



TOO MUCH OR TOO LITTLE? ASSESSING THE CONSUMER PROTECTION COOPERATION (CPC) NETWORK IN THE PROTECTION OF CONSUMERS AND CHILDREN ON TIKTOK

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SUMMARY:

On 16 February 2021, BEUC and 18 of its member organisations sent an alert against TikTok to the European network of consumer authorities (“CPC-Network”) highlighting several breaches of consumer rights. The experience drawn from this external alert revealed several worrying issues concerning the functioning and effectiveness of the Consumer Protection Cooperation Regulation (“CPC Regulation”), and the enforcement of consumer protection rules in general. There is still too much uncertainties with the procedures laid down in the CPC Regulation and the weight that the CPC-Network has given to “informal dialogues” raises concerns as their too frequent use may undermine the overall application of consumer law. Moreover, addressing cross-cutting infringements going beyond the realm of consumer law and with relevance for other sectors (such as digital rights or audiovisual media services laws) raises questions which are today unresolved. In the context of the evaluation and the announced revision of the CPC Regulation, the TikTok action brings to light several areas where improvements are needed to ensure that EU consumers are adequately protected.



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INTRODUCTION: IN SEARCH OF A CROSS-SECTORAL COORDINATED ACTION IN THE PLATFORM ECONOMY

The multifaceted nature of the platform economy requires a multidimensional effort with enforcement actions at different levels as various laws and regulations are relevant to the activities of online platforms such as consumer law, data protection or audiovisual media. This involves interventions by different enforcement networks, as different agencies or organizations may be responsible for enforcing different applicable rules. TikTok, currently one of the biggest platforms in this economy and the only one growing in social media in recent months, serves as a prime example of the cross-sectoral nature of these problems.

While originally TikTok was mainly used for memes, lip-sync, dances and entertainment, it rapidly became a platform for expressing political ideas, lifestyle, personal advice and for information.¹ For example, it has been reported that TikTok's users share in the platform more sensitive and private information than they would otherwise, thereby increasing concerns about the mental health impact of targeted content consumption.²

Although not directed at children below the age of 13³, TikTok has attracted a young user base. More than 60% of users in the platform are under 30⁴, and 43% of TikTok's global audience is between 18 and 24.⁵ While data shows that TikTok's users spend an average of 52 minutes per day on the app,⁶ children devote about 75 minutes on the platform daily.⁷ Recent studies on the use of social media by North American teenagers reports that 16% of all minors age between 13 and 17 admit to use TikTok "almost constantly".⁸

Since its arrival in the internal market, the platform has put personal data and consumer protection legislation to a test. Its powerful curator algorithm enables TikTok to intensively collect data, especially of minors, based on ambiguous terms and misleading practices that infringe data protection rules and strains users' protection under European Consumer Law.

In BEUC's report '[TikTok without filters](#)', it was found that TikTok infringed the rights of European consumers by engaging in misleading and unfair commercial practices, and ambiguous and unfair contract terms.⁹ In addition to breaches of EU consumer law, most notably the Unfair Contract Terms Directive (UCTD), the Unfair Commercial Practices Directive (UCPD) and Consumer Rights Directive (CRD), it was denounced that TikTok's practices also violated other EU laws such as data protection and audiovisual media services rules. The investigation

TikTok has put personal data and consumer protection legislation to a test.

¹ Evelyn Douek, *1 Billion TikTok Users Understand What Congress Doesn't*. The Atlantic, October 10, 2021.

² <https://www.theguardian.com/technology/2022/oct/30/tiktok-mental-health-social-media>.

³ <https://www.tiktok.com/community-guidelines> (accessed October 2022).

⁴ <https://www.businessofapps.com/data/tik-tok-statistics/>. See also Ofcom. (2021). *Children and parents: Media use and attitudes report*. https://www.ofcom.org.uk/_data/assets/pdf_file/0025/217825/children-and-parents-media-use-and-attitudes-report-2020-21.pdf

⁵ <https://datareportal.com/essential-tiktok-stats>.

⁶ <https://www.omnicoreagency.com/tiktok-statistics/>.

⁷ <https://thesocialshepherd.com/blog/tiktok-statistics>.

⁸ Emily A. Vogels, Risa Gelles-Watnick and Navid Massarat, *Teens, Social Media and Technology 2022*. Pew Research Center, August 10, 2022.

⁹ BEUC, *Tik Tok without Filters – a consumer law analysis of TikTok's policies and practices* – Report. February 15, 2021.

revealed the existence of unfair terms in TikTok’s “Terms of Service” and “Virtual Item Policy”, deceptive practices for processing personal data, and a lack of diligent measures to protect children and teenagers from hidden advertising and potentially harmful content. With regard to data protection, the study on TikTok’s data-collection practices, ‘[Confusing by design](#)’, analysed TikTok’s Privacy Policy in light of the EU General Data Protection Regulation (GDPR) and found a significant lack of compliance with the principles established by the EU data protection framework.¹⁰ Most importantly and given that a considerable amount of TikTok’s users are minors, including children under 13, there are special considerations that the platform should take when processing personal data of vulnerable data subjects as stated in the GDPR.¹¹ To date, there are multiple concerns about the platform’s compliance with the European data protection rules.¹² Furthermore, TikTok is failing to take diligent measures to protect young users against potentially harmful content as required in the revised Audiovisual Media Services Directive.¹³

Against this background, and with a view to trigger an effective and coordinated enforcement action, in February 2021, together with other 18 BEUC members, BEUC submitted an external alert to the Consumer Protection Cooperation Network (CPC Network) calling for action to investigate TikTok’s practices on the basis of repeated violations of European consumer and data protection legislation.¹⁴

The experience following this external alert exposes two main problems with regard to the functioning and effectiveness of the Consumer Protection Cooperation Regulation (CPC Regulation) mechanisms and the CPC Network:

- **first, an insufficient compliance with the procedures established in the CPC Regulation: ongoing developments and modifications of TikTok’s contractual framework and privacy policies following consumer associations’ and data protection authorities’ complaints were not based on binding regulatory action but on informal dialogues with the parties involved. There is well-grounded concern that these informal dialogues could serve as a precedent and that, as such, this practice may involve the risk of rendering the available remedies under consumer law to become dead letter. While voluntary approaches are welcome, exceedingly informal solutions that sidestep consumer protection law and procedures in the face of manifest violations are problematic if they are meant to prevent enforcement authorities from taking action against earlier abuses. Second, the potential of the CPC Regulation is not fully exploited and a better cross-border enforcement is needed to ensure the effectiveness of EU consumer law.**
- **Second, a suboptimal use of available mechanisms and resources of consumer protection entities revealing that consumer law enforcement is failing: this means that there are still many challenges and legal uncertainties that prevent consumer protection entities (public authorities and consumer organisations) to act in a coordinated manner against cross-border practices by non-EU platforms, in particular when the business practices covers the scope not only of various consumer laws but also of data privacy and audiovisual media.**

¹⁰ J. Ausloos and V. Verdoodt, (2021). *Confusing by Design: A Data Protection Law Analysis of TikTok’s Privacy Policy*.

¹¹ Recital 38 GDPR.

¹² J. Ausloos and V. Verdoodt, (2021). *Confusing by Design: A Data Protection Law Analysis of TikTok’s Privacy Policy*.

¹³ BEUC, *Tik Tok without Filters*.

¹⁴ BEUC, TikTok complaint – Letter to CPC and European Commission (Ref.: BEUC-X-2021-013/UPA/DMA/rs), February 15, 2021. Available at <https://www.beuc.eu/letters/tik-tok-complaint-letter-cpc-and-european-commission>.

BEUC'S CALL FOR ACTION: AN EXTERNAL ALERT ON TIKTOK

1. Basis for the external alert

As a result of the increasing cross-border nature of consumer transactions in the EU, the 2006 Consumer Protection Cooperation Regulation¹⁵ set up a network for a better coordination of the activity by competent authorities in the Member States designated for the enforcement of consumer law, the Consumer Protection Cooperation Network ('CPC Network'). The purpose of establishing a CPC Network was to allow national authorities from all countries in the European Economic Area to jointly cooperate against consumer law violations when the trader and the consumer are established in different countries. In 2017, a new Consumer Protection Cooperation Regulation granted national authorities with wider powers to detect consumer law violations and to rapidly act against offenders.¹⁶

Under the existing framework the European Commission can 'alert' the CPC Network and coordinate EU-wide enforcement action to address practices which harm a large majority of EU consumers with a view to ensure the consistent application of consumer law within the internal market.¹⁷ Upon suspicion of consumer law infringements, competent national authorities can, and shall, notify the Commission, other competent national authorities, and single liaison offices without undue delay about the potential breach(es).¹⁸ Member States can also confer designated bodies, European Consumer Centres, consumer organisations and associations (including trader associations) that have the necessary expertise, the power to issue an 'external alert' to the relevant competent authorities and the Commission of suspected infringements.¹⁹

Pursuant to Article 27 CPC Regulation (EU) 2017/2394, BEUC and 18 of BEUC's member organisations launched an external alert to the CPC-Network in February 2021.²⁰ BEUC's enquiry builds on the 2016 CPC-Network Common Position on social networks.²¹ In such Common Position, the CPC Network identified different unfair and misleading terms and practices by social media platforms. These terms and practices are part of TikTok's policies.

The purpose of this external alert was to bring attention to these infringements by the platform, which were identified through previous investigations that examined TikTok's practices in relation to the Unfair Commercial Practices Directive, the Consumer Rights Directive, the Unfair Contract Terms Directive, the

¹⁵ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004, p. 1–11.

¹⁶ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, p. 1–26.

¹⁷ Article 26(2) CPC Regulation. See more info at https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-protection-cooperation-regulation_en (Accessed October 2022).

¹⁸ Article 26(1) CPC Regulation.

¹⁹ Article 27 CPC Regulation.

²⁰ BEUC, TikTok complaint – Letter to CPC and European Commission (Ref.: BEUC-X-2021-013/UPA/DMA/rs), February 15, 2021. Available at <https://www.beuc.eu/letters/tik-tok-complaint-letter-cpc-and-european-commission>.

²¹ Common position of national authorities within the CPC-Network concerning the protection of consumers on social networks at https://ec.europa.eu/info/sites/default/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf.

GDPR, and the Audiovisual Media Services Directive. The technical analysis revealed that TikTok's practices were not in compliance with EU law, such as the introduction of unfair terms in the 'Terms of Service' and 'Virtual Item Policy', deceptive practices for processing personal data, and a lack of diligent measures to protect children and teenagers from hidden advertising and potentially harmful content.

Summary of the findings of the technical reports:

- TikTok's 'Terms of Service' include numerous unclear and ambiguous terms that create an unbalanced relationship between TikTok and its users, favoring the platform. In particular, TikTok's contractual provisions are found to be not sufficiently clear (e.g. regarding how content is available and shared in the platform), not adapted to the users (children and teenagers), and not to provide the contractual information in every official language of the EU Member States.
- TikTok's 'Virtual Item Policy' lacks clear pre-contractual information and includes several unfair terms, as well as an absence of an effective authorization mechanism to prevent abuse of the in-app payment system for buying 'virtual coins'.
- TikTok also does not clearly inform its users, particularly children and teenagers, about what personal data is collected and for what legal reason, and these practices do not allow consumers to make a fully informed decision about whether to register for the app and/or exercise their rights under the GDPR.
- TikTok does not take adequate measures against the proliferation of hidden advertising through marketers on its platform and does not limit the exposure of children and teenagers to potentially harmful content.

