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# Determination on the breach and penalty in respect of Tapnet Ltd pursuant to section 368Z2(1)(b) of the Communications Act 2003

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# 1. Determination on the breach and penalty

## Overview

- 1.1 This is a determination on the breach and penalty (the “Determination”) under Part 4B of the Communications Act 2003<sup>1</sup> (the “Act”) in respect of Tapnet Ltd (“Tapnet”), whose registered company number is 12189152 and registered office is c/o KRA Accountants Limited, Elsie Whitely Innovation Centre, Office 1, Hopwood Lane, Halifax, HX1 5ER.
- 1.2 Tapnet is the provider of RevealMe, a Video Sharing Platform (VSP) service notified to Ofcom under Part 4B of the Act.
- 1.3 This Determination relates to Tapnet’s compliance with obligations under Part 4B of the Act.
- 1.4 Ofcom has determined that Tapnet has contravened its duties under section 368Y(3)(b) and (c) of the Act to comply with a requirement for information under section 368Z10 and to co-operate fully with Ofcom for any purpose mentioned in section 368Z10(3).
- 1.5 We have decided to impose a penalty of £2,000 on Tapnet in respect of its contraventions.

## Background

- 1.6 Under the VSP Regime, as set out in Part 4B of the Act, VSP providers must take appropriate measures to:
  - a) protect all users from video content likely to incite violence or hatred against protected groups, and content which would be considered a criminal offence under laws relating to terrorism; child sexual abuse material; and racism and xenophobia (referred to as ‘relevant harmful material’); and
  - b) protect under-18s from videos containing R18 or unclassified material, and other material that might impair their physical, mental, or moral development (referred to as ‘restricted material’).

In this Determination we refer to ‘relevant harmful material’ and ‘restricted material’ collectively as ‘harmful material’. Ofcom’s role is to ensure platforms have relevant systems and processes in place that provide effective protection to their users from videos containing harmful material.

- 1.7 Ofcom has information gathering powers set out in section 368Z10 of the Act to require the provision of information which it considers necessary for the purpose of carrying out its functions relating to VSPs. VSP providers have a statutory duty under section 368Y(3)(b) and (c) of the Act to comply with a requirement for information under section 368Z10 and to co-operate fully with Ofcom for any purpose mentioned in section 368Z10(3). Ofcom

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<sup>1</sup> [Communications Act 2003 \(legislation.gov.uk\)](https://legislation.gov.uk)

has powers under section 368Z2 of the Act to take enforcement action where a VSP provider has contravened or is contravening its duties under section 368Y of the Act.

- 1.8 Ofcom’s information gathering powers are fundamental to its ability to carry out its statutory functions in relation to VSPs, in accordance with its principal duty of furthering the interests of citizens and consumers. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and are therefore key to the integrity of the regulation of VSPs.

### **Issuing the information request – summary**

- 1.9 On 6 June 2022, Ofcom sent Tapnet and other VSPs requests for information, pursuant to section 368Z10 of the Act, requiring them to provide information to Ofcom for the purposes of understanding and monitoring the measures VSPs have in place to protect users and to publish a report under section 368Z11 of the Act<sup>2</sup> (the “Notice”).<sup>3</sup>
- 1.10 Ofcom was careful to ensure that both the Notice and the process we followed to issue this Notice complied with the requirements of the Act. In particular, in accordance with section 368Z10(5) of the Act, the Notice described the required information, set out the purposes for which it was required and why we considered the request was proportionate.<sup>4</sup> As required under the Act, Tapnet and the other VSPs were given an opportunity to provide representations on a draft of the formal information request (the “draft Notice”) and the proposed timeframe for providing the information.<sup>5</sup> Tapnet did not make any representations on the draft Notice.
- 1.11 Having carefully considered comments received from those VSP providers who did respond to the draft Notice, the Notice was sent to all providers, including Tapnet, on 6 June 2022. The Notice set a deadline for the information to be provided by no later than 4 July 2022.
- 1.12 Tapnet wrote to Ofcom requesting an extension due to [redacted]. Following further correspondence between 1 July and 18 July 2022, Ofcom agreed to an extended deadline of 25 July 2022 (the “Extended Deadline”). Notwithstanding Ofcom’s agreement to allow more time, Tapnet did not provide the requested information by the Extended Deadline.<sup>6</sup>
- 1.13 Between 1 August and 25 August 2022, Ofcom sought to engage further with Tapnet, trying to set up a meeting with it and reiterating Tapnet’s legal obligation to respond to the Notice. Aside from a query as to the purpose of the meeting, which Ofcom answered, Ofcom did not receive any response from Tapnet to its offer to meet or any response to the Notice.<sup>7</sup>

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<sup>2</sup> This report has now been published: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0032/245579/2022-vsp-report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0032/245579/2022-vsp-report.pdf)

<sup>3</sup> A copy of the Notice is in Annex 1.

<sup>4</sup> The Notice explained why Ofcom needed the information and why we considered the request to be proportionate and justifiable.

<sup>5</sup> The draft information request was emailed to Tapnet on 1 April 2022.

<sup>6</sup> Further details are provided in paragraphs A2.7 to A2.10 of Annex 2

<sup>7</sup> Further details are provided in paragraphs A2.11 to A2.15 of Annex 2.

- 1.14 On 13 September 2022, Ofcom wrote again to Tapnet,<sup>8</sup> this time to inform it that Ofcom intended to refer Tapnet to its Enforcement team if Tapnet did not respond to the Notice by 5pm on 21 September 2022. Ofcom did not hear further from Tapnet. Accordingly, on 29 September 2022 we announced our decision to open an investigation into Tapnet’s compliance with section 368Z10 of the Act.<sup>9</sup>
- 1.15 On 3 October 2022,<sup>10</sup> Tapnet submitted the information required under the Notice and apologising for the delay, which it explained was due to [redacted].

## Ofcom’s investigation

- 1.16 Ofcom’s information gathering powers are critical to our ability to carry out our statutory functions under Part 4B of the Act. Ofcom is severely hampered in its ability to secure compliance with the VSP framework if it is unable to obtain the information it needs to monitor and report on the measures VSP providers take to protect their users from videos containing harmful material, or if such information is not provided in a timely and effective manner. Given the significance of these powers, on 29 September 2022 we decided to open an investigation into Tapnet’s compliance with its duties under sections 368Y(3)(b) and (c) of the Act. These provisions require VSP providers to comply with a requirement for information under section 368Z10 and to co-operate fully with Ofcom for any purpose mentioned in section 368Z10(3).
- 1.17 On 16 December 2022, we issued Tapnet with our preliminary view under section 368Z2 of the Act (the “Preliminary View”), which set out our grounds for having reason to believe that Tapnet had contravened sections 368Y(3)(b) and (c) of the Act, and proposed a financial penalty of £2,000.
- 1.18 We invited Tapnet to make written representations on our Preliminary View by 25 January 2023. Tapnet confirmed on 27 January 2023 it would not be making any written representations on the substance of the matters set out in the Preliminary View, although it provided some further (unevidenced) information about [redacted].<sup>11</sup>
- 1.19 This Determination sets out Ofcom’s decision that Tapnet has contravened sections 368Y(3)(b) and (c) of the Act and sets out the decision to impose a penalty pursuant to section 368Z2(1)(b) of the Act. In reaching our Determination we have had due regard to Tapnet’s comments regarding [redacted].

## Contravention determination

- 1.20 For the reasons set out below, we are satisfied that Tapnet has contravened its duties under section 368Y(3)(b) and (c) of the Act. Namely, it has failed to comply with a requirement for information under section 368Z10 and has failed to co-operate fully with

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<sup>8</sup> Email dated 13 September 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>9</sup> [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw\\_01263](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01263)

<sup>10</sup> Email dated 3 October 2022 from [redacted] (Tapnet) to Information Registry (Ofcom).

<sup>11</sup> Tapnet email of 17 December 2022, in which Tapnet [redacted] provided comments regarding confidentiality disclosures.

Ofcom for any purpose mentioned in section 368Z10(3). Specifically in this case, Tapnet failed to co-operate fully with Ofcom for the purposes of:

- a) determining which of the measures set out in Schedule 15A Ofcom considers to be appropriate for Tapnet to have taken;
- b) Ofcom’s monitoring of the measures set out in Schedule 15A that Tapnet has taken and implemented; and
- c) Ofcom’s production of a report under section 368Z11.

### **Contravention of section 368Y(3)(b)**

- 1.21 In accordance with section 368Z10(6) of the Act, Tapnet was under a duty to provide information required under section 368Z10 of the Act in such manner and form and within such reasonable period as specified in the Notice.
- 1.22 We consider that Tapnet was given a reasonable period to respond to the Notice. The Notice gave Tapnet a period of 20 working days to respond and this was further extended by 16 working days. This is in addition to the fact that Tapnet was sent the draft Notice two months prior to it receiving the final Notice and given an opportunity to make representations on the draft Notice (including representations on the deadline).
- 1.23 Taking this into account, Ofcom has decided that Tapnet contravened its duties under section 368Y(3)(b) of the Act to comply with a requirement for information under section 368Z10.

### **Contravention of section 368Y(3)(c)**

- 1.24 In accordance with section 368Y(3)(c) of the Act, Tapnet was under a duty to co-operate fully with Ofcom for any purpose mentioned in section 368Z10(3). As explained in the Notice, Ofcom required the requested information for the following purposes listed under section 368Z10(3):

*“(e) the purpose of determining which of the measures set out in Schedule 15A the authority consider to be appropriate in relation to a video-sharing platform service for any of the purposes mentioned in section 368Z1(1); ...*

*(g) the purpose of monitoring which of the measures set out in Schedule 15A are taken by providers of video-sharing platform services for the purposes mentioned in section 368Z1(1), and how such measures and implemented*

*(h) the purpose of producing a report under section 368Z11”*

- 1.25 The Notice explained that the information was required in order to:

*“a) understand and monitor the measures<sup>12</sup> you and other UK-based VSPs have in place and the way in which they work to ensure users are being appropriately protected from **harmful material**<sup>13</sup> in the following priority areas:*

