TikTok

15 September 2023

TikTok's response to the European Commission's consultation on the draft template relating to the reporting on consumer profiling techniques

This document outlines TikTok Technology Limited ("**TikTok**")'s response to the European Commission's consultation on the draft template (the "**Template**") relating to the reporting on consumer profiling techniques and audit of such reports that designated gatekeepers will have to submit annually under Article 15 of the Digital Markets Act ("**DMA**").

We appreciate the European Commission's efforts to bring additional clarity on the reporting and audit obligation contained in Article 15 DMA and welcome the opportunity to provide comments on the Template.

Article 15 DMA provides that a gatekeeper shall "*submit to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services listed in the designation decision pursuant to Article 3(9).*" Recital 72 DMA clarifies that the aim of the reporting obligation is to ensure an "*adequate level of transparency of profiling practices*" in order to facilitate "*contestability of core platform services*", including by allowing rivals to compete based on superior privacy guarantees. Recital 72 defines the meaning of profiling by reference to Article 4(4) of Regulation 2016/679 ("**GDPR**"), and sets out the kinds of information gatekeepers need to provide to ensure the effectiveness of the transparency obligation.

The Template takes the form of an implementing act pursuant to Articles 15(2) and 46(1)(g) of the DMA, with the aim to *"develop the methodology and procedure of the audited description of techniques used for profiling of consumers provided for in Article 15(1)."* The Template should be limited to *implementing* these provisions, as further clarified in Recital 72 DMA, and lacks any legal basis for *modifying* the DMA's requirements, or *expanding* their content. In addition, the Template should ensure a proportionate application of the DMA, in line with general EU law principles and Recital 107 DMA. We believe that certain aspects of the Template as currently drafted would exceed the mandate given by the DMA, for example by going beyond developing the methodology and procedure as the DMA requires, introducing requirements which supplement (or in certain cases contradict) the language of the DMA, or proposing certain approaches which would not further the stated purpose of Article 15 DMA, which Recital 72 DMA clarifies is to facilitate contestability through enhanced transparency.

The reporting obligation contained in Article 15 DMA should also be read in its wider regulatory context. TikTok is subject to several data, privacy, and consumer protection provisions, including those enshrined in the GDPR, Directive 2002/58/EC ("**ePrivacy Directive**"), and the Digital Services Act ("**DSA**"). To the extent TikTok relies on any profiling techniques to offer its services to consumers or businesses in the EU, it already complies with these laws and provides significant transparency as part of its compliance with such rules. In addition, beyond those regulatory provisions to which TikTok is subject, TikTok is engaging voluntarily and constructively with the European Commission, supervisory authorities, and industry and consumer organisations to better empower consumers to make effective choices regarding services based on profiling. We believe it is particularly important that the Template is aligned with the overlapping regulatory regimes and parallel enforcement efforts by competent regulatory bodies to minimise duplication, ensure alignment and have a consistent interpretation.

Our comments focus on the areas where the Template creates discrepancies or duplication with other regimes, extends the reporting obligation outside of the scope of the DMA and/or beyond its legal basis, or creates a disproportionate burden on the reporting companies that does not serve the stated purpose of the reporting obligation or the DMA as a whole.

Reporting obligation only applies to designated core platform services

Section 2.1 of the Template suggests that the reporting obligation may apply to the use of profiling techniques outside of designated core platform services ("*detailed description of all the consumer profiling techniques applied within the core platform service and across multiple core platform services*").

This appears to be inconsistent with Article 15 DMA that limits the reporting obligation to "*any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services listed in the designation decision pursuant to Article 3(9)*" (emphasis added). Any reporting obligation outside of designated core platform services, would be disproportionate as it would not further the objective stated in Recital 72 of increasing transparency in relation to core platform services that lack contestability.

We recommend making the Template consistent with Article 15 DMA and specify that the reporting obligation only relates to core platform services listed in the designation decision pursuant to Article 3(9) DMA.

Breadth of the data to be disclosed should be limited to "main data parameters"

Sections 2.1(c) and (d) of the Template extend the reporting obligation to a breadth of data that Article 15 DMA and Recital 72 were not meant to capture. The obligation as interpreted by the Template risks making the reporting obligation unworkable, would undermine the stated objectives of the DMA and is disproportionate.