Given the serious consequences of those infringements, the external alert was an attempt to urge the European Commission and national authorities to investigate TikTok's potentially unfair and misleading practices that affect not only consumers but particularly put at risk children and teenagers as a vulnerable group. Accordingly, in the letter, the European Commission and national authorities were requested to issue a 'Common Position' based on the investigation to ensure compliance with EU consumer law.²² As a designated body under the CPC Regulation, BEUC also requested to be regularly updated on the steps that the European Commission plans to take regarding TikTok, in order to facilitate coordination with relevant authorities.

In light of the identified infringements of the GDPR and the Audiovisual Media Services Directive, and to inform about the submission of the external alert as well as to ensure an appropriate protection for users under EU law against TikTok's practices, on February 16, 2021, BEUC sent letters to the European Data Protection Board (EDPB)²³ and to the European Regulators Group for Audiovisual Media Services (ERGA),²⁴ as TikTok is as a 'video-sharing platform' under the Audiovisual Media Services Directive.

2. National experiences following the coordinated action

Following the letter to the CPC Network, several BEUC members initiated actions against TikTok's practices at national level.

²² BEUC's Letter to CPC and European Commission.

²³ https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-015_eu_consumer_law_complaint_against_tiktok_-_gdpr_compliance_issues.pdf (accessed October 2022).

²⁴ https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-014_beuc_submitted_an_alert_to_consumer_protection_authorities_about_tiktok_with_relevance_for_erga.pdf (accessed October 2022).

Consumentenbond (the Netherlands)

The Dutch Consumer organisation, Consumentenbond, together with the Foundation Take Back Your Privacy, launched a collective action against TikTok seeking compensation following the Dutch 'WAMCA' legislation.²⁵ In particular, the claimants demanded TikTok the payment of damages to Dutch underage users for unlawfully collecting and trading their data.²⁶ TikTok assumed that the Dutch court would not rule on the claims because it does not have its headquarters in the Netherlands. This defense was dismissed. The Dutch court decided that it was competent. According to the Amsterdam District Court, TikTok's interpretation was incorrect and the court is actually competent to hear the case, preventing the platform's attempt to frustrate the proceedings.²⁷ This ruling opens the door to judicial adjudication against TikTok's non-compliant practices.

Organización de Consumidores y Usuarios - OCU (Spain)

In Spain, OCU filed a request for judicial mediation ('conciliación') with TikTok. BEUC's member also informed the Spanish Agency for Data Protection, the National Commission for Markets and Competition (CNMC), responsible for supervising the audiovisual sector, and the General Directorate of Consumer Affairs about the mediation request as well as about the coordinated actions taken following the external alert. The court considered that OCU's request met all the formal requirements to be admitted, and as such, it summoned the parties to a settlement hearing in June 2021. TikTok did not appear in court, despite being properly notified, and the hearing ended without the possibility of reaching an agreement between the parties.²⁸ It seems that enforcement action at national-level in Spain ended here on the grounds that CNMC transferred the investigation to Ireland based on the AVMSD's country of origin principle.²⁹

Verbraucherzentrale Bundesverband - vzbv (Germany)

Vzbv, sent a legal warning to TikTok regarding six terms in TikTok's Terms of Service that raised concerns. These terms included a requirement that users must be able to enter into a legally binding contract with TikTok and must also be at least 13 years old. The warning also raised issues regarding an unfair termination clause and other misleading and unclear terms. Following this warning, TikTok signed a cease-and-desist declaration in June 2021.³⁰

Altroconsumo and Consumatori Italiani per Europa (Italy)

In Italy, Altroconsumo and CIE turned to the Italian Data Protection Authority (Garante) and the Competition and Market Authority (AGCM), asking them to investigate the conduct of the social media platform. In 2019, Altroconsumo had already requested the intervention of the Garante because TikTok allowed minors under the age of 13 to sign up without the consent of their parents, as required by the GDPR. In March 2021, the AGCM launched two investigations related to i) the presence of unfair contract terms in TikTok's Terms of Service and its Virtual Items policy,³¹ and ii) potential unfair commercial practices.³² Following the investigations, in February 2022, the authority concluded that several of TikTok's terms were unfair.³³ In July 2022, the AGCM, while not explicitly acknowledging unfairness, signaled a set

²⁵ <https://www.consumentenbond.nl/nieuws/2022/nederlandse-rechtbank-mag-over-tiktokzaak-oordelen>.

²⁶ <https://stichtingtakebackyourprivacy.nl/wp-content/uploads/2022/11/20221109-press-release-STBYP-9-November-2022-EN-translation-final.pdf>.

²⁷ Ibid.

²⁸ <https://www.ocu.org/tecnologia/internet-telefonía/noticias/tiktok-derechos-usuarios>.

²⁹ https://www.cnmc.es/sites/default/files/3424374_0.pdf.

³⁰ https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-022_cpc_alert_report_an_unfinished_journey.pdf.

³¹ [https://www.agcm.it/dotcmsCustom/tc/2027/2/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/DB98FBB1A6B18BE7C12587E200574337/\\$File/p29976.pdf](https://www.agcm.it/dotcmsCustom/tc/2027/2/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/DB98FBB1A6B18BE7C12587E200574337/$File/p29976.pdf).

³² <https://www.agcm.it/dotcmsdoc/bollettini/2022/18-22.pdf>.

