

Past Age-Assurance Failures: “TikTok should have known better. TikTok should have done better.”

Elizabeth Kilburn

SENIOR ASSOCIATE, WEDLAKE BELL LLP

Alexander Dittel

PARTNER, WEDLAKE BELL LLP

☞ Children; Data processing; Fines; Information Commissioner; Online intermediaries; Parental consent; Personal data; Social media

The message from the UK Information Commissioner John Edwards in a video published on 4 April 2023 adds to what has already been a busy year for TikTok. The £12.7 million fine from the UK Information Commissioner’s Office (ICO) concerns the unlawful processing of data of children under the age of 13 without parental consent¹ in breach of the UK GDPR.² This comes in the wake of the UK Government’s ban of the TikTok app on official mobile phones following a security review of the platform,³ after similar steps were taken by the European Commission and the US Government earlier this year.

Lack of consent and appropriate transparency

The ICO fine relates to the period from May 2018 to July 2020 during the early days of the GDPR. Given the app’s obvious appeal and extensive use by children, TikTok “did not do enough” to check who was using their platform. Relying on the self-asserted age by the user is not sufficient to comply with the law, and neither is imposing a minimum age in the terms and conditions. The UK GDPR requires parental consent for users under the age of 13 in respect of processing of their data for marketing and profiling which would be ordinarily based on consent. In 2019, a lack of parental consent in breach of the Children’s Online Privacy Protection Act (COPPA) was investigated by the United States Federal Trade

¹ “ICO fines TikTok £12.7 million for misusing children’s data” ICO, 4 April 2023 at <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/04/ico-fines-tiktok-127-million-for-misusing-children-s-data/>.

² Regulation 2016/679 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 [2016] OJ L119/1.

³ “TikTok banned on UK government devices as part of wider app review” Gov.uk, 16 March 2023 at <https://www.gov.uk/government/news/tiktok-banned-on-uk-government-devices-as-part-of-wider-app-review#:~:text=Social%20media%20app%20TikTok%20has,Cabinet%20Office%20has%20announced%20today,&text=The%20ban%20comes%20after%20Cabinet%20Office%20Ministers%20ordered%20a%20security%20review.>

Commission. Unlike in the UK, in the US, a TikTok app with a limited experience remains available for users under the age of 13.

Secondly, TikTok failed to explain to users, in an easy-to-understand way, how their data is collected, used and shared. As a result, users of the app and in particular, children were unlikely to be able to make informed choices about whether to use the app and how to engage with it. Slightly ahead of the ICO, the Dutch DPA fined TikTok in 2021 for failing to provide a notice in the Dutch language in intelligible and plain language for children to understand.⁴

Finally, despite alleged concerns raised internally with some senior employees, TikTok failed to respond adequately and remove the estimated one million UK underage children that were actively using the app.

Default privacy settings not in scope

TikTok's wider data processing was not in the scope of this investigation. However, the ICO's Executive Director Stephen Bonner said, on 5 April 2023 in a Channel 4 news programme, that the ICO has other active investigations into TikTok as it continues to focus on social media, video sharing and gaming platforms.

In 2021, the Irish Data Protection Commission (DPC) as the "Lead Supervisory Authority" started a pan-European investigation into TikTok's processing of child user's personal data, including default settings such as public-by-default processing and age-verification measures.⁵

Introducing the "best interest of the child"

The ICO's binding statutory Age Appropriate Design Code became effective in September 2021. Whilst not relevant to the current investigation which pre-dates the Code, the Code expands on the UK GDPR's children's data rules.

The Code imposes 15 standards.⁶ Under the Code, organisations such as TikTok which offer online services likely to be accessed by children are expected to support children in exercising their basic rights, including the right to play and engage in recreational activities appropriate to their age, and to protect children from harms and exploitation, regardless of the children's awareness or attitude towards harm. Pursuing commercial interests is not prohibited but the best interest of the child must be the primary consideration.

Identifying the risks to children from data processing on the platform and working out mitigations is essential for compliance with the Code. Whilst not intended to

moderate content, if risk stems from data processing based around content, the Code could have an impact on content too.

Age assurance is key

Without appropriate and effective age-assurance measures, it will be hard to demonstrate compliance with the UK GDPR and the Code. If an organisation is unable to establish age with sufficient certainty, it will have to implement a floor level of protection suited to its youngest audiences for all users.

Age assurance includes age estimation and age verification. Neither the UK GDPR nor the Code prescribe any age-assurance measures. However, the invisible bar of compliance is not low and organisations must not turn a blind eye to the fact that children use their services. According to joint research by the ICO and Ofcom,⁷ children are likely to circumvent parental rules or controls, for example, by gaining access to their parents' settings or parental control apps, creating new accounts online when parents followed them on social media, and changing their IP address using a VPN to avoid controls on Wi-Fi settings. An organisation outsmarted by kids in these common ways will likely have failed to comply.

