

# Binding decision of the Board (Art. 65)



**Binding Decision 2/2023 on the dispute submitted by the  
Irish SA regarding TikTok Technology Limited (Art. 65 GDPR)**

**Adopted on 2 August 2023**

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## The European Data Protection Board

Having regard to Article 63 and Article 65(1)(a) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter ‘**GDPR**’)<sup>1</sup>,

Having regard to the European Economic Area (hereinafter ‘**EEA**’) Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018<sup>2</sup>,

Having regard to Article 11 and Article 22 of its Rules of Procedure (hereinafter ‘**EDPB RoP**’)<sup>3</sup>,

Whereas:

(1) It follows from Article 60 GDPR that the lead supervisory authority (hereinafter ‘**LSA**’) shall cooperate with the other supervisory authorities concerned (hereinafter ‘**CSAs**’) in an endeavour to reach consensus, that the LSA and CSAs shall exchange all relevant information with each other, and that the LSA shall, without delay, communicate the relevant information on the matter to the other supervisory authorities concerned. The LSA shall without delay submit a draft decision to the other CSAs for their opinion and take due account of their views.

(2) Where any of the CSAs expressed a reasoned and relevant objection on the draft decision in accordance with Article 4(24) and Article 60(4) GDPR and the LSA does not intend to follow the objection or considers that the objection is not reasoned and relevant, the LSA shall submit this matter to the consistency mechanism referred to in Article 63 GDPR.

(3) The main role of the European Data Protection Board (hereinafter the ‘**EDPB**’) is to ensure the consistent application of the GDPR throughout the EEA. Pursuant to Article 65(1)(a) GDPR, the EDPB shall issue a binding decision concerning all the matters which are the subject of the relevant and reasoned objections, in particular whether there is an infringement of the GDPR.

(4) The binding decision of the EDPB shall be adopted by a two-thirds majority of the members of the EDPB, pursuant to Article 65(2) GDPR in conjunction with Article 11(4) EDPB RoP, within one month after the Chair of the EDPB and the competent supervisory authority have decided that the file is complete. The deadline may be extended by a further month, taking into account the complexity of the subject-matter upon decision of the Chair of the EDPB on own initiative or at the request of at least one third of the members of the EDPB.

(5) In accordance with Article 65(3) GDPR, if, in spite of such an extension, the EDPB has not been able to adopt a decision within the timeframe, it shall do so within two weeks following the expiration of the extension by a simple majority of its members.

(6) In accordance with Article 11(6) EDPB RoP, only the English text of the decision is authentic as it is the language of the EDPB adoption procedure.

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<sup>1</sup> OJ L 119, 4.5.2016, p. 1.

<sup>2</sup> References to ‘Member States’ made throughout this decision should be understood as references to ‘EEA Member States’.

<sup>3</sup> EDPB Rules of Procedure, adopted on 25 May 2018 (current version: adopted on 6 April 2022).

## HAS ADOPTED THE FOLLOWING BINDING DECISION

### 1 SUMMARY OF THE DISPUTE

1. This document contains a binding decision adopted by the EDPB in accordance with Article 65(1)(a) GDPR. The decision concerns the dispute arisen following a draft decision (hereinafter, '**Draft Decision**') issued by the Irish supervisory authority ('Data Protection Commission', hereinafter, the '**IE SA**', also referred to in this context as the '**LSA**') and the subsequent objections expressed by the Italian Supervisory Authority ('Garante per la protezione dei dati personali', hereinafter, the '**IT SA**') and the German Supervisory Authorities of 'Berliner Beauftragte für Datenschutz und Informationsfreiheit' and 'Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg'<sup>4</sup> (hereinafter, the '**DE SAs**').
2. The Draft Decision at issue relates to an 'own volition inquiry' (IN-21-9-1) (hereinafter, the '**Inquiry**'), the commencement of which was notified by the IE SA to TikTok Technology Limited (hereinafter, '**TTL**') on 14 September 2021<sup>5</sup> and which concerns the compliance by TTL with its obligations pursuant to Articles 5, 12, 13, 24 and 25 GDPR in the context of its TikTok platform<sup>6</sup>.
3. TTL is a company established in Dublin, Ireland. The IE SA stated in its Draft Decision that it was satisfied that the IE SA is the LSA, within the meaning of the GDPR, for TTL, as controller, for the processing which is the subject of its Inquiry<sup>7</sup>.
4. TikTok is a video-focused social media platform that allows registered users to create and share videos of varying durations and to communicate with other users through messages<sup>8</sup> (hereinafter, '**TikTok platform**').
5. The Draft Decision concerns processing by TTL of personal data of registered TikTok platform users who are aged between 13 and 17 years old, as well as certain issues regarding TTL's processing of personal data relating to children under the age of 13<sup>9</sup>.
6. The temporal scope of the Inquiry covers the period between 31 July 2020 and 31 December 2020 (hereinafter, the '**Relevant Period**')<sup>10</sup>.
7. The following table presents a summary timeline of the events part of the procedure leading to the submission of the matter to the consistency mechanism.

7 June 2022	The IE SA issued a preliminary draft decision (hereinafter, the ' <b>Preliminary Draft Decision</b> ') to TTL on 7 June 2022. The IE SA invited TTL to provide its views on the Preliminary Draft Decision.
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<sup>4</sup> The objection was raised by the Berlin SA also on behalf of the Baden - Württemberg SA.

<sup>5</sup> Draft Decision, paragraph 22.

<sup>6</sup> Draft Decision, paragraphs 3, 32.

<sup>7</sup> Draft Decision, paragraph 51.

<sup>8</sup> Draft Decision, paragraph 5.

<sup>9</sup> Draft Decision, paragraph 32. The term 'Child Users' in the Draft Decision is used as a reference to registered TikTok platform users who are aged between 13 and 17 years old.

<sup>10</sup> Draft Decision, paragraph 31.

June - September 2022	<p>On 2 August 2022, TTL provided its submissions on the Preliminary Draft Decision (hereinafter, ‘<b>TTL PDD Submissions</b>’)<sup>11</sup>.</p> <p>On 11 August 2022, the IE SA made further queries to TTL in relation to TTL’s submissions; TTL responded on 22 August 2022.</p> <p>On 7 September 2022, TTL also submitted an expert report.</p>
13 September 2022	The IE SA shared its Draft Decision with the CSAs in accordance with Article 60(3) GDPR.
October 2022	<p>IT SA and DE SAs raised objections in accordance with Article 60(4) GDPR<sup>12</sup>.</p> <p>Additionally, several CSAs raised comments<sup>13</sup>.</p>
23 December 2022	The IE SA issued a response setting out its replies to such objections and shared it with the CSAs (hereinafter, the ‘ <b>Composite Response</b> ’). The IE SA requested the relevant CSAs to confirm by 11 January 2023 whether, having considered the IE SA’s position in relation to the objections as set out in the Composite Response, the CSAs intended to maintain their objections. On request, the deadline has been extended until 20 January 2023.
January - March 2023	<p>On 11 January 2023, the IT SA confirmed to the IE SA that they maintain their objection<sup>14</sup>.</p> <p>On 20 January 2023, the DE SAs confirmed to the IE SA that they maintain their objection<sup>15</sup>.</p>
7 March 2023	The IE SA clarified to TTL its intention to refer the dispute to the EDPB and invited TTL to exercise its right to be heard in respect of the objections (and comments) that the IE SA proposed to refer to the EDPB along with other relevant documents including the Composite Response and the communications received from the CSAs in reply to the Composite Response.
April 2023	On 18 April 2023, TTL provided the requested submissions, including 4 annexes:

<sup>11</sup> In addition, on 6 September 2022, TTL provided a table setting out the information in TTL PDD Submissions which it considers to be confidential and/or commercially sensitive and the supporting reasoning.

<sup>12</sup> IT SA Objection, dated 10 October 2022 and DE SAs Objection, dated 11 October 2022.

<sup>13</sup> Comment of the Hungarian SA, dated 10 October 2022; comment of the Danish SA, dated 11 October 2022; comment of the Dutch SA, dated 11 October 2022; comment of the French SA, dated 11 October 2022; and comment of the Berlin SA, dated 11 October 2022. These comments are not part of this dispute resolution procedure.

<sup>14</sup> Response of the IT SA to the Composite Response, dated 11 January 2023.

<sup>15</sup> Response of the DE SAs to the Composite Response, dated 20 January 2023.

	<ul style="list-style-type: none"> <li>• Annex 1: Response to CSAs’ objections and comments</li> <li>• Annexes 2-3-4: Expert Reports</li> </ul> (hereinafter, ‘ <b>TTL Art. 65 Submissions</b> ’) <sup>16</sup>
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8. Following the facts set out above, on 10 May 2023, the IE SA submitted the dispute to the EDPB in accordance with Article 60(4) GDPR, thus initiating the dispute resolution procedure under Article 65(1)(a) GDPR using the Internal Market Information system (hereinafter, ‘**IMI**’), at which time they also confirmed the completeness of the file.
9. Following the submission by the IE SA of this matter to the EDPB, the EDPB Secretariat assessed the completeness of the file on behalf of the Chair of the EDPB in line with Article 11(2) EDPB RoP.
10. The EDPB Secretariat contacted the IE SA on 17 May 2023 and 24 May 2023 asking it to provide additional documents and clarifications. The IE SA replied and provided the clarifications on 19 May 2023 and 2 June 2023 respectively. On 6 June 2023, the EDPB Secretariat confirmed its request to the IE SA to provide additional documents originating from TTL or documents with respect to which TTL already had an opportunity to exercise its right to be heard. Based on the exchanges with the IE SA, the EDPB Secretariat asked the IE SA to take additional action to inform TTL about the inclusion of such additional documents in the file of this dispute resolution procedure before the EDPB. On 13 June 2023, the IE SA submitted the requested additional documents in IMI and confirmed to the EDPB Secretariat that the additional action to inform TTL was completed.
11. A matter of particular importance that was scrutinised by the EDPB Secretariat was the right to be heard, as required by Article 41(2)(a) of the Charter of Fundamental Rights of the European Union (hereinafter, ‘**CFR**’). Further details on this are provided in Section 2 of this Binding Decision.
12. On 14 June 2023, the decision on the completeness of the file was taken by the Chair of the EDPB, and the file was circulated by the EDPB Secretariat to all the members of the EDPB.
13. The Chair of the EDPB decided, in compliance with Article 65(3) GDPR in conjunction with Article 11(4) EDPB RoP, to extend the default timeline for adoption of one month by a further month on account of the complexity of the subject-matter.

## 2 THE RIGHT TO GOOD ADMINISTRATION

14. The EDPB is subject to Article 41 of the CFR (right to good administration). This is also reflected in Article 11(1) EDPB RoP. Further details were provided in the EDPB Guidelines 03/2021 on the application of Article 65(1)(a) GDPR, version 1.0 for public consultation adopted on 13 April 2021 (hereinafter, ‘**EDPB Guidelines on Article 65(1)(a) GDPR V1.0**’) and version 2.0 after public consultation adopted on 24 May 2023 (hereinafter, ‘**EDPB Guidelines on Article 65(1)(a) GDPR V2.0**’)<sup>17</sup>.

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<sup>16</sup> On 25 April 2023, in addition, TTL provided a table setting out the information in TTL Art. 65 Submissions which it considers to be confidential and/or commercially sensitive and the supporting reasoning.

<sup>17</sup> EDPB Guidelines on Article 65(1)(a) GDPR V2.0, paragraphs 93-107 and EDPB Guidelines on Article 65(1)(a) GDPR V1.0, paragraphs 94-108.

15. The EDPB's decision 'shall be reasoned and addressed to the lead supervisory authority and all the supervisory authorities concerned and binding on them' (Article 65(2) GDPR). It is not aiming to address directly any other third party, as clarified by the order of the General Court in case T-709/21<sup>18</sup>.

16. Nevertheless, the EDPB assessed if TTL was offered the opportunity to exercise its right to be heard in relation to all the documents it received containing the matters of facts and law to be used by the EDPB to take its decision in this procedure.

17. The EDPB notes that TTL has received the opportunity to exercise its right to be heard regarding all the documents containing the matters of facts and of law considered and addressed by the EDPB in the context of this Binding Decision and provided its written observations<sup>19</sup>, which have been shared with the EDPB by the IE SA.

### 3 CONDITIONS FOR ADOPTING A BINDING DECISION

18. The general conditions for the adoption of a binding decision by the EDPB are set forth in Article 60(4) GDPR and Article 65(1)(a) GDPR<sup>20</sup>.

#### 3.1 Objection(s) expressed by CSA(s) in relation to a Draft Decision

19. The EDPB notes that the IT SA and the DE SAs raised objections to the Draft Decision via IMI. The objections were raised pursuant to Article 60(4) GDPR.

20. The IT SA confirmed that the part of its objection concerning the compliance order under Article 58(2)(d) GDPR in relation to the potential infringement of Article 25 GDPR by TTL is considered to be withdrawn. Therefore, this part of the IT SA's objection is not taken into account by the EDPB in this dispute resolution procedure and is not addressed in this Binding Decision.

#### 3.2 The IE SA does not follow the objections to the Draft Decision or is of the opinion that the objections are not relevant or reasoned

21. On 23 December 2022, the IE SA provided the CSAs with an analysis of its views on their objections in its Composite Response. The IE SA stated that this analysis is provided 'without prejudice to IE SA's position on whether any of the objections raised constitute "relevant and reasoned" objections for the purpose of Article 4(24) GDPR'<sup>21</sup>. After setting out its position on the reasons for

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<sup>18</sup> The General Court found in its Order of 7 December 2022, *WhatsApp v European Data Protection Board*, T-709/21, EU:T:2022:783 (hereinafter, '**T-709/21 WhatsApp**') that the controller addressed by the final decision of the LSA was not directly concerned by the EDPB Binding Decision 1/2021, adopted on 28 July 2021 (hereinafter, '**Binding Decision 1/2021**') since it did not in itself bring a distinct change in the applicant's legal position and constituted a preparatory or intermediate act. The General Court also clarified the Binding Decision 1/2021 had no legal effect vis-a-vis the controller that was independent of the final decision, on which the LSA had a measure of discretion. As a consequence, the General Court dismissed the action for annulment brought by WhatsApp Ireland Ltd as inadmissible, given that the conditions laid down in the fourth paragraph of Art. 263 TFEU had not been met. See T-709/21 WhatsApp, paragraphs 41-61.

<sup>19</sup> In particular, TTL PDD Submissions dated 2 August 2022 and TTL Art. 65 Submissions dated 18 April 2023.

<sup>20</sup> According to Art. 65(1)(a) GDPR, the EDPB will issue a binding decision when a supervisory authority has raised a relevant and reasoned objection to a draft decision of the LSA and the LSA has not followed the objection or the LSA has rejected such an objection as being not relevant or reasoned.

<sup>21</sup> Composite Response, p. 1.

maintaining the Draft Decision unchanged, the IE SA concluded that it would not follow the objections<sup>22</sup>.

22. The IE SA further explained that it considers that the objection raised by the IT SA is ‘relevant and reasoned’ for the purpose of Article 4(24) GDPR, with the exception of the corrective action elements that are not reasoned<sup>23</sup> and that the objection raised by the DE SAs is not ‘relevant and reasoned’<sup>24</sup>. The IE SA’s view is set out in its internal assessment of whether each of the objections constitutes a ‘relevant and reasoned objection’ pursuant to the GDPR<sup>25</sup>.

23. The IE SA confirmed, when referring the dispute to the EDPB, that it does not propose to follow the objections/does not consider them to be relevant and reasoned and that its efforts to reach consensus on the issues arising were unsuccessful<sup>26</sup>.

### 3.3 Admissibility of the case

24. The case at issue fulfils, *prima facie*, all the elements listed by Article 65(1)(a) GDPR, since CSAs raised objections to the Draft Decision within the deadline provided by Article 60(4) GDPR, and the IE SA has not followed objections or rejected them for being, in its view, not relevant or reasoned.

25. Considering the above, in particular that the conditions of Article 65(1)(a) GDPR are met, the EDPB is therefore competent to adopt a binding decision, which shall concern all the matters which are the subject of the relevant and reasoned objection(s), in particular whether there is an infringement of the GDPR or whether the envisaged action in relation to the controller or processor complies with the GDPR<sup>27</sup>.

26. The EDPB recalls that its current decision is without any prejudice to any assessments the EDPB may be called upon to make in other cases, including with the same parties, taking into account the contents of the relevant Draft Decision and the objections raised by the CSA(s).

### 3.4 Structure of the binding decision

27. For each of the objections raised, the EDPB decides on their admissibility, by assessing first whether they can be considered as a ‘relevant and reasoned objection’ within the meaning of Article 4(24) GDPR as clarified in the EDPB Guidelines 9/2020 on the concept of relevant and reasoned objection, Version 2.0, adopted on 9 March 2021 (hereinafter, ‘**EDPB Guidelines on RRO**’)<sup>28</sup>.

28. Where the EDPB finds that an objection does not meet the requirements of Article 4(24) GDPR, the EDPB does not take any position on the merit of any substantial issues raised by that objection in

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<sup>22</sup> Composite Response, p. 7.

<sup>23</sup> IE SA’s internal assessment of whether each of the objections constitutes a ‘relevant and reasoned objection’, undated, Annex to the IE SA’s letter to TTL dated 7 March 2023 (hereinafter, ‘**IE SA’s assessment of the objections**’), p. 2.

<sup>24</sup> IE SA’s assessment of the objections, p. 2.

<sup>25</sup> IE SA’s assessment of the objections.

<sup>26</sup> IE SA’s referral of objections to the EDPB pursuant to Art. 60(4) and 65(1)(a) GDPR, dated 10 May 2023, p. 2.

<sup>27</sup> Art. 65(1)(a) GDPR and Art. 4(24) GDPR. Some CSAs raised comments and not per se objections, which were, therefore, not taken into account by the EDPB.

<sup>28</sup> EDPB Guidelines on RRO.



this specific case. The EDPB will analyse the merits of the substantial issues raised by all objections it deems relevant and reasoned<sup>29</sup>.

## 4 ON THE POSSIBLE ADDITIONAL INFRINGEMENT OF ARTICLE 5(1)(A) GDPR (THE PRINCIPLE OF FAIRNESS)

### 4.1 Analysis by the LSA in the Draft Decision

29. The first type of processing examined by the IE SA in the Draft Decision (analysed within Issue 1<sup>30</sup>) relates to the processing of personal data of the registered TikTok platform users who are aged between 13 and 17 years old (hereinafter, ‘**Child Users**’)<sup>31</sup> in the context of the platform settings of the TTL platform (both mobile application and website based), in particular public by default processing of such platform settings<sup>32</sup>. In connection to Issue 1, the IE SA includes in the Draft Decision two proposed findings, leading respectively to a breach of Article 25(1), Article 25(2) and Article 5(1)(c) GDPR<sup>33</sup> and to a breach of Article 24(1) GDPR in relation to the public-by-default setting for Child Users<sup>34</sup>. For completeness, under Issue 1, the IE SA also proposes a finding of infringement of Article 5(1)(f) and Article 25(1) GDPR in relation to a specified aspect of the “Family Pairing” setting on TTL’s platform<sup>35</sup>.

30. Within Issue 3, the IE SA analyses TTL’s compliance with Articles 5, 12 and 13 GDPR in connection with transparency, by reference to ‘whether or not Child Users were adequately informed of the implications of registering as a User and adequately informed as to the implications of public-by-default processing’<sup>36</sup>. In connection to Issue 3, the IE SA includes in the Draft Decision a proposed finding leading to a breach of Article 13(1)(e) and Article 12(1) GDPR<sup>37</sup>.

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<sup>29</sup> ‘The EDPB will assess, in relation to each objection raised, whether the objection meets the requirements of Art. 4(24) GDPR and, if so, address the merits of the objection in the binding decision.’ See EDPB Guidelines on Article 65(1)(a) GDPR, V2.0, paragraph 63 and EDPB Guidelines on Article 65(1)(a) GDPR, V1.0, paragraph 63.

<sup>30</sup> Draft Decision, Section F.

<sup>31</sup> Draft Decision, paragraph 32.

<sup>32</sup> Draft Decision, paragraph 34. See also Draft Decision, paragraph 39.

<sup>33</sup> More specifically, the wording of Finding 1 is: ‘At the time of Relevant Period, TTL implemented a default account setting for Child Users which allowed anyone (on or off TikTok) to view social media content posted by Child Users. In this regard, I am of the view that TTL failed to implement appropriate technical and organisational measures to ensure that, by default, only personal data which were necessary for TTL’s purpose of processing were processed. In particular, this processing was performed to a global extent, and in circumstances where TTL did not implement measures to ensure that by default the social media content of Child Users was not made accessible (without the user’s intervention) to an indefinite number of natural persons. I am therefore of the view that the above processing by TTL was contrary to the principle of data protection by design and default under Article 25(1) and 25(2) GDPR, and contrary to the data minimisation principle under Article 5(1)(c) GDPR’.

<sup>34</sup> Draft Decision, Finding 2: ‘During the Relevant Period, TTL implemented a default account setting for Child Users which allowed anyone (on or off TikTok) to view social media content posted by Child Users. The above processing posed severe possible risks to the rights and freedoms of Child Users’.

In circumstances where TTL did not properly take into account the risks posed by the above processing, I am of the view that TTL did not implement appropriate technical and organisational measures to ensure that the above processing was performed in accordance with the GDPR, contrary to Article 24(1) GDPR”

<sup>35</sup> Draft Decision, paragraph 184.

<sup>36</sup> Draft Decision, paragraph 251.

<sup>37</sup> Draft Decision, Finding 5: ‘In circumstances where TTL did not provide Child Users with information on the categories of recipients or categories of recipients of personal data, I find on that TTL has not complied with its

31. The IE SA explains in particular that among the platform settings there was one by which all new TTL accounts, including Child User accounts, were set to public by default, and that at the stage of registration 'Child Users were presented with a pop-up notification inviting them to 'Go Private' or to 'Skip'<sup>38</sup> (hereinafter, referred to as the 'Registration Pop-Up').
32. The Registration Pop-Up appears after 'successfully passing through the age gate'<sup>39</sup> and states: 'With a private account, only approved followers can view your content on TikTok. Otherwise, your videos can be viewed by anyone. You can change your preferences in the app settings at any time'<sup>40</sup>.
33. The IE SA quotes TTL's description of the Registration Pop-Up, i.e. this full-screen pop-up notification provided at the stage of registration concerning the possibility of setting the account to private<sup>41</sup>. More specifically, TTL describes that 'Users between the ages of 13-17 ('under 18 Users') were presented with a full-screen pop-up notification highlighting account privacy, explaining, at a high-level, what a private account involved, and the implications of having a public account setting. This notice comprises a pro-privacy nudge containing a prominent button which Users could press to 'Go Private', and also reminded under 18 Users that they could change their privacy settings at any time in the app settings. Steps were therefore taken to empower younger Users to make an informed decision about their account setting'<sup>42</sup>.
34. With respect to the Registration Pop-Up, the IE SA notes that opting for a private account is something that users must positively opt to do: alternatively, they may 'skip' this decision and their accounts are made public by default<sup>43</sup>.