³³ [https://www.agcm.it/dotcmsCustom/tc/2027/2/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/DB98FBB1A6B18BE7C12587E200574337/\\$File/p29976.pdf](https://www.agcm.it/dotcmsCustom/tc/2027/2/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/DB98FBB1A6B18BE7C12587E200574337/$File/p29976.pdf).

of commitments to be undertaken by TikTok in order to address the concerns of the authority, including clearer information about branded content as well as more precise information about advertisements in its Terms of Service.³⁴ This adds to the fact that the Italian DPA, already, in 2021, imposed a limitation to the processing of personal data by TikTok of accounts that were not age-verified following the death of a 10-year-old user as a result of a viral challenge.³⁵ This action resulted in the removal of over 500,000 accounts of children under 13 under the GDPR.³⁶

The responsive action at national level following the external alert contrasts with the somewhat lack of convincing measures by the different EU networks responsible for monitoring enforcement in the event of widespread infringements.

THE CPC EXTERNAL ALERT AT PLAY

1. Insufficient EU-coordinated response to BEUC's alert

From the side of the CPC-Network

May 2021 – Formal Dialogue

Following BEUC's alert, in May 2021, the European Commission and the CPC Network launched a 'formal dialogue' with TikTok to review its commercial practices and policies.³⁷ During the announcement of the launch of this dialogue, Commissioner Reynders emphasized the risks for vulnerable consumers posed by targeting minors and disguised advertisement in a context of accelerated digitalization.³⁸

June 2022 – BEUC's Second Letter to the CPC Network

TikTok introduced several modifications to its Terms of Service as well to its Virtual Items policy to be effective on June 16, 2022. Accordingly, BEUC submitted a second letter to the CPC Network welcoming the CPC Network's decision to start investigations into TikTok.³⁹ BEUC noted that these changes may have been triggered by earlier requests by CPC authorities to "make improvements" in relation to TikTok's advertising practices, labelling of commercial content, personalisation and targeted marketing aimed at a young audience, and the Virtual Items policy. In BEUC's view, these changes were insufficient.⁴⁰

³⁴ The possibility of these commitments is foreseen in Article 27(7) of the Italian Consumer Code. The AGCM decision can be found at: [https://www.agcm.it/dotcmsCustom/tc/2021/7/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/8780A9DF8340B708C125888A00539354/\\$File/p30229.pdf](https://www.agcm.it/dotcmsCustom/tc/2021/7/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/8780A9DF8340B708C125888A00539354/$File/p30229.pdf).

³⁵ Garante per la protezione dei dati personali, *Tik Tok: Italian SA imposes limitation on processing after the death of the girl from Palermo*. January 22, 2021.

³⁶ Garante per la protezione dei dati personali, *TikTok to take additional measures to keep the youngest off the platform. Over 500,000 accounts of Italian children aged under 13 already removed*. May 12, 2021.

³⁷ https://ec.europa.eu/commission/presscorner/detail/en/mex_21_2744 (accessed October 2022).

³⁸ Ibid.

³⁹ BEUC, *One year has passed and TikTok continues to infringe EU consumer rights*. (Ref.: BEUC-X-2022-064/UPA/rs), June 7, 2021. Available at https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-064_tiktok_letter_cpc_-_may.pdf.

⁴⁰ Ibid.

The letter was accompanied by an Annex where BEUC contrasts the introduced changes with the previously identified violations and highlights issues not addressed or where the action taken remains insufficient. Regarding issues not addressed, BEUC identified persistent hidden advertising practices by social media influencers with millions of followers on the platform. The investigation found that TikTok continues to allow advertising practices that target children with ages 13-17. With regard to the modifications introduced in the Terms of Service and the Virtual Coins Policy, BEUC recognized a clearer and more user-friendly information provided in the form of summaries (so-called 'in short'). However, BEUC suggested that such improvement should not be limited to the general terms and instead should be expanded to other relevant frameworks such as privacy policy or community guidelines.⁴¹ BEUC underlined that TikTok's ToS were not yet available in all national languages of EU Member States (e.g., Slovenian). Despite improvements regarding the possibility for users to set their own preferences, BEUC expressed concern about content ownership since a protective 'by design' system would rely on an opt-in system rather than an opt-out one. BEUC signaled that, as per consumer law, TikTok should inform consumers about all modifications of the contractual relationship and not only "significant changes".

TikTok had also introduced amendments regarding the monitoring and removal of accounts. Users under the age of 13 are in principle not allowed to use the platform. BEUC called for a further clarity about the monitoring activities and suggested TikTok to further improve the compliance of this requirement by informing whether, as part of the internal monitoring to check that users fulfill the age criteria, the platform is acting on a proactive manner or on the basis of other users' warnings. Here, BEUC recalled the necessity to act proactively to ensure that underage users' accounts are deleted.⁴² So far, while in response to regulatory problems and resulting lawsuits TikTok has moved towards a more diligent approach for compliance regarding children's privacy, it has been argued that the platform's approach has not been proactive but reactive.⁴³

The Annex in BEUC's letter included a list of improvements still to be made as part of the Coins and Reward policies to be fully in line with the requirements under consumer law such as the possibility of monetary refunds, clearer precontractual information, abuse prevention during the purchase of virtual coins so that, for example, children cannot make any purchases without parental supervision.⁴⁴

In the letter, BEUC underscored that none of the modifications introduced meaningfully improved the data protection issues previously identified. For example, with regard to consent, BEUC found that data processing is made on the basis of 'dark patterns', by including ambiguous clauses by which the users are unable to identify what are they actually giving consent to. The privacy policy and technical design of TikTok's services do not yet allow the possibility of requesting parental authorization for those users who do not have age to consent. Lastly, BEUC listed the issues where TikTok still does not observe the GDPR such as lack of transparency concerning the sharing of personal data with third parties and data retention.

In sum, BEUC explicitly warned about the insufficiency of the proposed changes by TikTok. As the entity initiating the external alert, BEUC also denounced that given that the problems remain unresolved, the information provided was not correct, up-to-date or accurate.⁴⁵ Accordingly, and based on Article 9(8) CPC Regulation, BEUC requested the European Commission and the CPC authorities the possibility of an

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BEUC explicitly warned about the insufficiency of the proposed changes by TikTok.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Polito, Vinicius, et al (2022), "On the Compliance of Platforms with Children's Privacy and Protection Requirements-An Analysis of TikTok", in *International Conference on Software Business*. Springer, Cham, 85-100.

