and Article 6(d) DCCP**

460. SOMI is representing Injured Parties in the Netherlands who, in their capacity as consumers, entered into an agreement with TikTok as a professional party. A consumer agreement was thus created between the Injured Parties and TikTok. TikTok has no establishment in the Netherlands. To answer the question about the jurisdiction of the Dutch courts in the matter of consumer agreements, European and national international private law is the main guide.
461. In this case, the Recast Brussels I Regulation applies, because TikTok is established in the territory of a Member State of the European Union. Since TikTok engages in commercial activities in the Netherlands and concludes distance contracts with Dutch consumers to that end, SOMI can, as representative of the Dutch consumers, bring the case before the Dutch courts (Article 17(1)(c) in conjunction with Article 18(1) of the Recast Brussels I Regulation). Under Article 19 of the Recast Brussels I Regulation the non-exclusive choice of forum clause in the TikTok Terms of Use has no impact on this.

## **12.2 Applicable law**

462. The claims in this case are to be assessed according to Dutch law, including the GDPR. For the claims based on the GDPR, this applies based on Article 3 GDPR, for the claims relating to consumer contracts based on Article 6 of the Rome I Regulation and for the claims based on violations of the Dutch Telecommunications Act and Media Act (*Mediawet*) based on Article 4(1) of the Rome II Regulation.

### **12.2.1 Article 3 GDPR**

463. The territorial scope of the GDPR is defined in Article 3(1) GDPR. The GDPR applies to processing in the context of the activities of an establishment of a controller in the European Union. Recital 22 GDPR states the following in this regard:

*“(…) Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.”*

464. Since TikTok is established in the member state of Ireland and this establishment effectively and really exercises activities in order to offer TikTok’s services within the European Union, the GDPR therefore applies.

#### **12.2.2 Article 6 Rome I**

465. Regarding the claims arising from the consumer contracts entered into between the Injured Parties and TikTok, the matter of the applicable law is governed by 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 Regulation**”).

466. On the basis of Article 6, the applicable law is determined by the law of the consumer’s place of residence, provided that (i) the professional (seller) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or by any means, directs such activities to that country or to several countries including that country, and (ii) the contract falls within the scope of such activities. A physical connection with the consumer’s country of residence is not required, but the seller must have targeted the consumer market of that country, for example by printed advertising, or via telemarketing, internet activities or other media. These requirements are met since TikTok targets Dutch consumers with its Dutch app and Dutch website and, in the context of the use of the TikTok App, enters into a contract with Dutch users.

467. Article 6(2) Rome I Regulation stipulates that parties may agree on the choice of law, subject to the protection afforded to the consumer by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1. This means that the choice of Irish law in the Terms of Service, does not detract from the applicability of the mandatory provisions of Dutch consumer law.

#### **12.2.3 Article 4(1) Rome II**

468. Based on the general rule in Article 4(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“**Rome II Regulation**”), the law applicable to a non-contractual obligation arising out of an unlawful act shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. In this case, the Injured Parties all have their habitual residence in the Netherlands, and the damage therefore occurs in the Netherlands.

469. The choice of Irish law in Clause 13 of the Terms of Use is unfounded since the Parties did not agree on the choice of law *after* the event giving rise to damage occurred and the Injured Parties do not pursue a commercial activity (see Article 14(1) Rome II Regulation).

**13 TIKTOK’S DEFENCE**

470. SOMI is not aware of any defences put forward by TikTok other than those already dealt with in this summons. In its letter of 9 October 2020 (**exhibit 2b**), it defends itself in very general terms only:

*“At the outset, we reject SOMI’s generic claim that TikTok has “violated user privacy in numerous ways”. At TikTok, we are driven to maintain a positive and safe environment for our users where creativity and expression thrive. It goes without saying that, as part of this drive, we are committed to protecting and respecting the privacy of our users. TikTok takes compliance with applicable data protection laws – including the General Data Protection Regulation (“GDPR”) – very seriously.”*

471. Also in its letter of 20 May 2021, it merely comments that it rejects the assertion that it violates the law in any way (**exhibit 2d**):

*“Our mission at TikTok is to inspire creativity and bring joy. As we work to bring this mission to life, we have consistently sought to prioritise the privacy and safety of our community. TikTok has robust policies, processes and technologies in place to help protect its users, especially minors. We respectfully disagree with your conclusion that TikTok violates data protection and consumer protection law, including audio-visual media services legislation. We strongly reject these generic claims as unsubstantiated and lacking any factual basis.”*

