

**Subject: Comments on the draft template related to the audited description of consumer profiling techniques required by Article 15 of Regulation (EU) 2022/1925.**

Dear European Commission DMA Team,

BEUC welcomes the opportunity to comment on the draft template relating to the audited description of consumer profiling techniques required by Article 15 of Regulation (EU) 2022/1925 ("DMA") (hereinafter referred to as "the Template").

The content of the audited description of consumer profiling techniques, as well as the non-confidential overview, will be important instruments to ensure effective compliance by the gatekeepers with their obligations under the DMA.

Ensuring a high-quality description of profiling techniques is necessary to achieve the objectives of the DMA, including choice for end users in digital markets. Gatekeepers' profiling techniques and practices can contribute to further entrenching their position in the market as they have a significantly larger pool of data to profile consumers in a sophisticated and intrusive manner. At the same time, they can exacerbate and exploit consumers' vulnerabilities.

We therefore **welcome the scope** of the data and information requested under the Template. In enforcing the DMA, it will be essential for the Commission to understand both how and why the gatekeepers use profiling techniques on consumers.

**We also welcome the following aspects of the Template:**

- That the Template can be updated with further information that the gatekeepers are required to provide.
- That the gatekeepers should provide the name of each individual that took part in the drafting of the report, whether internally or as an external expert (Section 1.2). This should also cover the names of the members of the team conducting the external audit (Section 3.1). This will enable the use of Article 22 DMA interviews where appropriate.

However, in order to effectively meet the DMA's legislative objectives, and in particular the objectives set out in Recital 72 DMA, including the stated aim of "enhancing transparency and accountability regarding gatekeepers' profiling techniques as well as facilitating fairness and contestability of respective core platform services" it would be essential to make some amendments to the Template by way of important additions and clarifications.

.../...

**The following additions should be made to the Template:**

- **Section 2.1. (h)** should, in addition, specify that gatekeepers should report on the specific measures taken to ensure that any automated decision-making processes do not negatively affect the rights of consumers in relation to profiling, including by reporting on the specific measures taken to safeguard the user's rights and freedoms
- **Section 2.1 (k)** should require a **detailed** description, including screenshots (i.e. click-by-click) of each step the gatekeeper requires a consumer to go through to give, refuse or withdraw consent, including the wording presented to the consumer in each of these steps.

For the withdrawal process, the Template should require a description of the consumer journey from the point of the consumer's opening the app/webpage or similar to demonstrate where (and how easily) the consumer can find this option.

This provision should also require the description of any A/B testing or other testing that the gatekeeper has conducted or is conducting regarding the consent process.

The gatekeeper should demonstrate that it is not using any interface design or other techniques prohibited by Article 13 (4), (5) and (6) DMA and should detail how it fulfils the principles of protection by design and by default as required by Article 25 of Regulation (EU) 2016/679 ("the GDPR").

The detailed description should be provided both for data obtained directly from the data subject by the gatekeeper (first party data) as well as for third party data obtained by the gatekeeper from third parties.

- **Section 2.1 (l)** should also, in furtherance of the transparency required by Recital 72 in relation to the impact of such profiling on the gatekeeper's services, include how many consumers have chosen the non-profiling option given under Article 38 Digital Services Act ("the DSA").<sup>1</sup>
- **Section 2.1** should require the gatekeeper to provide information on its consumer information requests and complaints procedures in relation to consent withdrawal.
- **Section 2.1** should require the gatekeeper to provide information on any findings of breaches of EU or national data protection laws, of any laws or guidance on consumer profiling or any advertising laws or guidance.
- **Section 2.1** should also require the gatekeeper to provide information on where data relating to consumers is stored and whether any data-silo obligations have been imposed on the gatekeeper.
- Finally, **Section 2.1** should require the gatekeeper to provide a list of all third parties that may be involved in the collection or processing of personal data on behalf of the gatekeeper, and the precise activities carried out by these parties.
- **Sections 4.1 and 4.2** should refer to a "**detailed** description of the audit procedures performed by the independent auditor..." and "**detailed** description of the information relied on..." respectively, in line with Section 4.3.
- A named individual could be added for the declaration in **Section 7**.

**Some points in the Template should be clarified:**

- **Section 2.1** should be clarified in the opening paragraph to ensure that there is no ambiguity on how the information is to be presented in relation to the subsections of 2.1 by the addition of the word "Provide **separately** for each Core Platform Service..."
- **Section 2.1** should clarify that personal data also includes pseudonymised data, in accordance with Recital 26 of Regulation the GDPR.
- **Section 2.1 (b)** should clarify that gatekeepers should indicate if they process special categories of personal data pursuant to Article 9 of the GDPR for profiling purposes and the valid legal basis for it. In addition, if gatekeepers claim to rely on legitimate interest for the application of profiling practices, they must be required to provide information inter alia on the specific data processing, the criteria for weighting interests, the supporting arguments for the result of the weighting of interests and the modalities

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<sup>1</sup> Regulation (EU) 2022/2065.