***a. Reducing the risk of child sexual abuse material (CSAM)***

***b. Tackling hate and terror***

***c. Protections for under-18s***

***d. Age verification on adult VSPs***

***e. Reporting and flagging***

*b) publish a report in Autumn 2022 under section 368Z11 of the Act<sup>14</sup> highlighting how Tapnet and other UK-based VSPs are protecting users from videos containing **harmful material**.<sup>15</sup>”*

- 1.26 Ofcom considers that its ability to carry out its VSP functions under Part 4B of the Act was impacted in the following ways as a result of Tapnet not providing the requested information in a timely manner:
- a) it delayed Ofcom’s work in understanding and monitoring the measures Tapnet has in place to protect under-18s and the general public from harmful material;
  - b) Ofcom was unable to report on Tapnet’s measures in its first VSP report, published on 30 October 2022, a fundamental purpose of which was to provide transparency about how VSPs protect their users from harmful content.
- 1.27 Taking into account the above, the lack of engagement (as set out in Annex 2), and the fact that Tapnet only responded to the Notice after Ofcom had commenced formal enforcement action against Tapnet, we consider that Tapnet failed to co-operate fully with Ofcom for the purposes set out in section 368Z10(3)(e), (g) and (h) of the Act. Therefore, Ofcom has decided that Tapnet failed to comply with its duty under section 368Y(3)(c) of the Act.

## Penalty determination

- 1.28 Pursuant to section 368Z2(1)(b) of the Act, Ofcom has powers to impose a financial penalty where a VSP provider is contravening or has contravened section 368Y of the Act, which includes the duty to comply with a demand for information under section 368Z10 (section 368Y(3)(b)) and the duty to co-operate fully with the appropriate regulatory authority for any purpose mentioned in section 368Z10(3) (section 368Y(3)(c)).

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<sup>12</sup> Schedule 15A of the Act sets out a list of measures that must be taken by VSP providers as appropriate to protect their users. These are reflected in paragraph 2.33 of Ofcom’s Harms & Measures Guidance.

<sup>13</sup> Section 368Z10 (3)(e) and (g) of the Act.

<sup>14</sup> 368Z11(1)(b) of the Act provides that Ofcom may from time to time produce and publish reports about the measures taken by providers for the purposes mentioned in section 368Z1(1), and the ways in which such measures are implemented so as to carry out those purposes; and (c) the systems adopted by providers for the reporting, flagging or rating of material on the service and the handling of complaints or the resolution of disputes relating to the service.

<sup>15</sup> Section 368Z10 (3) (h) and 368Z11 (1) (b) and (c) of the Act.

- 1.29 For the reasons set out in paragraphs 1.20 to 1.27 above, Ofcom are satisfied that a contravention of the above duties has occurred and, for the reasons below, it would be appropriate to impose a penalty in this case:
- a) Ofcom's powers under section 368Z10 of the Act are crucial to Ofcom's ability to effectively regulate the VSP sector. A contravention of a requirement to provide information under section 368Z10 is a serious matter as it hinders Ofcom's ability to carry out its functions (such as to understand and monitor the measures VSPs have in place to protect users and to publish a report under section 368Z11 of the Act) and has the potential to undermine the integrity of the regulatory regime, thereby harming citizens and consumers.
  - b) As explained at paragraph 1.26 above, as a result of Tapnet not engaging with us or providing a response to the Notice by the Extended Deadline, Ofcom was hindered in its ability to produce a report under section 368Z11 of the Act. The information requested was a significant part of Ofcom's first annual report into VSPs, and in starting Ofcom's programme to monitor the VSP sector. Both are key to the performance of Ofcom's functions under Part 4B of the Act and are key to meeting Ofcom's annual strategic priorities. Tapnet's failure to respond to the Notice by the Extended Deadline impacted on our ability to comment on Tapnet's protection measures in this report and thereby inform users about the ways in which it protects them from videos containing harmful material, as well as divert Ofcom resource away from monitoring VSPs.
  - c) The contravention continued for a prolonged period, insofar as we sent a number of emails reminding Tapnet of the need to respond, and/or asking for an update. Ofcom considers that timely and effective steps were not taken to comply with the Notice.

## Amount of penalty

- 1.30 The amount of a penalty we can impose on a VSP provider is such amount not exceeding 5% of the provider's applicable qualifying revenue<sup>16</sup> or £250,000, whichever is the greater amount, as we determine to be appropriate and proportionate to the contravention or failure in respect of which it is imposed (section 368Z4(1) of the Act). Additionally, Ofcom has published Penalty Guidelines which set out some potentially relevant factors to take into account when determining the amount of the penalty.<sup>17</sup> In accordance with section 368Z4(2) of the Act, we have had regard to the Penalty Guidelines and have set out below

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<sup>16</sup> The "**applicable qualifying revenue**", in relation to a provider, means (a) the qualifying revenue for the provider's last complete accounting period falling within the period during which the provider has been providing the service to which the contravention or failure relates; or (b) in relation to a person whose first complete accounting period falling within that period has not ended when the penalty is imposed, the amount that the appropriate regulatory authority estimate to be the qualifying revenue for that period" (section 368Z4(3) of the Act). The "**qualifying revenue**" for an accounting period consists of the aggregate of all the amounts received or to be received by the provider of the service to which the contravention or failure relates or by any connected person in the accounting period—

(a) for the inclusion in that service of audio-visual commercial communications;  
(b) in respect of charges made in that period for the provision of videos by that service; and  
(c) which in any other way arise from the provision of that service.

