

EDPB-EDPS COMMENTS ON THE DRAFT TEMPLATE RELATING TO THE AUDITED DESCRIPTION OF CONSUMER PROFILING TECHNIQUES PURSUANT TO ARTICLE 15 OF THE DIGITAL MARKETS ACT ('DMA')

1. INTRODUCTION

On 31 July 2023, the European Commission launched a Public Consultation¹ concerning the template for the description of consumer profiling techniques and audit of such reports that designated gatekeepers will have to submit annually under Article 15 of the Digital Markets Act² ('DMA').

By letter of 31 July 2023, the Commission invited the European Data Protection Board ('EDPB') and the European Data Protection Supervisor ('EDPS') to provide feedback to the template. The EDPB and the EDPS welcome the opportunity to provide comments on the draft template.

In addition, as member of the DMA High Level Group under Article 40 of the DMA, both the EDPB and the EDPS remain available in that quality and beyond to advise the European Commission, with a view to ensuring regulatory consistency, or to provide advice for any matter of general implementation or enforcement of the DMA when data protection issues are at stake³.

2. GENERAL COMMENTS

The EDPB and EDPS recall that gatekeepers shall submit to the Commission, within 6 months after their designation, the independently audited descriptions of any techniques for profiling of consumers that they apply to or across their core platform services. The European Commission shall then transmit that audited description to the EDPB, pursuant to Article 15(1) DMA.

In accordance with Article 36 DMA, the information collected pursuant to Article 15 shall also be used for the purposes of Regulation (EU) 2016/679⁴ ('GDPR'). Recital (72) DMA clarifies that the independently audited descriptions may be relied upon to inform the enforcement of Union data protection rules.

The objectives of Article 15 DMA, as set out in Recital 72, include enhancing transparency and accountability regarding gatekeeper's profiling techniques as well as facilitating fairness and contestability of their respective core platform services. Such transparency should among others "help

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

² Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

³ Article 40(5) DMA.

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88.

avoiding that deep consumer profiling will become the *de facto* industry standard and allow competitors to differentiate themselves through the use of superior privacy guarantees”⁵.

Transparency about gatekeepers’ profiling techniques should bring to light how gatekeepers comply with data protection law. To be effective, the audited description of profiling techniques should provide supervisory authorities with sufficient insights to inform the enforcement of Union data protection rules in a meaningful manner. Even though the DMA does not have the force of *lex specialis* in relation to the GDPR or the ePrivacy Directive⁶, it is clear that Article 15 DMA will only be effective in providing transparency and accountability if the information gatekeepers are expected to share with the Commission is sufficiently comprehensive.

As a preliminary remark, the EDPB and the EDPS note that under Article 15(1) DMA the audited description should cover profiling techniques that gatekeepers apply ‘to or across’ their core platform services. In this regard, the EDPB and the EDPS recommend that the introduction to the template clarifies whether the Commission expects to receive different audited descriptions of profiling techniques for each of the core platform services of the gatekeeper, or whether a single description of profiling techniques for all concerned core platform services would be more appropriate. The EDPB and EDPS consider that if different core platform services of the gatekeeper use the same profiling techniques, one audited description could be submitted, provided that the audit of the description encompasses all core platform services concerned. Otherwise, multiple descriptions should be provided.

The EDPB-EDPS comments focus primarily on Section 2 of the draft template (‘Information about the profiling techniques of consumers’).

Without prejudice to the comments formulated below on Sections 3 to 5 of the template, the EDPB and the EDPS consider that the template should not serve as a replacement for the implementing act which the Commission may adopt pursuant to Articles 15(2) and 46(1)(g) DMA to develop the methodology and procedure of the audit. In particular, the EDPB and the EDPS are concerned that the template alone would not provide sufficient safeguards against low quality or otherwise unreliable audits on behalf of gatekeepers. Even if information obtained from gatekeepers (e.g., in the context of Sections 3 to 5 of the template) could inform the preparation of such an implementing act, the EDPB and the EDPS consider that a detailed methodology and procedure for the audited description of profiling techniques should be set out separately. This would ensure that gatekeepers would follow the correct and Commission-vetted process to collect and convey the information on consumer profiling sought by the Commission.