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obligations under 13(1)(e) GDPR. In circumstances where TTL did not provide Child Users with information on the scope and consequences of the public-by-default processing (that is, operating a social media network which, by default, allows the social media posts of Child Users to be seen by anyone) in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular insofar as the very limited information provided did not make it clear at all that this would occur, I find that TTL has not complied with its obligations under and 12(1) GDPR'.

In paragraphs 274-275 of the Draft Decision, the IE SA explains why in its view the breaches of transparency obligations at stake do not constitute also a breach of the transparency principle in Art. 5(1)(a) GDPR.

<sup>38</sup> Draft Decision, paragraph 128.

<sup>39</sup> Draft Decision, paragraph 255.

<sup>40</sup> Draft Decision, paragraph 128 and Image 1 in paragraph 255.

<sup>41</sup> This description is placed in the Draft Decision before the assessment of Issue 1, within the 'assessment of certain matters concerning Art. 5, 24 and 25 GDPR', including an assessment of the 'context of processing' as required by Art. 24 and 25 GDPR. Draft Decision, Section E.1 and specifically paragraphs 68 and following. With respect to the context in which accounts of Child Users are set to 'public' by default on registration, the IE SA quotes TTL's description at paragraph 70. The IE SA defines the 'context of processing' as 'the circumstances that form the setting of the processing' (Draft Decision, paragraph 68). In the excerpt of TTL's Response quoted by the Draft Decision in paragraph 70, TTL states that under 18 users were presented with the Registration Pop-Up 'To promote the fact that Users could select a private account at any time'. Draft Decision, paragraph 70, quoting TTL's Response to Request for Information dated 26 October 2021.

<sup>42</sup> Draft Decision, paragraph 70, quoting TTL's Response to Request for Information dated 26 October 2021.

<sup>43</sup> Draft Decision, paragraph 72. This is also reiterated in paragraph 76 ('Users must positively opt for a private account – this is a choice that they must make in order to avail of it or that may simply chose to 'skip' this decision in which case their account is public-by-default').

Importantly, the IE SA states that, regarding the public by default account settings, it is unclear why TTL permitted the accounts of Child Users to be set public by default, in light of the risks of high severity connected to this (Draft Decision, paragraph 160).

35. Moreover, the IE SA highlights that, while during the registration process, the child is prompted to select one of the two above-mentioned options, the Child User can choose to simply ‘Skip’ this step<sup>44</sup>. In this regard, the IE SA states that ‘this use of language would seem to incentivise or even trivialise the decision to opt for a private account’<sup>45</sup>. The IE SA further notes that the implications of having a public account are ‘particularly severe and wide-ranging’, given that the published content ‘could be accessed, viewed and otherwise processed beyond the control of the data subject and TTL’<sup>46</sup>.
36. The IE SA also highlights the ‘cascading implications’ of the public-by-default account on the other platform settings for the Child User (namely, videos and comments being posted publicly by default too, and some features being enabled by default)<sup>47</sup>. The IE SA also highlights that the selection of the button ‘Skip’ on the Registration Pop-Up by the Child User has a ‘cascading effect of allowing many further platform settings be rendered public - including the accessibility of comments on video content created by the Child User’<sup>48</sup>.
37. With respect to the implication that each video would be posted publicly by default, the IE SA also explains that when ‘public account Users sought to publish a public video, a pop-up notification explained the implications of doing so, asking the User to ‘Cancel’ or ‘Post Now’ (hereinafter, referred to as the ‘Video Posting Pop-Up’).
38. In the Video Posting Pop-Up, the ‘Cancel’ button gradient colour was a light grey and the ‘Post Now’ was black’<sup>49</sup>. In this regard, according to the IE SA, while ‘TTL notes that there are indeed granular level setting for each individual video, and that when a video was to be posted publicly for the first time, a Child User would be ‘nudged’ to select between ‘Post Now’ and ‘Cancel’, plainly the platform settings incentivised the selection of the posting of videos publicly, given both the phraseology used and the difference of colour gradient’<sup>50</sup>. According to the IE SA, where the video is posted publicly and the user holds a public account, this had the effect of making it viewable and accessible by an unlimited audience<sup>51</sup>.
39. The Video Posting Pop-Up included the text ‘Your account is public and your public videos will be visible to everyone. You can make this video private, or switch to a private account in your privacy settings’<sup>52</sup>.
40. The IE SA also notes, in the Draft Decision, that ‘the lack of transparency both in itself and in relation to the use, or rather lack of use, of information relating to the processing of personal data in a concise, transparent, intelligible and easily accessible form, in clear and plain language, adds to the lack of appropriate technical and organisational measures employed by TTL with regard to its platform settings and Child Users’<sup>53</sup>.

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<sup>44</sup> Draft Decision, paragraph 160.

<sup>45</sup> Draft Decision, paragraph 160.

<sup>46</sup> Draft Decision, paragraph 160.

<sup>47</sup> Draft Decision, paragraphs 161-164.

<sup>48</sup> Draft Decision, paragraph 173.

<sup>49</sup> Draft Decision, paragraph 131 and image 6 in paragraph 257.

<sup>50</sup> Draft Decision, paragraph 162.

<sup>51</sup> Draft Decision, paragraph 162.

<sup>52</sup> Draft Decision, image 6 in paragraph 257.

<sup>53</sup> Draft Decision, paragraph 165.

41. The IE SA states that the Registration Pop-Up did not indicate whether the fact that videos posted with a public account could be viewed by anyone referred only to other registered TTL users or indeed anyone at all<sup>54</sup>. The IE SA further explains that the Registration Pop-Up did not allow a User to navigate to the Privacy Policy or the Summary for Users U18 in order to determine who ‘anyone’ referred to, and that, in any event, both of the documents did not clearly explain that a public account’s content would be accessible to an indefinite audience, including unregistered users<sup>55</sup>.
42. Similarly, with respect to the Video Posting Pop-Up, according to the IE SA’s analysis, it is not clear that public accounts and publicly posted videos could be viewable by non-registered persons<sup>56</sup>.
43. The IE SA states that the information provided by TTL, including both the Registration Pop-Up and the Video Posting Pop-Up, the references to the terms ‘third parties’, ‘anyone’ and ‘everyone’ are ‘vague and opaque’.<sup>57</sup> The IE SA also rejects TTL’s submissions that the relevant references to the terms ‘public’ ‘anyone’ and ‘everyone’ are ‘concise, transparent, intelligible and easily accessible’ stating that such terms ‘are ambiguous insofar as they are capable of referring to both registered Users and those not registered’<sup>58</sup>. The IE SA further finds that ‘TTL failed to provide Child Users with information as to that public-by-default processing of accounts meant that an indefinite audience, including non-registered users, would be able to view their personal data’<sup>59</sup>.
44. Concerning Issue 3, the IE SA concludes in its Finding 5, that TTL did not comply with its obligations under Article 12(1) and Article 13(1)(e) GDPR<sup>60</sup>. In the context of its conclusions, the IE SA also states that TTL’s informational deficits do not constitute an infringement of the transparency principle pursuant to Article 5(1)(a) GDPR<sup>61</sup>.

## 4.2 Summary of the objection raised by the CSAs

45. The **DE SAs** raise an objection pursuant to Article 4(24) and Article 60(4) GDPR, regarding the existence of **an additional infringement of the principle of fairness enshrined in Article 5(1)(a) GDPR**<sup>62</sup>. They consider that, taking into account the facts presented by the IE SA in its Draft Decision, TTL has implemented dark patterns and thus committed a breach of the fairness principle<sup>63</sup>.
46. Pursuant to the DE SAs, the IE SA’s assessment of TTL’s registration process for Child Users and public by default settings ‘misses the assessment and statement that in this processing dark

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<sup>54</sup> Draft Decision, paragraph 256.

<sup>55</sup> Draft Decision, paragraph 256 and paragraphs 272-273.

<sup>56</sup> Draft Decision, paragraph 257-259 and paragraphs 272-273.

<sup>57</sup> Draft Decision, paragraph 272.

<sup>58</sup> Draft Decision, paragraph 259 (‘I do not accept TTL’s submissions that it used ‘simple, clear terminology that could be readily understood by all Users’ and that the relevant references to the terms ‘public’, ‘anyone’ and ‘everyone’ are ‘concise, transparent, intelligible and easily accessible’. Such terms are ambiguous insofar as they are capable of referring to both registered Users and those not registered and this distinction could have been specified succinctly and easily. Indeed, per [7.20] of the Response to the PDD, TTL refers to image 9 which states ‘Anyone will be able to see your contents and likes. You will no longer need to approve followers’. This additional context would suggest that TTL was only referring to registered Users, rather than anyone at all’).

<sup>59</sup> Draft Decision, paragraph 273.

<sup>60</sup> Draft Decision, Finding 5.

<sup>61</sup> Draft Decision, paragraph 275.

<sup>62</sup> DE SAs Objection, p. 3.

<sup>63</sup> DE SAs Objection, p. 4.

patterns are implemented’, constituting a breach of the fairness principle<sup>64</sup>. Consequently, the DE SAs highlight that, if the IE SA followed their objection, the Draft Decision would contain the additional finding that TTL in the Relevant Period has breached Article 5(1)(a) GDPR by using dark patterns to nudge Child Users to not make use of their option whether to set their account as public or not<sup>65</sup>.

47. According to the DE SAs, the infringement of Article 5(1)(a) GDPR and in particular of the principle of fairness was committed by TTL in two situations, which, in the DE SAs opinion, ‘constitute dark patterns on a social media platform by nudging the user to a certain decision’<sup>66</sup>.

48. The first of such situations relates to the registration process for Child Users and the Registration Pop-Up that appears to users for them to decide between a private and a public account<sup>67</sup>; in this regard, the DE SA makes reference to paragraphs 72, 128, 160, 173 and 255 of the Draft Decision, which are described above in paragraphs 31-36 of this Binding Decision.

49. The DE SAs in their objection argue that, in paragraph 160 of the Draft Decision, with the word ‘prompted’, as well as with the use of the words ‘incentivise’ and ‘trivialise’, the IE SA indicates the use of nudging during the registration process<sup>68</sup>.

50. In respect of this, the DE SAs claim that the following conclusion is missing from the IE SA’s analysis of the screenshot with the selection between ‘Go Private’ or ‘Skip’: the placement of the option ‘Skip’ on the right side will lead a majority of users to select ‘Skip’, ‘as internet and social media users are used to the button on the right side leading them to fulfil a step and go further (muscle memory)’<sup>69</sup>.

51. The second situation relates to the Video Posting Pop-Up, i.e. the pop-up window asking users to confirm whether they want to post a video online by giving them a choice between ‘Cancel’ and ‘Post Now’<sup>70</sup>. As underlined by the DE SAs, the option ‘Post Now’ is written in bold<sup>71</sup>. Specifically, the DE SAs are of the view that in this situation the nudging used by TTL is ‘even graver’<sup>72</sup>.

52. In this respect, the DE SAs highlight that the ‘Post Now’ choice is placed at the right side, making it a lot more likely for users to choose this option rather than ‘Cancel’ placed on the left side<sup>73</sup>. The DE SAs argue that the nudging effect is amplified by the fact that the option ‘Post Now’ is written in bold text, whereas ‘Cancel’ is displayed normally<sup>74</sup>.

53. Pursuant to the DE SAs, this means that the ‘Post Now’ option will appear more visible and prominent to users, which again raises the likelihood of users choosing this option<sup>75</sup>.

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<sup>64</sup> DE SAs Objection, p. 3.

<sup>65</sup> DE SAs Objection, p. 3.

<sup>66</sup> DE SAs Objection, p. 4.

<sup>67</sup> DE SAs Objection, p.4.

<sup>68</sup> DE SAs Objection, p. 5.

<sup>69</sup> DE SAs Objection, p. 5.

<sup>70</sup> DE SAs Objection, p. 5-6 (referring to Image 6, Notification pop-up prior to posting a public video, Draft Decision, paragraph 257).

<sup>71</sup> DE SAs Objection, p. 6.

<sup>72</sup> DE SAs Objection, p. 5.

<sup>73</sup> DE SAs Objection, p. 6.

<sup>74</sup> DE SAs Objection, p. 6 (referring to Image 6, Notification pop-up prior to posting a public video, Draft Decision, paragraph 257).

<sup>75</sup> DE SAs Objection, p. 6.

54. Moreover, the DE SAs argue that ‘the pop-in window makes it unnecessarily hard for users to change the default settings at this point’<sup>76</sup>. This is because the information in the window mentions ‘privacy settings’, but lacks a direct link to said settings<sup>77</sup>. The DE SAs argue that this means that users who wish to change the settings will first need to select ‘Cancel’ and then go through the trouble of looking for the privacy settings, where they will then need to find the exact setting that concerns the visibility of the account/switching to a private account<sup>78</sup>.
55. Based on the above argumentation, the DE SAs consider that this lowers the likelihood of users changing their settings, whereas the likelihood that users will go along with posting the video with the pre-set settings is high<sup>79</sup>. Furthermore, the DE SAs mention that, in paragraph 162 of the Draft Decision, the IE SA analyses that this practice qualifies as nudging<sup>80</sup>.
56. In the opinion of the DE SAs, making it harder for data subjects to make a choice in favour of the protection of their personal data, rather than to the detriment of their data protection, constitutes an unfair practice and processing<sup>81</sup>. The DE SAs therefore state that the IE SA fails to assess and to find an infringement of the fairness principle under Article 5 (1)(a) GDPR<sup>82</sup>, due to the implementation dark patterns<sup>83</sup>.
57. Consequently, the DE SAs claim that, based on IE SA’s assessment, TTL implemented dark patterns and thereby infringed the principle of fairness according to Article 5(1)(a) GDPR. In addition, the DE SAs refer to paragraph 8 of the EDPB Guidelines 03/2022<sup>84</sup>, in particular to the point made by the EDPB in its Guidelines that the ‘fairness principle has an umbrella function and all dark patterns would not comply with it, irrespectively of compliance with other data protection principles’<sup>85</sup>. The DE SAs also recall the definition of dark patterns provided by the EDPB<sup>86</sup>.
58. Furthermore, the DE SAs argue that the failure by the IE SA to find an infringement of the fairness principle poses a significant risk for the fundamental rights and freedoms of the TTL child users. According to the DE SAs, nudging by dark patterns leads them to make decisions with negative impact on the protection of their personal data<sup>87</sup>.
59. The DE SAs affirm that TTL is used by millions of users in Europe, including millions of child users and refer to Recital 38 GDPR, which envisages specific protection when the processing involves personal data of children. Pursuant to the DE SAs, children are more likely to be subject to dark patterns<sup>88</sup>. In addition, the Draft Decision focuses on the processing of personal data of Child Users, and according to the DE SAs, the IE SA’s failing to find an infringement of the fairness principle has

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<sup>76</sup> DE SAs Objection, p. 6.

<sup>77</sup> DE SAs Objection, p. 6.

<sup>78</sup> DE SAs Objection, p. 6.

<sup>79</sup> DE SAs Objection, p. 6.

<sup>80</sup> See this Binding Decision, paragraph 49 above.

<sup>81</sup> DE SAs Objection, p. 6-7.

<sup>82</sup> DE SAs Objection, p. 6.

<sup>83</sup> DE SAs Objection, p. 3.

<sup>84</sup> Guidelines 03/2022 on Dark patterns in social media platform interfaces: how to recognise and avoid them, adopted on 12 March 2022 (version of public consultation)(hereinafter “**EDPB Guidelines on deceptive design patterns**”).

<sup>85</sup> DE SAs Objection, p. 4, referring to EDPB Guidelines on deceptive design patterns, paragraph 8.

<sup>86</sup> DE SAs Objection, p. 4, referring to EDPB Guidelines on deceptive design patterns, paragraph 8.

<sup>87</sup> DE SAs Objection, p.7.

<sup>88</sup> In this regard, the DE SAs refer to EDPB Guidelines on deceptive design patterns, paragraph 7.

considerable significance to fundamental rights and freedoms of children. The DE SAs highlight that this is all the more relevant as the IE SA mentions and analyses nudging in the Draft Decision, but fails to name the consequences, i.e. the infringement of Article 5 (1)(a) GDPR. The DE SAs further state that TTL, as well as other social media providers, in case of a publication of the decision, could view this as a, at least partial, 'carte blanche' for using nudging and dark patterns<sup>89</sup>.

60. The fact that the IE SA has not found an infringement of Article 5 (1)(a) GDPR, according to the DE SAs, poses a risk on users to continuous confrontation with dark patterns that lead them subconsciously to decisions violating their privacy interests<sup>90</sup>.

### 4.3 Position of the LSA on the objection

61. The IE SA considers that the objection raised by DE SAs concerning the absence of a finding of infringement of the fairness principle set out in Article 5(1)(a) GDPR does not constitute a relevant and reasoned objection<sup>91</sup>.

62. In its Composite Response, the IE SA notes that the DE SAs are the only CSAs that have raised this matter and the IE SA questions whether an amendment of its Draft Decision, based on the DE SAs' objection 'would respect the consensus position of the CSAs on this matter'<sup>92</sup>.

63. In addition, the IE SA highlights that they cannot introduce a finding of an infringement, the subject matter of which was not examined in the context of the Inquiry at hand and regarding which TTL was never provided with the right to be heard<sup>93</sup>.

64. The IE SA has further indicated that it does not intend to follow this objection<sup>94</sup>.

### 4.4 Analysis of the EDPB

#### 4.4.1 Assessment of whether the objection was relevant and reasoned

65. The objection raised by the DE SAs concerns 'whether there is an additional infringement of the GDPR'<sup>95</sup>, as it argues that the IE SA, based on the facts stated in the Draft Decision, should have found an infringement of fairness principle under Article 5(1)(a) GDPR and included such additional finding in its final decision<sup>96</sup>.

66. The EDPB takes note of TTL's view that the DE SAs' objection does not meet the threshold set by Article 4(24) GDPR and should be thus rejected at the outset<sup>97</sup>.

67. In particular, TTL's view is that the DE SAs' objection fails to be relevant because it raises a new issue, which is not within the scope of the Inquiry<sup>98</sup>. TTL argues that, even if the IE SA's investigation took into account certain factors of Article 5(1)(a) GDPR, the allegation of the DE SAs that TTL used

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<sup>89</sup> DE SAs Objection, p. 7.

<sup>90</sup> DE SAs Objection, p. 8.

<sup>91</sup> IE SA's assessment of the objections, p. 2.

<sup>92</sup> Composite Response, p. 6.

<sup>93</sup> Composite Response, p. 6.

<sup>94</sup> Composite Response, p. 6-7.

<sup>95</sup> EDPB Guidelines on RRO, paragraph 24.

<sup>96</sup> DE SAs Objection, p. 3.

<sup>97</sup> TTL Art.65 Submissions, paragraphs 5.3, 7.2.

<sup>98</sup> TTL Art. 65 Submissions, paragraph 7.3.

dark patterns which equal to a breach of the fairness principle was not considered nor investigated and put to TTL<sup>99</sup>. In this regard, the EDPB highlights that, contrary to TTL's position<sup>100</sup>, objections can be directly connected to the substance of the LSA's draft decision despite not aligning with the scope of the inquiry defined by the LSA. Regarding whether an objection is 'relevant' or not, the EDPB recalls that an objection as to whether there is an infringement of the GDPR may also include a disagreement as to the conclusions to be drawn from the findings of the investigation and for instance may state that the findings amount to an additional infringement of a provision of the GDPR than those already found by the LSA in its draft decision<sup>101</sup>. Indeed, the DE SAs' objection relies upon the content and the findings in the Draft Decision<sup>102</sup> to highlight that the IE SA failed to conclude in the context of its Draft Decision that TTL infringed the principle of fairness, under Article 5(1)(a) GDPR<sup>103</sup>.

68. The EDPB notes that the DE SAs' objection has a direct connection with the Draft Decision and makes many references to its factual and legal content<sup>104</sup>. The DE SAs objection, if followed, would entail a change leading to a different conclusion as to 'whether there is an infringement of the GDPR'<sup>105</sup> since taking it on board would mean including the additional finding that TTL during the Relevant Period has breached Article 5(1)(a) GDPR (particularly, the principle of fairness)<sup>106</sup>.

69. In consequence, the EDPB finds that objection to be **relevant**.

70. With respect to whether an objection is 'reasoned' or not, the EDPB recalls that the objection needs to include clarifications and arguments (i.e. the legal / factual mistakes of the LSA's draft decision) as to why an amendment of the decision is proposed<sup>107</sup>.

71. TTL claims that the DE SAs' objection is not sufficiently reasoned as it only refers to EDPB guidelines in a vague way and relies upon a reasoning that is neither detailed nor precise<sup>108</sup>. TTL also argues

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<sup>99</sup> TTL Art.65 Submissions, paragraphs 7.4-7.5.

<sup>100</sup> TTL Art.65 Submissions, paragraph 7.6 (where TTL argues that 'It is clear that, by going beyond the Defined Scope of the Inquiry, the Berlin SAs's Objection is therefore not directly related to any finding of the Draft Decision – instead, the Berlin SA is proposing a new finding altogether. Accordingly, this Objection is not capable of being considered 'relevant').

<sup>101</sup> EDPB Guidelines on RRO, paragraph 26.

<sup>102</sup> The DE SAs refers e.g. to paragraphs 72, 128, 160, 162, 173, 255 of the Draft Decision.

Concerning the Registration Pop-Up, the DE SAs rely upon paragraphs 72, 138 and 255 of the Draft Decision to describe the alternative between 'Go Private' or 'Skip' (leading to their account being made public by default), and to the analysis made by the IE SA of the language of this pop-up, which 'would seem to incentivise or even trivialise the decision to opt for a private account'. Furthermore, the DE SAs rely on paragraph 173 of the Draft Decision to describe the 'cascading effect' that the decision of the users to 'Skip' can have on further platforms settings.

Furthermore, regarding the 'Video Posting Pop-Up', the DE SAs refer directly to paragraph 162 of the Draft Decision and in particular to the statement of the IE SA that the two options provided to the users (i.e. 'Cancel' or 'Post Now') would nudge the Child User and the fact that 'plainly the platform incentivised the selection of posting of videos publicly, given both the phraseology used and the difference in colour gradient'.

<sup>103</sup> DE SAs Objection, p. 8 ('the DPC in its analyses has shown that TTL has implemented dark patterns and nudging in its user interface, but has not drawn the legal consequences, i.e. has not found an infringement of Art. 5 (1) a GDPR').

<sup>104</sup> See this Binding Decision, section 4.2 above.

<sup>105</sup> EDPB Guidelines on RRO, paragraph 13.

<sup>106</sup> DE SAs Objection, p. 3, 8.

<sup>107</sup> EDPB Guidelines on RRO, paragraph 16.

<sup>108</sup> TTL Art. 65 Submissions, paragraph 7.13.



that the DE SAs failed to provide adequate reasoning in respect of TTLs use of dark patterns as they did not specify the precise type of dark pattern(s) allegedly present during the Relevant Period<sup>109</sup>.

72. The EDPB is not swayed by these views by TTL, as on the contrary, the DE SAs put forward several legal and factual arguments as to why on the basis of the findings included in the Draft Decision the IE SA should have found an additional infringement of the principle of fairness<sup>110</sup>.

73. More specifically, the DE SAs analyse in their objection that, considering the facts presented by the IE SA in the Draft Decision regarding the Registration Pop-Up and the Video Posting Pop-Up, that TTL implemented dark patterns and as a result the principle of fairness pursuant to Article 5(1)(a) GDPR is infringed<sup>111</sup>. According to the DE SAs, both pop-ups constitute dark patterns on a social media platform due to the fact that they are nudging the user to a certain decision<sup>112</sup>.

74. In their reasoning, the DE SAs describe in detail the Registration Pop-Up and the Video Posting Pop-Up and explain the aspects on the basis of which the IE SA should have found a breach of the fairness principle.

75. More specifically, with respect to the Registration Pop-Up<sup>113</sup> the DE SAs agree with the statement of the IE SA that the users were prompted, during the registration process, to select between 'Go Private' and 'Skip' (i.e. remaining public) and that Child Users could simply opt to 'Skip'<sup>114</sup>. Moreover, the DE SAs highlight, as acknowledged by the IE SA<sup>115</sup>, the fact that the use of the language by TTL seems to 'incentivise' or even 'trivialise' the decision of the users to opt for a private account<sup>116</sup>. Pursuant to the DE SA, the use of these terms by the IE SA in the Draft Decision demonstrates that the IE SA is of the opinion that the users were nudged by the TTL during the registration process<sup>117</sup>. Moreover, concerning the same pop-up, the DE SAs highlight the IE SA's statement, according to which users' decision to 'Skip' can have the cascading effect of 'allowing many further platform settings be rendered public - including the accessibility of comments on video content created by the Child User'<sup>118</sup>. In addition, the DE SAs state that the fact that the option 'Skip' is placed on the right, will lead the majority of users to select this option as 'they are used to the button on the right side leading them to fulfil a step and go further (muscle memory)<sup>119</sup>.

76. As regards to the 'Video Posting Pop-Up'<sup>120</sup> the DE SAs argue that nudging is even graver when the users want to post a video on the TTL platform<sup>121</sup>. In particular, they argue that placing the 'Post Now' on the right side increases the chances that the users select this option, while the fact that 'Post Now' is in bold, whereas 'Cancel' is displayed normally amplifies the nudging effect<sup>122</sup>.

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<sup>109</sup> TTL Art. 65 Submissions, paragraph 7.14.

<sup>110</sup> See this Binding Decision, section 4.2 above.

<sup>111</sup> DE SAs Objection, p. 3.

<sup>112</sup> DE SAs Objection, p. 4.

<sup>113</sup> See this Binding Decision, paragraph 49 above.

<sup>114</sup> DE SAs Objection, p. 5.

<sup>115</sup> Draft Decision, paragraph 160.

<sup>116</sup> DE SAs Objection, p. 5.

<sup>117</sup> DE SAs Objection, p. 5.

<sup>118</sup> DE SAs Objection, p. 5.

<sup>119</sup> DE SAs Objection, p. 5.

<sup>120</sup> See this Binding Decision, paragraph 37 above.

<sup>121</sup> DE SAs Objection, p. 5.

<sup>122</sup> DE SAs Objection, p. 6.

Additionally, the DE SA note that the information in the pop-up mentions ‘privacy settings’ but lacks a direct link to the settings, arguing that this lowers the likelihood of changing the settings, leading them to opt to post a video with the pre-set settings<sup>123</sup>.

77. The DE SAs also raise legal arguments by making reference to the fairness principle enshrined in Article 5(1)(a) GDPR and to the definition of ‘dark patterns’ in the EDPB Guidelines 3/2022 (with particular focus on paragraph 8)<sup>124</sup>.

78. Based on the above, the EDPB finds the objection to be **reasoned**.

79. In order for an objection to meet the threshold set by Article 4(24) GDPR, it also needs to clearly demonstrate the significance of the risks posed by the draft decision<sup>125</sup>.

80. TTL argues in its submission that the DE SAs do not sufficiently specify the risks which would be posed to Younger Users should the objection not be followed<sup>126</sup>.

81. The EDPB takes note of this position but also notes that, according to the DE SAs, the IE SA’s failure to find an infringement of fairness principle poses a significant risk for fundamental rights and freedoms of TTL Child Users<sup>127</sup>. The use of dark patterns by TTL to nudge the users has a result the making of decisions with negative impact for the protection of their personal data, and eventually for their fundamental rights and freedoms<sup>128</sup>. In addition, the DE SAs put forward the argument that, as the Draft Decision states, TTL is used by ‘millions of users in Europe including Child Users’<sup>129</sup>.

82. Moreover, the DE SAs argue that this all is even more relevant considering the fact that the IE SA mentions and analysing in the Draft Decision the nudging conducted by TTL, so if an infringement of the fairness principle is not identified, other social media providers, could interpret this as a ‘at least partial, carte blanche for nudging using nudging and dark patterns’<sup>130</sup>. Along the same lines and considering the analysis of the IE SA, the DE SAs are of the view that, the lack of identification of an additional infringement, poses a risk on users to continuously facing dark patterns and being subconsciously led to decisions violating their privacy interests<sup>131</sup>.

83. Considering the above, the EDPB finds that the objection of the DE SAs, requesting the IE SA to find an infringement of the principle of fairness under Article 5(1)(a) GDPR, in addition to the infringements proposed in the Draft Decision, is **relevant and reasoned** pursuant to Article 4(24) GDPR.

84. Finally, the EDPB takes note of TTL’s position that to introduce a finding of infringement which has not been examined during the Inquiry, would be breach of fair procedures under Irish and EU law

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<sup>123</sup> DE SAs Objection, p. 6.

<sup>124</sup> DE SAs Objection, p. 3-4

<sup>125</sup> EDPB Guidelines on RRO, paragraph 36.

<sup>126</sup> TTL Art. 65 Submissions, paragraphs 7.16-7.17.

<sup>127</sup> DE SAs Objection, p.7.

<sup>128</sup> DE SAs Objection, p. 7.

<sup>129</sup> In this context, the DE SAs refer to Recital 38 of the GDPR, which envisages specific protection when the processing involves children’s persona data, as they are less aware of the risks, consequences and safeguards related to the processing of their personal data. In addition, referring to the EDPB Guidelines on Dark Patterns, the DE SAs mention that children are also more likely to be subject to dark patterns.

<sup>130</sup> DE SAs Objection, p. 7.

<sup>131</sup> DE SAs Objection, p. 8.

including TikTok's right to be heard<sup>132</sup>. The EDPB considers that TTL has been provided the right to be heard on this issue, contrary to its claims, since it had the opportunity to express its point of view on the objection raised by the CSA on this matter<sup>133</sup>.

#### 4.4.2 Assessment on the merits

85. In accordance with Article 65(1)(a) GDPR, the EDPB shall take a binding decision concerning all the matters which are the subject of the relevant and reasoned objections, in particular whether there is an infringement of the GDPR.

86. The EDPB considers that the objection found to be relevant and reasoned in this section, raised by the DE SAs, requested the IE SA to find an infringement of the principle of fairness under Article 5(1)(a) GDPR in addition to the infringements proposed in the Draft Decision. When assessing the merits of the objection raised, the EDPB also takes into account TTL's position on the objection and its submissions.

87. On a preliminary note, the EDPB recalls that the EU legislature decided that a single relevant and reasoned objection is sufficient to trigger the dispute resolution mechanism<sup>134</sup>. Indeed, the EU legislature purposefully decided to set a qualitative threshold, i.e. the objection needing to be relevant and reasoned, and not a quantitative threshold<sup>135</sup>. Therefore, the argument provided by the IE SA, that the lack of similar objections by other CSAs indicates a consensus with these CSAs, has no impact on the EDPB's assessment of the merits in the case at hand.

#### TTL's position on the objection and its submissions

88. As previously mentioned, the EDPB takes note of TTL's view that the DE SAs' objection is not relevant and reasoned<sup>136</sup>. The EDPB also notes that TTL is of the opinion that the DE SAs' objection lacks of merit<sup>137</sup>.

89. In particular, TTL puts forward the argument that the DE SAs' objection referred to the EDPB Guidelines on Deceptive Design Patterns<sup>138</sup>, which were published in March 2022 and finalised in February 2023<sup>139</sup>. In this regard, TTL states that the Guidelines were public 'well after the Relevant Period of this Inquiry'<sup>140</sup> and that the DE SAs' objection 'was submitted prior to the finalisation of the Deceptive Design Pattern Guidelines'<sup>141</sup>. Additionally, TTL objects to the reliance of the EDPB on the Guidelines on Deceptive Design Patterns<sup>142</sup>.

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<sup>132</sup> TTL Art. 65 Submissions, paragraphs 7.7-7.11.

<sup>133</sup> See, in particular, TTL Art. 65 Submissions, paragraphs 7.24-7.47 where TTL argues that the DE SAs' objection should be rejected as lacking merit and explains the reasons.

<sup>134</sup> Art. 60(4) GDPR.

<sup>135</sup> See Presidency's Discussion note on possible thresholds for submitting cases to the EDPB, 5331/2015, Interinstitutional File: 2012/0011(COD) paragraph 6, <https://data.consilium.europa.eu/doc/document/ST-5331-2015-INIT/en/pdf>

<sup>136</sup> See this Binding Decision, paragraph 67 above.

<sup>137</sup> TTL Art. 65 Submissions, paragraph 7.24.

<sup>138</sup> EDPB Guidelines on Deceptive Design Patterns.

<sup>139</sup> TTL Art. 65 Submissions, paragraph 7.29.

<sup>140</sup> Draft Decision, paragraph 31: the period of IE SA's Inquiry was between 31 July and 31 December 2020.

<sup>141</sup> TTL Art. 65 Submissions, paragraph 7.29.

<sup>142</sup> TTL Art. 65 Submissions, paragraph 7.30. In particular, TTL's statement relies upon the following three reasons: a) it is not procedurally appropriate or lawful for the IE SA or the CSAs to assess TTL's GDPR compliance

90. The EDPB issues guidelines to clarify and provide guidance on the existing laws and to promote a common understanding of EU data protection laws. The Guidelines on Deceptive Design Patterns provide important practical guidance that can aid controllers and processors in their compliance with the GDPR. These guidelines built upon and are aligned with previous guidance already provided by the EDPB on the principle of fairness: even prior to the Relevant Period, the EDPB had already adopted guidance clarifying that the principle of fairness includes inter alia the avoidance of deception (deceptive or manipulative language or design), being truthful and not misleading the data subjects<sup>143</sup>.
91. In this context, the EDPB emphasises that the obligation to comply with the principle of fairness stems directly from the GDPR<sup>144</sup> and from the CFR<sup>145</sup>, and applies to all controllers and processors, even in the absence of EDPB guidance.
92. Therefore, the EDPB underlines that the obligation to comply with the principle of fairness stems from the law and applies to all the controllers and therefore does not depend on the existence of EDPB Guidelines. It is the task of the EDPB under Article 65 GDPR and Article 70(1)(a) GDPR to ensure the correct and consistent application of the GDPR in individual cases.
93. Furthermore, the EDPB takes note that, with respect to the additional infringement requested by the DE SAs in their objection, TTL is of the opinion that there are no facts in the Draft Decision warranting the finding of such additional infringement<sup>146</sup>.
94. In addition, TTL states that the DE SAs' objection regarding the violation of the fairness principle, pursuant to Article 5(1)(a) GDPR, with respect to the processing of personal data relating to younger users is unfounded<sup>147</sup>. TTL motivates this, first, stating that 'the Account Information Pop-Up and the First Post Pop-Up were not unduly detrimental, unexpected, misleading or deceptive to Younger Users and complied with the principle of fair processing'<sup>148</sup>. In addition, TTL states that there are no dark patterns implemented in the account information pop-up and the video posting pop-up, since they were not deceptive<sup>149</sup>. The EDPB will assess this key question below.
95. Moreover, TTL states that 'TikTok had detailed transparency information in place for Younger Users to support the principle of fair processing'<sup>150</sup>. On this particular point, the EDPB recalls what was established in the Draft Decision with respect to the transparency breaches identified by the IE SA

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retrospectively, based on Guidelines that were not adopted during the relevant period, b) such reliance would equal to an impermissible retrospective application of regulatory standards and to a clear breach of fair procedures, and c) if this approach would adopted, it would oppose to the principle of legal certainty and the right to fair procedures pursuant to Article 41 of the CFR.

<sup>143</sup> EDPB Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, adopted on 13 November 2019 (hereinafter, 'EDPB Guidelines on Data Protection by Design and by Default, V1.0') and adopted after public consultation on 20 October 2020 (hereinafter, 'EDPB Guidelines on Data Protection by Design and by Default, V2.0'). In particular, see EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraphs 69-70, and EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraphs 64-65.

<sup>144</sup> Art. 5(1)(a) GDPR.

<sup>145</sup> Art. 8(2) CFR.

<sup>146</sup> TTL Art. 65 Submissions, paragraph 7.33.

<sup>147</sup> TTL Art. 65 Submissions, paragraph 7.35.

<sup>148</sup> TTL Art. 65 Submissions, paragraph 7.35.

<sup>149</sup> TTL Art. 65 Submissions, paragraph 7.38, TTL included a summary of [REDACTED] expert report (hereinafter the 'Report'), addressing the allegation made by the DE SAs that certain information pop-ups used by TTL during the Relevant Period involved implementation by TTL of dark patterns.

<sup>150</sup> TTL Art. 65 Submissions, paragraph 7.35.

within Issue 3 and the relevant Finding 5<sup>151</sup>. In particular, the EDPB recalls that TTL was found to have infringed its transparency obligations under Article 12(1) and Article 13(1)(e) GDPR in relation to the processing specified in Finding 5 of the Draft Decision<sup>152</sup>, but not under the general principle of transparency pursuant to Article 5(1)(a) GDPR<sup>153</sup>. In this context, the EDPB emphasises that such findings were not the subject of any objection raised by CSAs and therefore amount to final determinations by the LSA.

96. Furthermore, TTL argues that the younger users were informed of the consequences of their decision<sup>154</sup>. The IE SA stated that TTL provided various ‘vague’ and ‘opaque’ references to ‘third parties’, ‘everyone’, ‘anyone’, and thus this cannot be regarded as having provided information in a ‘concise, transparent, intelligible’ way<sup>155</sup>. The IE SA finds that TTL failed to provide Child Users with information as to the fact that ‘public-by-default processing of accounts meant that an indefinite audience, including non-registered users, would be able to view their personal data’<sup>156</sup>.

97. Finally, TTL is of the view that the DE SAs in their objection failed to identify or to specify any precise deceptive design patterns, and instead only pointed out the existence of deceptive design patterns<sup>157</sup>.

#### EDPB’s assessment on the merits

98. Moving forward with the assessment of the question raised by the DE SAs objection, the EDPB recalls that the basic principles relating to the processing listed in Article 5 GDPR can, as such, be infringed<sup>158</sup>. This is apparent from the text of Article 83(5)(a) GDPR which subjects the infringement of the basic principles for processing to administrative fines up to 20 million euros, or in the case of undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher<sup>159</sup>.

99. The EDPB underlines that the principles of fairness, lawfulness and transparency, all three enshrined in Article 5(1)(a) GDPR, are three distinct but intrinsically linked and interdependent principles that every controller should respect when processing personal data. The link between these principles is evident from a number of GDPR provisions: Recitals 39 and 42, Article 6(2) and Article 6(3)(b) GDPR refer to lawful and fair processing, while Recitals 60 and 71 GDPR, as well as Article 13(2), Article 14(2) and Article 40(2)(a) GDPR refer to fair and transparent processing<sup>160</sup>.

100. The EDPB highlights that the fairness principle has an independent meaning and stresses that the assessment conducted by the IE SA on TTL’s compliance with the principle of transparency

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<sup>151</sup> Draft Decision, Finding 5.

<sup>152</sup> Draft Decision, Finding 5.

<sup>153</sup> Draft Decision, paragraph 275.

<sup>154</sup> In TTL Art. 65 Submissions, paragraph 7.40, TTL included a summary of [REDACTED] expert report (hereinafter ‘**Second [REDACTED] Report**’), relevant to the DE SAs’ allegations of the presence of dark patterns.

<sup>155</sup> Draft Decision, paragraph 272.

<sup>156</sup> Draft Decision, paragraph 273.

<sup>157</sup> TTL Art. 65 Submissions, paragraph 7.47.

<sup>158</sup> EDPB Binding Decision 3/2022, paragraph 218; Binding Decision 4/2022, paragraph 223; Binding Decision 5/2022, paragraph 141. See also Binding Decision 1/2021, paragraph 191.

<sup>159</sup> EDPB Binding Decision 3/2022, paragraph 218; Binding Decision 4/2022, paragraph 223; Binding Decision 5/2022, paragraph 141.

<sup>160</sup> EDPB Binding Decision 3/2022, paragraph 219; Binding Decision 4/2022, paragraph 224; Binding Decision 5/2022, paragraph 145.

(leading to Finding 5 where the IE SA concluded that Article 13(1)(e) and Article 12(1) GDPR were breached, but the principle of transparency, pursuant to Article 5(1)(a) GDPR was not breached<sup>161</sup>) does not automatically rule out the need for an assessment of TTL's compliance with the principle of fairness too<sup>162</sup>.

101. The EDPB has already provided some elements as to the meaning and effect of the principle of fairness in the context of processing personal data. For example, the EDPB has previously opined in its Guidelines on Data Protection by Design and by Default that '[f]airness is an overarching principle which requires that personal data should not be processed in a way that is unjustifiably detrimental, unlawfully discriminatory, unexpected or misleading to the data subject'<sup>163</sup>.

102. This definition, which was referred to by the IE SA when outlining 'the context of the processing' in the course of assessing TTL's compliance with Articles 24 and 25 GDPR including regarding the public-by-default processing of Child Users' social media content in the Draft Decision<sup>164</sup>, highlights the importance of taking into account certain key elements in the practical implementation of the principle of fairness<sup>165</sup>. In particular, the elements of autonomy of data subjects, avoidance of deception, power balance, and truthful processing<sup>166</sup> are relevant in the case at hand.

103. Additionally, the EDPB has previously explained that 'the principle of fairness includes, inter alia, recognising the reasonable expectations of the data subjects, considering possible adverse consequences processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller'<sup>167</sup>.

104. The GDPR includes multiple references to the need for individuals to have control over their own personal data<sup>168</sup>. In this respect, the EDPB clarified that data subjects 'should be granted the highest degree of autonomy possible to determine the use made of their personal data, as well as over the scope and conditions of that use or processing'<sup>169</sup> and that controllers 'cannot present the processing options in such a manner that makes it difficult for data subjects to abstain from sharing their data, or make it difficult for the data subjects to adjust their privacy settings and limit the processing'<sup>170</sup>.

105. In addition, the EDPB noted in the past that the controller, in line with the fairness principle, must not present the data subjects with options in a way that 'nudges the data subject in the direction of allowing the controller to collect more personal data than if the options were

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<sup>161</sup> Draft Decision, paragraph 275.

<sup>162</sup> EDPB Binding Decision 3/2022, paragraph 220; Binding Decision 4/2022, paragraph 225; Binding Decision 5/2022, paragraph 147.

<sup>163</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 69, and EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 64.

<sup>164</sup> Draft Decision, paragraphs 77, referring to the EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraphs 69-70.

<sup>165</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70.

<sup>166</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70.

<sup>167</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects Version 2.0, adopted on 8 October 2019 (hereinafter, '**EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR**'), paragraph 12.

<sup>168</sup> See the multiple references in GDPR, in particular in Recitals 7, 68, 75 and 85.

<sup>169</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70.

<sup>170</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, example 1 and V2.0, example 1.

presented in an equal and neutral way<sup>171</sup>. The options to provide consent or abstain should be equally visible, and accurately representing the ramifications of each choice to the data subject<sup>172</sup>.

106. It is also key to bear in mind that avoiding deception of the data subject means that ‘Data processing information and options should be provided in an objective and neutral way, avoiding any deceptive or manipulative language or design’, while the element of truthfulness requires that ‘The controller must make available information about how they process personal data, they should act as they declare they will and not mislead the data subjects’<sup>173</sup>.

107. Another important element of the fairness principle is linked to power balance<sup>174</sup>, since the principle of fairness under Article 5(1)(a) GDPR underpins the entire data protection framework and seeks to address power asymmetries between the controllers and the data subjects in order to cancel out the negative effects of such asymmetries and ensure the effective exercise of the data subjects’ rights<sup>175</sup>. It is relevant to recall that ‘the personal data at issue related to a particularly vulnerable cohort of data subjects – children<sup>176</sup>, who ‘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>177</sup>. Recital 75 GDPR explicitly includes the processing of individual’s data particularly those of children, to be among the situations where the risk for the fundamental rights and freedoms of varying likelihood and severity, may result from data processing that could lead to physical, material or non-material damage. Along the same lines, children may qualify as ‘vulnerable’ data subjects, as they can be considered to not be able to knowingly and thoughtfully oppose or consent to the processing of their personal data<sup>178</sup>.

108. It is therefore necessary for the EDPB to assess whether the two practices (i.e. the Registration Pop-Up and the Video Posting Pop-Up), which are the subject of the DE SAs’ objection, are in line with the principle of fairness pursuant to Article 5(1)(a) GDPR.

109. The EDPB notes that, as detailed in the Draft Decision, all new TTL accounts, including Child User accounts, were set by default public<sup>179</sup>, and that the IE SA considered that the information provided by TTL (which included the two pop-ups) did not allow Child Users to understand that their personal data would be visible to an indefinite audience (including non-registered users)<sup>180</sup>. More specifically, the EDPB finds it relevant that, according to the Draft Decision, the references to ‘everyone’ and ‘anyone’ in the information provided by TTL, which includes the Registration Pop-

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<sup>171</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, example 1 and V2.0, example 1.

<sup>172</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, example 1.

<sup>173</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70, and EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 65.

<sup>174</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70, and EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 65.

<sup>175</sup> EDPB Binding Decision 3/2022, paragraph 222; Binding Decision 4/2022, paragraph 227; Binding Decision 5/2022, paragraph 148.

<sup>176</sup> Draft Decision, paragraph 316.

<sup>177</sup> GDPR, Recital 38. See also Draft Decision, paragraph 69.

<sup>178</sup> Article 29 Working Party, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is “likely to result in high risk” for the purposes of Regulation 2016/679 on 4 April 2017, WP 248 rev.1, (hereinafter “**WP29 Guidelines on DPIA**”) endorsed by the EDPB on 25 May 2018, p. 10.

<sup>179</sup> Draft Decision, paragraph 128.

<sup>180</sup> Draft Decision, paragraph 273.

Up and the Video Posting Pop-Up, are 'vague and opaque'<sup>181</sup>. Moreover, the IE SA noted that the ambiguous terms of 'public', 'anyone' and 'everyone' were 'capable of referring to both registered Users and those not registered'<sup>182</sup>. This means that the consequences arising from choosing one or the other option in the two pop-up notifications were not clear to Child Users<sup>183</sup>.

