

DMA ARTICLE 15: DESCRIPTION OF CONSUMER PROFILING TECHNIQUES

Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) response to the consultation on the template relating to the reporting on consumer profiling techniques

14. September 2023

INTRODUCTION

vzbv welcomes the opportunity to comment on the draft template related to the audited description of consumer profiling techniques required by Article 15 of Regulation (EU) 2022/1925 (“DMA”) (hereinafter referred to as “Template”).¹

SECTION 2

The aim of Article 15 DMA is to allow for a comprehensive assessment of any negative effects of the processing of large amounts of end-user data by gatekeepers. It should facilitate contestability of core platform services and to put pressure on gatekeepers not to make deep consumer profiling the industry standard. It should allow other undertakings to differentiate themselves better through the use of superior privacy guarantees. It also aims to improve the enforcement of the Union's data protection rules by requiring the European Commission to communicate the audited description to the European Data Protection Board.

To achieve these objectives, the European Commission is consulting on the Template for the description of consumer profiling practices, which lists in section 2 the minimum information that gatekeepers should report on and provide to the European Commission. In vzbv's opinion, the minimum information listed in section 2 is a good first step. But although the Template can be updated with further information gatekeepers have to provide, which vzbv welcomes, it is not sufficient to achieve the stated objectives.

In 2020, German DPAs jointly assessed whether newspaper publishers used tracking practices on their websites in a legally compliant manner.² To this end, they sent a questionnaire³ to the relevant publishers, which – comparable to the European Commission's Template – was intended to enable such an assessment

¹ Consultation on the template relating to the reporting on consumer profiling techniques (2023), URL: https://digital-markets-act.ec.europa.eu/consultations/consultation-template-relating-reporting-consumer-profiling-techniques_en [Access: 14.09.2023].

² Der Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg: Länderübergreifende Datenschutz-Prüfung: Sind Tracking-Technologien auf Websites von Zeitungs-Verlagen rechtskonform? - Der Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg (2020), URL: <https://www.baden-wuerttemberg.datenschutz.de/laenderuebergreifende-datenschutz-pruefung-sind-tracking-technologien-auf-websites-von-zeitungs-verlagen-rechtskonform/> [Access: 14.09.2023].

³ Open Knowledge Foundation Deutschland - FragDenStaat: Länderübergreifende Datenschutz-Prüfung zu Tracking-Technologien, URL: <https://fragdenstaat.de/anfrage/laenderuebergreifende-datenschutz-pruefung-zu-tracking-technologien-5/#nachricht-515289> [Access: 14.09.2023].

to be made in the first place. In the opinion of vzbv, this questionnaire shows very well what information is required to comprehensively assess profiling practices and can accordingly be used well as a source of inspiration for section 2 of the European Commission's Template.

In particular, the following information is missing from the Template:

- Gatekeepers should provide information about what specific profiling practices they apply on their services in the first place i.e. at the beginning of the questionnaire. Otherwise, it would be difficult for readers to comprehend and assess the subsequent information (e.g. the description of the inferred data in 2.1 e)). However, it is unclear whether Section 2.1. g) should fulfil this requirement. If so, Section 2.1. (g) should be specified and placed at the beginning of the questionnaire.
- Section 2.1. b) should also refer to the consent requirements of Article 9 GDPR.
- Section 2.1. f) should also refer to safeguards against profiling based on special categories of data in line with Article 26 (3) DSA. Also, the focus of section 2.1. f) on advertisement is too narrow. It should be extended to all forms of presented/generated content.
- Section 2.1. h) should also include information about the measures to safeguard the users' rights and freedoms and legitimate interests in case automated decision-making takes place on the basis of an applied profiling practices.
- Section 2.1. l): Statistics on how many consumers choose to undergo profiling, if they are given a choice must be differentiated for all different services of the gatekeeper for which consumers can choose to refuse consent or object to profiling.
- Section 2.1. k): The detailed description of the steps taken to seek consumer consent should include of screenshots of those steps and should provide a comparison of the number of steps and the nature of the steps consumers would need to go through to refuse or withdraw such consent as compared when consumers give consent. Section 2.1. k) should demand a description of any A/B testing or other testing the gatekeeper has conducted or is conducting regarding the consent process. This allows the European Commission and third parties to evaluate in how far the consent process violates Article 13 DMA "by offering choices to the end-user in a non-neutral manner". Therefore, these descriptions (including the screenshots) and the test-results should be included in the detailed non-confidential overview of the audited description required in Section 6.
- If gatekeepers base the application of profiling practices on legitimate interest (even if this might only be possible in a few exceptional cases, if at all), they should provide information inter alia about the specific data processing, the criteria for weighing interests, the supporting arguments for the result of the weighing of interests, the possibilities for objection by users and its consequences.
- Gatekeepers should inform whether they rely on third parties for profiling practices applied on their services. If so, they should inter alia identify those third parties and the profiling practices used, as well as disclose what user data is

processed by the third party services, the purposes, the legal grounds and what the measures are to protect users' rights and freedoms and legitimate interests.

SECTION 4

- Section 4.1. 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.

SECTION 6

- Section 6.1. should require “a **detailed**, clear, and comprehensive non-confidential overview”. Only detailed information enables third parties to provide meaningful feedback to the European Commission on in how far gatekeepers comply with DMA obligations. This wording would also be in line with the wording of Section 4.1 of the Compliance Report Template.⁴
- In order to ensure that the non-confidential summary enables third parties to evaluate the gatekeepers compliance with the DMA rules and to provide meaningful input to the European Commission Section 6.1. should 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”.
- The wording in Section 6.1. could be interpreted narrowly and provide a loophole to the gatekeeper for not including all non-confidential information provided under Section 2. Therefore, Section 6.1. should explicitly demand that the gatekeeper provides **all** non-confidential information provided under Section 2 as well as the information about the audit procedure under Section 4 and the assessment of the auditor under Section 5 in the non-confidential summary.
- Section 6 of the Template should provide more specific guidance on how to present the information in the non-confidential overview. In line with Section 4 of the Template, the overview should contain a summary of the report that provides a comprehensive and accurate overview of its content. In order to be comprehensible the information provided should follow the same structure as the report submitted to the European Commission, with visible headings and subheadings.

Kontakt

Bundesverband der Verbraucherzentralen und Verbraucherverbände -
Verbraucherzentrale Bundesverband e.V.
Team Digitales
Digitales@vzbv.de

Rudi-Dutschke-Straße 17
10969 Berlin

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⁴ 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.