⁵ https://digital-markets-act.ec.europa.eu/consultations/consultation-template-relating-reporting-consumer-profiling-techniques_en. In the same vein, recital (72) of the DMA indicates that “*transparency puts external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or start-ups cannot access data to the same extent and depth, and at a similar scale. Enhanced transparency should allow other undertakings providing core platform services to differentiate themselves better through the use of superior privacy guarantees.*”

⁶ Article 8(1) DMA states that (emphasis added) “*The gatekeeper shall ensure and demonstrate compliance with the obligations laid down in Articles 5, 6 and 7 of this Regulation. The measures implemented by the gatekeeper to ensure compliance with those Articles shall be effective in achieving the objectives of this Regulation and of the relevant obligations. The gatekeeper shall ensure that the implementation of those measures complies with applicable law, in particular Regulation (EU) 2016/679, Directive 2002/58/EC, legislation on cyber security, consumer protection, product safety, as well as with the accessibility requirements.*” Recital (12) DMA adds that the Regulation applies “*without prejudice to the rules resulting from other acts of Union law regulating certain aspects of the provision of services covered by this Regulation, in particular Regulations (EU) 2016/679 (...) and Directives 2002/58/EC (...), as well as national rules aimed at enforcing or implementing those Union legal acts.*”

The information that the Commission obtains via the audited descriptions under Article 15 will in first instance serve as input for the European Commission to carry out its tasks under the DMA and is without prejudice to the tasks and powers of supervisory authorities under the GDPR. As a consequence, the EDPB and the EDPS underline that any tacit or explicit approval or expression of the European Commission on how a gatekeeper processes personal data for consumer profiling or how it informs consumer about profiling techniques does not automatically entail that the gatekeeper is complying with the GDPR, which is for supervisory authorities to verify⁷.

In addition, the information requested or shared under Article 15(1) DMA is without prejudice to the powers and competences of the Commission and supervisory authorities to request gatekeepers for access to additional information in the exercise of their respective investigative powers and enforcement⁸.

3. COMMENTS TO SECTION 1 OF THE TEMPLATE

The EDPB and EDPS note that the stated objective of Section 1, according to the introduction of the template, is to allow the Commission to obtain “*information on the identity of the gatekeeper*”. The EDPB and the EDPS therefore recommend replacing the current title of Section 1 (“*General information on profiling description*”) with “**Information on the identity and corporate structure of the gatekeeper**”.

Concerning 1.2 ‘Please 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’

The EDPB and the EDPS note that it would be important for gatekeepers to not only provide the Commission with the name of each person involved in the drafting of the submitted description of the consumer profiling techniques, but also with information about the function and role of such persons. That information could allow the Commission to detect or further investigate potential conflicts of interest or duties among persons who contributed to the drafting of the audited description.

In addition, the EDPB and the EDPS consider it unclear what it means to ‘contribute to the drafting’ of the audited description, and that this could be narrowly interpreted by gatekeepers. It appears important to have a complete overview of all relevant persons involved in the preparation of the audited description⁹. For example, it would appear appropriate for technical or legal experts that provided reports on the functioning of automated systems used for consumer profiling - which ultimately serve as input to the description of the techniques - to be mentioned.

The EDPB and the EDPS recommend redrafting point 1.2. of Section 1 of the template as follows:

*‘Please provide the name, **function and role** of each member of your organisation or external expert which contributed to the ~~drafting of~~ submitted description of the consumer profiling techniques’*

⁷ Article 8(3) of the Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁸ See Article 23(1) and (2) DMA and Article 58(1) GDPR.

⁹ For the sake of completeness, the EDPB and EDPS consider that individual contributors should not be mentioned in the publicly available overview of the audited description, as referred to in Article 15(3) DMA.

4. COMMENTS TO SECTION 2.1. OF THE TEMPLATE

Concerning a) ‘the specific purpose(s) pursued by the profiling technique(s) and for which they are used’

As a preliminary remark, the EDPB and the EDPS wish to underline that information about the profiling purposes should not consist of a generic reference to the evaluation of personal aspects to analyse or predict aspects concerning consumers¹⁰. The information about the specific purposes pursued by the profiling techniques and for which they are used should focus on the final results or outcomes which are expected or obtained by the gatekeeper from the profiling process (e.g., predicting the near future consumer purchasing needs or behaviour to tailor advertising messages or prices to their individual situation)¹¹. In this regard, the EDPB and the EDPS also note that recital (72) DMA refers to “the purpose for which the profile is prepared and eventually used”.