110. This is all the more relevant considering that the IE SA acknowledged that 'where a Child User were to avail of the relevant public features of the TikTok platform there could lead in the first instance to Child Users losing autonomy and control over their data'<sup>184</sup>. In addition, the IE SA, stated that TTL 'failed to explain and/or to explain clearly the scope and consequences of public-by-default account settings' and moreover that 'TTL failed to provide Child Users with information as to that public by default processing of accounts meant indefinite audience, including not registered, would be able to view their personal data'<sup>185</sup>.

111. Concerning, specifically, the Registration Pop-Up, the EDPB notes that, the IE SA's note that, this pop-up entailed the need for users to positively opt to choose a private account, since the option 'Skip' led to the account being set to public by default<sup>186</sup>. The consequence of omitting the decision by choosing 'Skip'<sup>187</sup> was to render the account public (as per the default setting) and thus to render the content viewable to an unlimited audience.

112. Moreover, as the IE SA states and as underlined by the DE SAs, the chosen language ('Skip') seems to 'incentivise or even trivialise the decision to opt for a private account' that the Child User was 'prompted' to make<sup>188</sup>. The DE SAs highlight that already this finding in the Draft Decision showed the use of 'nudging' during the registration process<sup>189</sup>. In addition, the IE SA also notes in its Draft Decision the fact that the decision to 'Skip' opting for a private account, has a cascading effect, in the sense that this would allow further platform settings to be rendered public<sup>190</sup>. According to a report of the Norwegian consumer authority, 'when the default settings allow widespread collection and use of personal data, users are nudged toward giving away their data'<sup>191</sup>. The DE SAs argue that 'Making it harder for data subjects to make a choice in favour of the protection of their personal data, rather than to the detriment of their data protection, constitutes an unfair practice and processing'<sup>192</sup>. The EDPB recalls that 'Data processing information and

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<sup>181</sup> Draft Decision, paragraph 272.

<sup>182</sup> Draft Decision, paragraph 259.

<sup>183</sup> Draft Decision, Finding 5, second part ('In circumstances where TTL did not provide Child Users with information on the scope and consequences of the public-by-default processing (that is, operating a social media network which, by default, allows the social media posts of Child Users to be seen by anyone) in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular insofar as the very limited information provided did not make it clear at all that this would occur, I find that TTL has not complied with its obligations under and 12(1) GDPR').

<sup>184</sup> Draft Decision, paragraph 93.

<sup>185</sup> Draft Decision, paragraph 173.

<sup>186</sup> Draft Decision, paragraphs 72 and 76.

<sup>187</sup> Draft Decision, paragraph 79.

<sup>188</sup> Draft Decision, paragraph 160. DE SAs Objection, p. 5.

<sup>189</sup> DE SAs Objection, p. 5

<sup>190</sup> Draft Decision, paragraph 173.

<sup>191</sup> Forbrukeradet, Report on deceived by design - How tech companies use dark patterns to discourage us from exercising our rights to privacy, dated on 27 June 2018, available at: <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>, p. 13.

<sup>192</sup> DE SAs Objection p. 6-7.



options should be provided in an objective and neutral way, avoiding any deceptive or manipulative language or design<sup>193</sup>.

113. The EDPB also highlights another feature of the Registration Pop-Up, namely the location of the option 'Skip' on the right side<sup>194</sup>. The DE SAs argue that the placement of an option on the right side will lead a majority of users to choose it, 'as internet and social media users are used to the button on the right side leading them to fulfil a step and go further (muscle memory)<sup>195</sup>.
114. Concerning the Video Posting Pop-Up, the EDPB agrees with the DE SAs that the 'nudging effect is amplified' by the fact that the option to post the video publicly is not only displayed on the right side, which has the effects mentioned above, but also shown in a bold darker text<sup>196</sup>. Consequently, as acknowledged by the IE SA, the settings plainly incentivised the selection of the posting of videos publicly, given both the phraseology used and the difference of colour gradient<sup>197</sup>. In particular, the fact that the option to post the video publicly appears 'more visible and prominent' increases the likelihood for the user to choose it<sup>198</sup>. As noted by the DE SAs, also the 'muscle memory' and the location of the button leading to the 'more public' option raised the likelihood of the user choosing it<sup>199</sup>. This is essential, also considering the fact, that individuals, using digital services nowadays, on their phones while on the go, so forcing individuals to choose between several actions on the spot, is already a type of 'nudging'<sup>200</sup>, which can be even more efficient when the controllers 'emphasise; one of the two provided options.
115. As stated above, the EDPB recalls that 'options should be provided in an objective and neutral way'<sup>201</sup> and controllers should not 'present the processing options in such a manner that makes it difficult for data subjects to abstain from sharing their data'<sup>202</sup> or 'nudges the data subject in the direction of allowing the controller to collect more personal data than if the options were presented in an equal and neutral way'<sup>203</sup>.
116. Additionally, the Video Posting Pop-Up refers to the possibility of changing preferences in the Privacy settings<sup>204</sup>. The EDPB considers it relevant to highlight that this pop-up 'lacks a direct link to said settings', as mentioned by the DE SAs<sup>205</sup>. More specifically, this means that users who wish to change the settings will first need to select 'Cancel' and then go through the trouble of looking for the privacy settings, where they will then need to find the exact setting that concerns the

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<sup>193</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70; also EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 65.

<sup>194</sup> Draft Decision, Image 1.

<sup>195</sup> DE SAs Objection, p. 5.

<sup>196</sup> DE SAs Objection, p. 6. Draft Decision, paragraph 131 and Image 6 in paragraph 257.

<sup>197</sup> Draft Decision, paragraph 162.

<sup>198</sup> DE SAs Objection, p. 6.

<sup>199</sup> DE SAs Objection, p 5.

<sup>200</sup> Forbrukeradet, Report on deceived by design - How tech companies use dark patterns to discourage us from exercising our rights to privacy, dated on 27 June 2018, available at: <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>, p. 27.

<sup>201</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 70; also EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 65.

<sup>202</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, example 1 and V2.0, example 1.

<sup>203</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, example 1 and V2.0, example 1.

<sup>204</sup> Draft Decision, paragraph 257.

<sup>205</sup> DE SAs Objection, p. 6.

visibility of the account/switching to a ‘private account’<sup>206</sup>. The EDPB agrees, with the DE SAs, that this lowers the likelihood that data subjects change their settings, while there is a high likelihood that users will ‘go along with posting the video with their pre-set settings’<sup>207</sup>. As mentioned above, controllers should not ‘make it difficult for the data subjects to adjust their privacy settings and limit the processing’<sup>208</sup>.

117. Based on all the above, the EDPB agrees with the DE SAs that the Registration Pop-Up and the Video Posting Pop-Ups were ‘nudging the user to a certain decision’<sup>209</sup> and leading them ‘subconsciously to decisions violating their privacy interest’<sup>210</sup>. It is relevant to consider, in this regard, that such decision towards which the users were encouraged is the ‘public-by-default setting’, which ‘appears to be a deliberate choice on the part of TTL intended to maximise user engagement and sharing on the platform’<sup>211</sup>. The EDPB also concurs with the DE SAs that ‘Making it harder for data subjects to make a choice in favour of the protection of their personal data, rather than to the detriment of their data protection, constitutes an unfair practice and processing’<sup>212</sup>. This is, in this case, combined with the fact that data subjects are children, who ‘merit specific protection with regard to their personal data’<sup>213</sup>, and with the lack of clarity as to the consequences of the different options particularly with regard to the audience of the future content of their account.

118. On the basis of the findings of the IE SA in its Draft Decision and considering the arguments provided by the DE SAs in their objection, **the EDPB finds that TTL has infringed the principle of fairness, pursuant to Article 5(1)(a) GDPR**, in the context of the practices described above, namely the Registration Pop-Up and the Video Posting Pop Up.

119. Accordingly, the EDPB instructs the IE SA to include in its final decision a finding of an infringement of the principle of fairness principle pursuant to Article 5(1)(a) GDPR by TTL.

## 5 ON THE POSSIBLE INFRINGEMENT OF ARTICLE 25 GDPR REGARDING AGE VERIFICATION

### 5.1 Analysis by the LSA in the Draft Decision

120. Within Issue 2, the IE SA analyses TTL’s compliance with Article 24(1), Article 25(1) and Article 25(2) GDPR with respect to its age verification measures for persons under 13 and the assessment of the risks for this specific category of data subjects<sup>214</sup>. In Finding 4, the IE SA concludes that TTL infringed Article 24(1) GDPR in respect of failure to properly take into account the risks posed to children below the age of 13 by processing related to a default account setting for Child Users which allowed anyone (on or off TikTok) to view social media content posted by

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<sup>206</sup> DE SAs Objection, p. 6.

<sup>207</sup> DE SAs Objection, p. 6.

<sup>208</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, example 1 and V2.0, example 1.

<sup>209</sup> DE SAs Objection, p. 4.

<sup>210</sup> DE SAs Objection, p. 8.

<sup>211</sup> Draft Decision, paragraph 72.

<sup>212</sup> DE SAs Objection p. 6-7.

<sup>213</sup> GDPR, Recital 38.

<sup>214</sup> Draft Decision, paragraphs 185-221.

Child Users<sup>215</sup>. This finding does not consider the age verification system as such. With respect to age verification measures, the IE SA concludes that the measures implemented by TTL concerning age verification are compliant with Articles 24 and 25 GDPR<sup>216</sup>, on the basis of the reasoning outlined below.

121. For the purpose of assessing if the age verification mechanism implemented by TTL complied with TTL’s obligations under Articles 24 and 25 GDPR, the IE SA first analyses the nature, scope, context and purpose of the processing<sup>217</sup>. Additionally, the IE SA addresses the risks of varying likelihood and severity resulting from the processing<sup>218</sup>. In that respect the IE SA finds that ‘a number of clear risks within the rubric of Recital 75 GDPR arise which could lead to physical, material or non-material damage’<sup>219</sup>. One of these risks, as identified above, is that the processing concerns public-by-default processing of personal data of vulnerable natural persons, that is children, and where such children are below the age of 13<sup>220</sup>. The processing of their data, given the high numbers of affected and potential affected users, constitutes processing involving a large amount of personal data and affecting a large number of data subjects<sup>221</sup>. The Draft Decision identifies [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>222</sup>.

122. In the Draft Decision, the IE SA recalls that as a controller, TTL is obliged to identify risks, which are posed by processing, as a requirement of the principle of accountability and Articles 24 and 25 GDPR<sup>223</sup>. Accordingly, after having had regard to the nature, scope, context and purposes of processing, as well as TTL’s own risk assessment set out in the DPIA which accepts that its processing activities pose a number of high ‘inherent’ risks<sup>224</sup>, the IE SA finds that, having regard to the nature, scope, context, and purposes of processing, both types of processing which are the subject of the Inquiry pose high risks to the rights and freedoms of Child Users, for the purposes of Articles 24 and 25 GDPR<sup>225</sup>. The IE SA concludes that the risks associated with the processing at stake were high both in terms of likelihood and severity<sup>226</sup>.

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<sup>215</sup> Draft Decision, Finding 4, available after paragraph 216.

<sup>216</sup> Draft Decision, paragraph 220 and 221.

<sup>217</sup> Draft Decision, paragraphs 60-82.

<sup>218</sup> Draft Decision, paragraphs 83-105.

<sup>219</sup> Draft Decision, paragraph 103.

<sup>220</sup> Draft Decision, paragraph 103 (referring to TTL Children’s Data and Age Appropriate Design DPIA of 8 October 2020, hereinafter ‘**TTL Children’s Data and Age Appropriate Design DPIA**’).

<sup>221</sup> Draft Decision, paragraph 103. TTL Children’s Data and Age Appropriate Design DPIA lists additionally in Schedule 2 Part B [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

<sup>222</sup> Draft Decision, paragraph 103.

<sup>223</sup> Draft Decision, paragraph 104.

<sup>224</sup> TTL Children’s Data and Age Appropriate Design DPIA, Schedule 2, p. 31.

<sup>225</sup> Draft Decision, paragraph 104.

<sup>226</sup> Draft Decision, paragraph 104.

123. The Draft Decision provides for an overview of the measures taken by TTL during the Relevant Period with regards to age verification, considering the requirement for users of the TikTok platform to be aged 13 and above<sup>227</sup>. These measures can be categorised as being either measures taken prior to the user's registration or measures taken after the user's registration.

124. The measures taken prior to the user's registration are described in the Draft Decision as follows:

- a. During the period from 29 July 2020 to 31 December 2020, TikTok was rated in the Apple App store as '12+' and in the Google Play store as 'Parental Guidance Recommended'<sup>228</sup>.
- b. Individuals who wish to use the TikTok platform must also confirm their date of birth via an age gate. Individuals are asked to insert their date of birth. No indication is provided for why this is necessary nor does the selection default to an age over 13<sup>229</sup>.
- c. When individuals insert a date of birth below 13 years of age, the registration process ceases<sup>230</sup> and they were blocked from the app<sup>231</sup>. Users were not informed that their input date of birth was the reason for them being blocked from registration. [REDACTED]  
[REDACTED]  
[REDACTED]<sup>232</sup>. A pop-up notification states the individual is not eligible for the TikTok platform. Individuals who seek to re-enter a date of birth, whether above or below 13, are shown the same notification, and those who re-install the platform app on their device<sup>233</sup>.
- d. Individuals under the age of 13 who entered a date of birth above 13, 16 or 18 years gained access to the age-relevant platform settings<sup>234</sup>.
- e. TTL does not require the provision of identity verification documentation in the registration process (for example, passport, national identity card, etc.)<sup>235</sup>.

125. Additionally, TTL employed a number of measures applicable after user's registration, i.e. aimed to remove users under the age of 13 who accessed the platform in case TTL believed a user was under 13<sup>236</sup>:

- f. Users and non-users could report a user under 13 using a web form and via the app. This web form was called 'Request Privacy Information', accessible via the 'TikTok Help Centre' and the 'TikTok Safety Centre' on both the website and the app. Reported accounts were referred to moderators<sup>237</sup>.

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<sup>227</sup> Draft Decision, paragraphs 190-203.

<sup>228</sup> Draft Decision, paragraph 190.

<sup>229</sup> Draft Decision, paragraph 191.

<sup>230</sup> Draft Decision, paragraph 192.

<sup>231</sup> Draft Decision, paragraph 203.

<sup>232</sup> Draft Decision, paragraph 203.

<sup>233</sup> Draft Decision, paragraph 192.

<sup>234</sup> Draft Decision, paragraph 193.

<sup>235</sup> Draft Decision, paragraph 199.

<sup>236</sup> Draft Decision, paragraph 194.

<sup>237</sup> Draft Decision, paragraph 195.

- g. TTL also used [REDACTED] to identify if an account was held by a user under 13 where such [REDACTED]. Where an account did, it was referred to moderation<sup>238</sup>.
- h. If a moderator in another area considered a user was under 13, 'they would refer the account for moderation or could action removal or the account themselves'<sup>239</sup>.
- i. Any accounts flagged for moderation, as suspected to be operated by a user under the age of 13, was assessed by a moderator, [REDACTED]  
[REDACTED]  
[REDACTED]<sup>240</sup>.
- j. For accounts deleted this way, [REDACTED]  
[REDACTED]<sup>241</sup>.

126. TTL also clarified that it does not require the provision of hard identifiers (identity verification documentation) in the registration process (for example, passport, national identity card, etc.)<sup>242</sup>.

127. During the period from 29 July 2020 to 31 December 2020 the approximate total average number of registered EU Child Users on the TikTok platform under the age of 18 was [REDACTED]<sup>243</sup>. TTL does not retain data to determine the approximate number of the TikTok platform users that were identified as being under the age of 13 when attempting to register during the period from 29 July 2020 to 31 December 2020; however, TTL believes that the approximate number of individuals in the EU who were failed registration on the basis of their identifying as an individual below 13 years of age during the equivalent number of days from 14 April to 16 September 2021 was [REDACTED]<sup>244</sup>. During the period from 29 July 2020 to 31 December 2020, the approximate number of EU TikTok platform users that were detected as being under 13 subsequent to their registration and removed from the TikTok platform was [REDACTED]<sup>245</sup>. In this respect, the IE SA highlights that this means that during the Relevant Period, in spite of the efforts undertaken by TTL, approximately [REDACTED] of TTL's approximate average Child Users were detected as being under 13, and that the number of children under 13 who evaded, and may continue to evade, detection is unclear<sup>246</sup>.

128. When assessing the age verification processes that TTL implemented during the Relevant Period, the IE SA notes that TTL has made extensive efforts to ensure its platform is only accessible to those over the age of 13<sup>247</sup>. The IE SA notes that this included the implementation of a neutral age gate, [REDACTED], utilising the age rating of the relevant applications stores in order to avail of age-gating device settings on individual devices, both general and specialist moderation teams to identify those under 13 who had passed through the age gate, in- and extra-app reporting functions, and [REDACTED]

<sup>238</sup> Draft Decision, paragraph 196.

<sup>239</sup> Draft Decision, paragraph 197.

<sup>240</sup> Draft Decision, paragraph 198.

<sup>241</sup> Draft decision, paragraph 203.

<sup>242</sup> Draft Decision, paragraph 199.

<sup>243</sup> Draft Decision, paragraph 200.

<sup>244</sup> Draft Decision, paragraph 200.

<sup>245</sup> Draft Decision, paragraph 200.

<sup>246</sup> Draft Decision, paragraph 211.

<sup>247</sup> Draft Decision, paragraph 217.

██████ where those personal data had been used to create an account of a user identified as under-13<sup>248</sup>.

129. As mentioned<sup>249</sup>, the IE SA notes that TTL did not employ the use of hard identifiers in order to determine the age of children accessing the platform; however, the IE SA accepts TTL's submission that such a requirement would be disproportionate. This is because children, particularly the younger the child, are unlikely to hold or have access to such hard identifiers and this would act to excluding or locking out Child Users who would otherwise be able to utilise the platform; also, such a requirement would likely disproportionately affect Child Users from minority backgrounds<sup>250</sup>.

130. The IE SA observes that Articles 24 and 25 GDPR do not themselves specify any particular measure that should be utilised in order to ensure age verification or prevent those for whom a platform is not intended to gain access to it, and that the area of age verification remains under development and there are yet to be accepted or stipulated industry or regulatory standards in this regard. The IE SA further notes that there is certainly no absolute method of age verification and that, according to the IE SA, it only falls to it to determine if the measures employed were appropriate with regard to the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing<sup>251</sup>.

131. Finally, as mentioned above, the IE SA concludes that 'the technical and organisational measures in respect of the age verification processes themselves undertaken by TTL complied with the GDPR in light of the measures undertaken and the extent to which TTL sought to ensure its platform remained accessible only to those above the age of 13'<sup>252</sup>.

## 5.2 Summary of the objection raised by the CSA

132. The **IT SA** raises an objection pursuant to Article 4(24) GDPR and Article 60(4) GDPR with regards to the conclusion reached by the IE SA in the Draft Decision<sup>253</sup> that the technical and organisational measures deployed by TTL for **age verification** purposes are compliant with **Article 25 GDPR**. The IT SA considers that the LSA should have instead found an infringement of Article 25 GDPR in that respect<sup>254</sup>.

133. The IT SA presents several different arguments on why it disagrees with the conclusion regarding Article 25 GDPR in the Draft Decision.

134. The IT SA generally agrees that there is as yet no age verification method such as to prevent, in all cases, access to the platform by below-13 users<sup>255</sup>. However, taking into account the state of the art and the severity of the risks related to the access to the social network in question by users below the age of 13, the IT SA disagrees with the finding of compliance made by the LSA<sup>256</sup>. The

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<sup>248</sup> Draft Decision, paragraph 217.

<sup>249</sup> See paragraph 126 of this Binding Decision.

<sup>250</sup> Draft Decision, paragraph 219.

<sup>251</sup> Draft Decision, paragraph 220.

<sup>252</sup> Draft Decision, paragraph 221.

<sup>253</sup> IT SA Objection, p. 2 referring to Draft Decision, paragraphs 189-221.

<sup>254</sup> IT SA Objection, p. 2.

<sup>255</sup> IT SA Objection, p. 4.

<sup>256</sup> IT SA Objection, p. 4.

IT SA refers to news reports indicating the considerable number of the TikTok platform users aged under 13, as well as to the finding 4 in the Draft Decision concerning the infringement of Article 24 GDPR<sup>257</sup>.

135. The IT SA considers that the age verification methods implemented by TTL are ‘seriously flawed’ and this is also shown by the figures provided by TTL concerning the number of failed registrations by users declaring to be below the age of 13 during the period from 29 July 2020 to 31 December 2020 and the number of profiles that were removed after being detected to belong to users below the age of 13<sup>258</sup>. According to the IT SA, the number of profiles that were removed means that at least that amount of users below the age of 13 managed to easily access the TikTok platform and they used it for an unspecified period (and there can be users of the platform who are below the age of 13 that have remained as yet undetected)<sup>259</sup>.

136. The IT SA thus argues that the above figures show that the age verification measures implemented by TTL are inadequate and poorly effective and it is not admissible, in the light of the relevant legal obligations, such as those arising out of Article 8 GDPR and the corresponding national laws, that such a high number of users aged below 13 is able to use the TikTok platform<sup>260</sup>.

137. The IT SA also refers to the age verification system implemented by TTL that blocks the registration of a user if they select a date of birth showing that they are younger than 13 years old. The IT SA points out that users can easily dodge the age gate, [REDACTED] – given that no check is performed at this stage<sup>261</sup>. The IT SA further argues that the Draft Decision does not specify [REDACTED] TTL blocks the user who entered a date of birth showing that they are younger than 13, since the Draft Decision only refers to the [REDACTED]<sup>262</sup>. The IT SA notes that no information is available as to whether the [REDACTED]<sup>263</sup>. According to the IT SA, [REDACTED] is not to be regarded as an effective deterrent measure<sup>264</sup>.

138. According to the IT SA, the remaining measures referred to by TTL – including, where appropriate, the implementation [REDACTED] as envisaged allegedly by TTL – relate to blocking mechanisms that are triggered after a child user has entered the TikTok platform. They fail to do away upstream, prior to the starting of any data processing operation, with the risks arising from that child user’s exposure on the web and the sharing of their data<sup>265</sup>.

139. The IT SA recalls Article 24(2) of the CFR and that, according to Recital 38 GDPR, children need special protection with regards to their personal data as they may be less aware of the risks, consequences and safeguards concerned and of their rights. In the IT SA’s opinion, this is especially

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<sup>257</sup> IT SA Objection, p. 4.

<sup>258</sup> IT SA Objection, p. 4-5 (referring to Draft Decision, paragraph 211).

<sup>259</sup> IT SA Objection, p. 4-5.

<sup>260</sup> IT SA Objection, p. 5.

<sup>261</sup> IT SA Objection, p. 5.

<sup>262</sup> IT SA Objection, p. 5.

<sup>263</sup> IT SA Objection, p. 5.

<sup>264</sup> Draft Decision, paragraph 203, point ii.

<sup>265</sup> IT SA Objection, p. 5.

the case if the collection of personal data with regard to children takes place when using services offered directly to a child – as it is the case with the TikTok platform<sup>266</sup>.