**14 CLAIM FOR RELIEF**

472. In view of the above, may it please the Court to enter a judgment as follows, provisionally enforceable if possible:

**Exclusive representative**

- I. To designate SOMI as exclusive representative within the meaning of Article 1018e(1) DCCP;

**Represented injured parties**

*Principally*

- II. To rule that in this collective claim SOMI represents the interests of the following narrowly defined groups of persons within the meaning of Article 1018e(2) DCCP (referred to jointly as “**Closely Defined Groups**”):
- a. All natural persons habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and had not yet reached the age of 13 at the moment of first use after 25 May 2018 (“**Closely Defined Group A**”);
  - b. All natural persons habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 13, 14 or 15 at the moment of first use after 25 May 2018 (“**Closely Defined Group B**”);
  - c. All natural persons habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 16 or 17 at the moment of first use after 25 May 2018 (“**Closely Defined Group C**”);

*Alternatively*

- III. To rule that in this collective claim SOMI represents the interests of the injured parties registered with it via the Participants’ Agreement (“**Registered Injured Parties**”), the Registered Injured Parties being divided into the following groups:
- a. All Registered Injured Parties habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and had not yet reached the age of 13 at the moment of first use after 25 May 2018 (“**Registered Injured Parties Group A**”);
  - b. All Registered Injured Parties habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 13, 14 or 15 at the moment of first use after 25 May 2018 (“**Registered Injured Parties Group B**”);
  - c. All Registered Injured Parties habitually resident in the Netherlands who used the TikTok App after 25 May 2018 and were aged 16 or 17 at the moment of first use after 25 May 2018 (“**Registered Injured Parties Group C**”);

**Declaratory decisions**

- IV. To rule that TikTok, for the reasons set out in the body of this summons, contravenes the EU Charter of Fundamental Rights, the EU General Data Protection Regulation, the Dutch Telecommunications Act, mandatory provisions of consumer law and/or the Dutch Media Act;
- V. To rule that TikTok is liable on the basis of Article 82 GDPR and/or Article 6:162 DCC to each member of the Closely Defined Groups, alternatively to each Registered Injured

Party, for the damage suffered and yet to be suffered by that member or by that Registered Injured Party;

- VI. To rule that:
- a. TikTok's Privacy Policy, Terms of Service and Virtual Items Policy as a whole are incomprehensible and unclear for the Injured Parties, or at any rate that the clauses to be decided by the Court therein are incomprehensible and unclear for the Injured Parties, and therefore voidable;
  - b. Clause 6, clause 9 and clause 12 of TikTok's Terms of Service and TikTok's entire Virtual Items Policy are unreasonably onerous, and therefore subject to annulment;
  - c. With its trade practices involving Coins, Gifts and Diamonds, TikTok is guilty of misleading and unfair commercial practices;
  - d. TikTok contravenes Articles 3:15e and 6:193b DCC and Section 3a.5 Dutch Media Act by failing to make commercial communication in the TikTok app identifiable as such.
  - e. TikTok must take appropriate steps to ensure that minors are protected against videos that may harm their physical, mental or moral development;

**Annulment of terms**

- VII. To annul the entire agreement regarding the use of the TikTok App between TikTok and Injured Parties who have not yet reached the age of 16 at the moment of passing of judgment in this matter;
- VIII. To annul clauses 6, 9 and 12 of TikTok's Terms of Service and TikTok's entire Virtual Items Policy, as applicable between the Injured Parties and TikTok, with regard to the Injured Parties referred to in claim #: alternatively to this claim;

**Deletion of personal data**

- IX. To order TikTok to delete irreversibly or arrange for the irreversible deletion of all personal data of Injured Parties who have not yet reached the age of 16 at the moment of passing of judgment in this matter and to provide SOMI with proof of this;

**Orders for the protection of minors**

- X. To order TikTok to:

- a. Implement an effective system whereby it can verify the age of persons registering to use the TikTok App and by which it ensures that children who have not yet reached the age of 13 cannot use the TikTok App;
- b. Implement an effective system whereby it ensures that for processing of personal data of children who have not yet reached the age of 16, for which consent is a legal requirement, such consent can only be given by parents or legal representatives of the child;
- c. Implement an effective system whereby it ensures that minors cannot watch videos that can harm their physical, mental or moral development, including a system whereby parents or legal representatives of minors can effectively monitor and manage which videos their minors can watch, without this leading to TikTok processing more personal data of these parents or legal representatives than is strictly necessary for that purpose;
- d. Take appropriate steps to make commercial communication in the TikTok App identifiable as such;
- e. Draw up and publish a code of conduct in accordance with Section 3a.3 Dutch Media Act;