Against this background, the EDPB and the EDPS welcome that point a) of Section 2.1. of the template refers to the *specific* purposes pursued by the profiling techniques and recommend including an explanatory footnote with a few negative and positive examples of purpose descriptions to guide gatekeepers when compiling and sharing the information requested¹².

Concerning b) ‘the legal ground relied on by the gatekeeper under Article 6(1) of Regulation (EU) 2016/679 and whether consent is required under points a) to d) of Article 5(2) of Regulation (EU) 2022/1925 for each purpose of profiling consumers’

In accordance with the accountability principle, it is the task of gatekeepers, when acting as controllers in relation to consumer profiling, to demonstrate how they comply with the data protection principles outlined in Article 5(1) GDPR¹³. This includes the lawfulness principle¹⁴ and the associated requirement of securing an appropriate legal basis for processing personal data¹⁵.

The EDPB and the EDPS recall that gatekeepers may also need to be able to demonstrate that an exception to the prohibition to process special categories of personal data under Article 9(2) of the GDPR applies in the context of their consumer profiling processing activities. In some instances, processing of personal data and special categories of data may also be subject to further limitations¹⁶,

¹⁰ Article 4(4) GDPR.

¹¹ [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), As last Revised and Adopted on 6 February 2018, page 7: “profiling is automated processing of personal data for evaluating personal aspects, in particular to analyse or make predictions about individuals [e.g., regarding their ability to perform a task, interests and likely future behaviour]. The use of the word ‘evaluating’ suggests that profiling involves some form of assessment or judgement about a person. A simple classification of individuals based on known characteristics such as their age, sex, and height does not necessarily lead to profiling. This will depend on the purpose of the classification. For instance, a business may wish to classify its customers according to their age or gender for statistical purposes and to acquire an aggregated overview of its clients without making any predictions or drawing any conclusion about an individual. In this case, the purpose is not assessing individual characteristics and is therefore not profiling.”

¹² Article 29 Data Protection Working Party Opinion 03/2013 on purpose limitation (WP 203), Adopted on 2 April 2013, page 16: “a purpose that is vague or general, such as for instance ‘improving users’ experience’, ‘marketing purposes’, ‘IT-security purposes’ or ‘future research’ will - without more detail - usually not meet the criteria of being ‘specific’.”

¹³ Article 5(2) GDPR.

¹⁴ Article 5(1)(a) GDPR.

¹⁵ Article 6(1) GDPR.

¹⁶ The EDPB and the EDPS also note that limitations to the processing of data may also stem from Directive

such as when it qualifies as automated decision-making under Article 22(1) GDPR¹⁷, or when it is used by gatekeepers who qualify as a provider of an online platform under the Digital Services Act ('DSA') to present advertisements to recipients of the service¹⁸.

Lastly, in relation to Article 5(2) of the DMA, in case the gatekeeper believes that the processing does not require consent and can rely on an alternative and permissible lawful ground under Article 6(1) GDPR, the gatekeeper should be required to demonstrate why it is appropriate to rely on Articles 6(1)(c), (d) or (e) GDPR. In this respect, account should be taken of the limitations on gatekeepers' ability to rely on Article 6(1)(d) or (e) GDPR to process consumer data, in light of their type of activity and their essentially economic and commercial nature¹⁹.

In light of the above, the EDPB and the EDPS recommend redrafting point b) of Section 2.1. of the template as follows:

'the legal basis relied on by the gatekeeper under Article 6(1) of Regulation (EU) 2016/679 for the processing referred to in point g) of the template, and, if applicable, the exception under Article 9(2) and/or Article 22(2) and (4) of Regulation (EU) 2016/679 that the gatekeeper relies upon, together with a justification for reliance on such legal basis and exception; and whether consent is required under points a) to d) of Article 5(2) of Regulation (EU) 2022/1925 for each purpose of profiling consumers and, if consent is not required, why it is appropriate to rely on Articles 6(1)(c), (d) or (e) of Regulation (EU) 2016/679'

In addition, the EDPB and the EDPS recommend adding a new point to the list below point b), considering that certain gatekeepers might seek to rely on the legitimate interests lawful ground under Article 6(1)(f) GDPR when carrying out consumer profiling in their core platform services, in particular in cases falling outside of the scope of Article 5(2) DMA. In that context, the EDPB and the EDPS would consider it necessary to ask gatekeepers to share with the Commission relevant information necessary to assess the lawfulness of the gatekeeper's reliance on that lawful ground, including: (i) a summary of the legitimate interest balancing test they have carried out in accordance with Article 6(1)(f) GDPR²⁰; (ii) a description of the mechanisms they made available to consumers to

2002/58/EC (the 'ePrivacy Directive'), which contains specific requirements in relation to storing information, or accessing information in the terminal equipment of a consumer, as well as additional requirements which would apply to providers of number-independent interpersonal communications services qualifying as gatekeepers and seeking to use certain types of information in the context of their consumer profiling techniques.