140. The IT SA finds that, taking into consideration the peculiar risks arising from the online processing of data relating to below-13 child users in the specific context of the social network platform at issue, and by having regard to statistics and media reports, the measures deployed by TTL cannot be considered to be ‘suitable and appropriate’<sup>267</sup>.

141. The IT SA further disagrees that the implementation of such measures is grounded merely in their ‘reasonableness’ rather than in a much more demanding, stringent evaluation regarding the factual effectiveness of the measures at issue also over time (as also recalled in Recital 74 GDPR). Moreover, the IT SA states that the consideration that there is a factually high level of danger for child users, should translate into an equally high level of commitment by TTL, which should not leave any feasible measure out of the scope of the tools to be implemented<sup>268</sup>.

142. The IT SA in its objection refers to alternative means for the age verification<sup>269</sup>. The IT SA argues that TTL should implement more complex measures that can bring about more effective safeguards – possibly without relying on hard verification measures: captcha, asking age-targeted questions, requiring another registered member acting as ‘trusted third party’ to step in and confirm the registering user’s age, etc.<sup>270</sup> The IT SA further suggests that one option could be age verification via a public or private trusted third party entity, which could certify individual features (here, the age or the fact of the person being above a certain age) without the need for disclosing the person’s identity<sup>271</sup>. Additionally, the IT SA refers to the standard BSI PAS 1296:2018<sup>272</sup>.

143. The IT SA argues that, considering the serious risks child users are exposed to, as well as the nature, scope, context (social networks) and purposes of the processing, TTL should have at least made the effort to implement all known state of the art solutions to avert the risks related to the processing for below-13 child users<sup>273</sup>.

144. According to the IT SA, from the accountability perspective, one cannot accept that a leading-edge technologically innovative company such as TTL – which is addressing its services overwhelmingly to young or very young users – has not even attempted to develop more effective

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<sup>266</sup> IT SA Objection, p. 5-6. IT SA further states: ‘On top of these legal provisions, one should take account unfortunately of the aforementioned cases as reported by the media. These go to show, on the one hand, that below-13 Child Users are unable to fully and appropriately realise the dangers lurking behind a social network platform; on the other hand, they require factually more stringent, targeted assessment exercises regarding the measures deployed by the controllers of such platforms to prevent unauthorised accesses. The facts at issue have shown that the likelihood for below-13 Child Users to easily access and readily use social networks remains worryingly high if the technical and organisational measures for age verification are not strengthened adequately, which ultimately carries the risk not only that equally tragical events take place but, more generally, that such users are exposed to dangers’ (IT SA Objection, p. 6).

<sup>267</sup> IT SA Objection, p. 6.

<sup>268</sup> IT SA Objection, p. 6.

<sup>269</sup> IT SA Objection, p. 6-7.

<sup>270</sup> IT SA Objection, p. 6.

<sup>271</sup> IT SA Objection, p. 6.

<sup>272</sup> The British Standards Institution, PAS 1296:2018: Online age checking. Provision and use of online age check services. Code of Practice, published on 31 March 2018: <https://knowledge.bsigroup.com/products/online-age-checking-provision-and-use-of-online-age-check-services-code-of-practice/standard>, (hereinafter ‘**BSI PAS 1296:2018**’) (referred to in the IT SA Objection, p. 6).

<sup>273</sup> IT SA Objection, p. 7.



measures compared to the [REDACTED], and that it has not envisaged any measures in case of untrue declarations by that user except for the reporting by other users<sup>274</sup>. The IT SA further recalls that in the case at hand the ban on access for below-13 child users is a fundamental precondition the company is required to fulfil with a view to carrying on its business and, if the company is unable to ensure appropriate safeguards, it would have to discontinue its core business with all the related processing of personal data<sup>275</sup>.

145. Based on the above, the IT SA finds that the age verification measures deployed by TTL with regard to below-13 child users are insufficient and accordingly Article 25 GDPR has been infringed in this respect, since TTL failed to implement appropriate technical and organisational measures to ensure and to be able to demonstrate compliance with the GDPR; this is especially so by having regard to the likelihood and severity of the risks for the rights and freedoms of natural persons, to the data subjects' age, and to the state of the art<sup>276</sup>.

146. Finally, the IT SA states that were the Draft Decision left unchanged in this connection, this would entail significant risks for the protection of the rights of the data subjects<sup>277</sup>. According to the IT SA, the failure to find the infringement in question would set a dangerous precedent, since one would fail to flag the need for the controller's processing activities to be amended and would endanger the data subjects in this respect<sup>278</sup>. This could also encourage other controllers from the social networking sector to implement inadequate age verification measures and as a consequence enhance the risks for below-13 Child Users<sup>279</sup>.

### 5.3 Position of the LSA on the objection

147. The IE SA considers that the objection raised by the IT SA concerning the infringement of Article 25 GDPR constitutes a relevant and reasoned objection<sup>280</sup>. The IE SA however states that it does not intend to follow the IT SA's objection<sup>281</sup>.

148. In its Composite Response, the IE SA firstly observes that the IT SA is the only CSA to have expressed concern with the proposed outcome of IE SA's assessment of the extent to which TTL has achieved compliance with its obligations pursuant to Article 25 GDPR. Based on this, the IE SA asserts that the consensus position, shared amongst all other CSAs, supports the retention of the analysis and conclusion in the Draft Decision<sup>282</sup>.

149. The IE SA further notes the IT SA's position that, in finding an infringement of Article 25 GDPR, a controller could be ordered to 'rely on public or private trusted third parties "certifying" individual features'<sup>283</sup>. While, as stated above at paragraph 20 of this Binding Decision, the IT SA withdrew the part of its objection concerning the request for a compliance order under Article 58(2)(d) GDPR in relation to the possible infringement of Article 25 GDPR, the IT SA referred

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<sup>274</sup> IT SA Objection, p. 7.

<sup>275</sup> IT SA Objection, p. 7.

<sup>276</sup> IT SA Objection, p. 7.

<sup>277</sup> IT SA Objection, p. 8.

<sup>278</sup> IT SA Objection, p. 8.

<sup>279</sup> IT SA Objection, p. 8.

<sup>280</sup> IE SA's assessment of the objections, p. 2.

<sup>281</sup> Composite Response, p. 7.

<sup>282</sup> Composite Response, p. 5.

<sup>283</sup> Composite Response, p. 5.

to third party certification mechanisms in support of its proposed infringement of Article 25 GDPR in its objection<sup>284</sup> and the IE SA expressed its position on those mechanisms in this context also. The IE SA states that, leaving aside the question of whether such services (as they pertain to children) might even be available in each Member State, the IE SA notes that this particular methodology is just one of a range of possible methods outlined by the BSI PAS 1296:2018 that a controller might elect to utilise, either by itself or in combination with other methods, for ‘age-gating’ purposes<sup>285</sup>.

150. With respect to the envisaged outcome, the IE SA notes that, if the IT SA’s objection regarding the infringement of Article 25 GDPR were followed, the obligations placed upon controllers by the GDPR require the controller itself to determine, by reference to its unique knowledge of its own business and data processing activities, the methods by which it will achieve compliance with its obligations<sup>286</sup>.

151. The IE SA further observes the risk of an unintended consequence of limiting the guidelines that are currently being prepared, at EDPB level, on the subject of children’s data<sup>287</sup>.

## 5.4 Analysis of the EDPB

### 5.4.1 Assessment of whether the objection was relevant and reasoned

152. The objection raised by the IT SA concerns ‘whether there is an infringement of the GDPR’<sup>288</sup>.

153. The IT SA in its objection disagrees<sup>289</sup> with the IE SA’s finding in the Draft Decision that the technical and organisational measures implemented by TTL during the Relevant Period in respect of age verification processes themselves complied with Article 25 GDPR<sup>290</sup>. The IT SA requests the IE SA to overturn this finding and to conclude that Article 25 GDPR was infringed<sup>291</sup>. The EDPB considers that there is a clear connection between the IT SA’s objection and the Draft Decision<sup>292</sup>, since the IT SA’s objection relates to specific legal and factual content of the Draft Decision<sup>293</sup> and, if followed, it would lead to a different conclusion as to whether there is an infringement of Article 25 GDPR<sup>294</sup>. In consequence, the EDPB finds the objection to be **relevant**.

154. The EDPB takes note of TTL’s view that the IT SA’s objection fails to meet the ‘Adequately Reasoned Threshold’ as it does not provide any sound or substantiated reasoning for the position that TTL age verification measures in place during the Relevant Period did not align with the relevant state of the art during the Relevant Period, or even identify what the relevant ‘state of the

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<sup>284</sup> IT SA Objection, p. 6 and 7.

<sup>285</sup> Composite Response, p. 5.

<sup>286</sup> Composite Response, p. 5.

<sup>287</sup> Composite Response, p. 5.

<sup>288</sup> EDPB Guidelines on RRO, paragraph 24.

<sup>289</sup> IT SA Objection, p. 2, 4, 7.

<sup>290</sup> Draft Decision, paragraphs 210-221, in particular paragraph 221.

<sup>291</sup> IT SA Objection, p. 2, 7.

<sup>292</sup> EDPB Guidelines on RRO, paragraph 12.

<sup>293</sup> EDPB Guidelines on RRO, paragraph 14. Specifically, the IT SA’s objection refers to the Inquiry carried out by the LSA on age verification measures as set out in paragraphs 189-221 of the Draft Decision (IT SA Objection, p. 2) and to the conclusion reached by the IE SA in paragraph 221 of the Draft Decision.

<sup>294</sup> EDPB Guidelines on RRO, paragraph 13.

art’ was<sup>295</sup>. Further, TTL claims that the IT SA fails to identify the specific legal error in the Draft Decision regarding compliance with Article 25(1) GDPR and contradicts itself when assessing the relevant legal standard<sup>296</sup>. The EDPB observes that TTL’s position relates to the content of the objection, which concerns its merits and not its admissibility. The EDPB assesses in the following paragraphs if the IT SA’s objection meets the threshold of being ‘reasoned’ in accordance with Article 4(24) GDPR.

155. The EDPB notes that the IT SA puts forward several legal and factual arguments in its objection in order to demonstrate why Article 25 GDPR was infringed by TTL in this particular case<sup>297</sup>.

156. First, the IT SA presents arguments demonstrating why, based on the numbers provided by TTL and referred to in the Draft Decision<sup>298</sup>, the age verification methods implemented by TTL are ‘seriously flawed’<sup>299</sup>. For example, according to the IT SA, these numbers point to the inadequacy and poor effectiveness of the measures implemented by TTL and such a high number of below-13 child users is inadmissible in the light of the relevant obligations under the law<sup>300</sup>. With regard to the age gate implemented by TTL, the IT SA notes that it can be ‘easily dodged’<sup>301</sup> and that the system based on self-declarations does not appear to entail any ‘reasonable likelihood’ of effectiveness such as to justify its implementation in the first place<sup>302</sup>. The IT SA also considers that TTL failed to fulfil its obligation to demonstrate the effectiveness of the measures it has deployed<sup>303</sup>. Furthermore, the IT SA argues why all the remaining measures referred to by TTL fail to address the risks arising for child users in this case<sup>304</sup>.

157. Next, the IT SA recalls that children merit specific protection with regard to the processing of their data by referring to Article 24(4) CFR and Recital 38 GDPR<sup>305</sup>. The IT SA puts forward the argument that this should be considered when assessing the measures implemented by the controller<sup>306</sup>. The IT SA contends that, taking into consideration the peculiar risks arising from the online processing of data relating to below-13 child users in the specific context of the social network platform at issue, and by having regard to statistics and media reports, the measures deployed by TTL cannot be considered to be ‘suitable and appropriate’<sup>307</sup>.

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<sup>295</sup> TTL Art. 65 Submissions, paragraphs 6.2, 6.6, 6.7.

<sup>296</sup> TTL Art. 65 Submissions, paragraph 6.8.

<sup>297</sup> See as well Section 5.2 above.

<sup>298</sup> In particular, the IT SA refers to the number of failed registrations and the number of profiles that were removed after being detected to belong to users below the age of 13 during the period from 29 July 2020 to 31 December 2020 (IT SA Objection, p. 4-5).

<sup>299</sup> IT SA Objection, p. 4-5 (referring to Draft Decision, paragraph 211).

<sup>300</sup> IT SA Objection, p. 5.

<sup>301</sup> IT SA Objection, p. 5: ‘since it is enough for a user to enter any date of birth in order to register with the platform – given that no check is performed at this stage’.

<sup>302</sup> The IT SA also refers to the fact that ██████████ is blocked after a failed registration and questions the relevance of this element for the assessment made in the Draft Decision (IT SA Objection, p. 5). The IT SA further argues that ██████████ is not to be regarded as an effective deterrent measure’ (IT SA Objection, p. 6).

<sup>303</sup> IT SA Objection, p. 5.

<sup>304</sup> IT SA Objection, p. 5.

<sup>305</sup> IT SA Objection, p. 5.

<sup>306</sup> IT SA Objection, p. 6.

<sup>307</sup> IT SA Objection, p. 6. The IT SA also notes that the consideration that there is a factually high level of danger for Child Users, should translate into an equally high level of commitment by TTL, which should not leave any feasible measure out of the scope of the tools to be implemented (IT SA Objection, p. 6).

158. Furthermore, the IT SA points out to other available measures for age verification<sup>308</sup> and states that, ‘taking account of the serious risks child users are exposed to as well as of the nature, scope, context (social networks) and purposes of the processing, the platform should have at least made the effort to implement all known state-of-the-art solutions to avert the risks related to the processing for below-13 child users’<sup>309</sup>. The IT SA argues that from the accountability perspective it is not acceptable that TTL has not even attempted to develop more effective measures<sup>310</sup>.
159. Finally, the IT SA clearly indicates how its requested change would leave to a different conclusion<sup>311</sup>, i.e. the IT SA asks the IE SA to find that Article 25 GDPR has been infringed since the controller failed to implement appropriate technical and organisational measures to ensure and be able to demonstrate compliance with the GDPR<sup>312</sup>.
160. In consequence, the EDPB finds the objection to be **reasoned**.
161. In order for an objection to meet the threshold set by Article 4(24) GDPR, it also needs to clearly demonstrate the significance of the risks posed by the Draft Decision<sup>313</sup>.
162. The EDPB takes note of TTL’s view that the IT SA’s objection does not meet the ‘Significant Risk Threshold regarding the alleged risk to the fundamental rights and freedoms of data subjects’ as the IT SA’s objection lacks specificity in this respect<sup>314</sup>.
163. The EDPB is not swayed by TTL’s argument and finds that the IT SA’s objection clearly demonstrates the risk to the rights for the data subjects if the Draft Decision were left unchanged. The IT SA states that the likelihood for below-13 child users to easily access and readily use social networks remains worryingly high if the technical and organisational measures for age verification are not strengthened adequately, which ultimately carries the risk that such users are exposed to dangers<sup>315</sup>. The IT SA further notes that the failure to find the infringement of Article 25 GDPR with respect to the measures implemented by TTL and the resulting endorsement of the practices followed so far by TTL would give rise to a dangerous precedent, since this would fail to flag the need for TTL’s processing activities to be amended and would endanger the data subjects whose data are and will be processed by that controller<sup>316</sup>. Moreover, the IT SA points out that other controllers from the social networking sector might decide to implement inadequate age verification measures and this would in turn enhance the risks for below-13 child users<sup>317</sup>.
164. Considering the above, the EDPB finds that the objection of the IT SA regarding the existence of the infringement of Article 25 GDPR is **relevant and reasoned** pursuant to Article 4(24) GDPR.

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<sup>308</sup> IT SA Objection, p. 6-7.

<sup>309</sup> IT SA Objection, p. 7.

<sup>310</sup> IT SA Objection, p. 7.

<sup>311</sup> EDPB Guidelines on RRO, paragraph 16.

<sup>312</sup> IT SA Objection, p. 7.

<sup>313</sup> EDPB Guidelines on RRO, paragraph 35.

<sup>314</sup> TTL Art. 65 Submissions, paragraph 6.12.

<sup>315</sup> IT SA Objection, p. 6.

<sup>316</sup> IT SA Objection, p. 8.

<sup>317</sup> IT SA Objection, p. 8.

#### 5.4.2 Assessment on the merits

165. In accordance with Article 65(1)(a) GDPR, the EDPB shall take a binding decision concerning all the matters which are the subject of the relevant and reasoned objections, in particular whether there is an infringement of the GDPR.
166. The EDPB notes that the IT SA's objection, found to be relevant and reasoned in section 5.4.1, requests the IE SA to change the Draft Decision in order to find an infringement of Article 25 GDPR insofar it relates to the age verification measures implemented by TTL in the TikTok platform.
167. The EDPB considers that, while the IT SA does not differentiate in its objection between specific parts of Article 25 GDPR, on the basis of its wording and content, the IT SA's objection is targeting specifically an alleged lack of compliance by TTL with Article 25(1) GDPR. Therefore, the scope of the EDPB's analysis in this section covers whether TTL has infringed **Article 25(1) GDPR ('data protection by design')** with regard to the age verification measures implemented by TTL in the context of the TikTok platform during the Relevant Period.
168. When assessing the merits of the IT SA's objection, the EDPB also takes into account TTL's position on the objection and its submissions.
169. On a preliminary note, the EDPB recalls that, as stated in paragraph 87 of this Binding Decision, the argument of the IE SA<sup>318</sup>, that the lack of similar objections by other CSAs indicates a consensus with these CSAs, has no impact on the EDPB's assessment of the merits in the case at hand.

#### TTL's position on the objection and its submissions

170. TTL submits that the IE SA finding in the Draft Decision that TTL age verification measures deployed during the Relevant Period complied with the GDPR was correct and supported by the evidence before the IE SA<sup>319</sup>.
171. First, TTL claims that IT SA in its objection fails to establish the 'state of the art' during the Relevant Period and to demonstrate how TTL fell below that standard<sup>320</sup>. In particular, TTL argues that there was no universally established or accepted 'state of the art' for internet platforms of this type during the Relevant Period and there was no regulatory guidance in place during the Relevant Period – or even today – specifying what constitutes appropriate and effective age verification mechanisms<sup>321</sup>. TTL asserts that the lack of concrete guidance regarding the processing of children's data under the GDPR is also demonstrated by the fact that various SAs have recently been conducting public consultations on this topic and that the EDPB is preparing guidelines on the processing of children's data<sup>322</sup>. TTL further refers to the expert evidence of [REDACTED] (the 'Expert Report of [REDACTED]', at Annex 2 of TTL Art. 65 Submissions, hereinafter **[REDACTED] Report**'), which finds that TTL age verification measures during the Relevant Period compared favourably with the practices of industry peers and other age-restricted sectors<sup>323</sup>. TTL also refers to the statement by the IE SA in the Composite Response that the CSAs (with the exception of the IT SA)

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<sup>318</sup> See paragraph 148 of this Binding Decision above.

<sup>319</sup> TTL Art. 65 Submissions, paragraph 6.16.

<sup>320</sup> TTL Art. 65 Submissions, paragraph 6.29.

<sup>321</sup> TTL Art. 65 Submissions, paragraphs 6.20-6.23.

<sup>322</sup> TTL Art. 65 Submissions, paragraphs 6.24-6.25.

<sup>323</sup> TTL Art. 65 Submissions, paragraphs 6.27-6.28; [REDACTED] Report, sections 6.2.1 and 6.2.3.

are in consensus that TTL age verification measures were appropriate during the Relevant Period<sup>324</sup>.

172. Second, TTL argues that Article 25(1) GDPR only require controllers to implement ‘appropriate’ measures and these have to be interpreted in the context of the regulatory landscape and industry practice at the time<sup>325</sup>. TTL asserts that the standard of ‘appropriateness’ means that a controller is required to implement measures to determine the age of users with an appropriate level of certainty (having regard to the various factors set out in Articles 24 and 25 GDPR including the risks presented by the processing) not with an absolute level of certainty<sup>326</sup>.

173. According to TTL, the IT SA seeks to incorrectly introduce a standard of factual effectiveness rather than appropriateness, when arguing that an infringement of Article 25 GDPR is evidenced because TTL identified individuals suspected to be under the age of 13 on the TikTok Platform through its various age verification measures<sup>327</sup>. TTL argues that the neutral age-gate and supplementary measures that were implemented satisfied TTL’s Article 25 GDPR obligations, compared favourably to contemporary industry practice and were ‘appropriate’<sup>328</sup>.

174. Finally, TTL insists that the age verification measures implemented by TTL during the Relevant Period reflected the best practice at the time in terms of balancing their effectiveness against considerations of data minimisation under Article 5(1)(c) GDPR<sup>329</sup>.

#### EDPB’s assessment on the merits

175. The EDPB recalls that Article 25(1) GDPR requires controllers to have data protection designed into their processing of personal data and that applies throughout the processing lifecycle. The core of the provision is to ensure appropriate and effective data protection by design, which means that controllers should be able to demonstrate that they have implemented the appropriate measures and safeguards in the processing of personal data to ensure that the requirements of the

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<sup>324</sup> TTL Art. 65 Submissions, paragraph 6.29.

<sup>325</sup> TTL Art. 65 Submissions, paragraph 6.31.

<sup>326</sup> TTL further argues that this view is ‘supported by guidance issued by supervisory authorities. For example, the ICO states that the level of certainty for age verification needs to be “appropriate to the risks to the rights and freedoms of children”, rather than an absolute threshold’ (TTL Art. 65 Submissions, paragraph 6.32).

<sup>327</sup> TTL Art. 65 Submissions, paragraphs 6.32-6.33. TTL further argues in paragraphs 6.34-6.35 of its Submissions: ‘No age verification method is 100% effective and the Italian SA’s Objection should properly consider that, as explained in paragraph 6.32 above, the standard of “appropriateness” means that a controller is required to implement measures to determine the age of users with an appropriate level of certainty (having regard to the various factors set out in Art. 24 and 25 GDPR including the risks presented by the processing), not with an absolute level of certainty. The GDPR does not require the absolute exclusion of underage users from the Platform; rather, it requires appropriate measures to be implemented. If anything, the fact that TikTok actively detects and removes underage accounts, as reflected by the removal figures cited in the Italian SA’s Objection, is evidence of TikTok’s reasonable, diligent efforts to keep individuals under the age of 13 off of the Platform.’

<sup>328</sup> TTL Art. 65 Submissions, paragraphs 6.37-6.43. With respect to the measure of ██████████ block, TTL contends that it ‘is in line with the ICO’s AADC, which provides that self-declaration may be suitable when used in conjunction with other techniques, such as ██████████’ (TTL Art. 65 Submissions, paragraph 6.42).

<sup>329</sup> TTL Art. 65 Submissions, paragraphs 6.44-6.48.

GDPR are met and that the data protection principles<sup>330</sup> and the rights and freedoms of data subjects are effective<sup>331</sup>.

176. As a preliminary remark, the EDPB notes that the measures implemented by TTL (as described in paragraphs 124-125 of this Binding Decision above) constitute of an *ex ante* part and an *ex post* part. The *ex ante* part is comprised of the steps a) - c), whereas the *ex post* part constitutes f) - i). The points d), e) and j) merely provide additional information about the circumstances of the measures. Further, it must be noted that, while in the context of the Draft Decision the IE SA and TTL refer to 'age verification', indeed, little verification, i.e. the confirmation as true or proofing by good evidence, is taking place<sup>332</sup>. Only one aspect of the *ex post* measures, the identifying users that in their profile description state to be- below 13, is verifying the age of the user. The remaining measures do not aim at collecting any form of reliable evidence that would allow indeed to verify the age. TTL in this regard acknowledges this by calling its solution under point a) an Age Gate, rather than an age verification process. However, for the sake of consistency, the EDPB will below refer to the *ex ante* and *ex post* measures as 'age verification' measures.

177. The EDPB underlines that, in the context of **Article 25(1) GDPR**, the requirement for the measures to be 'appropriate' means that the measures and necessary safeguards implemented by a controller should be suited to achieve the intended purpose, i.e. they must implement the data protection principles and secure the rights of data subjects 'effectively'<sup>333</sup>. The EDPB notes that the concept of 'effectiveness' in the context of data protection law stems from the objective of the GDPR to ensure 'effective protection of personal data throughout the Union'<sup>334</sup>.

178. The EDPB thus disagrees with TTL's assertion that the IT SA seeks to introduce a standard of 'factual effectiveness' rather than 'appropriateness' when assessing TTL's compliance with Article 25 GDPR and that the IT SA's objection incorrectly considers the effectiveness of the age verification measures implemented by TTL<sup>335</sup>.

179. The EDPB also underlines that, in line with the accountability principle, TTL as the controller is liable to demonstrate its compliance with the data protection principles and its other obligations under GDPR in relation to the processing at stake<sup>336</sup>.

180. While Article 25(1) GDPR does not require the implementation of any specific technical and organisational measures, and the controller has discretion in respect of the choice of the measures and safeguards, the measures and safeguards chosen by the controller have to be designed to be robust taking into account the risks associated with the processing. The EDPB considers that under Article 25(1) GDPR the requirement of appropriateness is therefore closely related to the

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<sup>330</sup> The data protection principles as listed in Art. 5 GDPR.

<sup>331</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 2 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 2.

<sup>332</sup> See definition in Oxford English Dictionary

<https://www.oed.com/view/Entry/222511?redirectedFrom=verify>.

<sup>333</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraphs 7 and 8.

<sup>334</sup> Recital 11 GDPR. See also CJEU case law, e.g. Judgement of the Court of Justice of 13 May 2014, *Google Spain*, C-131/12, ECLI:EU:C:2014:317, paragraphs 38, 53, 58.

<sup>335</sup> TTL Art. 65 Submissions, paragraphs 6.32-6.33. The EDPB notes that the notion of 'factual effectiveness' is introduced by TTL in its submissions and is not referred to as such in the IT SA's objection.

<sup>336</sup> Art. 5(2) and Art. 24 GDPR, also Recital 74 GDPR.

requirement of effectiveness<sup>337</sup>. Whether or not the measures chosen by the controller in the particular case are appropriate depends on the assessment of the elements listed in Article 25(1) GDPR<sup>338</sup>.

181. The EDPB therefore proceeds below with an analysis of those elements, in order to assess if the age verification measures implemented by TTL in the present case comply with Article 25(1) GDPR. The analysis will address, in turn: ‘nature, scope, context and purpose of processing’, ‘risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing’, the ‘state of the art’, the ‘cost of implementation’ and the effectiveness of the measures implemented by TTL in light of the requirements of Article 25(1) GDPR<sup>339</sup>. This will be carried out for both the *ex ante* and the *ex post* measures implemented by the controller. Finally, based on the elements available to the EDPB in the context of this procedure, the EDPB will assess whether, in accordance with Article 25(1) GDPR, the measures implemented by TTL were appropriate in this particular case.

‘nature, scope, context and purpose of processing’

182. The EDPB recalls that the concept of **nature** relates to the inherent characteristics of the processing<sup>340</sup>. As stated in the Draft Decision, this case relates to the processing of personal data of children under the age of 13 in the context of the TikTok platform, both mobile application- and website-based, in particular age verification<sup>341</sup>. As noted in the IT SA’s objection, the TikTok platform is a service that is offered directly to children<sup>342</sup>.

183. The **scope** refers to the size and range of the processing<sup>343</sup>. As described above, TTL does not retain data to determine the approximate number of the TikTok platform users that were identified as being under the age of 13 when attempting to register during the period from 29 July 2020 to 31 December 2020 and therefore provides an assumed approximate number of prevented registrations by users under the age of 13 (██████████) and an assumed number of accounts of users under the age of 13 being closed proactively by TTL itself (██████████)<sup>344</sup>. The Draft Decision further notes that during the Relevant Period, in spite of the efforts undertaken by TTL, approximately █████ of TTL’s approximate average Child Users were detected as being under 13, and that the number of children under 13 who evaded, and may continue to evade, detection is unclear<sup>345</sup>.

184. As noted in the IT SA’s objection, the fact that such an amount of profiles was removed means that as many below-13 child users managed to easily access the platform and used it for an unspecified period – not to mention all the below-13 child users of the platform that have remained as yet undetected<sup>346</sup>. The Draft Decision also establishes that TTL processed the personal data of

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<sup>337</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 8 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 8.

<sup>338</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraphs 14, 17.

<sup>339</sup> Art. 25(1) GDPR.

<sup>340</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 27 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 28.

<sup>341</sup> Draft Decision, paragraph 61.

<sup>342</sup> IT SA Objection, p. 6.

<sup>343</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 27 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 28.

<sup>344</sup> See paragraph 127 of this Binding Decision above.

<sup>345</sup> Draft Decision, paragraphs 67 and 211.

<sup>346</sup> IT SA Objection, p. 5.



at least those children under 13 whose account was detected, and by setting accounts to public by default, TTL ensured that the scope of processing of social media content of those children under 13 was potentially very extensive, being made accessible without restriction to an indeterminate global audience<sup>347</sup>.

185. As established in the Draft Decision, the accounts of registered TikTok platform users were public-by-default<sup>348</sup>. This meant that, for example, a public account was viewable not only by both every single TikTok platform user via the app and every single TikTok platform user via the website, but also by an effectively indeterminate number of persons who were not registered TikTok platform users on the website<sup>349</sup>. The implications of this are particularly severe and wide-ranging – the content published by Child Users, including those under the age of 13 who remained undetected, on the TikTok platform where the account was public-by-default and not otherwise restricted by individual video-settings, could be accessed, viewed and otherwise processed beyond the control of the data subject and TTL<sup>350</sup>.

186. The processing at stake therefore affected a large number of vulnerable persons<sup>351</sup> and the extent of the processing of their personal data was potentially very large.

187. The EDPB recalls that the concept of **context** relates to the circumstances of the processing<sup>352</sup>. The EDPB underlines that the processing at stake concerns personal data of a high number of particularly young children, i.e. children under 13 years old, in the context of their use of a social media platform.

188. Article 24(2) CFR provides that ‘in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration’<sup>353</sup>. The EDPB also recalls that, in accordance with Article 3(1) of the United Nations Convention on the Rights of the Child, ‘the best interests of the child shall be a primary consideration’<sup>354</sup>. As pointed out both by the IE SA in the Draft Decision and by the IT SA in its objection, the GDPR recognises children as a vulnerable category of natural persons. This is displayed by a number of provisions in the GDPR<sup>355</sup>. In particular, Recital 38 GDPR states that 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>356</sup>. Moreover, as raised

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<sup>347</sup> Draft Decision, paragraph 67.

<sup>348</sup> Draft Decision, paragraphs 80, 128.

<sup>349</sup> Draft Decision, paragraph 160.

<sup>350</sup> Draft Decision, paragraph 160.

<sup>351</sup> See this Binding Decision, paragraphs 127 and 183-184 above.

<sup>352</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 27 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 28.

<sup>353</sup> Art. 24(2) CFR, also as referred to in the IT SA Objection, p. 5.

<sup>354</sup> Art. 3(1) of the United Nations Convention on the Rights of the Child (adopted by a resolution 44/25 of the General Assembly of the United Nations on 20 November 1989) stating that: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

<sup>355</sup> See also Judgment of the Court of Justice of 4 July 2023 in case *Meta Platforms et al v Bundeskartellamt*, C-252/21, ECLI:EU:C:2023:537, paragraph 111.

<sup>356</sup> Draft Decision, paragraph 69; IT SA objection, p. 5.

by the IT SA<sup>357</sup>, the GDPR, for instance its Article 8<sup>358</sup>, envisages enhanced requirements for the processing of personal data of children under the age of 13 and in some cases, depending on Member State law, even for children of up to 16 years of age<sup>359</sup>.

189. The consideration of the special protection guaranteed for children is particularly relevant in the present case as the TikTok platform is a social media service that is offered directly to children<sup>360</sup> - i.e. there is an offer of information society services directly to a child<sup>361</sup>.

190. The EDPB also observes that the processing of personal data is at the core of the TTL business and the ban on access for below-13 child users to the TikTok platform is a fundamental precondition TTL is required to fulfil with a view to carrying out its business<sup>362</sup>. As the IT SA highlights, the company would have to otherwise discontinue its core business with all the related processing of personal data<sup>363</sup>.

191. Moreover, as observed by the IT SA in its objection<sup>364</sup>, there have been numerous reports indicating possible dangers to children related to their use of the TikTok platform. These risks were also acknowledged by TTL in its DPIA (

[REDACTED]

<sup>365</sup>).

192. The **purpose** pertains to the aims of the processing<sup>366</sup>. TTL provides the TikTok platform<sup>367</sup>. The Draft Decision states that 'TikTok is a video-focused social media platform that allows registered users to create and share videos of varying durations and to communicate with other users through messages'<sup>368</sup>. As submitted by TTL, it 'provided a global entertainment platform that, at its core, was designed to enable Users to create and share video content, enjoy videos from a variety of creators, and otherwise express their creativity, such as by interacting with videos to express new perspectives and ideas'<sup>369</sup>.

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<sup>357</sup> IT SA Objection, p. 5. The IT SA refers to Art. 8 GDPR.

<sup>358</sup> Art. 8 (1) GDPR. The EDPB also recalls that Art. 6(1)(f) GDPR, referring to the legal basis for processing consisting in the necessity for the purposes of the legitimate interests of the controller or a third party, raises in particular the case where the data subject is a child in the context of the balancing exercise to be carried out by the controller. The EDPB further recalls that, if a data subject is a child, this is also a relevant factor for the controller to take into account when relying on Art. 6(1)(b) GDPR, see EDPB Guidelines 2/2019 on Art. 6(1)(b) GDPR, paragraph 13.

<sup>359</sup> Art. 8(1) GDPR.

<sup>360</sup> IT SA Objection, p. 6.

<sup>361</sup> The EDPB recalls that, as TTL explicitly acknowledges, it offers the TikTok platform to users under 18 years of age (Draft Decision, paragraphs 12 and 13).

<sup>362</sup> IT SA Objection, p. 7.

<sup>363</sup> IT SA Objection, p. 7.

<sup>364</sup> IT SA Objection, p. 6.

<sup>365</sup> TTL Children's Data and Age Appropriate Design DPIA, Risk n. 1 on p. 31 and Risk n. 6 on p. 38 (on p. 32 and 39, TTL describes the measures taken to mitigate these risks).

<sup>366</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 27 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 28.

<sup>367</sup> Draft Decision, paragraphs 7 and 10.

<sup>368</sup> Draft Decision, paragraph 5.

<sup>369</sup> Draft Decision, paragraph 5, referring to TTL PDD Submissions, paragraphs 3.1-3.2.

193. This primary purpose informed the way in which the TikTok platform operated<sup>370</sup>, while TTL, as a private company, is pursuing commercial interest by carrying out the processing in the context of its services. In this respect, the EDPB observes that the number of users of the TikTok platform and the level of their engagement in the TikTok platform in relation to the processing at stake has relevance for commercial interests of TTL.

'risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing'

194. As a general remark, the EDPB recalls that, when performing the risk analysis for compliance with Article 25(1) GDPR, the controller has to identify the **risks** to the rights of data subjects and determine **their likelihood and severity** in order to implement measures to effectively mitigate the identified risks<sup>371</sup>. A systematic and thorough evaluation of the processing is crucial when doing risk assessments. The controller must always carry out a data protection risk assessment on a case by case basis for the processing activity at hand and verify the effectiveness of the appropriate measures and safeguards envisaged<sup>372</sup>.

195. Therefore, in complying with the requirements of Article 25(1) GDPR, in the first instance, it is necessary to identify the risks to the rights and freedoms of data subjects that a violation of the data protection principles presents. The controller must have regard to the likelihood and severity of those risks and must implement measures to effectively mitigate them.

196. Recital 75 GDPR provides examples of risks to the rights and freedoms of natural persons. These risks may include physical, material or non-material damage to natural persons<sup>373</sup>. Recital 76 GDPR provides guidance as to how risk should be evaluated, i.e. by reference to the nature, scope, context and purposes of the processing and on the basis of an objective assessment<sup>374</sup>. The EDPB recalls that the GDPR adopts a coherent risk based approach in many of its provisions, in Articles 24, 25, 32 and 35 GDPR, with a view to identifying appropriate technical

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<sup>370</sup> TTL PDD Submissions, paragraph 3.2.

<sup>371</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 29 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 30.

<sup>372</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 31 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 32.

<sup>373</sup> Recital 75 GDPR:

'The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data; where personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular of children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects' (emphasis added).

<sup>374</sup> Recital 76 GDPR.

and organisational measures to protect individuals, their personal data and complying with the requirements of the GDPR<sup>375</sup>.

197. The EDPB takes note that TTL has conducted the risk assessment with regard to the use of the TikTok platform by Child Users. Schedule 2 to the TTL Children’s Data and Age Appropriate Design DPIA<sup>376</sup> sets out the risks identified, a description of the risk, an assessment of the risk level before any mitigations are put in place (‘Inherent Risk’), the proposed mitigation measures to be put in place, and an assessment of the risk level after the relevant mitigations have been put in place (‘Residual Risk’). The methodology for calculating the overall risk score for each risk is as follows: [REDACTED]. This is applied for both the Inherent Risk and the Residual Risk<sup>377</sup>.

198. The TTL Children’s Data and Age Appropriate Design DPIA identifies thirteen risks to Child Users<sup>378</sup>. These are:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

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<sup>375</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 28 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 29, also stating that: ‘[t]he assets to protect are always the same (the individuals, via the protection of their personal data), against the same risks (to individuals’ rights), taking into account the same conditions (nature, scope, context and purposes of processing)’.

<sup>376</sup> TTL Children’s Data and Age Appropriate Design DPIA, Schedule 2.

<sup>377</sup> TTL Children’s Data and Age Appropriate Design DPIA, Schedule 2, Part A.

<sup>378</sup> TTL Children’s Data and Age Appropriate Design DPIA at Part B, Schedule 2; Draft Decision, paragraph 90.

[REDACTED]

199. As stated in the Draft Decision, TTL identifies [REDACTED]<sup>379</sup>. In relation to its mitigation measures, TTL determines that [REDACTED]<sup>380</sup>. However, the IE SA in the Draft Decision indicates that there is still a high risk in terms of likelihood and severity<sup>381</sup>.

200. The EDPB takes note that TTL disagrees with that categorisation of the risk, as TTL considers that the risks outlined by the IE SA are potential and hypothetical risks at best and some of them are outside the scope of data protection law<sup>382</sup>. However, first, the EDPB notes that the IE SA's assessment of the level of the risk is not disputed by any of the CSAs and, secondly, the EDPB agrees with the IE SA's assessment in this respect and is not swayed by the arguments of TTL.

201. At the outset, the EDPB observes that in the Draft Decision the IE SA notes that TTL Children's Data and Age Appropriate Design DPIA identifies neither the risk of children under the age of 13 accessing the TikTok platform, nor the further risks to them that may arise from this<sup>383</sup>. The EDPB considers that TTL's failure to specifically assess the risks for children under the age of 13 were they to get access to the TikTok platform has clear implications for TTL's ability to implement appropriate technical and organisational measures in accordance with Article 25(1) GDPR. As recalled above<sup>384</sup>, the risk assessment is necessary in order to verify the required effectiveness and the appropriateness of the measures and safeguards envisaged.

202. The EDPB recalls that children are recognised as vulnerable persons under GDPR<sup>385</sup> and this case concerns processing of the personal data of particularly young children, i.e. under the age of 13. Further, the EDPB observes that TTL itself determines that even for users above 13 covered by TTL Children's Data and Age Appropriate Design DPIA, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>388</sup>.

203. The EDPB agrees with the IE SA's remark that, with respect to Child Users, including children under the age of 13 who were to gain access to the TikTok platform, due to the relevant public features of the TikTok platform, the risks for Child Users include: loss of autonomy and control over their data, and possibly becoming targets for bad actors, given the public nature of their use of the TikTok platform; them becoming subject to a wide range of potentially deleterious activities,

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<sup>379</sup> Draft Decision, paragraph 91.

<sup>380</sup> Draft Decision, paragraph 91.

<sup>381</sup> Draft Decision, paragraph 102

<sup>382</sup> TTL PDD Submissions, paragraphs 4.18-4.25.

<sup>383</sup> Draft Decision, paragraph 96.

<sup>384</sup> See paragraph 195 of this Binding Decision above.

<sup>385</sup> Recitals 38 and 75 GDPR. See also WP29 Guidelines on DPIA, p. 9 stating that the processing of personal data of vulnerable data subjects, which may include children, is to be considered when assessing the existence of inherit high risk.

<sup>386</sup> Draft Decision, paragraph 91. Also, Part B of the TTL Children's Data and Age Appropriate Design DPIA.

<sup>387</sup> The Residual Risk is defined by TTL as being 'an assessment of the risk level after the relevant mitigations have been put in place'. TTL Children's Data and Age Appropriate Design DPIA, p. 31.

<sup>388</sup> TTL Children's Data and Age Appropriate Design DPIA, p. 32, 34, 36.

including online exploitation or grooming, or further physical, material or non-material damage where they inherently or advertently reveal identifying personal data; risk of social anxiety, self-esteem issues, bullying or peer pressure<sup>389</sup>.

204. The EDPB also agrees with the IE SA's assessment that, while the risks identified in the TTL Children's Data and Age Appropriate Design DPIA apply equally to children under the age of 13 as those over the age of 13, the risks associated with these users are exacerbated and particularly severe given their young age and that the TikTok platform is expressly not intended for those under the age of 13<sup>390</sup>. Indeed, TTL explained that it offers the TikTok platform to users, who are 13 years old or older<sup>391</sup>. The TikTok platform has a content rating on the Apple App store of '12+' and on the Google Play store of 'Parental Guidance Recommended'<sup>392</sup>.

205. Furthermore, the EDPB concurs with the IE SA regarding the risks identified in the Draft Decision specifically for children under the age of 13 who were to gain access to the TikTok platform<sup>393</sup>, in particular the risk of viewing and accessing materials that are harmful or inappropriate for a child of such youth, particularly given that the TikTok platform is not intended for children under 13<sup>394</sup>.

206. The EDPB also recalls that in the Draft Decision the IE SA found that the public-by-default account setting exposes social media posts by Child Users to an indeterminate audience and that this presents a severe risk for Child Users<sup>395</sup>. This is even more pertinent in relation to a significant number of children under the age of 13 who had access to the TikTok Platform for an undetermined period<sup>396</sup>.

207. Considering the above and taking into account the nature, scope, context, and purposes of processing, the EDPB shares the conclusion of the IE SA in its Draft Decision that the processing at stake poses high risks and that those risks associated with the processing analysed in the Draft Decision were high both in terms of likelihood and severity<sup>397</sup>.

208. The above assessment is applicable both for the *ex ante* and the *ex post* measures.

#### 'State of the art' and 'cost of implementation'

209. Under Article 25(1) GDPR, the reference to '**state of the art**' imposes an obligation on controllers, when determining the appropriate technical and organisational measures, to take account of the current progress in technology that is available in the market<sup>398</sup>. In this respect, the

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<sup>389</sup> Draft Decision, paragraph 93-94.

<sup>390</sup> Draft Decision, paragraph 96.

<sup>391</sup> Draft Decision, paragraph 12.

<sup>392</sup> Draft Decision, paragraph 12.

<sup>393</sup> As evident from paragraphs 183-184 above, a high number of children under 13 years old indeed had access to the TikTok platform during the Relevant Period.

<sup>394</sup> Draft Decision, paragraph 94.

<sup>395</sup> Draft Decision, paragraph 95.

<sup>396</sup> See paragraphs 183-184 of this Binding Decision.

<sup>397</sup> Draft Decision, paragraph 104.

<sup>398</sup> EDPB Guidelines on Data Protection by Design and by Default, V1.0, paragraph 19 and EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 19.

EDPB underlines that the principle of accountability is an overarching one and requires the controller to take up its responsibility in choosing the measures to be applied<sup>399</sup>.

210. In line with TTL's accountability obligations, TTL had an obligation to consider and assess the measures available in the market when choosing the age verification measures that it considered to be appropriate technical and organisational measures<sup>400</sup> in accordance with Article 25(1) GDPR. When it comes to the evaluation of the state of the art, therefore, TTL has to be able to demonstrate in the particular case that it has assessed and takes into account the state of art measures regarding age verification in order to secure effective implementation of the data protection principles and rights of data subjects.

211. First, the EDPB wishes to reply to TTL's submission that during the Relevant Period there was no regulatory guidance in place specifying what constitutes appropriate and effective age verification mechanisms<sup>401</sup>. In this regard, the EDPB refers to paragraphs 91-92 of this Binding Decision and recalls that the obligations of controllers stem directly from the GDPR. The application of controllers' obligations under Article 25(1) GDPR to take into consideration the state of the art is not conditional upon existence of any further regulatory guidance regarding the measures to be implemented in a particular case<sup>402</sup>. In addition, the fact that the supervisory authorities or the EDPB are working on the future guidelines in a relevant field does not affect the need for the controller to comply from the outset with its obligations stemming from the GDPR.

212. In any case, the EDPB highlights that there was relevant guidance by the EDPB on age verification in its Guidelines 05/2020 on Consent<sup>403</sup>.

213. The IT SA describes in its objection the concept of requiring a trusted third party to verify the identity and age of the user and makes reference to the BSI PAS 1296:2018 standard<sup>404</sup>. The EDPB highlights that the concept of requiring a trusted third party to verify the identity and age of the user is long established in some Member States<sup>405</sup> and that the BSI PAS 1296:2018<sup>406</sup> existed during the Relevant Period. This standard of the British Standards Institution has provided a framework for age check systems and is relevant to assess the available measures for age verification during the Relevant Period.

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<sup>399</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 64.

<sup>400</sup> Art. 5(2) and Art. 24 GDPR, Recital 74 GDPR.

<sup>401</sup> TLL Art. 65 Submissions, paragraphs 6.20-6.25.

<sup>402</sup> As the obligation stems directly from the GDPR. See also EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 10.

<sup>403</sup> EDPB Guidelines 05/2020 on Consent under Regulation 2016/679, Version 1.1. published on 11 May 2020 (hereinafter, the '**EDPB Guidelines on Consent**'), see section 7.1.3. Further, the EDPB Guidelines on Data Protection by Design and by Default, V1.0 were adopted on 13 November 2019, i.e. prior to the Relevant Period, and EDPB Guidelines on Data Protection by Design and by Default, V2.0 were adopted on 20 October 2020.