⁴⁴ Ibid.

⁴⁵ BEUC, *One year has passed and TikTok continues to infringe EU consumer rights*, supra n 39.

exchange on the existing concerns and to take consideration of BEUC's findings in the by then ongoing dialogue with TikTok.⁴⁶

From the side of ERGA:

March 2021 – ERGA's reply

ERGA replied to BEUC's concerns regarding TikTok's failure to comply with the AVMSD by emphasizing that the Broadcast Authority of Ireland (BAI) was competent to deal with the matter as TikTok is established in Ireland and that, as such, ERGA members were expected to refer ongoing investigations to the BAI as the competent authority. This contrasts with the fact that, by the time not having yet transposed the AVMSD in Ireland, the BAI considered that it is not competent for the enforcement of the AVMSD since the new media authority (Media Commission), to replace BAI, was not yet created. The new media regulator, Coimisiún na Meán, will be operational in February 2023, following the enactment of the Online Safety and Media Regulation Act on December 2022.

October 2021 – Letter to BAI/ERGA and DG Connect

In October 2021, BEUC sent a second letter to ERGA.⁴⁷ BEUC expressed concern about the lack of transposition of the revised Audiovisual Media Services Directive (AVMSD). The subsequent enforcement gap enabled children's exposure to inappropriate content on video-sharing platforms due to the lack of implementation of the AVMSD, in particular, Article 28b AVMSD. This provision requires Member States to ensure that video-sharing platform providers take appropriate measures to protect minors from audiovisual content that may impair their physical, mental or moral development.⁴⁸ On the same date, a letter was sent to DG CONNECT asking the Commission to support BEUC's call on ERGA given the delayed transposition of the revised AVMSD in Ireland.⁴⁹

2. Closure of the investigation by the European Commission and the CPC-Network

The limited progress made regarding the improvement of the platform's practices and contractual frameworks led BEUC to consider that "more could be done". As explained above, in the second letter to the CPC Network, BEUC had already restated the areas where lack of compliance with EU consumer law was still observed. Moreover, the issue also raised concerns about the effectiveness of the CPC mechanisms.

Pursuant to Article 19 of the CPC Regulation, competent authorities involved in a coordinated action 'shall ensure that investigations and inspections are conducted in an effective, efficient and coordinated manner'⁵⁰ and, where appropriate, they shall set out the outcome of the investigation 'common position' agreed upon among themselves⁵¹ that the coordination shall communicate to the infringing trader.⁵² In the case at stake, the issue did not result in a common position. Instead, the outcome of the investigation has been a 'press release' containing a list of the commitments proposed by the platform.⁵³ The

⁴⁶ Ibid.

⁴⁷ https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-094_consumer_protection_concerns_over_avmsd_implementation_and_enforcement_against_tiktok_and_other_video-sharing_platforms_established_in_ireland.pdf.

⁴⁸ Ibid.

⁴⁹ https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-095_consumer_protection_concerns_over_avmsd_implementation_and_enforcement_against_tiktok_letter_to_g._abbamonte.pdf.

⁵⁰ Article 19(1) CPC Regulation.

⁵¹ Article 19(3) CPC Regulation.

⁵² Article 19(4) CPC Regulation.

⁵³ European Commission, *EU Consumer protection: TikTok commits to align with EU rules to better protect consumers*. Press release, June 21, 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3823.

announcement took place only a few days after BEUC sent the second letter to the CPC Network in June 2022. The European Commission informed about the closure of the investigation sustaining that the ‘series of concerns have now been addressed and TikTok committed to change its practices’.⁵⁴ This could be interpreted as meaning that, for the European Commission and the CPC Network, the actions taken by TikTok following the requests are believed to be satisfactory.

June 2022 – Press release

The handling of the case suggests that the dialogues of the European Commission and the CPC authorities with TikTok are regarded as an adequate response to recurrent violations of data and consumer protection, undermining the significance of the specific mechanisms and powers under the CPC Regulation, such as a common position. When such a common position is reached, and while respecting the rules on confidentiality and on professional and commercial secrecy, the competent authorities involved in a coordinated action shall decide whether to publish the position⁵⁵ as well as the proposed commitments to cease that infringement.⁵⁶ To date, while the press release includes an ‘overview of the main commitments’, the specific actions proposed under the dialogues remain unknown to the public. The dialogue is no equivalent to a common position, legally speaking is even less than a common position.



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According to the European Commission’s press release, these commitments included:

1. The possibility for users to report ads directed at nudging children into ordering certain goods or services;
2. The introduction of a Branded Content policy⁵⁷ that includes the requirement for users to communicate clearly when a commercial relationship exists by incorporating #ad or #sponsored to their content) and the prohibition to advertise certain products or services such as cigarettes, alcohol or sex-related services, among others, with a view to prevent illegal or hidden advertising;
3. A review of content by users with more than 10,000 followers to be in line with community guidelines;
4. The clarification about the purchase and use of ‘coins’, including the estimated price in local currency and the right of withdrawal in line with consumer law requirements;
5. The identification of paid advertising in videos;
6. The possibility for users to report undisclosed branded content.

In the Commission’s view, “[t]he series of concerns have now been addressed and TikTok committed to change its practices”.⁵⁸ This implies that the agreement reached is satisfactory. However, these commitments are largely related to disclosing information rather than to specific actions to counterbalance identified wrongdoings, thereby increasing the perception that transparency requirements are a satisfactory solution whereas in fact serious consumer and data protection violations are at stake. These commitments did not include special protections for minors regarding technical functionalities that prevent them from being profiled for the purpose of advertising. Likewise, they did not involve the establishment of an age-verification mechanism to prohibit children under 13 to have an account on the

⁵⁴ Ibid.