¹⁷ Article 22(2) GDPR sets out three exhaustive cases in which the prohibition under Article 22(1) GDPR on specific types of automated decision-making would not apply, notably when the decision: is necessary for entering into, or performance of, a contract between the data subject and a data controller; is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or is based on the data subject's explicit consent. See also Article 22(4) GDPR: "Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place."

¹⁸ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102, Article 26(3).

¹⁹ Judgment of the Court of Justice of 4 July 2023 *Meta Platforms and others (Conditions générales d'utilisation d'un réseau social)*, C-252/21 ECLI:EU:C:2023:537, paragraphs 133 and 137.

²⁰ The summary of the balancing test should include information on (i) the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed, (ii) the need to process personal data for the purposes of the legitimate interests pursued, and (iii) the condition that the fundamental rights and freedoms of the data subject whose data require protection do not take precedence. See the [EDPB Guidelines 8/2020 on the targeting of social media users](#), Version 2.0, adopted on 13 April 2021, para. 50, with reference to Judgment of the Court of Justice of 29 July 2019, *Fashion ID*, C-40/17, ECLI:EU:C:2019:629, para. 95.

object to such profiling under Article 21 GDPR; (iii) how objection requests are honoured in practice; and (iv) any compelling legitimate grounds for continuing the processing despite objection requests.

Concerning c) ‘a numbered list with a detailed description of each category of personal data and data derived from user activity (in particular, distinguish data and personal data categories actively provided by consumers²¹ from observed data²²) and sources for each of these categories of data and personal data processed for profiling consumers applied to or across the designated core platform services (in particular, distinguish data and personal data originating from the gatekeeper’s services, including core platform services, from data and personal data originating from third parties’

As a baseline for clarifying the scope of the information requested, the EDPB and EDPS would like to underline the distinction between personal data that is ‘provided’ by the data subject and personal data that is created by the data controller on the basis of the former (i.e., ‘derived’ or ‘inferred’ data). The EDPB has had the opportunity to elaborate on the distinction between those categories of data in its guidelines on Article 20 of the GDPR²³ and on the targeting of social media users²⁴.

In light of this distinction, the examples provided of data ‘derived’ from user activity in point c) of Section 2.1. of the template, as well as other references in its wording and its explanatory footnotes, may be misunderstood by gatekeepers. Indeed, the EDPB and the EDPS understand Recital 72 DMA as referring to all types of data which are derived from user activity (in the broad sense), including not only ‘provided’ and ‘observed’ data, but also ‘derived’ or ‘inferred’ data.

When listing the sources for the categories of personal data processed for profiling consumers, the EDPB and the EDPS recommend that gatekeepers are required to provide the Commission not only with information on “data originating from third parties” as such, but also data resulting from the “use of third party services”.

21 “For example, profile information (e.g. age, sex, location and other) provided by consumers through any core platform service, or provided through any other service of gatekeeper, when this data is combined or cross-used with that of a core platform service.”

22 “Observed data are understood as data provided by the consumer by virtue of using a service or device. For example, data related to, or derived from, the activity of the consumer on the gatekeeper’s core platform services or other services (e.g. the content that a user has consulted, shared or liked) as well as data related to, or derived from, the use of devices on which the gatekeepers’ core platform services or services are provided (e.g. GPS location).”

²³ [Article 29 Data Protection Working Party Guidelines on the right to data portability \(WP 242 rev.01\)](#), as last revised and adopted on 5 April 2017, pages 10 and 11: “In general, given the policy objectives of the right to data portability, the term “provided by the data subject” must be interpreted broadly, and should exclude “inferred data” and “derived data”, which include personal data that are created by a service provider (for example, algorithmic results). A data controller can exclude those inferred data but should include all other personal data provided by the data subject through technical means provided by the controller. Thus, the term “provided by” includes personal data that relate to the data subject activity or result from the observation of an individual’s behaviour, but does not include data resulting from subsequent analysis of that behaviour. By contrast, any personal data which have been created by the data controller as part of the data processing, e.g. by a personalisation or recommendation process, by user categorisation or profiling are data which are derived or inferred from the personal data provided by the data subject, and are not covered by the right to data portability.”

