

J Markets and cases VI: Digital Platforms
F3 Digital Markets and DG COMP
DG Connect
European Commission

14 September 2023

Template for Article 15 DMA reports

Dear colleagues,

We recommend several amendments to the draft template for the article 15 reporting.

Section 2, question c

In section 2, we recommend that question (c) should specify three distinct types of data: personal data, special category personal data, and non-personal data. Gatekeepers may process diverse categories of each of these three types of data, and will have different requirements for each one.

Special category data are defined in Article 9 of the GDPR as follows:

“...personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation...”

Recognising the role of “special category data” as defined in Article 9 of the GDPR is important in the context of profiling because the data are particularly sensitive for individual people on the one hand, and are also likely to be particularly valuable for gatekeepers on the other.

Section 2, questions b and k

Article 9 of the GDPR prohibits processing of special category data. In normal circumstances, the only applicable derogation for a gatekeeper would be where a user has given their “explicit consent”. “Explicit consent” is understood to require a two-step action to give the person the opportunity to confirm their consent.¹ A person must give consent, and then confirm that they have done so. Therefore, the Commission should examine in questions (b) and (k) whether the higher test of lawfulness has been met for special category data.

¹ “Guidelines 05/2020 on consent under Regulation 2016/679”, European Data Protection Board, 4 May 2020 (URL: https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf), pp. 20-22.

Section 2, question d

The request in question (d) for a “detailed description of the inferred data” is not sufficiently clear. We suggest that the Commission should specify a minimum level of information and the minimum features of such a report so that gatekeepers have no opportunity to answer evasively.

Section 2, question h

The words “on the basis of an applied profiling technique” in question (h) of paragraph 2.1 are not sufficiently clear. We suggest the Commission redraft this in a way that removes any ambiguity about what information it wishes to obtain.

Section 2, question c

We also suggest that the Commission should request information about “meaningful information about the logic involved” in automated processing, as described in Article 13(2)(f) and Article 14(2)(g) of the GDPR.

We are at your disposal to discuss the template in detail.

Sincerely,

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