

# Response to the Consultation on the template relating to the reporting on consumer profiling techniques



Oxera response

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Oxera welcomes the consultation by the European Commission (Commission) regarding the template for the description of the techniques for user profiling that gatekeepers will have to submit under the Digital Markets Act (DMA) for each of their core platform services.<sup>1</sup>

The focus on describing the data (para. 2.1. points a and d), the processes applied (para 2.1 g) and the actions taken to inform consumers (para 2.1 j) are welcomed. Similarly, the request to explain the impact of the profiling techniques on the business operations of the gatekeeper should allow the Commission to better understand their activity in the market.

However, we identified four points where we have suggestions for amendments that may assist in enhancing the effectiveness of the template in achieving its objectives. We discuss these in more detail below.

**First**, the Commission's requested description of the techniques for user profiling does not gather information on how users interact with the services of the gatekeeper and how they give rise to the data that allows a firm to profile them.

It is widely known that the online choice architecture can influence consumers' decision on what data they share.<sup>2</sup> At present the Commission only requires gatekeepers to explain how data is collected regarding the consent users give. But choice architecture can matter in many other ways—for example by the use of defaults, which can affect how users are profiled. Thus if this is indeed an area the Commission wishes to better understand, it should consider expanding the number of questions that address the ways through which data comes to be collected.

**Second**, the consultation draft implies in footnote 5 that the design measures taken by the gatekeeper to request consent need to guarantee a neutral presentation.<sup>3</sup> It is unclear why this would be needed, because a neutral representation of consent options may be

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<sup>1</sup> Commission (2023), 'Consultation on the template relating to the reporting on consumer profiling techniques', available at: [https://digital-markets-act.ec.europa.eu/system/files/2023-08/DMA\\_article15\\_report\\_template.pdf](https://digital-markets-act.ec.europa.eu/system/files/2023-08/DMA_article15_report_template.pdf)

<sup>2</sup> We discussed some of the latest economic thinking in this article: Oxera (2021), 'Bits of advice: the true colours of dark patterns, Agenda, <https://www.oxera.com/insights/agenda/articles/bits-of-advice-the-true-colours-of-dark-patterns/>.

<sup>3</sup> Furthermore and in any case, design measures cannot be fully 'neutral', in the sense that it is not possible to provide all relevant information with equal prominence on a single screen in a way that does not influence consumer decisions.

counter to the interests of the user as well as to the objectives of the DMA.

For example, in some cases the quality of the service may necessarily be severely diminished or become unavailable when the user declines to share personal data. It seems reasonable that gatekeepers should be allowed to explicitly communicate this to the user where consent is generally vital for the use of the platform (as is often the case with many personalised services like social platforms). The template could be adjusted such that it asks the gatekeeper to guarantee a presentation of choices that, instead of being 'neutral', is reflective of the consequences for the user of refusal or withdrawal of consent.

**Third**, since gatekeepers may have flexibility in deciding user consequences of not providing consent, the gatekeeper should (where applicable) be invited to motivate why it has chosen the consequences that it has. The draft compliance template already stipulates that the gatekeeper should specify these consequences, but by not inviting the motivation behind them the compliance template risks taking an overly formalistic approach. In many cases where user consequences of not sharing personal data are severe, this may be inherent to the business model of the gatekeeper or the conditions of the market. Therefore, where product design decisions leave freedom to decide user consequences, the gatekeeper should be invited to explain these drivers.

**Finally**, we would like to make a general observation related to the outcomes that can be expected with increased transparency. The Commission should be mindful that increased transparency does not necessarily lead to less deep consumer profiling.<sup>4</sup> For example, some studies show that users are more likely to share data when properly informed on how it will be used.<sup>5</sup> Furthermore, less deep consumer profiling does not always guarantee better outcomes for consumers. As discussed above, some services would not be available at the same quality without consumer profiling. The emergence of more privacy enhancing alternatives is to be encouraged, however, a priori, it should

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<sup>4</sup> The Commission notes on its consultation page that 'Transparency should help avoiding that deep consumer profiling will become the *de facto* industry standard [...]'. See Commission (2023), 'Consultation on the template relating to the reporting on consumer profiling techniques', 31 July 2023, available at: [https://digital-markets-act.ec.europa.eu/consultations/consultation-template-relating-reporting-consumer-profiling-techniques\\_en](https://digital-markets-act.ec.europa.eu/consultations/consultation-template-relating-reporting-consumer-profiling-techniques_en).

<sup>5</sup> Johnson, G. A., Shriver, S. K., and Du, S. (2020), 'Consumer privacy choice in online advertising: Who opts out and at what cost to industry?', *Marketing Science*, **39**:1, pp. 33–51. Gerber et al. (2018) find that users are more willing to disclose personal information when they perceive it to be more useful, or when they have a greater awareness of how the disclosed information is used. See Gerber, N., Gerber, P., and Volkamer, M. (2018), 'Explaining the privacy paradox: A systematic review of literature investigating privacy attitude and behavior', *Computers & Security*, **77**:3, 226–261.

not be expected that they are of better quality than the gatekeepers' services. Similarly, gatekeepers cannot be deemed to be in the wrong for not providing privacy enhancing solutions as long as they have obtained informed consent from users.

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