²⁴ EDPB Guidelines 8/2020 on the targeting of social media users Version 2.0, Adopted on 13 April 2021, pages 13 and 14: ““Provided data” refers to information actively provided by the data subject to the social media provider and/or the targeter. (...) Observed data are data provided by the data subject by virtue of using a service or device. (...) – “Inferred data” or “derived data” are created by the data controller on the basis of the data provided by the data subject or as observed by the controller.”

Therefore, the EDPB and the EDPS recommend redrafting point c) of Section 2.1. of the template as follows:

*'a numbered list with a detailed description of each category of personal data and data derived from user activity (in-particular, distinguish data and personal data categories actively provided by consumers from observed data **and from derived or inferred data**) and sources for each of these categories of data and personal data processed for profiling consumers applied to or across the designated core platform services (in particular, distinguish data and personal data originating from the gatekeeper's services, including core platform services, from data and personal data originating from third parties **and/or the use of services of third parties**)'*

Concerning d) 'a detailed description of the inferred data'²⁵ about consumers from the processing of the data and personal data listed in point c)'

In line with the observations and recommendations concerning point c) above, the EDPB and the EDPS recommend clarifying that gatekeepers should report on data that they derive or infer from the processing of the data covered by point c) of Section 2.1.

Therefore, the EDPB and the EDPS recommend redrafting point d) of Section 2.1. of the template as follows:

*'a detailed description of the **derived or inferred data** about consumers from the processing of the data and personal data listed in point c), **as well as an explanation of how such derived or inferred data were created**'*

Additionally, the EDPB and the EDPS recommend aligning the first sentence of the explanatory footnote in point d) - referring to the definition of 'inferred data' - with the EDPB guidelines on the targeting of social media users, as follows: *'Inferred data are understood as data **created** by the gatekeeper from the processing of observed data **and/or from** data actively provided by consumer'.*

Concerning e) 'the retention duration of each category of data and personal data listed in points c) and d) and of the profiling itself'

The EDPB and the EDPS welcome point e) of Section 2.1. of the template, which would provide information relevant to assessing compliance with the principle of storage limitation²⁶.

Nonetheless, the EDPB and the EDPS recall that Recital (72) states that the audited description of gatekeepers' consumer profiling techniques should concern *"the duration of the profiling"* which has a broader scope than the reference to personal data storage periods. The EDPB and the EDPS consider that information about the *"duration of the profiling"* should unambiguously indicate the time during which the consumer profiling process occurs - from the moment when gatekeepers collect data until the moment they apply a profile to the individual²⁷. In addition, the EDPB and EDPS consider that gatekeepers should be requested to justify the chosen duration.

Therefore, the EDPB and the EDPS recommend redrafting point e) of Section 2.1. of the template as

²⁵ *"Inferred data are understood as data derived by the gatekeeper from the processing of observed data or data actively provided by consumer. For example, consumers' interests or socio-economic status. Further guidance on the distinction between provided data, observed data and inferred data, can be found in the European Data Protection Board's [Guidelines on the targeting of social media users](#)."*

²⁶ Article 5(1)(e) GDPR.

²⁷ [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), as last Revised and Adopted on 6 February 2018, page 12.

follows:

'the duration of the profiling process, as well as the retention duration of each category of data and personal data listed in points c) and d), accompanied by a justification of the chosen duration and of the profiling itself'

Concerning f) 'a numbered list with a detailed description of the technical safeguards in place to avoid the presentation of advertisements on the gatekeeper's interface based on profiling of minors or children, including a description of how user data is collected, used or processed in a way that allows the gatekeeper to identify a user as a minor, as well as quantitative indicators to measure the successful identification of minors'

The EDPB and the EDPS take note that gatekeepers that qualify as online platforms under the DSA are prohibited from presenting advertisements based on profiling to minors under Article 28(2) of the DSA. The EDPB and the EDPS further note that gatekeepers qualifying as online platforms are also prohibited from presenting advertisements based on profiling using special categories of personal data under Article 26(4) of the DSA. At the same time, the data protection and privacy interests of end users may be significantly affected even where the profiling practices of gatekeepers do not result in the presentation of advertisements to minors or are based on profiling using special categories of data.

