

GDPR Case Study: Dutch DPA Fines TikTok Over Privacy Policy

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Abstract

TikTok Inc was fined 750,000 Euros on April 9, 2021 by the Dutch Data Protection Agency, Autoriteit Persoonsgegevens (AP), for failing to provide their privacy policy to Dutch users in a readable format. Upon installing the application, the Privacy Policy was only available in English, which the AP argued was a violation of GDPR as the application fails to provide Dutch users, including children, with a clear understanding of how their data is collected and used.

1 Background

The Chinese company ByteDance is the parent company of TikTok Inc, which owns the TikTok application (hereinafter: TikTok) [8]. TikTok is a social media platform that allows users to upload and browse content, primarily consisting of short videos. The scale of TikTok is massive, as they recently passed 3 billion app downloads in 2021 [6]. In the Netherlands, it was reported that TikTok had 4.5 million users in August 2020, with approximately 1.26 million of those users in the age range of 13 to 17 years old [1]. TikTok Inc’s official headquarters are in California, U.S., and they didn’t have a headquarters in the EU until July 29, 2020 when they opened one in Ireland [9].

Concern over the growing influence of TikTok in the Netherlands and how well the app handles the data of its young users, the AP launched an open investigation of TikTok’s data privacy practices in May 2020 and published its findings in October 2020 [1] [13]. They found that from May 25, 2018 and July 29, 2020, TikTok did not offer its privacy policy to Dutch users in English. During user registration on the platform, the Privacy Policy was displayed in English and was not available in Dutch. Investigators found the same issue when accessing the Privacy Policy in the app after registration [9].

As a result, the AP sought to fine TikTok Inc, the data controller, over violating the rights of its data subjects, the Dutch users, according to the GDPR. TikTok Inc objected to

this fine and argued that the AP was not competent in this case because they had an established headquarters in Ireland. However, TikTok Inc did not have a headquarters in the EU until July 29, 2020, and according to Article 55(1) of the GDP [3], any EU member state was considered competent to investigate and decide on GDPR violations. Since TikTok Inc didn’t establish a headquarters in the EU at the beginning of the investigation, the AP was still considered competent in this case [9].

2 GDPR Violation

2.1 Article 12(1) violation

In accordance with Article 4(1), Article 4(2), Article 2(1), and Article 3(1), TikTok Inc is held accountable to the GDPR for the collecting and processing of personal data. As such, the AP found TikTok Inc was in violation of Article 12(1) for failing to provide their Privacy Policy in Dutch for Dutch users [9]. Article 12(1) specifically states that any communications to the data subject regarding the collecting or processing of their personal data should be “concise, transparent, intelligible, and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child [2]”. Given that a significant proportion of TikTok’s Dutch users are under 16 years old, Recital 58 is especially relevant, as it emphasizes the special protection children merit with regards to transparency and clear and plain language [9]. The Guidelines on Transparency under Regulation 2016/679 (hereinafter: Transparency Guidelines) expands upon this, stating that the data controller must be aware when they are targeted children and ensure that the language it uses is appropriate and effectively resonates with children [5].

2.2 TikTok Inc’s stance

TikTok Inc argued that the AP was wrong to focus on the lack of a translated Privacy Policy, as it provided substantial

privacy information elsewhere in their app. Specifically, they implemented pop-up notifications and privacy and safety settings, provided supplemental information in their Help Centre and Safety Centre, and published its Dutch Policy in July 2020. They also stated that many Dutch users are competent in English, given that the Netherlands has been ranked in the three countries worldwide in the Education First English Proficiency Index since 2011. As such, TikTok Inc believed that Dutch users were provided intelligible information and that the company was not in violation of Article 12(1) [10].

2.3 The AP's stance

The AP acknowledges that many Dutch users are proficient in English, particularly young users, it states that "it cannot be taken for granted" that said users are proficient enough in English to understand their rights according to the English Privacy Policy. Given the weighted responsibility of handling children's rights, as stated in the GDPR and Transparency Guidelines, children deserve overtly clear and transparent language, without regards to what their English proficiency may be. The AP also stated that the extra privacy features offered do not change the fact that the Privacy Policy was not offered in Dutch and do not cover all the information TikTok Inc is mandated to provide under Article 13. As such, the pop-ups and supplemental information cannot be considered a replacement for an intelligible and clear policy. Finally, because TikTok Inc did eventually offer their Privacy Policy in Dutch on July 29, 2020, the AP will only hold them accountable until then [11].

3 Discussion

3.1 Was the Fine Appropriate?

While TikTok Inc was fined the maximum amount for being classified as a category III infringement of Article 12(1) of the GDPR, given TikTok Inc's scale, it's a small fine to pay relative to TikTok Inc's roughly \$1.9 billion revenue (2020) [7]. There are over 1 million Dutch TikTok users under the age of 18, which would value the fine at less than 1 Euro per young user [1]. The large number of users, particularly young users who have extra protections under the GDPR, and the duration of the offense, lasting nearly 2 years, makes this case much more severe and minimizes the 750,000 Euro fine.