<sup>17</sup> Ofcom, Penalty guidelines, December 2022,

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0029/249095/enforcement-guidelines.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0029/249095/enforcement-guidelines.pdf)

our consideration of the factors set out therein to the extent that they are relevant to this case.

### **Deterrence**

- 1.31 As set out in the Penalty Guidelines, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient, having regard to the relevant turnover, to have a material impact on the regulated body so that it is incentivised to bring itself into compliance and avoid recurrences of the contraventions in future. It is also important that the penalty imposed serves to deter the wider industry from contravening regulatory requirements.
- 1.32 Any penalty we set should therefore be sufficiently high to discourage poor compliance and incentivise Tapnet to comply with both future information requests and the wider regulatory regime applicable to VSPs.
- 1.33 As a general matter, we are of the view that the need for deterrence in any penalty set for a contravention of information requirements is important as information requests are fundamental to Ofcom's regulatory function, and in the context of VSP regulation, information requests are especially important at the start of the new regime. In light of this, we believe it is important to reiterate this for the sector to ensure that Tapnet and other VSPs understand both the importance of responding, and of doing so in a timely way.

### **Seriousness, culpability and harm**

- 1.34 As noted above, a contravention of a requirement to provide information is inherently serious since Ofcom's powers under section 368Z10 of the Act are fundamental to its ability to carry out its statutory functions.
- 1.35 Where companies contravene these requirements, Ofcom is at risk of being prevented from exercising its functions in the interests of citizens and consumers because of the resulting asymmetry of information. This occurs because the VSPs Ofcom regulates hold much of the information that it requires and uses in order to fulfil its role to ensure VSP providers take and implement appropriate measures to provide effective protection to under 18s and the general public from videos containing harmful material. It is therefore of fundamental importance to the performance of Ofcom's functions that it has accurate and reliable data.
- 1.36 As set out above, and as specified in the Notice, Tapnet had a duty under sections 369Y(3)(b) and 368Z10 of the Act to provide the requested information. In correspondence between Tapnet and Ofcom between 1 July and 5 July, Tapnet enquired whether replying to the Notice was optional and asked what the consequences would be of not replying. Ofcom responded, reiterating the information set out in the Notice, that Tapnet was under a legal requirement to reply and that any failure to comply with the Notice may result in Ofcom taking enforcement action. In fact, Tapnet was informed of its obligations and the

consequences of failing to comply on a number of occasions.<sup>18</sup> Notwithstanding this, Tapnet did not respond until after Ofcom had announced that it would be commencing formal enforcement action against it.

- 1.37 Given this, and the number of opportunities Ofcom presented for the information to be submitted prior to opening the investigation, Ofcom considers that Tapnet was aware of the need to respond to the Notice and had repeated opportunities to do so. Ofcom also considers that Tapnet was aware of the potential consequences if it did not respond.

### **History of contraventions**

- 1.38 Tapnet, as a newly regulated VSP, does not have a history of any regulatory breaches. Additionally, as we have noted below, it has also cooperated with a subsequent informal information request.

### **Co-operation and remedial action**

- 1.39 Whilst we have concluded that Tapnet was in breach of the requirement to comply with the Notice, it has now provided the required information and has been engaging with Ofcom to help us understand its platform and business. However, both actions followed significantly after the Extended Deadline and only after Ofcom announced it was opening an investigation into the issue.

### **Additional mitigating factors**

- 1.40 We also considered any other mitigating factors in regard to the penalty amount, which we set out below.

### ***Size and financial position of the company***

- 1.41 Tapnet is one of the smallest VSPs that has notified to Ofcom. From the data Tapnet provided as part of its response to the Notice, we understand the number of unique visitors per month to its VSP service, RevealMe, is around [redacted], which is among the smallest notified VSPs.
- 1.42 The most recent set of statutory accounts filed by Tapnet at Companies House (on 18 October 2022) show that in the period to 28 February 2021, its total assets less current liabilities were £35,945.<sup>19</sup> Tapnet has also informed Ofcom that [redacted].

### ***Role of new regulation***

- 1.43 We also recognised that Tapnet, along with other VSPs, is a newly regulated entity as a result of the new regulatory regime. As such, there may be some uncertainty amongst Tapnet and other stakeholders about the new regime and understanding their legal

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<sup>18</sup> They were given information on this in the following correspondence: the draft Notice, the Notice and the emails dated: 5 July 2022, 18 July 2022, 24 August 2022 and 13 September 2022.

<sup>19</sup> <https://find-and-update.company-information.service.gov.uk/company/12189152/filing-history/MzMxMic1OTM4MmFkaXF6a2N4/document?format=pdf&download=0>

obligations. However, as noted above, we have informed Tapnet of its legal obligations under the regulatory regime on a number of occasions.