⁵⁵ Cf. Article 19(5) CPC Regulation.

⁵⁶ Article 20(2) CPC Regulation.

⁵⁷ <https://www.tiktok.com/legal/bc-policy?lang=en>.

⁵⁸ European Commission. Press release supra n 53.

platform. Therefore, despite compromises to increase clarity, the problems associated with the treatment of minors by the platform (including its potential manipulation) are not overcome.

Moreover, according to BEUC,⁵⁹ the found solution is incompatible with the 5 key principles of fair advertising to children recently endorsed by consumer and data protection authorities.⁶⁰ Thus, and in line with BEUC's views, we believe that the detected infringements have not been adequately remedied. Besides that, the closure of the investigation and the outcome derived from the dialogue, i.e. the commitments, do not seem to fully exploit the enforcement tools under the CPC Regulation.⁶¹ We will further discuss this issue below.

July 2022 – BEUC addressing EDPB

Following the unsatisfactory response by the European Commission and the CPC authorities with the closure of the investigations, and on the basis of illegal persistent and new developments on TikTok's data protection practices, in July 2022, BEUC turned again to the EDPB calling for action from supervisory authorities to ensure compliance with the GDPR and the e-Privacy Directive by the platform.⁶² BEUC denounced a change in TikTok's privacy policy by which the company would resort to legitimate interests as the legal basis for the lawful collection of personal data for the purposes of surveillance advertising.⁶³ This would potentially breach GDPR's and e-Privacy provisions since the EDPB itself sustained that relying on legitimate interests does not provide a sufficient legal basis for intrusive profiling and tracking practices for advertising and that, in BEUC's view, TikTok does not meet the criteria established by the case law.⁶⁴ This not only does not solve the problem but instead exacerbates the insufficient protection of minors online, as the main users of the platform. BEUC further underlined the disregard for the special protection requirements for children as stated in the GDPR, requiring a 'deep scrutiny and rapid response across the Union to ensure the swift, coherent and consistent application and enforcement of the law'.⁶⁵

July 2022 – Back to the national level

The controversial modification, to be implemented in July 2022, triggered important concerns at national level. The Italian DPA, warned TikTok about the inadequacy and risks of using legitimate interest for personalized advertising that also targets children.⁶⁶ On the same day, the Spanish DPA announced the initiation of ex officio preliminary investigations on the issue.⁶⁷ The announcement of these investigations and warnings led TikTok to the decision to not implement the changes to its terms on the processing of personal data on the basis of legitimate interests.⁶⁸

December 2022 – Letter to DG JUST

Five months after the commitments were announced in the press release, BEUC sent a letter to DG JUST

⁵⁹ BEUC, Investigation into TikTok closed with important questions unresolved - consumers left in the dark. Press Release, June 21, 2022. <https://www.beuc.eu/press-releases/investigation-tiktok-closed-important-questions-unresolved-consumers-left-dark>.

⁶⁰ 5 key principles of fair advertising to children, https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/cooperation-between-consumer-and-data-protection-authorities_en.

⁶¹ See BEUC, An unfinished journey. Consumer groups' experience of CPC external alerts two years on. February 17, 2022. Available at https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-022_cpc_alert_report_an_unfinished_journey.pdf.

⁶² BEUC, Letter to EDPB - Swift and deterring action needed against TikTok's privacy violations (Ref.: BEUC-X-2022-078), July 7, 2022; available at https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-078_letter_to_european_data_protection_board_swift_and_deterring_action_needed_against_tiktoks_privacy_violations.pdf.

⁶³ Ibid.

⁶⁴ Ibid., referring to Case C-40/17 - *Fashion ID*. ECLI:EU:C:2019:629.

⁶⁵ Ibid.

⁶⁶ Garante per la protezione dei dati personali, Tik Tok: Italian SA warns against 'personalised' ads based on legitimate interest. July 12, 2022. Available at: <https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/print/9788342#english>.

⁶⁷ Agencia Española de Protección de Datos, on Twitter: https://twitter.com/aepd_es/status/1546818248301330432.

⁶⁸ <https://www.reuters.com/technology/tiktok-pauses-changes-privacy-policy-targeted-ads-europe-2022-07-12/>.

containing a preliminary assessment of the implementation of TikTok's commitments.⁶⁹ Based on the evaluations, which took place between September and November 2022, it was noted that some of the commitments were only partially implemented (e.g. users cannot yet report undisclosed branded content) and that the contractual framework still infringes consumer law.

THE (UNEXPLOITED) POTENTIAL OF THE CPC AND THE NEED OF CROSS-SECTORAL COORDINATION TO ADDRESS PLATFORMS' MULTIDIMENSIONAL PROBLEMS

1. Considerations regarding the effectiveness of the CPC external alert mechanism

The external alert mechanism set up by the 2017 CPC Regulation is seen as a valuable tool to improve the enforcement of consumer law across Europe. To date, in addition to the external alert on TikTok, BEUC has used this mechanism to request the investigations in 3 other cases (against airlines' practices during the pandemic, Nintendo, and WhatsApp).⁷⁰

The external alert on TikTok provides an informative account of the deficiencies of the CPC system under its current institutional and procedural design.