### **Compensation**

- XI. To order TikTok to compensate for the non-material damage of each member of the Closely Defined Groups, alternatively of each Registered Injured Party;

### *Principally*

- XII. To assess the damage at:
  - a. A sum of EUR 2,000 (in words: two thousand euros) per member of Closely Defined Group A, alternatively per member of Registered Injured Parties Group A;
  - b. A sum of EUR 1,000 (in words: one thousand euros) per member of Closely Defined Group B, alternatively per member of Registered Injured Parties Group B;
  - c. A sum of EUR 500 (in words: five hundred euros) per member of Closely Defined Group C, alternatively per member of Registered Injured Parties Group C,

plus statutory interest from the date of the judgment to be entered in this matter to the date on which payment is made in full;

*Alternatively*

- XIII. To assess the damage at a sum or sums to be determined by the Court in the proper administration of justice, plus statutory interest from the date of the judgment to be entered in this matter to the date on which payment is made in full;

*Further in the alternative*

- XIV. To rule that the damage suffered by the members of the Closely Defined Groups, alternatively the Registered Injured Parties, shall be further assessed during separate follow-up proceedings and shall be paid according to the law;

**Settlement of claims**

*Principally*

- XV. To order TikTok to pay SOMI within six weeks following the date of the judgment to be entered in this matter:

*Principally*

- a. All compensation awarded on the basis of the judgment to be entered in this matter to the members of the Closely Defined Groups, based on 510,000 members in Closely Defined Group A, 298,000 members in Closely Defined Group B and 196,000 members in Closely Defined Group C, thus totalling EUR 1,416,000,000 (in words: one billion four hundred and sixteen million euros), or at any rate a number of members and/or sum to be determined by the Court in the proper administration of justice, thereby ruling that any part of the total sum remaining twenty-four months after payment by TikTok, or at any rate a length of time to be determined by the Court in the proper administration of justice, may be donated by SOMI to one or more not-for-profit organisations to be designated by SOMI which are active in the area of the protection of minors, privacy and/or consumers;

*Alternatively*

- b. All compensation awarded on the basis of the judgment to be entered in this matter to the Registered Injured Parties, based on the number of members of the various groups of Registered Injured Parties to be specified by SOMI, or at any rate a number of members to be determined by the Court in the proper administration of justice, thereby ruling that any part of the total sum remaining twenty-four months after payment by TikTok, or at any rate a length of time to be determined by the Court in the proper administration of justice, may be donated by SOMI to one or

more not-for-profit organisations to be designated by SOMI which are active in the area of the protection of minors, privacy and/or consumers;

*Principally and alternatively*

- c. A sum of EUR 5,000,000 (in words: five million euros), or a sum to be specified by SOMI, or at any rate a sum to be determined by the Court in the proper administration of justice, by way of compensation for the costs to be incurred by SOMI for the distribution of compensation among the members of the Closely Defined Groups, alternatively the Registered Injured Parties, thereby ruling that any part of the total sum remaining after the distribution of the compensation is completed and all associated costs of SOMI have been reimbursed, shall be repaid to TikTok within sixty days, alternatively to rule that SOMI may deduct the costs of distribution of compensation among the members of the Closely Defined Groups, alternatively the Registered Injured Parties, from the compensation to be paid by or on behalf of SOMI;
  
- XVI. To rule that SOMI may deduct from the payment by or on behalf of SOMI of the compensation to the members of the Closely Defined Groups and/or the Registered Injured Parties a normal market remuneration to be specified further by SOMI for services rendered by SOMI, including a reasonable surcharge with respect to (future) representation of collective interests and costs of the use of equity or debt;
  
- XVII. To rule that SOMI shall engage the services of a reliable and professional claims handler to ensure the fair distribution of the compensation to be paid by TikTok;
  
- XVIII. To rule that those members of the Closely Defined Groups and/or the Registered Injured Parties wishing to claim compensation must consent to this end to a binding opinion procedure with respect to the assessment by the claims handler of the right to compensation and with respect to the distribution of the compensation, whereby an independent person with sufficient expertise, to be nominated by the Court after consulting the parties, shall act as a third party charged with giving a binding opinion;