A. Exceeds the language of the DMA

Article 15 DMA obliges gatekeepers to disclose the "*techniques for profiling of consumers*" (emphasis added). This must be understood as providing an insight into the manner in which consumers are profiled and the ways in which this is done. This should not be interpreted as an obligation to set out detailed information in relation to every category of data used in, or

inferred from, profiling of consumers but rather as a focus on the processing techniques themselves.

Recital 72 refers to the GDPR for the definition of profiling as "*any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person*" and states that gatekeepers need to at least provide "*whether personal data and data derived from user activity in line with Regulation (EU) 2016/679 is relied on*" (emphasis added). Recital 72 does not provide a basis to oblige gatekeepers to disclose all underlying categories of data that are used to profile consumers.

Sections 2.1(c) and (d) of the Template go beyond the language of Article 15 DMA and the specification in Recital 72 as it compels gatekeepers to disclose detailed lists describing each category of personal data and data derived from user activity, the source of this data, and a detailed description of the inferred data.

B. Contrary to the objectives of the DMA and the principle of proportionality

The requirements to disclose categories of data as set out in Sections 2.1(c) and (d) of the Template are not conducive to achieving the goal of the Article 15 reporting obligation.

As set out above, the goal as described in Recital 72 is to create transparency on profiling in order to inform consumers and enable privacy to become a parameter of competition by rivals. A reporting obligation that requires an expansive disclosure of underlying data points instead of focusing on the processing techniques used does not achieve this goal. By focusing on the detailed categories of data used, which in themselves are not informative of the way in which they are used, would in fact have the opposite effect. Overloading information would lead to obfuscating any insights on profiling techniques and would therefore not be to the benefit of consumers or competing businesses. The goals as described in Recital 72 are more likely to be met if the reporting consists of clear and concise information that is of most use to lay consumers.

Given that the requirements in the i) Template exceed the scope of Article 15 DMA and Recital 72, ii) do not further the stated objectives of the DMA as they would not benefit the Commission, users or competing businesses, and iii) entail an excessive burden on the reporting companies, the Template is in breach of the principle of proportionality.

C. Recommendation: the reporting obligation should be limited to "main data parameters"

Instead, we suggest limiting the disclosure obligation to "main data parameters" in line with reporting obligations in Articles 26 and 27 of the DSA (on and display advertising and recommender systems). Aligning reporting obligations in the Template with gatekeepers' obligations under other EU legislation will prevent unnecessary duplication for gatekeepers, avoid confusion of interpretation, and ensure administrative efficiency for the Commission.

Reporting should not relate to retention duration of categories of data

Section 2.1(e) of the Template states that gatekeepers should provide information on "*the retention duration of each category of data and personal data listed in points c) and d) and of the profiling itself*" (emphasis added).

While the Recital 72 specifies that gatekeepers should detail the duration of consumer profiling, it does not specify that gatekeepers should provide information about how long data is retained for. Requiring information about how long data is retained for is therefore outside the scope of Article 15 DMA. Furthermore, it is not clear how information about data retention relates to the Commission's goals of understanding the consumer profiling techniques of gatekeepers. Additionally, rules governing data retention stem from a wider legal framework and generally data retention periods are not linked solely to profiling activities. The retention period for a relevant category of data may, therefore, be based on the requirements of processing purposes other than the profiling activities, for example, compliance with a legal obligation.

We recommend limiting Section 2.1(e) of the Template to the "duration of consumer profiling".

Reporting should not extend beyond "impact" of consumer profiling

Section 2.1(i) of the Template requires that the gatekeeper provides information about the *"qualitative and quantitative impact or importance of the profiling techniques in question for the business operations of the gatekeeper"* (emphasis added). This extends the scope of the reporting obligation beyond Recital 72 which refers to a description of the "*the impact of such profiling on the gatekeeper's services*". The importance of profiling is an inherently subjective assessment based on forward-looking strategy considerations of the gatekeeper. Such assessment is necessarily sensitive commercial information that could not be disclosed to rivals that aim to compete on privacy parameters. Its subjective nature makes an audit devoid of purpose.

We recommend the reference to "importance" be removed from the Template.