The EDPB and the EDPS recommend the Commission to inquire more generally about the technical safeguards that gatekeepers have in place to protect the rights and freedoms of end users when displaying advertisements on the basis of profiling, including (but not limited to) situations where end users are minors or otherwise vulnerable, and where there is a possibility that the presentation of advertising would be based on profiling using of special categories of personal data.

In addition, Article 28(3) of the DSA states that, when complying with the prohibition under Article 28(2) of the DSA, online platforms are not obliged to process additional personal data in order to assess whether the recipient of the service is a minor. Thus, the EDPB and the EDPS recommend clarifying in a footnote that the information sought by the Commission under point f) of Section 2.1. of the template should not be read as obliging gatekeepers to process additional personal data in order to assess whether the recipient of the service is a minor.

In light of the above considerations, the EDPB and the EDPS recommend redrafting point f) of Section 2.1. of the template as follows:

'a numbered list with a detailed description of the technical safeguards in place to protect the rights and freedoms of end users when displaying advertisements on the basis of profiling, and, if applicable including measures to avoid the presentation of advertisements on the gatekeeper's interface based on profiling of minors or children to minors or profiling based on special categories personal data referred to in Article 9(1) of Regulation (EU) 2016/679; including this shall include a description of how user data is collected, used or processed in a way that allows the gatekeeper to identify a user as a minor, as well as quantitative indicators to measure the successful identification of minors, if applicable, and a description of whether (and if so, of which categories of) special categories of personal data are used for profiling'

Concerning g) 'the processing applied'

The EDPB and the EDPS recall the broad definition of processing under the GDPR²⁸, and consider that

²⁸ Article 4(2) GDPR: "'processing' means any operation or set of operations which is performed on personal data

gatekeepers may benefit from further clarifications as to the specific types of processing activities for which the Commission is seeking information on as they relate to consumer profiling techniques.

The EDPB and the EDPS recommend clarifying that the audited description regarding the ‘processing applied’ by the gatekeeper shall contain a complete description of the data lifecycle - from the moment of initial data collection until the moment of data erasure or destruction - and of the profiling techniques applied. This should cover, at least, all the stages of the consumer profiling process, specifically when gatekeepers collect data, analyse data, build a profile for an individual, and apply a profile to make a decision affecting the individual²⁹.

In addition, the EDPB and the EDPS recommend that the Commission explains in a footnote that gatekeepers should provide under this point an exhaustive description of the profiles applied to consumers, the description of the features or functionalities of the core platform service associated to those profiles, and whether the profiling is carried out directly by the gatekeeper or by another (named) entity (acting either on behalf of the gatekeeper as a processor, or as a separate/joint controller).

Concerning h) ‘whether automated decision-making takes place on the basis of an applied profiling technique, the number and object of such automated decisions, the legal effects³⁰ the automated-decision making mechanism is producing or may produce, and a description of the algorithms underpinning the automated decision mechanism’

The EDPB and the EDPS recall that some instances of profiling can partially overlap with or result in automated decision-making affecting the rights and freedoms of data subjects to an extent that they would render them prohibited under Article 22(1) GDPR, in the absence of an applicable exception under Article 22(2) GDPR³¹. However, it is equally possible that the profiling does not, in itself, constitute or involve automated decision-making³².

or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.”

²⁹ [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), as last Revised and Adopted on 6 February 2018, page 12.

³⁰ ‘A decision produces legal effects when the subject’s legal rights are impacted. This could include, for example, any resulting effect on their right to vote, their ability to take out a loan, and their position in recruitment.’

³¹ Opinion of Advocate General Pikamae of 16 March 2023, *OQ contre Land Hessen, en présence de SCHUFA Holding AG* (C-634/21), ECLI:EU:C:2023:220, which argues that the automated establishment of a probability value concerning the ability of the person concerned to service a loan in the future already constitutes a decision based solely on automated processing, including profiling, which produces legal effects concerning that person or similarly significantly affects him or her, where that value, determined by means of personal data relating to that person, is transmitted by the controller to a third-party controller and the latter, in accordance with consistent practice, draws strongly on that value for its decision on the establishment, implementation or termination of a contractual relationship with that same person.