Lack of Common Position

The coordinated action triggered by BEUC's external alert on TikTok was closed with the publication of a press release by the European Commission.⁷¹ This issue was similar to that of the external alert leading to an investigation of airlines' practices during the pandemic. In that case, the European Commission and the CPC-Network only published a general overview of the commitments, without providing details about the commitments agreed by each airline.⁷² The press release contains a list of the commitments already undertaken by TikTok by June 2022. However, there is no publicly available information of what the originally proposed commitments were. Moreover, the outcome of the case was not even set out in a 'common position'. While drafting a common position is not mandatory,⁷³ it would have allowed a law-based evaluation of the effectiveness of the coordinated action and an assessment whether the commitments were proportionate and sufficient to bring about the cessation of the infringements.⁷⁴

Legality of informal dialogues

As part of the coordinated action on TikTok but also in the coordinated actions on airlines' practices

⁶⁹ BEUC's assessment of the implementation of TikTok commitments following the CPC-Network coordinated action. assessment of the implementation of TikTok commitments following the CPC-Network coordinated action. (BEUC-L-2022-299/UPA/SBE/rs), December 14, 2022.

⁷⁰ BEUC, An unfinished journey. Supra n xx.

⁷¹ See above.

⁷² BEUC, An unfinished journey. Supra n xx.

⁷³ Article 19(3) CPC Regulation read "where appropriate".

⁷⁴ Article 20(3) CPC Regulation.

during the pandemic and on WhatsApp, the European Commission and the CPC-Network launched a ‘dialogue’ with the traders concerned to amend their practices.⁷⁵ It is worth examining whether, under CPC Regulation, the initiation of the dialogue legally requires the existence of a common position. As it currently stands, the CPC Regulation does not formally require the European Commission and the CPC-Network to draft and publish a ‘common position’ following the investigations under the triggered coordinated that follow the external alert. However, while Article 20(1) allows the possibility for the competent authorities to invite the trader to propose within a set time limit commitments to cease that infringement, the provision equally requires that such invitation takes places ‘on the basis of a common position adopted pursuant to Article 19(3)’. The wording suggests that the common position is a precondition for engaging into a dialogue. The absence of a common position casts doubts about the legality of the dialogues and the subsequent commitments agreed thereof.

It has to be recalled that the Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty formalised the commitment procedure and the remedies so as to abolish informal arrangements.⁷⁶ Article 9 Regulation 1/2003 made the commitments decisions binding and provided the basis for introducing rules on the monitoring of commitment decisions,⁷⁷ if not of the European Commission itself then through consultancy firms who acted on behalf of the European Commission.⁷⁸ Even in competition law there is room for agreements outside the Regulation 1/2003 prior to the initiation of official proceedings or if on the basis of a complaint from a competitor the accused company agrees to abolish illegal practices.

However, this was not the case in TikTok. The procedure was set into motion through the alert of BEUC. There was no room for agreements before the beginning of the investigation. Therefore, the Member States and the European Commission should have followed the rules foreseen in the CPC Regulation. This would have meant to elaborate a common position under the lead of the competent supervisory authorities, to ensure compliance via commitments and to decide whether or not the common position and the commitment of the company should be made public.

Insufficient information

During the investigations triggered following the external alerts, BEUC and its members were informed only informally about the status of the investigations.

This is the direct result of a legal mechanism which grants consumer organisations the power to send out an alert without having any possibility foreseen in the Regulation to push the CPC network into action and to learn about the outcome of the ‘dialogue’ with the CPC network and the company concerned.

The envisaged revision should take the experience gained in the field of competition law as a blueprint for action. There is an urgent need to abolish ‘informal arrangements’ and in turn to strengthen the role and function of the commitment. Similar to Regulation 1/2013 the commitment decisions should be made binding and – at least to some extent and while respecting confidentiality – made publicly available.



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There is an urgent need to abolish ‘informal arrangements’ and in turn to strengthen the role and function of the commitment.

⁷⁵ Article 20(1) CPC Regulation. See also <https://portal.ieu-monitoring.com/editorial/eu-commission-and-national-consumer-protection-authorities-launch-dialogue-with-tiktok>.

⁷⁶ Wils, P. J. W. (2006), ‘Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003’, 29 *World Competition*, Issue 3, 345-366.

⁷⁷ Schweitzer, H. (2008). Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law. *EUJ Working Papers LAW No. 2008/22*.

⁷⁸ Dunne, N. (2014). Commitment decisions in EU competition law. *Journal of Competition Law and Economics*, 10(2), 399-444.

Lack of remedial commitments

Pursuant to Article 21 of the CPC Regulation, the relevant authorities involved in the coordinated effort must take any necessary legal actions within their jurisdiction against the trader responsible for the widespread infringement or infringement with a Union dimension, in order to cease or to prohibit the infringement, including the possibility of imposing fines. To date, no competent authority following BEUC's external alert on TikTok has taken enforcement action under Article 21 CPC Regulation against the identified practices.

Under the same provision, regulatory authorities may receive voluntary proposals from traders for additional remedial commitments to compensate consumers affected by an alleged widespread violation or may request such measures if deemed appropriate. In the case at hand, no remedial commitments had been offered by TikTok. The set of commitments, agreed with the European Commission and made public in the press release, did not contain any remedial commitments for the benefit of consumers that have been affected by the infringements.

The CPC Regulation lacks clear cut guidance on the content of the commitments, on the monitoring and surveillance of the compliance with the commitments and on the eventual publication of the commitment. Here the respective rules on the commitment procedure in the Regulation 1/2003 on competition enforcement should serve as a source of inspiration for the further development of the CPC network.

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The CPC Regulation lacks clear cut guidance on the content of the commitments, on the monitoring and surveillance of the compliance with the commitments and on the eventual publication of the commitments.

2. Unsatisfactory cross-border enforcement

The situation is further complicated due to the cross-border nature of online services where the activities of various national enforcement authorities must be coordinated, let alone the fact that set up and powers of national enforcement authorities vary considerably across the EU.