*Alternatively*

- XIX. To design the collective claim settlement as the Court considers appropriate based on one or more proposals for a collective claim settlement to be submitted by SOMI and TikTok based on Article 1018i DCCP;

**Legal costs and out-of-court expenses**

*Principally*

- XX. To order TikTok to pay the costs of these proceedings, including reasonable and fair legal costs, out-of-court expenses and other costs incurred by SOMI, including any fee payable by SOMI to a funder, on the basis of Article 1018l(2) DCCP, or at any rate on the basis of Article 237 DCCP, or at any rate on the basis of Article 6:96 DCC, all to be assessed further by SOMI and payable plus statutory interest from the date of the judgment to be entered in this matter to the date on which payment is made in full;

*Alternatively*

- XXI. To rule that SOMI is to deduct the reasonable and fair legal costs, out-of-court expenses and other costs actually incurred by it, including any fee payable by SOMI to a funder, from the compensation payable by it or on its behalf,

The costs incurred by me, the bailiff, amount to:

Bailiff

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The following have conduct of this case:

SOLV Advocaten

D.M. Linders

Y. van den Winkel

L. Mourcous

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## EXHIBIT OVERVIEW

**Exhibit 1** Articles of association SOMI dated 31 May 2021

**Exhibit 2** Correspondence between SOMI and TikTok

- a. Letter from SOMI to TikTok dated 8 September 2020
- b. Letter from TikTok to SOMI dated 9 October 2020
- c. Letter from the lawyer of SOMI to TikTok dated 7 May 2021
- d. Letter from TikTok to the lawyer of SOMI dated 20 May 2021
- e. Letter from the lawyer SOMI to TikTok dated 21 May 2021
- f. Letter from TikTok to the lawyer of SOMI dated 25 May 2021
- g. Email from the lawyer of SOMI to TikTok dated 25 May 2021
- h. Email from TikTok to the lawyer of SOMI dated 27 May 2021
- i. Email from the lawyer of SOMI to TikTok dated 2 June 2021

**Exhibit 3** Different versions of the Terms of Service of TikTok

- a. Current version of the Dutch Terms of Service dated July 2020 (first identified on 16 February 2021)
- b. Terms of Service dated July 2020 (English)
- c. Terms of Service dated February 2020 (English)
- d. Terms of Service dated February 2019 (English)
- e. Terms of Service subject to the EU such as online at 22 October 2018 (English)
- f. Terms of Service subject to the EU such as online at 5 September 2018 (English)
- g. Terms of Service for the US dated August 2018 (English)

**Exhibit 4** Different versions of the Privacy Policies of TikTok

- a. Current version of the Dutch Privacy Policy dated July 2020
- b. Privacy Policy dated January 2020 (English)

- c. Current version of the Privacy Policy for Younger Users dated January 2020 (English)
- d. Privacy Policy dated October 2019 (English)
- e. Privacy Policy dated January 2019 (English)
- f. Privacy Policy dated August 2018 (English)

- Exhibit 5** Current version of the Virtual Items Policy dated December 2019 (English)
- Exhibit 6** Current version of the TikTok Platform Cookies Policy dated 5 November 2020 (English)
- Exhibit 7** Current version of the Dutch Cookie Statement for the Websites of TikTok dated 3 August 2020
- Exhibit 8** Cookie Banner within the TikTok App
- Exhibit 9** TikTok Privacy Policy for inhabitants of the US dated December 2020 and TikTok Privacy Policy for inhabitants outside the US, the EEA, the UK or Switzerland dated February 2021
- Exhibit 10** Website TikTok Business Help Center: “Ad Targeting”
- Exhibit 11** Website TikTok Business Help Center: “Advertising on TikTok Ads Manager”
- Exhibit 12** Website TikTok for Business: “Advertising Solutions”
- Exhibit 13** Website TikTok for Business: “Promoting the Doritos Truth or Dare game to a young Dutch audience”
- Exhibit 14** Screenshots of the advertising video from Doritos
- Exhibit 15** Screenshots of the pop up in the TikTok App for giving consent to personalised advertisements and "Manage in Settings”
- Exhibit 16** Email from TikTok with the registration confirmation
- Exhibit 17** Screenshots of the purchase process of Gifts in the TikTok App
- Exhibit 18** Report from the website SpendMeNot.com: “TikTok Revenue Statistics That Will Amaze You”
- Exhibit 19** Report from the website SensorTower.com: “Top Grossing Apps Worldwide for February 2021”
- Exhibit 20** Report from the website Multiscope.nl: “1 Miljoen TikTok gebruikers in Nederland”