Age estimation is used to determine an age range on an ongoing basis based on algorithms and pattern recognition. For example, Instagram uses "artificial intelligence to estimate how old people are based on things like 'Happy Birthday' posts". Similarly, TikTok processes keystroke patterns, user engagement data, search history, settings, contact information from linked platforms and other data to infer an age range for safety and compliance purposes. Relying on innovative technology and experts, user monitoring for age estimation is data-heavy and only offers statistical accuracy. On the upside, however, it spares the user the burdensome task of having to provide identification information or to upload official documents, an impossible requirement to meet for a young user without a passport.

On the other hand, age verification is based on the verification of documents such as an official ID and provides greater certainty of the user's age. It seems that TikTok does not resort to hard ID verification or biometric ID verification which is common in financial services and other regulated sectors. Instead, when TikTok does require a higher proof it will rely on alternatives, such as a photo of a "trusted adult" looking at the camera and holding a piece of paper which says "TikTok proof of age", the child's date of birth, and a unique code sent to the user as well as another photo

⁴ "Dutch DPA: TikTok fined for violating children's privacy" EDPB, 22 July 2021 at https://edpb.europa.eu/news/national-news/2021/dutch-dpa-tiktok-fined-violating-childrens-privacy_en.

⁵ "Irish DPC submits Article 60 draft decision on inquiry into TikTok" September 2022 at <https://www.dataprotection.ie/en/news-medial/irish-dpc-submits-article-60-draft-decision-inquiry-tiktok-0>.

⁶ "ICO's Age appropriate design: a code of practice for online services" at <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/introduction-to-the-childrens-code/>.

⁷ "Families' attitudes towards age assurance: research commissioned by the ICO and Ofcom" October 2022 at <https://www.gov.uk/government/publications/families-attitudes-towards-age-assurance-research-commissioned-by-the-ico-and-ofcom>.

of the adult and child together. This age assurance is used if someone wishes to appeal a ban for being suspected under age.

Risk-based approach

The ICO promotes a risk-based approach to age assurance.⁸ While high-risk data processing will require the highest possible level of age certainty, medium-to-low-risk processing will require certainty that is proportionate to the risk to children's rights and freedoms.

A recent Age Check report for the ICO suggests that self-asserted age should be treated with zero trust by organisations.⁹ But how compliant are modern statistical age estimation measures? Some answers may lie within the ISO/IEC 27566 standard about age assurance and others might be expected soon as the ICO is standardising its approach to measuring efficiency of age-assurance measures. The obvious question arises, if guidance is only being formulated now, what confidence does the ICO have that its fine can be substantiated?

TikTok currently uses a mixture of age-estimation and age-verification measures; it enables parental controls and its terms prevent users under the age of 13 from using the platform in the UK. However, imposing user restrictions might not be appreciated by the public. According to the joint ICO-Ofcom research, many parents found age restrictions on social media and games arbitrary. Others were concerned about data collected for age assurance based on behavioural profiling, hard identifiers and facial image analysis.¹⁰ Age assurance will continue to be a difficult balancing exercise for the likes of TikTok.

Conclusion

Whilst the ICO's ongoing focus on children's privacy will be welcomed by many, some might be disappointed about the reduction of the fine from the initial £27 million in relation to a contravention which lasted for two years. There is also fear that this is another example of the waning effectiveness of the regulator, amidst its limited enforcement activity and Government interference.

However, given the unclear rules and a lack of available age assurance technologies at the time, one could view the ICO fine as premature. Moreover, TikTok appears to have implemented a number of significant children privacy-related features and initiatives since.

We have not seen the full penalty notice at the time of writing this article, and it remains unclear how the ICO presented its case. Without compelling evidence, a challenge by TikTok is likely.

⁸ "Information Commissioner's opinion: Age Assurance for the Children's Code" 14 October 2021 at <https://ico.org.uk/media/about-the-ico/documents/4018659/age-assurance-opinion-202110.pdf>.

⁹ Measurement of Age Assurance Technologies, "A Research Report for the Information Commissioner's Office Age Check Certification Scheme" at <https://ico.org.uk/media/about-the-ico/documents/4021822/measurement-of-age-assurance-technologies.pdf>.

¹⁰ "Families' attitudes towards age assurance: research commissioned by the ICO and Ofcom" October 2022 at <https://www.gov.uk/government/publications/families-attitudes-towards-age-assurance-research-commissioned-by-the-ico-and-ofcom>.