### **Conclusion on the appropriate penalty**

- 1.44 Taking all of the factors set out at paragraphs 1.28 to 1.43 above in the round, we consider it appropriate and proportionate to impose a penalty of £2,000 in respect of Tapnet’s contravention of sections 368Y(3)(b) and (c) of the Act. We also consider that a penalty of this amount is in accordance with section 368Z4 of the Act as it is below the threshold set in that provision (see paragraph 1.30 above).
- 1.45 Ofcom’s decision, therefore, is to impose a penalty of £2,000, which Tapnet must pay by no later than Monday 29 May 2023 (two calendar months from the date of this Determination).<sup>20</sup>

[S]

**Paul Phillips**

**Director, Legal**

**27 March 2023**

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<sup>20</sup> In accordance with section 368Z4(6) to (8) of the Act, Ofcom will pay the penalty into the appropriate Consolidated Fund.

A1. The Notice (issued under section 368Z10 of the Act) to Tapnet dated 6 June 2022

[X]

## A2. Relevant facts: Chronology of correspondence between Tapnet and Ofcom

### Issuing the draft Notice

- A2.1 On 27 January 2022, Ofcom emailed Tapnet seeking consent from Tapnet that Ofcom could deliver notifications and other documents to Tapnet electronically via email,<sup>21</sup> as opposed to printed copies being posted.<sup>22</sup> Ofcom sent a further email to Tapnet on 4 February 2022, stating it would be grateful for a reply to its email on 27 January by 11 February 2022.<sup>23</sup> On 4 February 2022, Tapnet emailed Ofcom confirming it preferred Ofcom documents and notifications to be sent electronically via email.<sup>24</sup>
- A2.2 On 1 April 2022, Ofcom emailed Tapnet a draft information request under Section 368Z10 of the Act setting out the information Ofcom required for the purpose of understanding and monitoring the measures Tapnet has in place to protect users and to publish a report under section 368Z11 of the Act (the “draft Notice”).<sup>25</sup>
- A2.3 In accordance with section 368Z10(5)(c), Tapnet was given the opportunity to provide representations on the draft information request and the proposed timeframe for providing the information. The deadline for comments on the draft Notice was 19 April 2022. On 13 April 2022, Ofcom emailed Tapnet, stating it had not yet received a response from Tapnet regarding the draft Notice and asking Tapnet to confirm whether it would be commenting on the draft Notice, and reiterating the deadline for comments to the draft Notice was 19 April 2022.<sup>26</sup> Ofcom did not receive a response from Tapnet to the draft Notice nor confirmation of receipt of the draft Notice. Ofcom subsequently telephoned Tapnet twice on 17 May 2022, including leaving a voice message asking if it had received the draft information request and asking Tapnet to either call back or email Ofcom.<sup>27</sup> Tapnet did not call back or email Ofcom in response to the telephone messages on 17 May 2022.

### Issuing the Notice

- A2.4 As we had not had any response and the deadline for providing comments on the draft Notice had expired, on 6 June 2022, Ofcom emailed Tapnet an information request under section 368Z10 of the Act.<sup>28</sup> This required it to provide information to Ofcom for the purposes of understanding and monitoring the measures VSPs have in place to protect users and to publish a report under section 368Z11 of the Act (the “Notice”).

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<sup>21</sup> Email dated 27 January 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>22</sup> In accordance with section 395 “Notifications and documents in electronic form” of the Act.

<sup>23</sup> Email dated 4 February 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>24</sup> Email dated 4 February 2022 from [redacted] (Tapnet) to Information Registry (Ofcom).

<sup>25</sup> Email dated 1 April 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>26</sup> Email dated 13 April 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>27</sup> Telephone call dated 17 May 2022 (13:31 and 13:35) from [redacted] (Ofcom) to [redacted] (Tapnet).

<sup>28</sup> Email dated 5 June 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

- A2.5 The specified information required by the Notice was set out in the Annexes to that Notice.
- A2.6 The Notice set a deadline for the information to be provided by no later than 4 July 2022.
- A2.7 Having received no confirmation of receipt of the Notice from Tapnet, on 1 July 2022, Ofcom sent a reminder to Tapnet,<sup>29</sup> reminding them of the submission deadline. Tapnet replied on the same day,<sup>30</sup> requesting an extension due to [redacted]. Tapnet also enquired whether replying to the information request was optional and asked what the consequences would be of not replying.
- A2.8 On 5 July 2022, Ofcom replied to Tapnet,<sup>31</sup> stating that it was under a legal requirement to reply to the Notice and that any failure to comply with the Notice may result in Ofcom taking enforcement action. Ofcom also asked Tapnet to indicate how much time it anticipated needing to respond to the information request in order to consider a new deadline. Ofcom received no reply from Tapnet to this email.
- A2.9 On 18 July 2022, Ofcom further wrote to Tapnet,<sup>32</sup> stating that as it had not received a reply to its email of 5 July 2022, it was giving Tapnet the new deadline of 25 July 2022 to provide a full response to the Notice.
- A2.10 Tapnet replied on 19 July 2022,<sup>33</sup> stating it was hoping a reply in September 2022 would be possible, citing [redacted].
- A2.11 On 1 August 2022, Ofcom replied,<sup>34</sup> stating it considered a meeting with Tapnet appropriate to explain the purpose of the Notice and discuss the deadline to respond. Tapnet did not respond to this email.
- A2.12 On 16 August 2022, Ofcom further wrote to Tapnet,<sup>35</sup> stating it had not replied to its request for a meeting and seeking confirmation of receipt of this email by 23 August 2022. Tapnet did not respond to this email.
- A2.13 On 24 August 2022, Ofcom further wrote to Tapnet, stating it had concerns about the lack of engagement from Tapnet,<sup>36</sup> and setting out its engagement with the company to date. Ofcom highlighted that Tapnet were technically in breach of the extended deadline of the Notice of 25 July 2022 and offered a final invitation for a meeting in recognition of the formal information request having been issued as part of a new regulatory regime, Tapnet being a small platform and [redacted].
- A2.14 On 25 August 2022, Tapnet replied to Ofcom seeking clarification of the purpose of the meeting.<sup>37</sup>