offered to users to object to the processing in line with the GDPR and the European Data Protection Board's guidelines, including on automated decision-making and profiling.<sup>2</sup>

- **In Section 2.1 (c)** it would be important to include how the personal data of consumers are used across different services and on what legal basis. Section 2.1(c) could also benefit from more clarity regarding personal data originating from third parties. We recommend having a separate point on third-party data, covering where each category of personal data comes from, the legal basis on which it was obtained by the gatekeeper, where, how and by whom the consumer's consent for sharing this data was obtained.
- **Section 2.1 (f)** should be clarified to cover not only technical safeguards undertaken to avoid display of advertisements based on profiling of minors and children but should also refer to safeguards against profiling based on special categories of data as per Article 26(3) DSA.
- **Section 3** could clarify that any relationship between the auditor and the gatekeeper, including indirect, past and planned relationships, must be specified.
- The phrasing of the first sentence of **Sections 4.1, 5.1, and 6.1** of the Template could be considered unclear as there is no requesting verb. In line with other sections of the Template (and with the Compliance Report Template), the word "provide" could be added at the start of the first sentence of those sections.
- Throughout the Template, the term "profiling technique(s)" is used. The DMA itself refers to both "techniques for profiling" and "profiling practices".<sup>3</sup> The Template should clarify that all references to "profiling techniques" should be understood as also referring to "profiling practices" as used in Recital 72 DMA to ensure that profiling techniques also include practices including, but not limited to, profiling within the meaning of Article 4, point (4), of Regulation (EU) 2016/679.

#### **As regards the non-confidential overview in Section 6:**

The level of detail provided in the non-confidential overview will be critical to enable third parties to provide meaningful input to the Commission on gatekeepers' compliance with their DMA obligations. To that end:

- Section 6.1 should require "a **detailed**, clear, and comprehensive non-confidential overview". The phrasing would then be in line with the wording of Section 4.1 of the Compliance Report Template.<sup>4</sup>
- It will be particularly important for the non-confidential overviews to contain sufficient details in relation to Sections 2, 4, and 5 of the Template. The wording of the information covered by the non-confidential overview in Section 6.1 of the Template should therefore be clarified accordingly as it could be interpreted narrowly. It should explicitly cover detailed information for Sections 2, 4, and 5.
- In addition, Section 6 of the Template should also contain the sentence "The non-confidential summary must enable third parties to provide meaningful input to the Commission on the gatekeeper's compliance with its obligations under Regulation (EU) 2022/1925", as was included in Section 4.1 of the Compliance Report Template.
- Section 6 of the Template should further clarify how the information contained in the non-confidential overview should be presented. In line with Section 4 of the Compliance Report Template, Section 6 of the present Template should require that the overview comprise self-standing texts that give a faithful comprehensive and meaningful picture of the audited description of consumer profiling techniques, and that it should follow the same structure as that audited description, all headings should be visible and all sections and sub-sections should be covered.

<sup>2</sup> Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, available at [https://edpb.europa.eu/our-work-tools/our-documents/guidelines/automated-decision-making-and-profiling\\_en](https://edpb.europa.eu/our-work-tools/our-documents/guidelines/automated-decision-making-and-profiling_en). In this sense, it is important to note "it would be difficult for controllers to justify using legitimate interests as a lawful basis for intrusive profiling and tracking practices for marketing or advertising purposes, for example those that involve tracking individuals across multiple websites, locations, devices, services or data-brokering" (p. 15 of the Guidelines).

<sup>3</sup> The term "profiling practices" is only used once in Recital 72 of the DMA. Notably, the Recital defines it broadly as 'including but not limited to' profiling within the definition of Article 4(4) GDPR.

<sup>4</sup> Template for Reporting Pursuant to Article 11 of Regulation (EU) 2022/1925 (Digital Markets Act) (referred to as "Compliance Report Template"), available at [https://digital-markets-act.ec.europa.eu/consultations/consultation-template-compliance-report\\_en](https://digital-markets-act.ec.europa.eu/consultations/consultation-template-compliance-report_en).

- The independent auditor should assess and report on whether the non-confidential overview gives this faithful, comprehensive, meaningful picture of the audited description of consumer profiling techniques.
- Our experience in competition cases has shown that companies can be prone to inappropriate and unjustified confidentiality claims. These can lead to both delay in the ability of third parties to comment and undermine the value of their comments. This must be prevented in relation to the audited description of consumer profiling techniques. The Commission could consider how best to achieve this. Similar processes could be envisaged to those set out in Article 7(4)-(6) DMA Implementing Regulation.
- The Commission should consider whether gatekeepers and third parties, including civil society organisations, could agree to a disclosure process in the case of confidentiality disputes, potentially based on the procedures of Article 8 DMA Implementing Regulation.
- The Template should specify where and how the overviews are to be published, to avoid that gatekeepers bury them somewhere deep in a hidden section of their websites. The published overview should also make a clear and complete reference to Article 15 DMA so that it can be found by using a search engine.

Yours sincerely,

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