Alliance Digitale's contribution on the European Commission Consultation on the Template relating to Article 15 of Regulation 2022/125 (Digital Markets Act)

Opening remarks

- Alliance Digitale is the **main industry body for digital marketing in France**. It was born in 2022, when both IAB France and La Mobile Marketing Association France decided to join forces and operate under one single entity.

- Alliance Digitale's main mission is to bring the digital marketing industry forward and promote innovative, responsible, and interoperable solutions by setting industry standards and best practices. **With more than 250 diverse companies across the industry representing Brands, Media, Agencies, retail platforms, gaming companies, and tech companies**, the association brings together most digital marketing players in France.

- As the voice of the digital marketing and advertising sectors in France, Alliance Digitale has always supported the establishment of a more transparent, competitive, and sustainable digital market within the European Union. We believe the Digital Markets Act (DMA) is a great step toward better regulating gatekepeers and ensuring fair competition on the EU digital market.

- We appreciate the opportunity to respond to the consultation initiated by the European Commission regarding the implementing act on the audited description of consumer profiling techniques under article 15 of the DMA. We believe it is indeed important to guarantee an appropriate level of transparency of the profiling techniques deployed by gatekeepers in order to facilitate the contestability of core platform services (CPS) and allow access to the market to rivals.

General

- Alliance Digitale first would like to emphasize the importance of gatekeepers providing the required information in a language and format that is comprehensible for all stakeholders. As transparency is essential in addressing the concerns outlined in the DMA, the auditing process should make sure the overview is provided by the

gatekeeper in clear and comprehensible format. Such a requirement could be easily added in Section 5 of the template dedicated to the audit conclusions.

- We believe that the information requested from the CPS of gatekeepers in Section 2 of the draft template falls into somewhat catch-all categories that do not take sufficiently into account the different areas of activity of the CPS in question. It is important to highlight that each piece of information requested will not have the same significance depending on the activity of a CPS. Now that the gatekeepers have been designated by the Commission, it would be appropriate to tailor the information to be requested more closely to the specific activities of the CPS concerned with more granular information on the relevance of the information for a particular CPS. This could enable the Commission to be more precise and better meet the objectives of the implementing act and of the DMA which aims to limit the possibility of data sharing on or across the different CPS of the gatekeeper to limit market power.

- We would also like to draw the Commission's attention to a number of points which we feel do little to achieve the objective of making European digital markets more contestable:

- First, it is important to note that it is likely that some of the techniques or tools that will be analyzed as part of the audit may have already evolved, making the conclusions of the audit less valuable for the rest of the market. Although focusing on real-time data falls outside the current scope of the Commission's implementing act, it would be relevant to require from the CPS to mention, explain and substantiate recent and future developments with regards to techniques and tools concerned as part of the audit.

- Second, the direct correlation between some of the information requests and the objective of ensuring competition and contestability in the markets is not always clear. Indeed, some of the information sought seems to fall more within the scope of data protection law than that of the DMA, with little if any added value in achieving the objectives mentioned above.
    - Specifically, we do not see the need to require information about alternatives to profiling as provided for by articles 2.1 (n) and 2.1 (o) as well as the protection impact assessment under Article 2.1 (m). Similarly, knowing the technical safeguards in place regarding minors appear to have no importance for gatekeepers competitors and for market contestability
    - We fear that requesting from gatekeeper too much information only focusing on data protection law may make the audit exercise unnecessarily tedious and derail it from the DMA's original objective to enhance market contestability. While requesting information pertaining to personal data and data protection

law is relevant to profiling techniques, it is important that the Commission also considers additional relevant categories of information. The objective of Article 15 (recital 72) is also to ensure the contestability of CPS. "*Transparency puts external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or start-ups cannot access data to the same extent and depth, and at a similar scale. »*

Information about the profiling techniques of consumers

- Article 2.1 (b) limits legal grounds relied by gatekeepers to article 6(1) of the GDPR. However, Recital 72 refers to the GDPR without limitation to any legal basis. Furthermore, Article 13(5) (anti-circumvention) of the DMA also does not limit consent to a specific article of the GDPR. We therefore suggest the incorporation of the legal basis provided for by Article 9 of the GDPR. Gatekeepers are the only players that have actually relied on this legal basis for profiling activities since 2018.

