Booking.com

Digital Markets Act - Response to the Consultation on the Draft Template on Audited Descriptions of Consumer Profiling Techniques

This submission outlines Booking.com's views on the European Commission's (the "**Commission**") Draft Template relating to the Audited Descriptions of Consumer Profiling Techniques pursuant to Article 15 (the "**Draft Template**" or "**Template**") of Regulation (EU) 2022/1925 (the "**Digital Markets Act**" or "**DMA**"). Booking.com welcomes the additional clarity that the current draft provides and is grateful for the opportunity to provide comments.

Our view is that aspects of the Draft Template set out the mechanisms for preparing the Art. 15 description in a thoughtful way and create helpful clarity while also fostering a common standard amongst gatekeepers. Other aspects of the Draft Template, however, are not obviously related to the purpose of Art. 15 and do not align with the logic of Recital 72 and the proportionality requirement of Recitals 28 and 29 but appear to be unrelated to transparency and contestability.

While we welcome the Draft Template and its contents, important aspects of the template would merit further consideration to (i) better align the information that is being required to the purpose of Art. 15 and (ii) to ensure that the significant work the template requires is proportionate and tailored to the DMA's goals. Section I of our Response sets out this view in more detail. Section II sets out some examples of areas where we believe such additional consideration could be particularly impactful, and it includes specific suggestions.

We stand ready to further discuss this submission with the Commission if useful.

I. The Template should be tailored to the requirements and objectives of Art. 15

Art. 15 DMA requires gatekeepers to provide the Commission with an independently audited description of any techniques for profiling of consumers and to make an overview of this description publicly available.

Recital 72 explains that the rationale for this obligation is to ensure an "*adequate level of transparency of profiling practices employed by gatekeepers*." The DMA seeks to "*enhance*" transparency in this way because it is thought to "*facilitate contestability of core platform services*" by enabling "*other undertakings providing core platform services to differentiate themselves better through the use of superior*

privacy guarantees." The recital thus makes clear the purpose of Art. 15 is to promote contestability by favouring competition against gatekeeper platforms on privacy guarantees around profiling. This goal is in line with the DMA's overall purpose of promoting "*contestability and fairness*" including, in particular, "*for business users and end users of core platform services provided by gatekeepers*" (Recital 7). In short, Art. 15 aims to promote contestability by providing end-users with actionable information about profiling on gatekeeper's platforms.

The second paragraph of Recital 72 then deals with how Art. 15's reporting requirements are intended to contribute to achieving this goal. It makes clear that the audited description required by Art. 15 is designed to "*ensure a minimum level of effectiveness of this transparency obligation*." To this end, the recital sets out a list of data points that are directly relevant to transparency for users – including, for instance, questions regarding "*the steps taken to effectively enable end users to be aware of the relevant use of such profiling,*" which speaks to the contestability-through-transparency purpose of the rule. Recital 72 is therefore clear that the audited description is a means of ensuring gatekeepers are providing complete, accurate, and comprehensible explanations to their end-users. This is also apparent from the fact that Art. 15 requires a "*description*" of the profiling techniques used; not an exhaustive compendium of them. Finally, we believe it is generally agreed that users are not served by unduly long and complicated disclosures.[1]

In the same vein, Recital 72 indicates that the Commission should transfer the audited description to the European Data Protection Board to "*inform the enforcement of Union data protection rules*." This is a useful step: privacy regulators will continue to have oversight over the new disclosures provided by gatekeepers in the same way they have oversight over all such privacy disclosures. It is therefore sensible that these regulators have access to the same information the Commission receives since they will be analysing the same disclosures from a similar perspective.

In our view, Recital 72 therefore makes clear that Art. 15 is about informing end-users of the profiling techniques of a gatekeeper and ensuring a minimum level of effectiveness of this transparency obligation. It follows from the above that the audited description ought to set out a "*methodology and procedure*" (Art. 46 (g), DMA) to ensure effective transparency- but in a "*proportionate manner*" (Recital 28, DMA).

Our preliminary view is that aspects of the Draft Template approach this standard in a thoughtful way and create helpful clarity while also fostering a common standard

[1] *See*, by analogy, Art. 12.1 GDPR which requires communication in a "*concise, transparent, intelligible and easily accessible form, using clear and plain language*."

amongst gatekeepers, which is important in a context where Art. 15 is designed to enable users to choose what service to use.

Other aspects of the Draft Template, however, are not obviously related to the purpose of Art. 15 and do not align with the logic of Recital 72 and the proportionality requirement of Recitals 28 and 29. Indeed, several items appear linked to goals that go beyond the scope of Art. 15. For instance, footnote 7 indicates one of the data categories is required because "*asking for alternatives to profiling allows assessing whether gatekeepers have considered less intrusive measures and is particularly informative in terms of accountability*." But the DMA does not set a data minimization goal – and it does not require gatekeepers to seek "*alternatives to profiling*." This concept appears to reference the "Accountability" principle established in the GDPR, and referred to elsewhere in the Template,[2] where data controllers are accountable for implementing the processing principles set out in Art. 5(1) GDPR, which may have a bearing on the type of profiling a controller can undertake. This "Accountability" principle is, however, never mentioned in the DMA. Art. 15 DMA contains no substantive norm on "profiling" – only a requirement to provide transparency around what type of profiling is actually taking place; nor does it contain any requirement for gatekeepers to prove compliance with the *GDPR's "Accountability" requirements*.

Overall, we therefore welcome the Draft Template and its contents; but we believe that important aspects of the template would merit further consideration to (i) better align the information that is being required to the purpose of Art. 15 and (ii) to ensure that the significant work the template requires is proportionate and tailored to the DMA's goals. Section II below sets out some examples of areas where we believe such additional consideration could be particularly impactful, with specific suggestions.

II. Specific suggestions to more closely align the template to the goals of Art. 15

In view of the general considerations explained in Section I, we would like to highlight the following concrete aspects of the Draft Template:

- **The level of detail of the requirements should reflect the purpose of Art. 15 and the dynamic nature of data processing, and account for the technical realities of preparing a description of the sort envisioned.** As explained above, Art. 15 DMA provides for an audited description that is to be updated "*at least annually*" and that is designed to facilitate contestability-through-transparency. The granularity of the requirements in the Draft Template run counter to these goals in two ways:

[2] Template, Introduction ¶2 and ftnt 7.

- First, the level of granularity envisaged would yield a level of detail that risks being counterproductive in view of the goals of Art. 15. For Art. 15 to promote contestability, the description it requires must be understandable by end-users. If the description becomes foreboding or indecipherable through excessive complexity, technicalities and detail, it cannot serve its purpose. Art. 15 refers to a "description," not an exhaustive list of the sort now contemplated in the Draft Template. As noted above, the GDPR and privacy approaches more generally take issue with unduly long and complicated disclosures, favouring instead disclosures that are "*concise, transparent, intelligible*."
- Second, the level of granularity implies that the accuracy of the report will rapidly decay over time whereas we believe that the "*methodology and procedure*" should foster a description that remains representative and informative over time. The granularity of several requirements in the Draft Template would make long-run accuracy impossible. Requirements to provide extremely detailed information in lists (e.g., Section 2.1.c, which appears to require a detailed list of data points and their sources, and 2.1.g, which requires a similar list for the processing applied by gatekeepers), as opposed to the "*description*" envisaged by the law, create a point-in-time view that risks becoming rapidly outdated. Digital markets are subject to continuous and rapid change to respond to new requirements, changes in user expectations, and innovative technical developments. The data companies process will change too as companies cease processing certain data types – for instance if they deprecate a feature – or begin processing new ones – for instance if they launch a new feature. Compliance with these requirements will therefore merely give rise to an artificial snapshot.

Importantly, the granular approach envisioned in the document would create a significant burden on gatekeepers with no countervailing upside for contestability-through-transparency: including such granularity in a public-facing disclosure would make such a disclosure difficult for end-users to engage with and understand. This would be disproportionate and it would run counter to the stated purpose of Art. 15, which is to promote "*contestability*." We therefore consider these points should be amended to indicate that gatekeepers ought to provide detailed supporting explanations to validate that the description is comprehensive and accurate; as opposed to exhaustive numbered lists of the sort contemplated in the draft.

- **The requirements should be tailored to information relevant to "profiling," which necessarily implies that the requirements ought to relate only to "personal data."** The DMA does not provide its own definition of profiling but

refers to the GDPR (Art. 2(31) DMA). Art 4(4) GDPR defines profiling by reference to personal data as it states that profiling means "*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* […]."[3]

The Draft Template, however, appears to create a distinction between "data" and "personal data" and require the provision of information relating to both categories. For instance in Section 2.1.e, where it requires the provision of "*data and personal data*" (a similar issue arises in Section 2.1.c). This category of "data" beyond personal data is inherently not relevant to "profiling" and is therefore not relevant to the description of such profiling. The contents of the "data" category are also not clear, which makes these portions of the Draft Template difficult to understand. The obligations the Draft Template introduces should be tailored to personal data, since this is the type of data relevant to profiling.

- **Information requirements should be directly related to Art. 15 DMA and Recital 72.** Section 2 of the Draft Template introduces new information requirements that do not obviously relate to Art. 15 DMA and recital 72. In particular:
    - *Section 2.1.e on the retention period of each category of data*. The DMA does not impose any obligations regarding data retention – obligations around data retention are in the purview of the GDPR and are irrelevant to the scope, purpose, or application of Art. 15. Art. 15 is only concerned with the retention period of the profiling – *i.e.*, the last part of section 2.1.e. of the form – not with the retention of personal data. The references to retention periods for personal data should therefore be removed from the Template, while the retention periods for the profiles could usefully be maintained.
    - *Section 2.1.f on the measures taken to avoid showing advertisements to minors*. Enhanced protections for minors online is a key goal of European Digital regulation. This goal is, however, pursued within the framework of the DSA (Art. 28 DSA), not the DMA. The DMA does not impose any obligation that concerns advertisements targeted at

[3] Recital 72 suggests the definition of the term could potentially "*not be limited to*" the definition in the GDPR but it is not clear what other definitions there would be; or how even hypothetical definitions of the term could involve processing data that is not personal data. In any event, the text of the law itself defines profiling specifically by reference to the GDPR.

minors.[4] Indeed, in view of the subject matter, legal basis, and breadth of enforceability the DSA is the better home for requirements of this nature. It is therefore difficult to understand the relevance of Section 2.1.f in a template relating to Art. 15 of the DMA – which requires a description of what a gatekeeper *does*, not what it *does not do*. The addition in the Draft Template is therefore unnecessary and potentially confusing.

- *Section 2.1.h on automated decision-making*. This section sets out an obligation to provide extremely detailed and technical information on decision-making that takes place on the basis of profiles. It is unclear why this onerous requirement is necessary when Section 2.1.a already requires a comprehensive discussion of the purposes for which profiles are used. In addition, the information requested is commercially sensitive since it covers "*a description of the algorithms*" underpinning each mechanism. This is a disproportionate requirement in a document that will be relatively widely shared by the Commission. Finally, the discussion of the "legal effects" of the profiling does not appear relevant to the goals of Art. 15.

- *Section 2.1.l on consent rates*. Another information requirement that does not obviously relate to Art. 15 DMA is the obligation to provide statistics on consent rates (Section 2.1.l). This information is not relevant to the description envisioned in Art. 15 since Art. 15 requires a description of the profiling a gatekeeper does and does not create special requirements around consents for data processing or the way users react to such consents – these types of requirements are under the purview of the GDPR and their inclusion in the template is therefore confusing.

- *Section 2.1.m requiring a description of GDPR-related compliance steps.* Art. 15 does not alter existing GDPR obligations in any way, and is not a tool for GDPR enforcement – it rather creates a new, additional requirement for specific disclosures. Introducing a requirement to provide GDPR compliance documentation is therefore confusing as it suggests that Art. 15 is a GDPR enforcement mechanism. This is not correct – the Article is explicitly designed as a means to increase *contestability*, which is why it features in the DMA, which is not a privacy law and has not been enacted on that basis.

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[4] Recital 38 generally provides that "[n]*othing in this Regulation exempts gatekeepers from the obligation to protect children laid down in applicable Union law.*"

- *Section 2.1.n and 2.1.o requiring a description of "alternative" measures to profiling, including ones that were not chosen.* Art. 15 requires a description of the profiling measures a gatekeeper engages in. But as these two requirements relate to measures that are not profiling, they are therefore out of scope of the Art. 15 description. More generally, the footnote explaining their inclusion explicitly states that this information is "*particularly informative in terms of accountability*." But this is irrelevant to Art. 15, which never mentions "accountability" (a term seemingly borrowed from the GDPR, as discussed above), contains no substantive norm on "profiling," and instead relates to contestability through transparency around what type of profiling is actually taking place. It is unclear why these sections have been included and we believe they should be removed.

We believe these aspects of the template step beyond the requirements and goals of Art. 15 and create disproportionate obligations. Firstly, the Draft Template must be closely tailored to the underlying legal obligation. For the reasons explained above, this is not the case here – the Draft Template goes further than the DMA itself. Secondly, the extensive information demands set out here are counter-productive because they will confuse and otherwise cloud the description, which can only serve its purpose if it is understandable by end-users. And third, we believe the Draft Template has not sufficiently taken account of the considerable burden it will create for gatekeepers – additional burdens in complying with the DMA ought to reflect countervailing upside in facilitating the DMA's enforcement and objectives. The categories of the Draft Template that are not tailored to Art. 15 or go beyond its objectives do not yield such an upside – and we believe they should therefore be reconsidered.

To summarise, we believe the Template would benefit from the following changes:

- Sections 2.1.c. and 2.1.g should be formulated to allow for detailed explanations rather than exhaustive lists.

- Sections 2.1.c, 2.1.d, and 2.1.e should be tailored to information relevant to "profiling," which necessarily implies that the requirements ought to relate only to "personal data."

- Sections 2.1.e, 2.1.f, 2.1.h, 2.1.l, 2.1.m, 2.1.n, and 2.1.o should be dropped or tailored to mirror the requirements and legal basis of Art. 15.

Thank you.