<sup>404</sup> IT SA Objection, p. 6.

<sup>405</sup> For example, the German Postident service has been available at least since 2010: [https://web.archive.org/web/20100314082647/http://www.deutschepost.de/dpag?tab=1&skin=hi&check=ye&lang=de\\_DE&xmlFile=link1015473\\_1014871](https://web.archive.org/web/20100314082647/http://www.deutschepost.de/dpag?tab=1&skin=hi&check=ye&lang=de_DE&xmlFile=link1015473_1014871).

<sup>406</sup> The British Standards Institution, PAS 1296:2018: Online age checking. Provision and use of online age check services. Code of Practice, published on 31 March 2018: <https://knowledge.bsigroup.com/products/online-age-checking-provision-and-use-of-online-age-check-services-code-of-practice/standard>.

214. Furthermore, the EDPB underlines that the issue of age verification is not a new issue nor an issue limited to the context of the protection of personal data<sup>407</sup>. The practices with regard to age verification in other fields have to be taken into account when assessing the question of what constitutes the ‘state of the art’ in the context of Article 25(1) GDPR<sup>408</sup>. By way of clarification, the elements identified by the EDPB are not meant to be exhaustive.
215. The EDPB also points out that the state of the art is not statically defined at a fixed point in time, but should be assessed continuously in the context of technological progress. If a controller fails to keep up to date with technological changes, this could result in a lack of compliance with Article 25 (1) GDPR<sup>409</sup>.
216. In reply to TTL’s assertion that the age verification measures implemented by TTL during the Relevant Period compare, according to the expert report submitted by TTL, favourably to those of its competitors<sup>410</sup>, the EDPB points out that a particular controller’s compliance with Article 25 GDPR is assessed on a case-by-case basis, taking into account the nature, context, scope and purpose of the processing at stake, as well as the risk to fundamental rights and freedoms of individuals in each specific case. Moreover, the potential infringement of the law by another party does not legitimise one’s own infringement of the law. The EDPB is therefore not swayed by this argument.
217. Taking into account the elements available to the EDPB in the context of this procedure the EDPB considers that, in this particular case, it does not have sufficient information to conclusively assess, pursuant to Article 25(1) GDPR, the state of art element in relation to measures implemented by TTL for the age verification of children as young as 13 years old during the Relevant Period.
218. Finally, regarding the ‘cost’ element in Article 25(1) GDPR, the EDPB recalls that the controller is not required to spend a disproportionate amount of resources when alternative, less resource-demanding, yet effective measures exist. However, the chosen measures need to ensure that the processing activity foreseen by the data controller does not process personal data in violation of the data protection principles, regardless of cost<sup>411</sup>.
219. The EDPB observes that in the present case TTL has not made any submissions demonstrating disproportionate cost for the implementation of the possible additional or alternative measures with regard to age verification on the TikTok platform. In any case, the EDPB agrees with the IT SA that a leading-edge technologically innovative company such as TTL that is addressing its social media services to children should be in a position to consider all available measures to ensure its compliance with Article 25 GDPR in an effective manner<sup>412</sup>.

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<sup>407</sup> See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) amended by Directive (EU) 2018/1808, in particular Art. 28b thereof which obliges the video-sharing platforms to, along the other things, establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors.

<sup>408</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 22.

<sup>409</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 20.

<sup>410</sup> TTL Art. 65 Submissions, paragraph 6.28.

<sup>411</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraphs 23-25.

<sup>412</sup> IT SA Objection, p. 7.



Whether the technical and organisational measures implemented by TTL with regard to age verification were 'effective'

220. The EDPB recalls that, as established in the Draft Decision<sup>413</sup>, TTL implemented the technical and organisational measures for age verification during the registration process to prevent children under the age of 13 from accessing the TikTok platform as described in paragraphs 124-125 of this Binding Decision above.
221. The EDPB notes that under Article 25(1) GDPR the requirement for the measures to be 'appropriate' means that the measures and necessary safeguards implemented by a data controller should be suited to achieve the intended purpose, i.e. they must implement the data protection principles enumerated in Article 5(1) GDPR 'in an effective manner'<sup>414</sup>.
222. In light of the above, the EDPB proceeds to evaluate the effectiveness or contribution to the effectiveness of the technical and organisational measures implemented by TTL in the case at hand.
223. The EDPB recalls the principle of accountability and notes that TTL as the data controller in the present case is responsible for and has to be able to demonstrate its compliance with the data protection principles under Article 5(1) GDPR and other provisions of the GDPR<sup>415</sup>. The accountability principle requires the controller to 'demonstrate the effects of the measures taken to protect the data subjects' rights, and why the measures are considered to be appropriate and effective'<sup>416</sup>, thus it puts focus on the element of demonstration. With regard to the protection of children's rights under the GDPR and determining whether children are actually affected, the controller needs to be able to demonstrate effective measures for ensuring that the processing of their personal data is in compliance with the data protection principles as discussed in detail subsequently.
224. Therefore, TTL is responsible to demonstrate that it has assessed the feasible alternatives and chosen appropriate measures for age verification taking into account all the elements listed in Article 25(1) GDPR. In particular, TTL is liable to demonstrate the effectiveness of the measures chosen in the particular case. This is particularly important when the demonstration of compliance is linked to the protection of vulnerable data subjects such as children.
225. As mentioned above, the analysis of effectiveness under Article 25(1) GDPR refers to the implementation of data protection principles, i.e. all the principles enshrined in Article 5 GDPR. The IT SA's objection mentions in particular the principle of data minimisation<sup>417</sup>. In this regard, the EDPB recalls that Article 5(1)(c) GDPR requires TTL to ensure that it only processes personal data that is adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed. Per TTL's Terms of Service, users of the TikTok platform<sup>418</sup> must be at least 13 years of age<sup>419</sup>. Therefore, for the purpose of providing its service, i.e. the TikTok platform<sup>420</sup>, TTL could

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<sup>413</sup> Draft Decision, paragraphs 190-203.

<sup>414</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 8.

<sup>415</sup> Art. 5(2) GDPR and Recital 74 GDPR.

<sup>416</sup> EDPB Guidelines on Data Protection by Design and by Default, V2.0, paragraph 87.

<sup>417</sup> IT SA Objection, p. 7.

<sup>418</sup> Regarding the purpose of the TikTok platform, see paragraphs 192-193 of this Binding Decision above.

<sup>419</sup> Draft Decision, paragraph 12.

<sup>420</sup> Draft Decision, paragraph 5, referring to TTL PDD Submissions, paragraphs 3.1-3.2. TTL PDD Submissions, paragraph 3.2: 'TikTok provided a global entertainment platform that, at its core, was designed to enable Users

only process personal data of users of at least 13 years of age<sup>421</sup>. TTL should have implemented technical and organisational measures to this end.

226. As noted above<sup>422</sup>, a particularly high number of users below the age of 13 was able to gain access to the TikTok platform, therefore TTL processed a high volume of personal data of vulnerable data subjects, i.e. children under the age of 13, during the Relevant Period, even though it was not necessary for the purpose of providing its service. Considering such high volume of personal data accidentally processed by TTL, the EDPB shares the concerns of the IT SA<sup>423</sup> regarding the lack of effective implementation by TTL of the principle of data minimisation in the present case.

227. As outlined in paragraphs 182-208 of this Binding Decision above, in particular due to the nature of the processing that concerns children under 13 and the context being the accessibility of a social media platform for a high number of such children, who constitute particularly vulnerable data subjects requiring specific protection and considering the high risk posed by the processing at stake, the EDPB is of the view that a particularly high level of effectiveness<sup>424</sup> is necessary to meet the requirements of Article 25(1) GDPR. Taking this into account, the EDPB does not find that the situation analysed in the present case is such where a reduced level of effectiveness would be appropriate. The measures implemented by TTL need to be analysed bearing this in mind.

228. When considering the level of 'effectiveness' of the measures implemented by TTL, the EDPB first notes the view of the IT SA that the age gate can be 'easily dodged'<sup>425</sup>. The EDPB agrees that the factor that an age verification system can be 'easily circumvented' constitutes a relevant factor considering the effectiveness of the measures in place<sup>426</sup>.

229. Second, the EDPB takes account of TTL's indication that 'if an individual entered a birth date which indicated that they were under 13, they were simply told they were ineligible for an account. By not explaining the reason for either presenting the age-gate or for preventing a potential user from creating an account, this ensured that individuals were not encouraged to provide an inaccurate birthdate'<sup>427</sup>. While the EDPB takes note of the age gate was presented in a neutral manner, it observes that such measure in itself does not ensure sufficient discouragement of individuals to not enter an inaccurate date of birth. As described above<sup>428</sup>, the date of birth constitutes the only information a user needs to provide before receiving the prompt of non-eligibility. Therefore, it is not inconceivable that an individual younger than 13 could conclude that the date of birth would constitute the sole factor for assessing their eligibility to access the TikTok platform.

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to create and share video content, enjoy videos from a variety of creators, and otherwise express their creativity, such as by interacting with videos to express new perspectives and ideas'.

<sup>421</sup> Insofar as such processing of personal data is compatible with GDPR.

<sup>422</sup> See paragraphs 183-184 of this Binding Decision above.

<sup>423</sup> IT SA Objection, p. 7.

<sup>424</sup> The German Bundesgerichtshof held in I ZR 102/05 based on Döring/Günter, MMR 2004, 231, 234; that '[t]he reliability of an age verification system presupposed that it eliminates simple, manifest and obvious possibilities for circumvention'.

<sup>425</sup> IT SA objection, p. 5 and 7.

<sup>426</sup> See footnote 424 above.

<sup>427</sup> TTL Art. 65 Submissions, paragraph 6.39.

<sup>428</sup> Paragraph 124 of this Binding Decision above.

230. Additionally, as with methods based on obscurity, once a way of circumvention is known, this method can be easily shared with peers to facilitate them circumventing the measure in place. Lastly, the EDPB takes note of the fact that the TikTok app was rated as 12+ in the Apple store<sup>429</sup>, therefore an individual interested in getting access to the TikTok platform could easily infer that in order to access the TikTok platform they needed to enter a date of birth indicating that their age is higher than 12 years old.

231. The EDPB also takes into account the blocking mechanism employed by TTL in combination with self-declaration. The mechanism in place in practice [REDACTED] any device [REDACTED]. Without prejudice to the impact of the [REDACTED] in place on the considered effectiveness, the mechanism [REDACTED]. Therefore, it is not inconceivable that data subjects under the age of 13 concluded that their lack of eligibility [REDACTED] and to conclude that an attempt from [REDACTED].

232. Additionally, [REDACTED], according to TTL Children's Data and Age Appropriate Design DPIA, constitutes [REDACTED]<sup>430</sup>, which in practice means a below 13 year old could [REDACTED]. Additionally, [REDACTED]. Once a user has signed up, for example, [REDACTED], it would therefore not be relevant anymore. Therefore, the EDPB considers that the blocking mechanism does not substantially enhance the effectiveness of the *ex ante* age verification process.

233. The EDPB further points out that the [REDACTED] Report submitted by TTL itself notes<sup>431</sup> that the EDPB Guidelines on Consent indicate that '[i]n some low-risk situations, it may be appropriate to require a new subscriber to a service to disclose their year of birth or to fill out a form stating they are (not) a minor'<sup>432</sup>. However, TTL's own risk assessment clearly indicates [REDACTED]<sup>433</sup>. The [REDACTED] Report does not take note, however, of the following paragraphs of the EDPB Guidelines on Consent stating that: 'In low-risk cases, verification of parental responsibility via email may be sufficient. Conversely, in high-risk cases, it may be appropriate to ask for more proof, so that the controller is able to verify and retain the information pursuant to Article 7(1) GDPR. Trusted third party verification services may offer solutions, which minimise the amount of personal data the controller has to process itself'<sup>434</sup>. Therefore, the EDPB Guidelines on Consent make it clear that more proof or proof of a higher quality is appropriate in high-risks cases and refer to trusted third party verification services in this respect (a solution indicated by the IT SA in its objection<sup>435</sup>).

234. Taking into account the above<sup>436</sup>, with respect to 'effectiveness' of the *ex ante* measures implemented by TTL, the EDPB expresses serious doubts as to whether the self-verification by the user (even in combination with the blocking mechanism) was a sufficiently effective solution for such high risk processing. Additionally, the EDPB expresses serious doubts as to whether TTL has

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<sup>429</sup> Draft Decision, paragraph 190.

<sup>430</sup> TTL Children's Data and Age Appropriate Design DPIA, p. 19, 3.a.iii. The EDPB notes that the DPIA in question is dated 8 October 2020, therefore this duration seems to be applicable at least as of that moment.

<sup>431</sup> [REDACTED] Report, section 5.1.1.

<sup>432</sup> EDPB Guidelines on Consent, paragraph 135.

<sup>433</sup> See paragraph 125 of this Binding Decision.

<sup>434</sup> EDPB Guidelines on Consent, paragraph 137.

<sup>435</sup> IT SA Objection, p. 6.

<sup>436</sup> Paragraphs 194-208 of this Binding Decision.

demonstrated, as required by the accountability principle, measurable effectiveness of the implemented *ex ante* measures.

235. Concerning the *ex post* measures, the EDPB notes that the reporting system [REDACTED]. It is to be further noted that this is not a systematic measure [REDACTED].

236. The other *ex post* measure relies on the matching of [REDACTED] [REDACTED]<sup>437</sup>. This mechanism hinges on users under 13 years of age [REDACTED] [REDACTED]<sup>438</sup>. In cases where [REDACTED], such content moderation tools will not be effective. TTL also did not provide information that allowed it to demonstrate that the majority of matches indeed identified a user below 13 years of age or whether the system is susceptible for false positives, i.e. to demonstrate the accuracy of the algorithm.

237. Further, in line with the accountability principle, the EDPB notes that within the available materials and submissions TTL did not demonstrate that either of these checks and the [REDACTED] [REDACTED] are done often and timely enough to minimise the time such accounts stay active on the TikTok platform, as could have been done with statistics of the duration between the creation of an account by a user under 13 years of age and the subsequent deletion of that account<sup>439</sup>.

238. Considering the above analysis, the EDPB expresses doubts as to whether the *ex post* measures implemented by TTL during the Relevant Period ensured a high level of effectiveness.

Whether the technical and organisational measures implemented by TTL were ‘appropriate’ pursuant to Article 25(1) GDPR

239. As a final step for the analysis, the EDPB will consider whether the age verification measures implemented by TTL during the Relevant Period were appropriate in accordance with Article 25(1) GDPR<sup>440</sup>.

240. The EDPB further notes that, in order to be considered ‘appropriate’, the technical and organisational measures for age verification chosen by controllers have to be compliant with the data protection principles under Article 5 GDPR, for example the principle of data minimisation under Article 5(1)(c) GDPR, and need to fulfil other requirements of the GDPR.

241. When assessing whether the *ex ante* and *ex post* measures employed by the controller were, taking together and as a whole, appropriate for attaining the aim of preventing the children below

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<sup>437</sup> See paragraph 125 of this Binding Decision.

<sup>438</sup> Draft Decision, paragraphs 196-198.

<sup>439</sup> The EDPB notes as well that some time could be needed to perform the human review in line with Art. 22 GDPR, where relevant, which could be not due to an issue under Art. 22 GDPR, but the result of the *ex post* use of content moderation measures to remedy a shortcoming, i.e. the registration of a user with age below 13, of the *ex ante* measures.

<sup>440</sup> In this regard the EDPB takes note of TTL’s view that the measures implemented need to lead to an appropriate level of effectiveness and certainty of assessing the age, and not an absolute level of certainty (TTL Art. 65 Submissions, paragraph 6.32). However, as evident from the assessment in the sub-section 5.4.2 of this Binding Decision, the EDPB is assessing the measures implemented by TTL not against an absolute level of certainty and effectiveness, but against an ‘appropriate’ level as envisaged in Article 25(1) GDPR.

13 years of age to use TikTok platform, the EDPB takes into account the standard set by the CJEU. While measures may not be sufficiently reliable to prevent all persons under the permitted age from being accepted, the measures need to significantly reduce the likelihood of such acceptance that would exist if that method were not used<sup>441</sup>. The EDPB expresses serious doubts in relation to whether TTL provided sufficient evidence as required by Article 5(2) GDPR for the measures in place to demonstrate that it did 'significantly reduce' the likelihood of children under the age of 13 from accessing and using the TikTok platform.

242. For the purposes of its assessment, the EDPB considers that the additional *ex post* measures in place by TTL do not as such prevent the registration of children under 13 years of age but instead mitigate shortcomings of the *ex ante* measures by removing accounts belonging to children under 13 years of age when they are identified as such. In this regard, theoretically an *ex post* measure with a high enough level of accuracy and short enough delay in the removal of identified users could exist<sup>442</sup>. However, the EDPB has serious doubts if in the case at hand the *ex post* measures in place provide for such a level of effectiveness that would mitigate the shortcomings indicated above of the *ex ante* measures<sup>443</sup>.

### Conclusion

243. Taking into account the above, the EDPB expresses its **serious doubts regarding the effectiveness** of the age verification measures put in place by TTL during the Relevant Period, and more specifically regarding whether the combination of the *ex ante* and *ex post* measures implemented by TTL were sufficient to bring the effectiveness to the level required in this specific case, considering the severity of the risks and the high number of vulnerable data subjects affected.

244. However, taking into account the elements available to the EDPB in the context of this procedure, the EDPB recalls that it lacks conclusive information regarding the state of the art element in relation to age verification during the Relevant Period<sup>444</sup>. Therefore, the EDPB **does not have sufficient information**, in particular in relation to the state of the art element, **to conclusively assess TTL's compliance with Article 25(1) GDPR**. Consequently, the EDPB **is not in a position to conclude** that TTL infringed Article 25(1) GDPR.

245. In light of the serious doubts expressed regarding the effectiveness of the measures chosen by TTL, the EDPB requires the IE SA to modify the conclusion set out in paragraph 221 of the Draft Decision in the IE SA's final decision in the present case, by stating that it cannot be concluded in this case that the technical and organisational measures in respect of the age verification processes themselves undertaken by TTL during the Relevant Period infringed the GDPR in light of the measures undertaken and the extent to which TTL sought to ensure its platform remained accessible only to those above the age of 13.

246. As a final remark, the EDPB recalls that the appropriateness of the technical and organisational measures that need to be implemented to comply with Article 25(1) GDPR is, due to their link to the state of the art and the possible changes of the relevant risks, regularly changing over time. This is particularly relevant in the field of age verification. A controller therefore has to periodically

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<sup>441</sup> Judgement of the Court of Justice 17 October 2013 in case *Michael Schwarz v Stadt Bochum*, C-291/12, ECLI:EU:C:2013:670, paragraphs 42 and 43.

<sup>442</sup> Without prejudice to future work of the EDPB or national SAs, such a method may in turn create risks for other fundamental rights.

<sup>443</sup> See paragraphs 225-234 of this Binding Decision above.

<sup>444</sup> See paragraph 217 of this Binding Decision above.

review whether the measures applied are still appropriate at the current moment, taking into account all the factors under Article 25(1) GDPR, considering their specific case at hand, in particular the level of risk. In addition, controllers need to ensure that any measure chosen is compliant with EU and Member State law, in particular the GDPR.

## 6 ON THE CORRECTIVE MEASURES

### 6.1 Analysis by the LSA in the Draft Decision

247. In the Draft Decision the IE SA envisages the imposition of corrective powers in connection to the infringements identified<sup>445</sup>, in particular: an order to bring processing operations into compliance pursuant to Article 58(2)(d) GDPR, a reprimand pursuant to Article 58(2)(b) GDPR, and administrative fines<sup>446</sup>.

248. More specifically, concerning the envisaged order, the IE SA imposes an order to TTL to bring the relevant processing into compliance with Article 5(1)(c), Article 5(1)(f) and Article 25(1) and (2), and Articles 12(1) and Article 13(1)(e) GDPR insofar as is still necessary within three months of the date of notification of any final decision<sup>447</sup>. The IE SA states that the relevant provisions do not prescribe a particular form or manner of processing and it is incumbent on TTL to ensure compliance<sup>448</sup>.

249. Concerning the envisaged reprimand, the IE SA specifies that it is ‘necessary and proportionate in addition to the order’ as it ‘formally recognises the serious nature of the infringements’ and ‘deter future similar non-compliance’<sup>449</sup>.

250. As to the administrative fines, the IE SA includes in the Draft Decision a range for the envisaged administrative fines to be imposed, respectively, for the infringement of Articles 5(1)(c) and 25(1) and (2) GDPR<sup>450</sup>, for the infringement of Articles 5(1)(f) and Articles 25(1) GDPR<sup>451</sup>, and for the infringement of Articles 12(1) and 13(1)(e) GDPR<sup>452</sup>.

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<sup>445</sup> In particular, the Draft Decision envisages the imposition of corrective powers in respect of the identified infringements of the following provisions:

- in respect of TTL’s data protection by design and default in respect of its processing of the personal data of Child Users: Articles 5(1)(c), 5(1)(f), 24(1), 25(1) and 25(2) GDPR (Draft Decision, paragraph 276);
- in respect of TTL’s age verification measures: Article 24(1) GDPR (Draft Decision, paragraph 277);
- in respect of TTL’s Transparency obligations: Articles 12(1) and 13(1)(e) GDPR (Draft Decision, paragraph 278)

<sup>446</sup> Draft Decision, paragraph 413.

<sup>447</sup> Draft Decision, paragraphs 284-286, 294-297 and 413.

<sup>448</sup> Draft Decision, paragraph 296.

<sup>449</sup> Draft Decision, paragraphs 300-301.

<sup>450</sup> The IE SA proposes the imposition of a fine between 55 million and 100 million euros for this infringement. (Draft Decision, paragraphs 281, 371, 413).

<sup>451</sup> The IE SA proposes the imposition of a fine between 55 million and 100 million euros for this infringement. (Draft Decision, paragraphs 281, 371, 413).

<sup>452</sup> The IE SA proposes the imposition of a fine between 110 million and 180 million euros for this infringement. (Draft Decision, paragraphs 281, 371, 413).

251. The EDPB notes that the compliance order and the reprimand already envisaged in the Draft Decision are not subject to objections of the CSAs and as such are not addressed in this Binding Decision.

## 6.2 Summary of the objections raised by the CSAs

252. The **DE SAs raise the need to extend the compliance order** envisaged by the IE SA in the Draft Decision to the additional infringement of the principle of fairness under Article 5(1)(a) GDPR<sup>453</sup>. In the view of the DE SAs, the additional finding that TTL has breached Article 5(1)(a) GDPR by using dark patterns to nudge Child Users during the Relevant Period<sup>454</sup> has a direct impact on the necessary administrative measures<sup>455</sup>.

253. The DE SAs further explain the manner to bring the TTL's processing into compliance, such as by underlying that TTL 'has to eliminate all dark patterns and situations that nudge Child Users to decisions that violate their privacy, especially those named [in the DE SAs' objection]'<sup>456</sup>. According to the DE SAs, this would protect a considerable number of data subjects from (further) infringements of their rights<sup>457</sup>.