3.2 Was the Fine Effective?

On July 29, 2020, a few months after the AP opened an investigation into TikTok Inc's GDPR compliance, the company provided a Dutch version of their privacy policy [10]. While the fine was small, the timing of the investigation brought a lot of public attention to the data privacy rights. At the time of the investigation, TikTok was receiving significant public

attention as the popularity of the app was growing at a record pace, and the media extensively covered the GDPR's investigation and findings. The quick turnaround from when the investigation was opened and when TikTok Inc provided their privacy policy in Dutch demonstrates the effectiveness of the GDPR enforcement strategy along with the effectiveness of public pressure.

3.3 Transfer to Irish DPA

Under the Articles 55(1) and 56(1) of the GDPR [3] [4], competency is given to the DPA of the country where the controller's headquarters reside. Since the establishment of TikTok's Irish headquarters happened in the middle of the investigation, the AP was only able to assess TikTok Inc on its privacy policy violation before transferring the investigation over to the Irish DPA. As of September 2021, the Irish DPA continues to investigate TikTok Inc on their GDPR compliance, particularly with regards to children's data [12].

It wasn't clear if the establishment of TikTok Inc's new Irish headquarters was intentional to delay the investigation through the transfer of the case, or if it was related to the investigation at all. However, TikTok Inc did object to the fine on the basis that the AP was incompetent [9], but the investigation was still upheld given that its findings focused on the time before the headquarters were officially established. This sets a precedent for future investigations as the transfer did not keep TikTok Inc from being held accountable and did not thwart the ongoing investigation.

3.4 Other considerations

While the TikTok case focuses heavily on transparency of information to children, the GDPR and Transparency Guidelines also include transparency of information to vulnerable populations. With regards to web and mobile applications, this may include users with accessibility needs, such as those who use screen readers or keyboard navigation. If privacy information is not accessible for users with impaired visibility, mobility, or hearing, companies may be subject to Article 12 violations, even if they pay explicit attention to language. From a technical perspective, preventing Article 12 violations can be relatively easy; companies just need to ensure that the policy is available in their produce, in their audience's locale, and to users with accessibility needs. The most difficult part might then be ensuring that transparency is effectively communicated with special considerations for the needs, whatever they may be, of data subjects.

References

- [1] Erwin Boogert. Tiktok groeit in nederland tot 4,5 miljoen gebruikers. <https://www.emerce.nl/nieuws/>

- tiktok-groeit-nederland-tot-45-miljoen-gebruike[12] The Associated Press. Ireland investigates tiktok over child, china data concerns. <https://abcnews.go.com/Technology/wireStory/ireland-investigates-tiktok-child-china-data-concerns> August 2020. Last accessed 24 September 2021.
- [2] European Commission. Article 12: Transparent information, communication and modalities for the exercise of the rights of the data subject. <https://www.gdpr.org/regulation/article-12.html>, 2018. Last accessed 24 September 2021.
- [3] European Commission. Article 55: Competence. <https://www.gdpr.org/regulation/article-55.html>, 2018. Last accessed 24 September 2021.
- [4] European Commission. Article 56: Competence of the lead supervisory authority. <https://www.gdpr.org/regulation/article-56.html>, 2018. Last accessed 24 September 2021.
- [5] European Commission. Guidelines on transparency under regulation 2016/679. <https://ec.europa.eu/newsroom/article29/items/622227>, 2018. Last accessed 24 September 2021.
- [6] Rae Hodge. Tiktok hits 3 billion downloads. <https://www.cnet.com/tech/services-and-software/tiktok-hits-3-billion-downloads/>, July 2021. Last accessed 24 September 2021.
- [7] MANSOOR IQBAL. Tiktok revenue and usage statistics (2021). <https://www.businessofapps.com/data/tik-tok-statistics/>, September 2021. Last accessed 24 September 2021.
- [8] Sophia Smith Galer Joe Tidy. Tiktok: The story of a social media giant. <https://www.bbc.com/news/technology-53640724>, August 2020. Last accessed 24 September 2021.
- [9] Autoriteit Persoonsgegevens. Decision to impose a fine on tiktok. https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/decision_to_impose_a_fine_on_tiktok.pdf, October 2020. Last accessed 24 September 2021.
- [10] Autoriteit Persoonsgegevens. Decision to impose a fine on tiktok, paragraph 95. https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/decision_to_impose_a_fine_on_tiktok.pdf, October 2020. Last accessed 24 September 2021.
- [11] Autoriteit Persoonsgegevens. Decision to impose a fine on tiktok, paragraph 96 - 102. https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/decision_to_impose_a_fine_on_tiktok.pdf, October 2020. Last accessed 24 September 2021.
- [13] Reuters Staff. Dutch watchdog to investigate tiktok's use of children's data. <https://www.reuters.com/article/us-netherlands-dataprivacy-tiktok/dutch-watchdog-to-investigate-tiktoks-use-of-children> May 2020. Last accessed 24 September 2021.