Section 2.1(l) of the Template requires provision of "*statistics on how many consumers choose to undergo profiling if they are given a choice*." It is not clear how this information would assist the Commission with understanding the profiling techniques used, or indeed how it would assist with ensuring adequate levels of transparency of profiling practices employed by gatekeepers. Rather, this would require gatekeepers to provide broad-brush statistical information about their consumers, with no clear link as to how these relate to the gatekeeper's specific profiling techniques. Such information is outside the scope of Article 15 DMA, is likely to be highly subjective and commercially sensitive, goes beyond the type of information envisaged for audits, and, as such, is unlikely to be particularly informative for consumers or competing businesses.

We recommend Section 2.1(l) to be removed from the Template.

Consistency should be ensured with DSA minor safety provisions

Section 2.1(f) of the Template requires gatekeepers to report on the technical safeguards in place to avoid the presentation of advertisements on the gatekeeper's interface based on profiling of minors or children.

TikTok is deeply committed to ensuring that it provides a safe and positive experience for people under the age of 18. We apply age limitations and do not allow content that may put young people at risk of exploitation, or psychological, physical, or developmental harm. We

take several steps to provide young people with an experience that is developmentally appropriate and helps to ensure a safe space for self-exploration.[1]

Section 2.1(f) of the Template would, however, duplicate the robust regime already provided by the DSA and arguably goes beyond the scope of the DMA. Minor safety and the online protection of children is a clear objective of the DSA and is referenced consistently throughout. Section 2.1(f) of the Template overlaps with Article 28(2) of the DSA, which states that "*providers of online platforms shall not present advertisements on their interface based on profiling...using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor.*"

As providers of online platforms are subject to audits in connection with the DSA, the requirement to provide the information contained in Section 2.1(f) of the Template effectively duplicates the obligations under the DSA to provide information about the steps it takes to prevent the presenting of advertisements based on profiling of minors.

Under the DSA, providers of online platforms are also expressly required to: (i) conduct risk assessments which address any actual or foreseeable negative effects on minors (Article 34(1)(d) DSA); and (ii) put in place measures to mitigate the risks identified within its risk assessments, including targeted measures to protect the rights of the child (Article 35(1)(j) DSA). Providers of online platforms are required to make public a non-confidential report which outlines the results of these risk assessments. Therefore, the DSA achieves the objective stated in Recital 72 to *ensure an adequate level of transparency of profiling practices*.

While Recital 38 DMA acknowledges that *children merit specific protection with regard to their personal data* and that *the protection of children online is an important objective,* this is the only express reference to the protection of minors and children within the DMA. However, the Template brings the measures gatekeepers have in place to protect minors and children online within the application and enforcement of the DMA.

We suggest deleting this section from the Template on the basis that the substance of the obligations are covered by the terms of the DSA (noting the DSA also contains its own audit requirements), which is intended to complement the DMA. It is not proportionate to duplicate the substance of these obligations and make those subject to two separate audits at a different point in time. The DSA also contains various measures to ensure transparency of information.

Alternative measures to profiling

Sections 2.1(n) and 2.1(o) of the Template require gatekeepers to disclose information about alternative measures to profiling that have either been implemented, or considered but not implemented.

The Template indicates the purpose of this inclusion is to enable an assessment about "*whether gatekeepers have considered less intrusive measures*" to profiling and notes such information "*is particularly informative in terms of accountability*."

Requiring disclosure of information about alternatives to profiling goes beyond the language of Article 15 DMA and the specification in Recital 72. In addition, this information is unlikely to assist in achieving the Commission's objective of ensuring a greater level of transparency

[1] https://www.tiktok.com/community-guidelines/en/youth-safety/

regarding the profiling techniques that have actually been implemented by the gatekeeper (particularly Section 2.1(o) which requires disclosure of alternatives to profiling that have been considered, but not implemented).

On that basis, and bearing in mind the related obligations under the DSA, we suggest deleting both of these sections from the Template. At a minimum, the Commission may seek to provide further guidance on Section 2.1(o) of the Template. In particular, the relevant threshold for the term "considering" as this will have a significant impact on what level of disclosure is required. If the objective of the audits is to provide greater transparency to users about profiling practices implemented by gatekeepers, the proposed additional disclosure risks diverting users' understanding of the profiling practices actually implemented by the gatekeeper. This may undermine a users' ability to make informed decisions.