On the one hand, there are horizontal consumer protection rules such as Unfair Contract Terms Directive, Unfair Commercial Practices Directive and the Consumer Rights Directive. On the other, there are more specific rules that apply due to the nature of the services provided (GDPR, AVMSD or the DSA). **Each of these rules provides for different available enforcement mechanisms but also different understandings of enforcement itself (e.g. CPC for consumer law enforcement and GDPR mechanisms for data protection enforcement). Naturally, the more applicable rules there are, the more frictions. The TikTok's example demonstrates that one and the same business practices may fall into the realm of consumer laws, data protection law, e-commerce law and audiovisual law at the same time. But even within consumer law, national enforcement authorities may choose to mobilise either unfair terms or unfair commercial practices legislation against the identical business practices. The choice is determined by path dependency, familiarity, and long-standing experience in the application of the respective consumer laws.⁷⁹**

The practical difficulties are well demonstrated in the struggle over the competence on enforcement of data protection law. The game changer is TikTok's decision to move its headquarters to Ireland. As long

⁷⁹ Cafaggi, F., & Micklitz, H. W. (2009) (eds), *New frontiers of consumer protection. The Interplay Between Private and Public Enforcement*. Intersentia.

as TikTok had not headquarter in Europe, the national data protection authorities remained competent. When TikTok moved its headquarters to Ireland, the enforcement scenario changed and competence allocation under the GDPR came into effect. The results from the investigation resulting in a fine imposed on TikTok by the Dutch DPA in 2021 for violating children’s privacy, were transferred to the Irish DPA.⁸⁰ On request of the Italian DPA in early 2020,⁸¹ the EDPB decided in June 2020 to establish a “TikTok Taskforce” in order to identify and coordinate of the platform’s processing and practices across the EU.⁸² By mid-2021, the work of the taskforce was seemingly halted, coinciding with the Irish DPA takeover following TikTok’s base establishment in Dublin in 2018. Based on an exchange between the EDPB and TikTok in February 2021, it can be concluded that the investigations under the taskforce were supposed to be confidential.⁸³

The next uncertainty comes up in relation to the AVMSD. Here the ‘country of origin principle’ also applies. This means that, in the case of TikTok, the Irish law is applicable, as TikTok moved its headquarter to Ireland. Article 28b of the revised AVMSD aims at preventing minors from user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development. Until the enactment of the Online Safety and Media Regulation Act in December 2022, Ireland had not transposed the revised AVMSD, which added provisions applicable to video-sharing platforms services, including Article 28b. Therefore, pending implementation, the Irish Broadcasting Authority cannot yet oversee compliance with that provision. Does the non-implementation prevent national authorities from taking action? Does the Directive unfold effects prior to its transposition and what about state liability under the Francovich doctrine?⁸⁴

In sum, there are different points of friction and different applicable rules for the protection of the non-exclusionary categories of consumers, data subjects, and minors. **TikTok remains lawfully providing services in the EU provided that, to date, no authority has effectively managed to sanction the platform for the identified wrongdoings.** Despite the manifold authorities watching over online practices, none of the available mechanisms appeared to be effectively used in a way that is conducive to meet the regulatory objectives of consumer protection.⁸⁵

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There are different points of friction and different applicable rules for the protection of the non-exclusionary categories of consumers, data subjects, and minors.

⁸⁰ https://edpb.europa.eu/news/national-news/2021/dutch-dpa-tiktok-fined-violating-childrens-privacy_en.

⁸¹ <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9249681>.

⁸² https://edpb.europa.eu/news/news/2020/thirty-first-plenary-session-establishment-taskforce-tiktok-response-meps-use_en.

⁸³ EDPB, Response to TikTok (Ref: OUT2021-0017) on February 2, 2021, available at https://edpb.europa.eu/sites/default/files/files/file1/edpb_response_to_tiktok_letter_on_confidentiality_breach.pdf. Interestingly, this exchange was available following a request for access to documents, see: https://www.asktheeu.org/en/request/exchange_between_edpb_and_tiktok.

⁸⁴ Judgment of the Court of 19 November 1991. - Andrea Francovich and Danila Bonifaci and others v Italian Republic. - References for a preliminary ruling: Pretura di Vicenza and Pretura di Bassano del Grappa - Italy. - Failure to implement a directive - Liability of the Member State. - Joined cases C-6/90 and C-9/90 European Court reports 1991 Page I-05357

⁸⁵ In his Opinion in Case C-252/21, AG Rantos notes the lack of clear rules on cooperation mechanisms (see para. 29).

CONCLUSIONS

Almost two years after the launching of the external alert, TikTok continues to infringe EU law. TikTok's experience illustrates that despite the existence of different enforcement networks, the lack of deterrence of the CPC-Network, the country of origin in the AVMSD and the one-stop-shop mechanism under the GDPR prevent effective action -especially at national level since enforcement was transferred to Ireland. **Yet, the recollection of facts shows that the CPC Regulation can work as an effective tool against widespread infringements: several complaints were made, available mechanisms were triggered, and manifold authorities took part in the investigations, yet some important limitations were observed.** First, violations were seemingly redeemed on the basis of close doors dialogues and loose commitments that did not address the main issues that triggered the investigations in the first place, sidestepping the established procedures for enforcing consumer protection law. And second, the procedure concluded without the imposition of deterrent fines or adequate remedies for aggravated consumers. Thus, under the current procedural rules the coordination-based approach of the CPC Regulation seems merely *performative*. To better exploit their potential, the BEUC has laid down its position on the deficiencies of the CPC Regulation and the CPC Network and provided for a series of recommendations in the ongoing reform process.⁸⁶ TikTok's example underscores the need to formalise the negotiations under Article 20(1) of the CPC Regulation. This lesson can be learned from similar developments in competition law enforcement.

⁸⁶ Strengthening the coordinated enforcement of consumer protection rules. The revision of the Consumer Protection Coordination (CPC) Regulation, available at https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135_Strengthening_the_coordinated_enforcement_of_consumer_protection_rules.pdf.



Published in February 2023 by BEUC



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Co-funded by the European Union