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<sup>29</sup> Email dated 1 July 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>30</sup> Email dated 1 July 2022 from [redacted] (Tapnet) to Information Registry (Ofcom).

<sup>31</sup> Email dated 5 July 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>32</sup> Email dated 18 July 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>33</sup> Email dated 19 July 2022 from [redacted] (Tapnet) to Information Registry (Ofcom).

<sup>34</sup> Email dated 1 August 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>35</sup> Email dated 16 August 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>36</sup> Email dated 24 August 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>37</sup> Email dated 25 August 2022 from [redacted] (Tapnet) to Information Registry (Ofcom).

- A2.15 On the same day, Ofcom replied to Tapnet,<sup>38</sup> outlining the purpose of the meeting including to “*discuss and agree next steps for providing a response to the outstanding information request notice*”. Tapnet did not respond to this email.
- A2.16 On 13 September 2022, Ofcom wrote to Tapnet,<sup>39</sup> informing it that Ofcom intended to refer Tapnet to Ofcom’s Enforcement team if it failed to respond to the Notice by 5pm on 21 September 2022. Tapnet did not respond to this email.
- A2.17 Given the importance and reliance we place on the information requested under our statutory powers, Ofcom decided to open an investigation into Tapnet’s compliance with section 368Z10 of the Act on 29 September 2022.<sup>40</sup>
- A2.18 On 3 October 2022,<sup>41</sup> Tapnet submitted the information required under the Notice, and apologised for the delay, again citing resourcing and financial difficulties.

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<sup>38</sup> Email dated 25 August 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

<sup>39</sup> Email dated 13 September 2022 from Information Registry (Ofcom) to [redacted] (Tapnet).

[https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw\\_01263](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01263)

<sup>41</sup> Email dated 3 October 2022 from [redacted] (Tapnet) to Information Registry (Ofcom).

## A3. Legal provisions: sections 368S, 368Y(3), 368Z2, 368Z4, 368Z10 and 394 of the Act

In this section, we set out extracts<sup>42</sup> of the relevant legal provisions including provisions relating to Ofcom’s powers to require the provision of information and to take enforcement action in relation to such information requirements.

### Section 368S

#### Meaning of “video-sharing platform service”

(1) In this Part “video-sharing platform service” means a service or dissociable section of a service which meets the conditions in subsection (2), where the provision of videos to members of the public is—

- (a) the principal purpose of the service or of the dissociable section of the service, or
- (b) an essential functionality of the service.

(2) The conditions in relation to the service or dissociable section of the service are—

- (a) it is provided by means of an electronic communications network;
- (b) it is provided on a commercial basis;
- (c) the person providing it—
  - (i) does not have general control over what videos are available on it, but
  - (ii) does have general control over the manner in which videos are organised on it (and in this sub-paragraph “organised” includes being organised automatically or by way of algorithms, in particular by displaying, tagging and sequencing); and
- (d) the person providing it has the required connection with the United Kingdom.

[...]

### Section 368Y(3)

#### Duties of service providers

[...]

(3) The provider of a video-sharing platform service must—

[...]

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<sup>42</sup> Refer to the Act for the full provisions: [Communications Act 2003 \(legislation.gov.uk\)](https://legislation.gov.uk)

- (b) comply with any requirement under section 368Z10;
- (c) co-operate fully with the appropriate regulatory authority for any purpose mentioned in section 368Z10(3).

[..]

## Section 368Z2

### Enforcement of sections 368Y and 368Z1(6) and (7)

(1) Where the appropriate regulatory authority determine that a provider of a video-sharing platform service is contravening or has contravened section 368Y or 368Z1(6) or (7) they may do one or both of the following—

- (a) give the provider an enforcement notification under this section;
- (b) impose a financial penalty on the provider in accordance with section 368Z4.

(2) The appropriate regulatory authority must not make a determination as mentioned in subsection (1) unless there are reasonable grounds for believing that a contravention of section 368Y or 368Z1(6) or (7) is occurring or has occurred and they have allowed the provider an opportunity to make representations about that apparent contravention.