Auditing

Section 3.1(b) of the Template requires gatekeepers to provide an overview of the professional qualifications, including domains of expertise and certifications for each member of the auditing team. These requirements are excessive and go beyond what information is requested under the DSA. We note that the risk is on the gatekeeper to ensure an effective audit (and therefore, should be up to the relevant gatekeeper to define). This is also an onerous requirement for auditors themselves and is likely to limit competition for this work. We would suggest deleting this section from the Template. Alternatively, this section should be limited to requiring information about the expertise and qualifications of the auditing firm as a whole (rather than the individual members of the audit team).

Sections 4.2 and 4.3 of the Template require an overview of the information relied upon as audit evidence, as well as a detailed description of data sources of potential relevance that were not included within the scope of the audit, to be included in the audited description.

As a general point, it is not clear how auditors can provide definitive conclusions over the completeness and accuracy of the information in the description. Instead, the Commission should make clear that conclusions with respect to the completeness and accuracy of information are based on an assessment of the system of internal governance and controls that underpins the information, specifically their design and operational effectiveness.

Section 4.2(b) and (c) of the Template requires gatekeepers to specify the observed period(s) which is subject to the audit into profiling techniques and the period when the audit was conducted. There is a risk that some audits will be approached as a point in time, while others will be approached as through the period. In order to ensure the Commission receives audited descriptions which are consistent, the Commission should specify the relevant time period to which these audits should relate. Failure to do so will mean the Commission receives audited descriptions which do not allow the Commission to compare the approach taken by gatekeepers in any meaningful way.

We recommend that, for the first audit, the Commission specify that it be a point in time audit on a nominated date. This will put gatekeepers in a better position to provide the initial audited description in March 2024, and allow sufficient time for the gatekeepers to set up their underlying system of controls. We note there is precedent for choosing a point in time assessment for the first year of operation of an entity's controls.

Section 5.1 of the Template allows for the audit assessment to be "positive", "positive with comments" or "negative". This reporting approach is not aligned with international assurance standards and unfamiliar to audit practitioners. There is a risk that audit providers will reach different conclusions about when to use a positive with comments versus a negative and so on, thereby reducing consistency across the audits and their usefulness to the Commission. We suggest that a reporting framework underpinned by international assurance standards is more likely to promote consistency, while also facilitating audit opinions that fairly reflect the underlying level of compliance within a gatekeeper, as well as areas for enhancement.

The timing of the first audit presents difficulties for both auditors and gatekeepers. Following their designation on 6 September 2023, gatekeepers have six months to submit their audited description to the Commission. It remains unclear what the timing requirement is regarding publication of the overview of the audited description.

There is a substantial amount of preparatory work that needs to take place prior to the preparation of an audit report. This includes (i) running an RFP; (ii) identifying and engaging an audit provider that is independent and sufficiently qualified; and (iii) developing an audit approach and engagement plan (which involves an assessment of the gatekeeper's internal systems).

The current timing requirement may result in a number of unintended consequences. Namely, that:

- gatekeepers may be unable to engage an appropriately qualified and independent auditor who is able to complete the audit within the timeframe. The professional obligations of many auditors prevent them from accepting an engagement where there is an undue level of risk that the audit opinion will be unreliable, or that they will otherwise be unable to reach a level of 'reasonable assurance' within the timeframe. We note that the audit methodology provided by the Template has recently been made available and remains in draft form. Auditors will require a significant amount of time to develop an audit approach based on this Template, carry out their audit field work, and prepare their reports; or
- gatekeepers may be unable to comply with the timing requirements, potentially as a result of being unable to engage a qualified and independent auditor, and will have no option but to deliver their audited descriptions after the deadline.

We recommend the Commission extend the deadline for delivery of the first audited description, noting in particular that the Template is not yet finalised.

Responsible employees

Section 1.2 of the Template states that gatekeepers need to provide the name of each member of their organisation or external expert who contributed to the drafting of the submitted description of the consumer profiling techniques.

Article 15 DMA does not require submission of this information about employees, so requiring it in the Template is out of scope. Absent any rationale or legal basis for providing this information, it is not clear how the Commission would benefit from this; asking gatekeepers to provide it is disproportionate considering the breadth of the reporting obligation and when weighed against any benefit of this obligation.

We recommend that Section 1.2 of the Template be limited to providing the name of members of the gatekeeper's organisation *responsible* for drafting the report.

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