- Article 2.1 (c) requires gatekeepers to provide a list with a detailed description of each category of personal data and data derived from user activity as well as sources for each of these categories for profiling, (in particular, distinguish data originating from the gatekeeper's services, from data originating from third parties):
    - The notion of "third-party" is key here. We have observed for the past years an artificial distinction created by some gatekeepers like Apple between "first-party" data (data collected directly) and "third-party" data (which comes from third parties), allowing them to argue that they do not track the user since their profiling activities are based on so-called "first-party data". The latter has no basis in European or national law, it is purely used to create an artificial asymmetry between walled-gardens and others that need third-party data for their profiling activities. We would like to draw the Commission's attention to this point, which is also the subject of numerous proceedings in the European Union, such as the Privacy Sandbox[1] and Apple ATT[2];
    - Besides, we believe the identification of data originating from other gatekeepers' services in Section 2, whether they are CPS or not, is crucial, as the amalgamation of data serves as a significant source of market power. It is also consistent as per Article 5.2 of the DMA.

- Article 2.1 (i) provides that gatekeepers should submit qualitative and quantitative impact or importance of profiling techniques in question for the business operations

[1] Investigation of the DG Comp started June 2021

[2] Procedure in front the FCAs of France, Poland, Germany and Italy. Recent statement of objection in France, see here: https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/publicite-sur-applications-mobiles-ios-le-rapporteur-general-indique-avoir

of the gatekeeper. It is not clear what is being asked for or what the Commission is trying to achieve with this "quantitative and qualitative impact or importance of the profiling techniques". The answer could be multiple: revenue share, profitability, new product development, acquisition, market position etc., and therefore if nothing is specified, the Commission runs the risk of being provided with indicators that are either irrelevant or already known.

- Article 2.1 (k) and 2.1 (l) provide that gatekeepers should provide a description of any step taken to obtain consent of the user as well statistics on how many consumers choose to undergo profiling if they are giving a choice. the issue at hand is not solely the availability of choice or the statistics but its presentation, its different purposes, its frequency, etc. It is essential for the Commission to consider whether the conditions for a freely given, specific, informed, and unambiguous consent as per the GDPR are met given the legislative deadlock of the proposal for an ePrivacy regulation and complaints surrounding Apple's ATT choice feature. This is all the more important when considering the competitive implications that a biased choice can have, and that a violation of the GDPR can constitute an abuse of dominant market position within the meaning of Article 102 TFEU[3].

Information about audit procedure (Section 4)

- We believe that stakeholders including the Commission should have the right to contest the selection of an appointed auditor if needed, ensuring impartiality and transparency in the audit process.

- Regarding data not included in the scope of the audit, we trust that article 4.3 may appear too permissive. It is important to clarify that the scope of article 4.3 is limited to data within the scope of trade secrets and aligned with the provisions of articles 15(3) and 36(3) of the DMA.

- We finally would like to express our concerns over Article 4.4, which appears to introduce the potential for circumventing specific aspects of the audit process. Article 4(4) provides that the description of audit procedures should contain any circumstance which would have prevented the audit organization from performing with a reasonable level of assurance the audit of one or more profiling techniques. This addition is not part of the DMA. Furthermore, Article 30(3)(d) provides that the Commission may impose a fine of 1% of total worldwide turnover if the gatekeeper fails to submit the information or submit incorrect, incomplete, or misleading information. Article 4(4) seems to create a loophole by insufficiently framing exceptional circumstances in which an audit can occur. We recommend establishing

[3] CJEU Meta vs Bundeskartellamt, 4 July 2023
https://curia.europa.eu/juris/document/document.jsf;jsessionid=E4F35BD8693F1005470070A6EF2D7AB1?text=&docid=275125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3926733

stringent criteria and clear parameters to govern exceptional cases where such circumventions may occur and avoid any gatekeeper circumventing their obligations.