³² [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), as last Revised and Adopted on 6 February 2018, page 8: “Automated decision-making has a different scope and may partially overlap with or result from profiling. Solely automated decision-making is the ability to make decisions by technological means without human involvement. (...) Automated decisions can be made with or without profiling; profiling can take place without making automated decisions. However, profiling and automated decision-making are not necessarily separate activities. Something that starts off as a simple automated decision-making process could become one based on profiling, depending upon how the data is used. (...) Decisions that are not solely automated might also include profiling. For example, before granting a mortgage, a bank may consider the credit score of the borrower, with additional meaningful intervention carried out by humans before any decision is applied to an individual.”

The EDPB and the EDPS would find it appropriate to enlarge the scope of point h) of Section 2.1. of the template, to include information related to both profiling and automated decision-making, as the concepts are different, yet both concepts are relevant to assess the potential negative effects of the gatekeeper's practices.

Additionally, the EDPS and the EDPB consider that the audited description of profiling techniques under Article 15 DMA should provide visibility over the effects that profiling techniques applied by the gatekeepers and automated decision-making based on such profiling may have on consumers, not only where gatekeepers understand that they qualify as "legal" effects.

If implemented, the footnote in point h) of Section 2.1. outlining examples of the types of effects that profiling or automated decision-making may have on consumers should therefore not focus solely on "legal" effects but also other types of significant effects. In any event, the EDPB and the EDPS note that the examples concerning the ability of individuals to take out a loan or success in e-recruitment processes currently included in the explanatory footnote could be seen not as 'legal' effects but 'similarly significant' effects³³. Therefore, the EDPB and the EDPS recommend amending the footnote accordingly.

Lastly, the EDPB and the EDPS recommend the inclusion of a footnote providing examples of the types of information that the Commission expects to receive with regards to the description of the algorithms underpinning the gatekeepers' profiling processes and automated decision-making schemes. Clear examples may help gatekeepers to identify the information sought and provide useful insights regarding their techniques, without necessarily revealing trade secrets. In this context, some examples could include the information such as why the gatekeeper considers the selected categories of data under points c) and d) of Section 2.1. of the template to be pertinent, how consumer profiles are built (including any statistics used), and why the profile is relevant for automated decision-making processes³⁴.

In light of the above, the EDPB and the EDPS recommend redrafting point h) of Section 2.1. of the template as follows:

*'whether automated decision-making takes place on the basis of an applied profiling technique, the number and object of such automated decisions, the legal, **similarly significant and other types** of effects the automated-decision making mechanism **and the profiling techniques are** producing or may produce, and a description of the algorithms underpinning the automated decision mechanism **and the profiling techniques**'*

Concerning i) 'qualitative and quantitative impact or importance of the profiling techniques in question for the business operations of the gatekeeper'

Recital (72) DMA states that the audited description of gatekeepers' consumer profiling techniques should contain the "impact of such profiling on the gatekeeper's services". This does not necessarily

³³ Recital (71) GDPR. See also [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), last Revised and Adopted on 6 February 2018, page 22: "It is difficult to be precise about what would be considered sufficiently significant to meet the threshold, although the following decisions could fall into this category: decisions that affect someone's financial circumstances, such as their eligibility to credit; decisions that affect someone's access to health services; decisions that deny someone an employment opportunity or put them at a serious disadvantage; decisions that affect someone's access to education, for example university admissions."

³⁴ [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), As last Revised and Adopted on 6 February 2018, page 31.

correspond to the 'business operations' of the gatekeeper as currently mentioned in point i) of Section 2.1. of the template.

Therefore, the EDPB and the EDPS recommend redrafting point i) of Section 2.1. of the template as follows:

*'qualitative and quantitative impact or importance of the profiling techniques in question for **the core platform services and other services of the gatekeeper, as well as the business operations of the gatekeeper**'*

In addition, the EDPB and EDPS recommend the Commission to further clarify which specific quantifiable information it seeks regarding the impact or importance of the profiling techniques for the business operations of the gatekeeper (e.g., the frequency with which profiles are applied, the number of advertising campaigns that relied on the use of profiling techniques, listing business areas or units which rely on the use of profiling techniques, or other types of correlation between the use of consumer profiling techniques and the business operations of the gatekeepers).