- Exhibit 21** The National Social Media Research 2020 of Newcom Research & Consultancy B.V. dated January 2020
- Exhibit 22** The National Social Media Research 2021 of Newcom Research & Consultancy B.V. dated January 2021
- Exhibit 23** Report from the website NYTimes.com: “A Third of TikTok’s U.S. Users May Be 14 or Under, Raising Safety Questions”
- Exhibit 24** Report from the website BBC.com: “TikTok’s young fans ‘exploited’ for digital gifts”
- Exhibit 25** Various news reports concerning incidents from “challenges” on TikTok:
- a. Ad.nl: “Italië blokkeert TikTok na dood 10-jarig Maysje”
  - b. Newsweek.com: “TikTok Blackout Choking Challenge Leads to 12-Year-Old Boy Becoming Brain Dead”
  - c. Dailymail.co.uk: “FDA issues ‘Benadryl Challenge’ warning as it investigates reports of teen deaths and injuries linked to a TikTok craze and urges the social media site to remove videos”
  - d. Parool.nl: “Waarschuwing voor ‘zelfmoordspel’ Blue Whale Challenge”
  - e. Ad.nl: “Artsen waarschuwen voor levensgevaarlijke ‘skull-breaker challenge’ op TikTok”
- Exhibit 26** Report from the website Volkskrant.nl: “Op TikTok ligt de pro-anacontent voor het oprapen”
- Exhibit 27** Report from the website FTC.gov: “Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children’s Privacy Law”
- Exhibit 28** The settlement between the Federal Trade Commission and Musical.ly dated 27 February 2019
- Exhibit 29** The settlement between TikTok regarding Consumer Privacy Litigation dated 25 February 2021
- Exhibit 30** Report from the website BBC.com: “TikTok sued for billions over use of children’s data”
- Exhibit 31** Report from the website Autoriteitpersoonsgegevens.nl: “AP start onderzoek naar TikTok”
- Exhibit 32** Report from the website EDPB.europa.eu: “Europees Comité voor gegevensbescherming – Eenendertigste plenaire vergadering: oprichting van een taskforce inzake TikTok”

- Exhibit 33** Report from the website RTLnieuws.nl: “TikTok beboet in Zuid-Korea na verzamelen data kinderen”
- Exhibit 34** Report from the website Research.checkpoint.com: “Tik or Tok? Is TikTok secure enough?”
- Exhibit 35** Security analysis from Penetrum: “Penetrum Security Analysis of TikTok versions 10.0.8 - 15.2.3” dated April 2020
- Exhibit 36** Research report of BEUC “TikTok without filters” dated February 2021
- Exhibit 37** Research report of BEUC: “Confusing By Design” dated February 2021
- Exhibit 38** Report from the website BEUC.eu: “BEUC files complaint against TikTok for multiple EU consumer law breaches”
- Exhibit 39** Report from the website TheIntercept.com: “Invisible censorship. TikTok Told Moderators to Suppress Posts by “Ugly” People and the Poor to Attract New Users”
- Exhibit 40** Report from the website TheGuardian.com: “Revealed: how TikTok censors videos that do not please Beijing”
- Exhibit 41** Report the website Netzpolitik.org: “Cheerfulness and censorship”
- Exhibit 42** Report from the website Netzpolitik.org: “TikTok curbed reach for people with disabilities”
- Exhibit 43** Website Newsroom.tiktok.com/nl: “Verbeterde privacy en veiligheid voor jongeren op TikTok”
- Exhibit 44** Website Newsroom.tiktok.com/nl: “Ondersteuning van jongeren en gezinnen op TikTok”
- Exhibit 45** Screenshots from the music library in the TikTok App
- Exhibit 46** Website of SOMI
- Exhibit 47** Campaign websites of SOMI for collective actions
- Exhibit 48** Screenshot regarding the app of SOMI
- Exhibit 49** Articles and blogs of SOMI regarding privacy related subjects
- Exhibit 50** Report in the media about SOMI and TikTok
- Exhibit 51** The participation agreement with and power of attorney to SOMI