

European Data Protection Board

Re: Intervening in TikTok's upcoming changes to personalised advertising settings in the EEA, UK, and Switzerland

We, Access Now, are writing to you regarding TikTok's announced changes to personalised advertising in the EEA, UK, and Switzerland set to take effect on 13 July 2022.¹ We call on members of the European Data Protection Board to use their powers, including by making use of the urgency procedure under the General Data Protection Regulation, to prevent TikTok from implementing the announced changes.

As a global organisation with the mission to defend and extend human rights in the digital age, we seek to advance robust, rights-respecting, and user-centric data protection policies and frameworks. TikTok's proposed changes to personalised advertising settings stand at odds with data protection and privacy principles.

TikTok seeks to change the legal basis for the serving of personalised ads to people over the age of 18. The announcement reads as follows:

“Historically, TikTok asked you for your “consent” to use your on-TikTok activity and off-TikTok activity to serve you personalised ads. From 13 July 2022 TikTok will rely on its “legitimate interests” as its legal basis to use on-TikTok activity to personalise the ads of users who are 18 or over.”

In practice, this means that TikTok users who previously did not consent to personalised ads will now receive such ads based on their on-TikTok activity collected on or after 13 July 2022.

It is questionable whether the mechanism put in place by TikTok to obtain people’s consent is valid under the General Data Protection Regulation and it should be investigated. Yet, we believe that TikTok's announced changes are in conflict with several measures established in the ePrivacy Directive, the General Data Protection Regulation, and the soon-to-be adopted Digital Services Act.

We call on members of the EDPB to take urgent actions to prevent TikTok from implementing the announced changes:

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- **Individual national supervisory authorities members of the EDPB: make use of the urgency procedure and immediately adopt provisional measures to ask TikTok to not proceed with the announced changes pursuant Article 66.1 of the GDPR.**

¹ <https://www.tiktok.com/legal/changes-to-personalised-advertising-in-the-eea?lang=en>

- **Relevant national supervisory authority, following up on the use of powers under Article 66.1: request an urgent binding decision from the Board pursuant Article 66.2 of the GDPR.**
 - Regarding possible issues with compliance of the announced changes with the GDPR, we point to the EDPB Guidelines on consent which indicates:
*“the controller **cannot swap from consent to other lawful bases**. For example, it is not allowed to **retrospectively utilise the legitimate interest basis in order to justify processing, where problems have been encountered with the validity of consent**. Because of the requirement to disclose the lawful basis, which the controller is relying upon at the time of collection of personal data, controllers must have decided in advance of collection what the applicable lawful basis is.”²*
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- **Members of the EDPB: request information from TikTok on what assessment it has conducted to determine that, in its opinion, it can rely on legitimate interest as a valid legal basis to serve personalised ads.**
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- **National supervisory authorities: urgently take any additional and complementary actions to ensure TikTok's compliance with the ePrivacy Directive.**
 - **It is unclear how TikTok would technically be able to deliver personalised ads without storing information or gaining access to information stored in a users' phone or computer. As a result, this raises questions as to how TikTok complies with Article 5.3 ePrivacy and how users can refuse such a processing.** Relatedly, it is also unclear how TikTok could rely on other legal basis than consent.
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We look forward to the members of the EDPB and the Board acting quickly to address this matter. The changes announced by TikTok are not only relevant for this platform but for the whole industry serving personalised ads. At a time where the legislators are taking additional steps to regulate these activities, regulators must act to prevent changes that seek to limit people's privacy and data protection rights.

Finally, we inform you that we also wrote to TikTok today to ask the companies' questions regarding its legal assessments of the announced changes.

Sincerely,

Estelle Massé, Global Data Protection Lead, Access Now

estelle@accessnow.org

Isedua Oribhabor, Business and Human Rights Lead, Access Now

isedua@accessnow.org

² https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf