Linklaters

Linklaters' reply to the European Commission consultation on the template relating to the reporting on consumer profiling techniques

(1) We appreciate the opportunity to participate in the public consultation launched by the European Commission (the "**Commission**") on 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**") (the "**Template**").[1]

(2) Our comments address the following: (1) the general information profiling on description; (2) the information about the profiling of customers; and (3) independent audit requirements.

1 Section 1: General information on profiling description

(3) Section 1.2 of the Template stipulates that gatekeepers must provide "*the name of each member of your organisation or external expert which contributed to the drafting of the submitted description of the consumer profiling techniques*".

(4) We would suggest two amendments.

1.1 Section 1.2: the scope of personnel who must be listed in the Report

(5) First, we would suggest that Section 1.2 be narrowed to only require the names of the personnel who were *"responsible"* for the report rather than the names of all individuals who *"contributed"*.

(6) Since the detailed nature of the information required by the Template may necessitate involvement from a significant number of personnel, Section 1.2 would, as currently drafted, create a broad obligation to disclose a potentially long list of personnel where there is no rationale or legal basis for doing so. Article 15 of the DMA does not require the submission of such information about employees so such information is outside the scope of Article 15. There is equally no rationale for why such information is needed: the Commission's assessment is highly unlikely to benefit from disclosing *all* contributors to the report.

(7) Furthermore, the broad scope risks conflicting with the Commission's obligations under both the Personal Data Regulation and the Charter of Fundamental Rights (the "**Charter**").[2] In particular, under the Personal Data Regulation, the Commission must ensure personal data is adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed – i.e. performance of the Commission's functions under Article 15 of the DMA. Collecting such information thus risks contravening the data minimisation principle.

(8) By the same token, the scope risks cutting across individuals' right to privacy in Articles 7 and 8 of the Charter. The Court held in *Meta Platforms Ireland* that any interference with the fundamental right to privacy must be: (1) provided for by law (the DMA in this case); (2) meet objectives of general interest of the European Union; and (3) be necessary and proportionate.[3] We respectfully suggest that it is challenging to justify why it is proportionate for the Commission to receive the names of all of those who have contributed to the report.

1.2 Section 1.2: the scope of disclosure concerning external experts

[1] https://digital-markets-act.ec.europa.eu/consultations/consultation-template-relating-reporting-consumer-profiling-techniques_en

[2] Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data.

[3] Case T-451/20 *Meta Platforms Ireland v Commission* [2023] ECLI:EU:T:2023:276, para. 182.

(9) Second, we would suggest that Section 1.2 excludes external legal counsel from the obligation to disclose external experts who have contributed to the report. This is to avoid the Template inadvertently breaching the principle of legal privilege that individuals cannot be compelled to disclose whether they have sought legal advice in relation to a particular issue.

(10) The Court of Justice has recently held in *Orde Van Vlaamse Bailies* that: *"it is apparent … that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (…). Like that provision, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence."* (emphasis added).[4]

(11) Requesting that gatekeepers disclose whether external experts, including external legal counsel, have contributed to the report would accordingly risk infringing on gatekeepers' fundamental right to confidentiality over whether they have received external legal advice on the content of the report.

2 Section 2: Information about the profiling techniques of consumers

(8) Section 2 of the Template stipulates the information on customer profiling that gatekeepers must provide. While the vast majority of the information obligations flow from Article 15 and serve the purpose of increasing transparency over consumer profiling, some of obligations, as currently drafted, are unlikely to increase transparency for practical purposes, are disproportionate and, in some instances, are outside the scope of the DMA.[5]

(9) We would accordingly suggest the following amendments:

2.1 Scope of the Reporting Obligation in Section 2.1

(12) First, Section 2.1 should be consistent with the scope of Article 15 of the DMA to avoid the risk that the Template inadvertently differs from the underlying substantive obligation in the DMA.

(13) Section 2.1 currently states that a gatekeeper must provide for each designated core platform service the relevant information concerning consumer profiling techniques *'applied within the core platform service and across multiple core platform services'*. Article 15 of the DMA states, on the other hand, that the reporting obligation relates to profiling techniques that the gatekeeper *'applies to or across its core platform services listed in the designation decision …'* (emphasis added).

(14) The Template risks inadvertently implying that gatekeepers must disclose consumer profiling techniques applied to core platform services not designated under the DMA where there is a link to a designated core platform service. This would, however, exceed the scope of Article 15 which stipulates that the reporting obligation only concerns consumer profiling techniques pertaining to *designated* core platform services.

(15) We would, as such, suggest that Section 2.1 tracks the text of Article 15 so that it refers to *"other designated"* core platform services rather than *"multiple"* core platform services.

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[4] Case C-694/20, Orde Van Vlaamse Balies, ECLI:EU:C:2022:963, para. 27.

[5] Article 15 of the DMA provides that gatekeepers submit "*an independently audited description of techniques for profiling consumers that the gatekeeper applies to or across its core platform services*." The audited description is then transferred to the European Data Protection Board to inform the enforcement of data protection rules. Ultimately, the purpose of providing this information to the Commission is ultimately to ensure a minimum level of effectiveness of gatekeepers' transparency obligations vis-a-vis end users, which is aimed at putting external pressure on gatekeepers not to make deep consumer profiling the industry standard (as potential entrants or start-ups cannot access data to the same extent and depth, or at a similar scale).

2.2 Scope of Section 2.1(c), (d) and (e): types of volunteered, observed and inferred data used for consumer profiling

(16) Second, Section 2.1(c) and Section 2.1(d) should be amended, or a footnote introduced, to clarify that "category" of data, in the case of Section 2.1(c), or "data", the case of Section 2.1(d), does not constitute an exhaustive enumeration of every possible type of data used for consumer profiling but rather requires gatekeepers to disclose the "main parameters" of data used for consumer profiling (e.g. data parameters relating to consumers' age, sex, socio-economic status etc.).

(9) As currently drafted, Section 2.1(c) requires "*a detailed description of each category of data derived from user activity*" and asks gatekeepers to distinguish data and personal data categories provided by consumers from "observed data". Section 2.1(d) requires "*a detailed description of the inferred data about consumers*" (i.e., information such as consumers' interests or socio-economic status which can be inferred from volunteered and observed data).

(10) While high-level information on the underlying data used for consumer profiling may be useful to inform any assessment, it is not strictly a requirement of the DMA which does not reference the need to disclose such information. Furthermore, the potential breadth of the provisions, as currently drafted, do not serve the purpose of enhancing transparency for users and are likely to result in gatekeepers providing a significant level of information that will aid neither the Commission nor users in understanding the depth of profiling techniques being used.

(11) There is, in particular, a risk that the provisions will elicit the production of long lists of datafields that have no utility and are only likely to serve to confuse users. More specifically:

(i) While systems using consumer profiling vary significantly, most are likely to operate a range of different profiling and recommender systems. For example, the recommender used to recommend products on an ecommerce site is likely to be completely different to the recommender system used to order product reviews. Each of those systems is, in turn, likely to be underpinned by a large number (potentially hundreds) of machine learning models.

(ii) Determining all of the data for the models underpinning those systems would likely to require an extensive and detailed technical investigation, and may result in a very long list of datafields. Many of those datafields may well have limited influence on the actual output of the profiling or recommender systems, given the purpose of the machine learning model is to screen out less relevant signals and focus on those most relevant to the function of the system. However, they would still need to be listed as it is likely impossible to discount that they have some limited effect on the profiling and so are still "processed" for that purpose.

(iii) Added to this, machine learning models are often highly interactive and do not always produce output that can be easily understood. For example, these models might well work with so-called vector representations of data, which are then passed to another machine learning model to achieve a particular purpose but are not understandable or interpretable.

(12) Disclosure of the main data parameters would, conversely, provide the Commission and users with an understanding of the nature of the data being collected and hence the potential depth of consumer profiling undertaken by the gatekeeper.

(13) Such an approach would, moreover, align the Template with the corresponding provisions in the Digital Services Act (Articles 26 and 27) that require disclosure of the "main parameters" used to

display an advertisement or used in a recommender system (respectively), thereby ensuring administrative efficiency for the Commission as well as removing unnecessary duplication of core platform services that are also regulated under the DSA.

2.3 Scope of Section 2.1(h) - Automated Decision-Making

(14) Third, Section 2.1(h) should make clear that the notion of automated decision-making is consistent with the same concept under Article 22 of the General Data Protection Regulation ("**GDPR**").

(15) Article 22 GDPR provides individuals with the right *'not to be subject to a decision based solely on automated processing … which produces legal effects concerning him or her …'* subject to a number of specified carve outs. We assume that Section 2.1(h) is intended to create a reporting obligation for those instances where a gatekeeper's core platform services may engage in such automated decision-making.

(16) Making this clear by including such a statement either in the obligation or in the accompanying footnote would aid gatekeepers in preparing the report as well as remove legal uncertainty. It would also have the administrative benefit of ensuring coherency across the EU's digital regulation of personal data.

2.4 Scope of Section 2.1(i),(n) and (o) – importance of data and alternatives to profiling

(17) Fourth, Section 2.1(i) should be amended to delete the reference to "importance" and we would respectfully recommend that the Commission considers whether Section 2.1(l), Section 2.1(n) and Section 2.1(o) are reasonably necessary and, if so, be more precise on their scope.

2.4.1 "Importance" of profiling techniques for gatekeeper

(18) Section 2.1(i) 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"*.

(19) While the DMA's recitals specify that gatekeepers should detail the *impact* of consumer profiling techniques on their services, it does not state any expectation that gatekeepers provide information about the *importance* of those techniques.[6] This has, moreover, potential practical significance since, unlike "impact" which looks at how the techniques have historically affected services, "importance" arguably encompasses things like the business' broader strategic reasons for using the techniques and is, by its nature, a more forward-looking exercise.

(20) Furthermore, it is not clear how such forward-looking strategy considerations would aid the Commission in understanding the techniques themselves or, indeed, in facilitating transparency to the benefit of users without compromising gatekeepers' commercial secrets and undermining competition for such services. Finally, information on the "importance" of the profiling techniques is inherently subjective and it will be challenging for an auditor to opine on this.

(21) For these reasons we would suggest that Section 2.1(i) be amended to remove the words "or importance".

[6] The DMA at para (72) states that: "*To ensure a minimum level of effectiveness of this transparency obligation, gatekeepers should at least provide an independently audited description of the basis upon which profiling is performed, including whether personal data and data derived from user activity in line with Regulation (EU) 2016/679 is relied on, the processing applied, the purpose for which the profile is prepared and eventually used, the duration of the profiling, the impact of such profiling, as well as the steps to seek their consent or provide them with the possibility of denying or withdrawing consent.*"

2.4.2 Alternative measures to profiling

(22) Section 2.1(n) and Section 2.1(o) require information on "alternative measures to profiling" that have been implemented or considered but not implemented respectively. The Template provides that *'asking for alternatives to profiling allows assessing whether gatekeepers have considered less intrusive measures and is particularly informative in terms of accountability.'*

(23) As a starting point, such information falls, in principle, outside the scope of the DMA which does not mention the inclusion of information concerning alternatives to consumer profiling techniques. It is also unclear how it is likely to facilitate transparency and competition based on privacy standards – the intent of the report – given such information concerns, in the case of Section 2.1(o), hypothetical alternatives and risks confusing users in terms of what each service does.

(24) More practically, even if such information may be useful for the Commission and users, the obligations are challenging to interpret. For example, assuming that "consumer profiling" follows the definition of "profiling" in Article 4(4) GDPR (which concerns any form of automated processing of personal data to analyse certain personal aspects of natural persons), does the obligation seek information where a gatekeeper has considered alternatives that involve no use of personal data? Equally, is the requisite threshold for a gatekeeper to have "considered" a particular alternative: must senior management have reviewed the alternative, for example, to merit inclusion?

(25) Finally, insofar as the obligation concerns alternatives that are not in the public domain, these may be potentially competitively sensitive and would thus be ineligible for public disclosure. A fact which would undermine the purpose of requesting such information (since the report's primary purpose is facilitating user awareness).

(26) For these reasons, we propose that Sections 2.1(n) and (o) be deleted or, alternatively, the Commission may want to ask for more open-ended information concerning gatekeepers' choice of data protection techniques and why they believe they strike the right balance between optimising the relevant service and protecting users' privacy. We respectfully submit that this is likely to be of use for users and hence more effective at increasing transparency that benefits comparison across different services.

3 Sections 3 - 5: Independent Audit Requirements

(27) The independent audit process envisaged under Article 15 offers a number of potential benefits. A robust audit process provides the EC with independent assurance about the description of the gatekeepers' profiling techniques. It also brings an additional level of rigour to gatekeepers' approach to compliance.

(28) To achieve these benefits, it is important that the audit obligation is effective and allows auditors to reach a conclusion that fairly reflects the underlying level of compliance. Section 5.1 allows for the audit assessment to be "positive", "positive with comments" or "negative", and requires detailed justifications for this assessment. It would be helpful if the Commission could clarify that the "positive with comments" categorisation could be broadly applicable at the auditor's discretion, including when they are unable to provide a definitive conclusion or because there is no "correct" answer.

(29) Such a clarification is important given that there is a significant difference between the audit requirements set out in the Template and more "traditional" audit activity, such as financial audits. While a financial audit can draw on accumulated experiences and audit standards, there is little by way of internationally accepted standards or benchmarks against which auditors can assess compliance efforts of gatekeepers. Gatekeepers should not be penalised in situations where no

auditor could reasonably provide an opinion i.e. where the lack of clarity is not because of the shortcomings of a single gatekeeper.

(30) As set out above, a number of Section 2 requirements will be challenging for gatekeepers to comply with. The proposed amendments set out in Section 2 of this response are doubly important since some of the sections are also likely to raise concerns from an audit perspective. In particular:

(i) **Sections 2.1(c) and (d)**. As set out in Section 2.1 of this response the obligations under this section require gatekeepers to provide an unwieldy amount of data. Each gatekeeper's system is set up differently, but most are likely to operate a range of different profiling and recommender systems which are each underpinned by machine learning models. Gatekeepers will have to conduct an extensive and detailed technical investigation and produce a very long list of datafields. This results in a disproportionate burden on both gatekeepers and auditors. We also note that audit firms may lack the competence and technical expertise to audit these requirements.

(i) **Section 2.1(i).** As currently drafted, this requires information on the qualitative and quantitative impact of profiling techniques on the business operation of the gatekeepers. The "importance" of the profiling techniques is inherently subjective, and it will be challenging for an auditor to opine on this.

(ii) **Section 2.1(o).** Gatekeepers are required to provide information on "alternative measures to profiling", but the Template does not make clear what time-period it relates to, and what constitutes "consideration" of an option. This lack of clarity will make it particularly difficult to audit.

(31) There may be additional requirements that raise challenges for particular gatekeepers e.g., because of how their systems are set up.

(32) Finally, given the Template is not yet finalised, it may be difficult for gatekeepers and auditors to submit an audited report within the 6-month time period,[7] particularly as it is not yet clear what information needs to be collected, how it needs to be described, and how it should be audited. In order to ensure that the audited reports are accurate and robust, we propose that the deadline for the audited description of consumer profiling be extended until 6 months after the Template is finalised.

Brussels, 15 September 2023

[7] Gatekeepers have six months from the date of designation on 6 September 2023 to submit their first audited description to the EC.