(3) An enforcement notification under this section is a notification which specifies the determination made as mentioned in subsection (1) and imposes requirements on the provider to take such steps for complying with section 368Y or 368Z1(6) or (7) and for remedying the consequences of the contravention as may be specified in the notification.

(4) The requirements specified in an enforcement notification may in particular include requirements to do one or more of the following—

- (a) cease providing or restrict access to—
  - (i) a specified video, or
  - (ii) videos of a specified description;
- (b) cease showing or restrict access to—
  - (i) a specified audiovisual commercial communication, or
  - (ii) audiovisual commercial communications of a specified description;
- (c) provide additional information about the content of a specified video or videos of a specified description prior to the selection of that video or a video of that description by an individual for viewing;

- (d) provide an out-of-court procedure of a specified description for resolving disputes between the provider and a person using the service;
- (e) show an audiovisual commercial communication marketed, sold or arranged by the provider on the service only with specified modifications; or
- (f) publish a statement of the findings of the appropriate regulatory authority in the form and place and for the time period specified.

(5) An enforcement notification must—

- (a) include reasons for the appropriate regulatory authority's decision to give the enforcement notification, and
- (b) fix a reasonable period for taking the steps required by the notification.

(6) Where a person is required by an enforcement notification to publish a statement of findings, the person may publish with the statement of findings a statement that it is published in pursuance of the enforcement notification.

(7) It is the duty of a person to whom an enforcement notification has been given to comply with it.

(8) That duty is enforceable in civil proceedings by the appropriate regulatory authority—

- (a) for an injunction;
- (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
- (c) for any other appropriate remedy or relief.

(9) If a person to whom an enforcement notification has been given does not comply with it within the period fixed by the appropriate regulatory authority in that enforcement notification, the appropriate regulatory authority may impose a financial penalty on that person in accordance with section 368Z4.

## **Section 368Z4**

### **Financial penalties**

(1) The amount of a penalty imposed on a provider of a video-sharing platform service under section 368W, 368Z2 or 368Z3 is to be such amount not exceeding 5% of the provider's applicable qualifying revenue or £250,000, whichever is the greater amount, as the appropriate regulatory authority determine to be—

- (a) appropriate; and
- (b) proportionate to the contravention or failure in respect of which it is imposed.

(2) In determining the amount of a penalty under subsection (1) the appropriate regulatory authority must have regard to any statement published by OFCOM under section 392 (guidelines to be followed in determining amount of penalties).

(3) The “applicable qualifying revenue”, in relation to a provider, means—

(a) the qualifying revenue for the provider’s last complete accounting period falling within the period during which the provider has been providing the service to which the contravention or failure relates; or

(b) in relation to a person whose first complete accounting period falling within that period has not ended when the penalty is imposed, the amount that the appropriate regulatory authority estimate to be the qualifying revenue for that period.

(4) For the purposes of subsection (3) the “qualifying revenue” for an accounting period consists of the aggregate of all the amounts received or to be received by the provider of the service to which the contravention or failure relates or by any connected person in the accounting period—

(a) for the inclusion in that service of audiovisual commercial communications;

(b) in respect of charges made in that period for the provision of videos by that service; and

(c) which in any other way arise from the provision of that service.

(5) For the purposes of subsection (4), “connected” has the same meaning as it has in the Broadcasting Act 1990 by virtue of section 202 of that Act.

(6) A financial penalty imposed under this section must be paid into the appropriate Consolidated Fund.

(7) For the purposes of subsections (3) and (6)—

(a) the amount of a person’s qualifying revenue for an accounting period, or

(b) the amount of any payment to be made into the appropriate Consolidated Fund by any person in respect of any such revenue,

is, in the event of a disagreement between the appropriate regulatory authority and that person, the amount determined by the appropriate regulatory authority.

(8) The references in this section to the payment of an amount into the appropriate Consolidated Fund—

(a) in the case of an amount received in respect of matters appearing to OFCOM to have no connection with Northern Ireland, is a reference to the payment of the amount into the Consolidated Fund of the United Kingdom;

(b) in the case of an amount received in respect of matters appearing to OFCOM to have a connection with Northern Ireland but no connection with the rest of the United Kingdom, is a reference to the payment of the amount into the Consolidated Fund of Northern Ireland; and

(c) in any other case, is a reference to the payment of the amount, in such proportions as OFCOM consider appropriate, into each of those Funds.

## Section 368Z10

### Power to demand information

(1) The appropriate regulatory authority may require a person who appears to be or to have been a provider of a video-sharing platform service to provide them with all such information relating to that service as the authority require for the purpose of carrying out their functions under this Part.

(2) The appropriate regulatory authority may also require a person who appears to have or to be able to generate information that the authority reasonably require for the purpose of carrying out their functions under this Part to provide them with that information.