254. Finally, the DE SAs state that leaving the Draft Decision unchanged poses a significant risk for the fundamental rights and freedoms of Child Users of the TikTok platform, as 'the nudging by dark patterns leads them to make decisions with negative impact for the protection of their personal data (and therefore their fundamental rights and freedoms)'<sup>458</sup>. The DE SAs further raise that there are significant risks, considering TTL 'is used by millions of users in Europe, including millions of children'<sup>459</sup>. The DE SAs recall that, as indicated in Recital 38 GDPR, 'children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of their personal data'<sup>460</sup> and 'they are also more likely to be subject to dark patterns'<sup>461</sup>.

255. The **DE SAs** further raise an objection on the need to adjust the **administrative fine**, which would need to be reassessed and set higher, due to the finding of an additional infringement of the principle of fairness under Article 5(1)(a) GDPR<sup>462</sup>. According to the DE SAs, this is needed to ensure that the fine remains effective, proportionate and dissuasive<sup>463</sup>.

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256. The **IT SA** in its objection requests to adapt the **administrative fine**, in connection with the alleged additional infringement of Article 25 GDPR<sup>464</sup>. The IT SA reasons that its objection relating to this additional infringement should clearly impact the corrective measures envisaged<sup>465</sup>. The

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<sup>453</sup> DE SAs Objection, p. 8. See section 4 above.

<sup>454</sup> For the summary of the DE SAs' objection in that respect see section 4.2 above.

<sup>455</sup> DE SAs Objection, p. 3

<sup>456</sup> DE SAs Objection, p. 8

<sup>457</sup> DE SAs Objection, p. 8.

<sup>458</sup> DE SAs Objection, p. 7.

<sup>459</sup> DE SAs Objection, p. 7

<sup>460</sup> DE SAs Objection, p. 7.

<sup>461</sup> DE SAs Objection, p. 7.

<sup>462</sup> DE SAs Objection, p. 8.

<sup>463</sup> DE SAs Objection, p. 3.

<sup>464</sup> IT SA Objection, p. 8. See section 5 above.

<sup>465</sup> IT SA Objection, p. 2.

IT SA considers it necessary to impose an administrative fine, as referred to in Article 83(4)(a) GDPR for this additional infringement and in accordance with the criteria set out in Article 83(3) GDPR<sup>466</sup>. According to the IT SA, this fine would need to be on top of the fines already envisaged in the Draft Decision<sup>467</sup>.

257. The IT SA argues that the assessment leading to the calculation of the fine needs to make it truly effective and dissuasive<sup>468</sup>. According to the IT SA, if the Draft Decision were left unchanged it would entail significant risks for the protection of the rights of the data subjects<sup>469</sup>. If the measures currently envisaged were retained, a high number of data subjects below the age of 13, would be exposed to risks of various nature<sup>470</sup>. In the view of the IT SA, this means that the rights of the data subjects would not be effectively protected and would incentivise the controller and other companies to continue committing such infringements<sup>471</sup>.

### 6.3 Position of the LSA on the objections

258. Regarding the **DE SAs' objection insofar as it concerns the compliance order**, the IE SA questions if 'the proposed order to bring processing into compliance would satisfy the requirements of Recital 129 GDPR, for binding measures to be 'clear and unambiguous'<sup>472</sup>. The IE SA argues that 'the terms of the order proposed by the DE SAs are highly generalised in nature and do not identify, with any degree of specificity, what action the controller is required to take'<sup>473</sup>. Further, the IE SA questions the possibility 'to enforce such an order against the controller in the event of perceived default'<sup>474</sup>.

259. Regarding the **DE SAs' objection insofar as it concerns the administrative fine**, the IE SA highlights that 'the DE SAs only indicate that "the" fine should be "reassessed and set higher", however, the DE SAs' objection does not indicate which of the three existing fining ranges should be reassessed'<sup>475</sup>. Further, it does not provide indications on how the criteria of Article 83(2) GDPR should be considered<sup>476</sup>. Therefore, in the view of the IE SA, 'it is impossible to envisage how the IE SA could follow the objection, whether it be on its own volition or following a binding decision by the EDPB'<sup>477</sup>.

260. Additionally, the IE SA argues that the DE SAs' objection (in relation to both the additional compliance order and the administrative fine) is not 'relevant and reasoned' because 'the corrective action element has not been adequately rationalised and does not address the risks to the fundamental rights and freedoms of data subjects'<sup>478</sup>.

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<sup>466</sup> IT SA Objection, p. 8.

<sup>467</sup> IT SA Objection, p. 8.

<sup>468</sup> IT SA Objection, p. 8.

<sup>469</sup> IT SA Objection, p. 8.

<sup>470</sup> IT SA Objection, p. 8.

<sup>471</sup> IT SA Objection, p. 8.

<sup>472</sup> Composite Response, p. 6.

<sup>473</sup> Composite Response, p. 6-7.

<sup>474</sup> Composite Response, p. 7.

<sup>475</sup> Composite Response, p. 7.

<sup>476</sup> Composite Response, p. 7.

<sup>477</sup> Composite Response, p. 7.

<sup>478</sup> IE SA's assessment of the objections, p. 2.



261. Concerning the **IT SA's objection on the administrative fine**, the IE SA is of the view that the IT SA failed to sufficiently engage with the criteria that should be considered for the imposition of a fine<sup>479</sup>. Instead, the IT SA limits itself to the nature of the infringement and the level of damages that was and may be suffered<sup>480</sup>. The IE SA considers further that, considering all the extensive detail on a range of matters that might be considered relevant for the purpose of Article 83(2) GDPR in the Draft Decision, 'it is unclear why the IT SA did not provide sufficient reasoning to support this aspect of its objection'<sup>481</sup>. Lastly, according to the IE SA, such a high level approach makes it difficult to imagine how the IE SA could follow this aspect of the objection, whether it be on its own volition or based on a binding decision of the EDPB<sup>482</sup>. Additionally, the IE SA argues that the corrective action elements in the IT SA's objection are not meeting the threshold set by Article 4(24) GDPR as they have 'not been adequately rationalised and do not adequately address the risks to the fundamental rights and freedoms of data subjects'<sup>483</sup>.

## 6.4 Analysis of the EDPB

### 6.4.1 Assessment of whether the objections were relevant and reasoned

262. The EDPB considers that the objections of the IT SA and the DE SAs relating to the administrative fine do not sufficiently elaborate the legal or factual arguments that would justify such a change in the Draft Decision. Additionally, concerning the DE SAs' objection regarding the administrative fine, the EDPB is of the view that it does not sufficiently clearly demonstrate the significance of the risks that the Draft Decision poses to the fundamental rights and freedoms of the data subjects or the free flow of data within the EEA. Consequently, the EDPB finds that the objections of the IT SA and DE SAs concerning the administrative fine are **not sufficiently reasoned** and thus do not meet the threshold stipulated by Article 4(24) GDPR.

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263. With regard to the DE SAs' objection concerning the need to adjust the compliance order, it concerns 'whether the envisaged action in relation to the controller complies with the GDPR'<sup>484</sup>.

264. The DE SAs' objection regarding the compliance order and its underlying reasoning is closely linked to the DE SAs' objection requesting the IE SA to find the additional infringement of the principle of fairness under Article 5(1)(a) GDPR<sup>485</sup>.

265. The EDPB considers that the DE SAs' objection has a direct connection with the Draft Decision. Indeed, for the demonstration that, in the context of the Registration Pop-Up and the Video Posting Pop-Up, TTL implemented dark patterns resulting in non-compliance with Article 5(1)(a) GDPR, the DE SAs' objection relies upon the content and analysis included in the Draft Decision<sup>486</sup>. If followed, the DE SAs' objection would lead to a different conclusion<sup>487</sup>, since the proposed order to bring

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<sup>479</sup> Composite Response, p. 6.

<sup>480</sup> Composite Response, p. 6.

<sup>481</sup> Composite Response, p. 6.

<sup>482</sup> Composite Response, p. 6.

<sup>483</sup> IE SA's assessment of the objections, p. 2.

<sup>484</sup> Art. 4(24) GDPR.

<sup>485</sup> See section 4 of this Binding Decision.

<sup>486</sup> The DE SAs refer to e.g., paragraphs 72, 128, 160, 162, 173, 255 of the Draft Decision (DE SAs Objection, p. 4-6).

<sup>487</sup> EDPB Guidelines on RRO, paragraph 13.

processing into compliance<sup>488</sup> would be extended to encompass the infringement of Article 5(1)(a) GDPR. Therefore, the EDPB finds that the objection is **relevant**.

266. The EDPB recalls the TTL's general view that the DE SAs' objection relating to the breach of the principle of fairness does not meet the threshold set by Article 4(24) GDPR as it raises a new issue, which is not within the scope of the Inquiry and should thus be rejected at the outset<sup>489</sup>. On this matter, the EDPB refers to its analysis in paragraph 67 above, where the EDPB also takes into account TTL's views on this matter<sup>490</sup>.

267. The EDPB takes note that TTL refers to the view that the DE SAs' objection, insofar it concerns the compliance order, is formulated in vague terms and lacks specificity on what action the controller is required to take, thus it does not satisfy the requirements of Recital 129 GDPR for binding measures to be 'clear and unambiguous'<sup>491</sup>. The EDPB will assess below if the DE SAs' objection is adequately reasoned. In addition, the EDPB observes that TTL's position also relates to the content of the objection, which concerns its merits and not its admissibility.

268. In their objection, the DE SAs put forward their reasoning, in addition to their reasoning on the existence of the additional infringement of fairness principle under Article 5(1)(a) GDPR<sup>492</sup>, as to why the compliance order should be imposed in the case at hand. In particular, the DE SAs state that the legal consequences of the finding that TTL has implemented dark patterns have to be drawn and the compliance order envisaged in the Draft Decision should be amended, as 'to eliminate all dark patterns and situations that nudge Child Users to decisions that violate their privacy'<sup>493</sup>. According to the DE SAs, it is needed to protect a considerable number of data subjects from (further) infringements of their rights<sup>494</sup>. Moreover, the DE SAs explain in their objection, as set out in paragraph 252 above, how the Draft Decision would need to be amended if the objection is followed<sup>495</sup>, i.e. the proposed order to bring processing into compliance would be extended to encompass the infringement of Article 5(1)(a) GDPR.

269. In consequence, the EDPB finds that the objection is sufficiently **reasoned** in respect of the request for the additional corrective measure requested in the DE SAs' objection in this particular case, i.e. the order to bring processing into compliance under Article 58(2)(d) GDPR.

270. Lastly, the DE SAs' objection indicates the significance of the risks posed by the Draft Decision if it were not to be amended. More specifically, the DE SAs state that leaving the Draft Decision unchanged poses a significant risk for the fundamental rights and freedoms of Child Users of the TikTok platform, as 'the nudging by dark patterns leads them to make decisions with negative impact for the protection of their personal data (and therefore their fundamental rights and freedoms)<sup>496</sup>. The DE SAs also highlight that including this corrective measure would protect a considerable number of data subjects from (further) infringements of their rights, that children merit specific protection in light of Recital 38 GDPR and that they are more likely to be subject to

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<sup>488</sup> Draft Decision, paragraphs 284-286, 294-297 and 413.

<sup>489</sup> TTL Art. 65 Submissions, paragraphs 5.3, 7.2.

<sup>490</sup> Section 4.4.1 above, in particular paragraph 67 of this Binding Decision.

<sup>491</sup> TTL Art. 65 Submissions, paragraph 7.15.

<sup>492</sup> See this Binding Decision, section 4.2.

<sup>493</sup> DE SAs Objection, p. 8.

<sup>494</sup> DE SAs Objection, p. 8.

<sup>495</sup> DE SAs Objection, p. 8.

<sup>496</sup> DE SAs Objection, p. 7.

dark patterns<sup>497</sup>. Lastly, the DE SAs argue that ‘there is a risk that other social media providers, in case of the publication of the Draft Decision in its current version, could view this a, at least partial *carte blanche* for using nudging and dark patterns’<sup>498</sup>. In this respect, the EDPB finds that the DE SAs’ objection clearly demonstrate the significance of the risks for the rights and freedoms of data subjects.

271. Considering the above, the EDPB finds that the DE SAs’ objection concerning the compliance order in relation to the infringement by TTL of the principle of fairness under Article 5(1)(a) GDPR is **relevant and reasoned** and therefore meets the threshold stipulated by Article 4(24) GDPR.

#### 6.4.2 Assessment on the merits

272. The EDPB considers that the DE SAs’ objection found to be relevant and reasoned in this subsection<sup>499</sup> require an assessment of whether the Draft Decision needs to be changed in respect of the corrective measures proposed. More specifically, the EDPB needs to assess the request to expand the compliance order on TTL<sup>500</sup> in order to include the infringement of the principle of fairness under Article 5(1)(a) GDPR established above in Section 4.4.2<sup>501</sup>. When assessing the merits of the objection raised, the EDPB also takes into account TTL’s position on the objection and its submissions.

273. The EDPB notes that TTL submits that the DE SAs’ objection regarding the additional infringement lacks merit<sup>502</sup> and that, in relation to the DE SAs’ request for the compliance order, TTL states that the objection is vague and lacks specificity on what action the controller is required to take<sup>503</sup>. TTL further submits that ‘the EDPB cannot direct the [LSA] to adopt specific corrective measures where the CSA has not particularised its direction’<sup>504</sup>.

274. The EDPB recalls that when a violation of the GDPR has been established, competent supervisory authorities are required to react appropriately to remedy this infringement in accordance with the means provided to them by Article 58(2) GDPR<sup>505</sup>. According to Recital 129 GDPR, every corrective measure applied by a supervisory authority under Article 58(2) GDPR should be ‘appropriate, necessary and proportionate in view of ensuring compliance with the Regulation’ in light of all the circumstances of each individual case. CSAs can propose in their relevant and reasoned objections alternative or additional corrective measures to those envisaged in the Draft Decision, when they consider that the envisaged measures do not meet these requirements<sup>506</sup>.

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<sup>497</sup> DE SAs Objection, p. 7. See also paragraph 254 of this Binding Decision (section 6.2 of this Binding Decision).

<sup>498</sup> DE SAs Objection, p. 7.

<sup>499</sup> See paragraph 270 of this Binding Decision.

<sup>500</sup> Draft Decision, paragraphs 284-286, 294-297 and 413.

<sup>501</sup> See in particular paragraph 118 of this Binding Decision.

<sup>502</sup> See paragraphs 93-97 of this Binding Decision (in section 4.4.2), as well TTL Art. 65 Submissions, paragraph 7.56.

<sup>503</sup> TTL Art. 65 Submissions, paragraph 7.15 on p. 27.

<sup>504</sup> TTL Art. 65 Submissions, paragraph 7.15 on p. 27.

<sup>505</sup> Judgement of the Court of Justice of 16 July 2020 in case *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, C-311/18, ECLI:EU:C:2020:559, (hereinafter, ‘C-311/18, **Schrems II**’), paragraph 111.

<sup>506</sup> Recital 129 GDPR. EDPB Guidelines on Article 65(1)(a) GDPR V1.0, paragraphs 92 and EDPB Guidelines on Article 65 (1)(a) GDPR V2.0, paragraph 92.

275. Considering the conclusion on the additional infringement of Article 5(1)(a) GDPR established in Section 4.4.2 above, as well as the type<sup>507</sup> and number of data subjects affected by this infringement<sup>508</sup>, the EDPB shares the view of the DE SAs<sup>509</sup> that the corrective measure chosen in the circumstances of this case should aim to bring the TTL's processing into compliance with the GDPR thus minimising the potential harm to data subjects created by the violation of the GDPR<sup>510</sup>.
276. The EDPB considers that, in order to ensure compliance and bring the harm to the data subjects to an end, in this particular case, it is appropriate, necessary and proportionate to amend the order to TTL to bring processing into compliance envisaged in the Draft Decision to include the TTL's infringement of the principle of fairness under Article 5(1)(a) GDPR<sup>511</sup>. This measure would require TTL, as proposed by the DE SAs in their objection<sup>512</sup>, to put in place the necessary technical and operational measures to achieve compliance, i.e. to eliminate the deceptive design patterns identified in paragraphs 109-113 and 114-116 of this Binding Decision, taking into account the EDPB's analysis in paragraphs 104-107 and 117-118 of this Binding Decision.
277. The EDPB takes notes that the DE SAs' objection does not identify a specific timeframe for such order, if it were to be imposed. The EDPB considers that the deadline for compliance with the order should be reasonable and proportionate, in light of the potential harms to the data subject rights and the resources available to the controller to achieve compliance.
278. The EDPB recalls that compliance with the GDPR can be achieved in different manners and it is the controller's responsibility to identify and implement the appropriate measures to bring its processing operations into compliance with the GDPR<sup>513</sup>. In the case at hand TTL has to remedy the infringement of the principle of fairness under Article 5(1)(a) GDPR by eliminating the deceptive design patterns in the context of the Registration Pop-Up<sup>514</sup> and the Video Posting Pop Up<sup>515</sup> of the TikTok platform. The EDPB however considers that in this particular case, TTL is in a position to decide the most suitable manner to implement the compliance order, in accordance with its accountability obligations<sup>516</sup>.
279. Finally, the EDPB recalls that non-compliance with an order issued by a supervisory authority can be relevant both in terms of it being subject to administrative fines in line with Article 83(6) GDPR, and in terms of it being an aggravating factor for the imposition of administrative fines<sup>517</sup>. In addition, the investigative powers of supervisory authorities allow them to order the provision

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<sup>507</sup> See paragraph 117 of this Binding Decision (reference to section 4.4.2)

<sup>508</sup> DE SAs Objection, p. 7.

<sup>509</sup> DE SAs Objection, p. 8.

<sup>510</sup> C-311/18 Schrems II, paragraph 112: 'Although the supervisory authority must determine which action is appropriate and necessary and take into consideration all the circumstances [...] in that determination, the supervisory authority is nevertheless required to execute its responsibility for ensuring that the GDPR is fully enforced with all due diligence'.

<sup>511</sup> As identified by the EDPB in Section 4 of this Binding Decision.

<sup>512</sup> DE SAs Objection, p. 8.

<sup>513</sup> Art. 24 GDPR.

<sup>514</sup> Paragraphs 111-113 of this Binding Decision.

<sup>515</sup> Paragraphs 114-116 of this Binding Decision.

<sup>516</sup> Art. 5(2) GDPR.

<sup>517</sup> See Art. 83(2)(i) GDPR.

of all the information necessary for the performance of their tasks including the verification of compliance with one of their orders<sup>518</sup>.

280. The EDPB therefore instructs the IE SA to expand the compliance order envisaged in its Draft Decision<sup>519</sup> and to include in its final decision an order to TTL to bring its processing in the context of the Registration Pop-Up and the Video Posting Pop Up of the TikTok platform into compliance with the principle of fairness in accordance with Article 5(1)(a) GDPR. Specifically, TTL has to be ordered to eliminate the deceptive design patterns identified in paragraphs 109-113 and 114-116 of this Binding Decision, taking into account the EDPB's analysis in paragraphs 104-107 and 117-118 of this Binding Decision, within the specified timeframe to be determined by the IE SA.

## 7 BINDING DECISION

281. In light of the above, and in accordance with the task of the EDPB under Article 70(1)(t) GDPR to issue binding decisions pursuant to Article 65 GDPR, the EDPB issues the following Binding Decision in accordance with Article 65(1)(a) GDPR.

### On the objection concerning the potential additional infringement of the principle of fairness

282. The EDPB decides that the objection of the DE SAs, regarding the additional infringement by TTL of the principle of fairness under Article 5(1)(a) GDPR, meets the requirements of Article 4(24) GDPR.

283. The EDPB instructs the IE SA to include in its final decision an additional infringement by TTL of the principle of fairness under Article 5(1)(a) GDPR in line with the analysis above.

### On the objection concerning the potential infringement of Article 25 GDPR

284. The EDPB decides that the objection of the IT SA, regarding the existence of the infringement by TTL of Article 25 GDPR, meets the requirements of Article 4(24) GDPR.

285. The EDPB decides that, taking into account the elements available to the EDPB in the context of this procedure, it does not have sufficient information to conclusively assess TTL's compliance with Article 25(1) GDPR in relation to the age verification measures implemented by TTL on the TikTok platform during the Relevant Period.

286. In light of the serious doubts expressed regarding the effectiveness of the measures chosen by TTL, the EDPB requires the IE SA to modify the conclusion set out in paragraph 221 of the Draft Decision in the IE SA's final decision in the present case, by stating that it cannot be concluded in this case that the technical and organisational measures in respect of the age verification processes themselves undertaken by TTL during the Relevant Period infringed the GDPR in light of the measures undertaken and the extent to which TTL sought to ensure its platform remained accessible only to those above the age of 13.

### On the objection concerning the compliance order

287. The EDPB decides that the objection of the DE SAs on the order to bring processing into compliance with the GDPR under Article 58(2)(d) GDPR, in relation to the additional infringement

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<sup>518</sup> Art. 58(1) GDPR.

<sup>519</sup> Draft Decision, paragraphs 284-286, 294-297 and 413.

of the principle of fairness under Article 5(1)(a) GDPR, meets the requirements of Article 4(24) GDPR.

288. The EDPB instructs the IE SA to expand the compliance order envisaged in its Draft Decision and to include in its final decision an order to TTL to bring its processing in the context of the Registration Pop-Up and the Video Posting Pop Up of the TikTok platform into compliance with the principle of fairness in accordance with Article 5(1)(a) GDPR.

On the objections concerning the administrative fine

289. The EDPB decides that the relevant parts of the objections of the DE SAs and IT SA specifically relating to an administrative fine do not meet the threshold of Article 4(24) GDPR.

## 8 FINAL REMARKS

290. The EDPB addresses this Binding Decision to the LSA in this case (the IE SA) and to all the CSAs, in accordance with Article 65(2) GDPR.

291. Regarding the objections deemed not to meet the requirements stipulated by Article 4(24) GDPR, the EDPB does not take any position on the merit of any substantial issues raised therein. The EDPB reiterates that its current decision is without any prejudice to any assessments the EDPB may be called upon to make in other cases, including with the same parties, taking into account the contents of the relevant draft decision and the objections raised by the CSAs.

292. According to Article 65(6) GDPR, the IE SA shall adopt its final decision on the basis of the Binding Decision without undue delay and at the latest by one month after the EDPB has notified its Binding Decision.

293. The IE SA shall inform the EDPB of the date when its final decision is notified to the controller<sup>520</sup>. This Binding Decision will be made public pursuant to Article 65(5) GDPR without delay after the IE SA has notified its final decision to the controller<sup>521</sup>.

294. The IE SA will communicate its final decision to the EDPB<sup>522</sup>. Pursuant to Article 70(1)(y) GDPR, the IE SA's final decision communicated to the EDPB will be included in the register of decisions that have been subject to the consistency mechanism.

For the European Data Protection Board

The Chair

(Anu Talus)

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<sup>520</sup> Art. 65(6) GDPR.

<sup>521</sup> Art. 65(5) and (6) GDPR.

<sup>522</sup> Art. 60(7) GDPR.