(3) The information that may be required by the appropriate regulatory authority under subsection (1) or (2) includes, in particular, information that they require for any one or more of the following purposes—

(a) the purpose of determining whether a person falls under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive;

(b) the purpose of determining whether there has been any change of circumstance that may affect a determination mentioned in paragraph (a);

(c) the purpose of determining the appropriate fee that a provider of a video-sharing platform service is required to pay under section 368Z9;

(d) the purpose of assessing compliance with section 368V, 368Y or 368Z1(1), (2), (6) or (7);

(e) the purpose of determining which of the measures set out in Schedule 15A the authority consider to be appropriate in relation to a video-sharing platform service for any of the purposes mentioned in section 368Z1(1);

(f) the purposes of an investigation being carried out by the authority to determine—

(i) whether a contravention of section 368V, 368Y or 368Z1(6) or (7) has occurred or is occurring,

(ii) whether a provider of a video-sharing platform service has failed to take a measure set out in Schedule 15A which the authority consider to be appropriate in

relation to that service for any of the purposes mentioned in subsection (1) of section 368Z1, or

(iii) whether a provider of a video-sharing platform service has failed to comply with subsection (2) of section 368Z1;

(g) the purpose of monitoring which of the measures set out in Schedule 15A are taken by providers of video-sharing platform services for the purposes mentioned in section 368Z1(1), and how such measures are implemented;

(h) the purpose of producing a report under section 368Z11;

(i) the purpose of ascertaining or calculating applicable qualifying revenue under section 368Z4.

(4) A requirement imposed on a person to provide information under this section includes a requirement that the person must, if necessary, generate the information.

(5) The appropriate regulatory authority may only require the provision of information under this section if—

(a) the demand for the information is contained in a notice served on the person from whom the information is required that describes the required information and sets out the purpose or purposes for which it is required,

(b) the demand for the information is proportionate to the use to which the information is to be put in the carrying out of the authority's functions, and

(c) the authority have given the person from whom the information is required the opportunity to make representations to the authority concerning the demand.

(6) A person who is required to provide information under this section must provide it in such manner and form and within such reasonable period as may be specified by the authority in the demand for information.

(7) Sections 368Z2 and 368Z5 apply in relation to a failure by a provider of a video-sharing platform service to comply with a demand for information under this section as if that failure were a contravention of section 368Y.

(8) Section 368Z2 applies in relation to a failure by a person other than a provider of a video-sharing platform service to comply with a demand for information under this section as if that failure were a contravention of section 368Y, but where section 368Z2 applies by virtue of this subsection—

(a) references in that section and in section 368Z4 to a provider of a video-sharing platform service are to be read as references to the person who has failed to comply with the demand for information, and

(b) section 368Z4(1) is to apply as if, for the words “5% of the provider’s applicable qualifying revenue or £250,000, whichever is the greater amount,” there were substituted “£250,000”.

(9) In this section “information” includes technical information and material such as videos, audiovisual commercial communications, screenshots and archived material.

## **Section 394**

### **Service of notifications and other documents**

(1) This section applies where provision made (in whatever terms) by or under an enactment specified in subsection (2) authorises or requires—

- (a) a notification to be given to any person; or
- (b) a document of any other description (including a copy of a document) to be sent to any person.

(2) Those enactments are—

- (a) this Act;
- [...]

(3) The notification or document may be given or sent to the person in question—

- (a) by delivering it to him;
- (b) by leaving it at his proper address; or
- (c) by sending it by post to him at that address.

(4) The notification or document may be given or sent to a body corporate by being given or sent to the secretary or clerk of that body.

(5) The notification or document may be given or sent to a firm by being given or sent to—

- (a) a partner in the firm; or
- (b) a person having the control or management of the partnership business.

(6) The notification or document may be given or sent to an unincorporated body or association by being given or sent to a member of the governing body of the body or association.

(7) For the purposes of this section and section 7 of the Interpretation Act 1978 (c. 30) (service of documents by post) in its application to this section, the proper address of a person is—

- (a) in the case of body corporate, the address of the registered or principal office of the body;

(b) in the case of a firm, unincorporated body or association, the address of the principal office of the partnership, body or association;

(c) in the case of a person to whom the notification or other document is given or sent in reliance on any of subsections (4) to (6), the proper address of the body corporate, firm or (as the case may be) other body or association in question; and

(d) in any other case, the last known address of the person in question.

[...]

(9) In this section—

- “document” includes anything in writing; and
- “notification” includes notice;
- and references in this section to giving or sending a notification or other document to a person include references to transmitting it to him and to serving it on him.

## A4. Correspondence to/from Tapnet after sending Section 368Z10 Notice

Date	Form	To	From
1 April 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
13 April 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
17 May 2022 (13:31 and 13:35)	Telephone call	[REDACTED] (Tapnet)	[REDACTED] (Ofcom)
5 June 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
6 June 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
1 July 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
1 July 2022	Email	Information Registry (Ofcom)	[REDACTED] (Tapnet)
5 July 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
18 July 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
19 July 2022	Email	Information Registry (Ofcom)	[REDACTED] (Tapnet)
1 August 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
16 August 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
24 August 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
25 August 2022	Email	Information Registry (Ofcom)	[REDACTED] (Tapnet)
25 August 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
13 September 2022	Email	[REDACTED] (Tapnet)	Information Registry (Ofcom)
3 October 2022	Email	Information Registry (Ofcom)	[REDACTED] (Tapnet)