Concerning j) 'actions taken to effectively enable consumers to be aware that they are undergoing profiling and the relevant use of such profiling'

The EDPB and the EDPS recommend asking gatekeepers to share the information that they provide to consumers about the profiling techniques they apply, as well as the format and the timing of such notice or description. To be clear, this information should not be restricted to automated decision-making, including profiling, within the meaning of Article 22(1) GDPR, but should also cover profiling that does not produce the types of effects covered by Article 22(1) GDPR³⁵.

The EDPB and the EDPS recall that the GDPR requires controllers to inform data subjects about various elements related to the processing of their personal data, including about the existence of specific types of automated decision-making and profiling and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject³⁶.

Furthermore, the EDPB and the EDPS stress that it may be appropriate or necessary for gatekeepers to provide consumers with additional controls and corresponding information in relation to whether or how they carry out profiling, notably by giving consumers the possibility of adjusting or selecting the parameters that gatekeepers rely on for profiling³⁷. Details on the transparency that gatekeepers provide on the offered controls could inform supervisory authorities on the measure of data subjects' control over the use of their personal data in core platform services.

The EDPB and the EDPS recommend redrafting point j) of Section 2.1. of the template as follows:

³⁵ Recital 60 GDPR refers to the obligation to disclose the purposes of processing (under Article 13(1)(c) GDPR), including when the purpose is profiling and even if the profiling is not covered by Article 22 GDPR. See [Article 29 Data Protection Working Party Article 29 Working Party Guidelines on transparency under Regulation 2016/679 \(WP260 rev.01\)](#), As last Revised and Adopted on 11 April 2018, paragraph 41.

³⁶ Articles 13(2)(f) and 14(2)(g) GDPR. For further detail, see [Article 29 Data Protection Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 \(WP251rev.01\)](#), last Revised and Adopted on 6 February 2018, pages 25, 26 and 31.

³⁷ For example, the EDPB and EDPS note that gatekeepers that qualify as providers of very large online platforms and of very large online search engines and that use recommender systems shall provide at least one option for each of their recommender systems that is not based on profiling, under Article 37 DSA. However, certain gatekeepers may provide more granular control to end users about how (and not only if) they are profiled, in line with key data protection principles such as fairness and data protection by design.

*'actions taken, **including copies of information provided**, to effectively enable consumers to be aware that they are undergoing profiling, **to be aware of the profiling techniques applied**, ~~and~~ the relevant use, **underlying logic and envisaged consequences** of such profiling, **the consumers' rights**, as well as **any options provided by gatekeepers in relation to such profiling**'*

Concerning k) where consumer consent is required for the given purpose under Regulation (EU) 2016/679, Directive 2002/58/EC and/or Regulation (EU) 2022/1925, a description of any steps taken to seek such consent to profiling, including details on how consumers can refuse consent or withdraw it, and any consequences of such refusal or withdrawal.³⁸

First, the EDPB and the EDPS recommend moving this point upwards in the list under Section 2.1. to logically follow point b) concerning the GDPR lawful grounds that gatekeepers rely on to carry out consumer profiling in their core platform services.

Secondly, the EDPB and the EDPS note that, in some situations - like when the processing involves special categories of data or constitutes automated decision-making covered by Article 22(1) GDPR - the threshold for valid consent is higher, as it must also be "explicit". Given the practical implications of this distinction regarding the level of formality required from controllers to obtain valid consent from data subjects³⁹, the EDPB and the EDPS recommend underlining this distinction in the template, so that the gatekeepers describe the extra efforts undertaken to ensure that consent is explicit when this is required.

Thirdly, the EDPB and the EDPS consider it appropriate for the Commission to seek from gatekeepers the specific wording, design and format gatekeepers use when requesting consent from data subjects in relation to their profiling techniques, including a visual representation thereof, and information about the moment when such consent is sought⁴⁰.

Therefore, the EDPB and the EDPS recommend redrafting point k) of Section 2.1. of the template as follows:

*'where consumer consent or **explicit consent** is required for the given purpose under Regulation (EU) 2016/679, Directive 2002/58/EC and/or Regulation (EU) 2022/1925, a description of any steps taken to seek such consent to profiling, including **a copy and visual representation of the consent requests presented to consumers, the moment in which consent is requested from consumers**, details on how consumers can refuse consent or withdraw it, and any consequences of such refusal or withdrawal'*

Concerning l) 'statistics on how many consumers choose to undergo profiling if they are given a choice'

To clarify the scope of the information sought by the Commission in relation to this point, the EDPB

³⁸ "It should be clear from the description what measures (e.g. in design) the gatekeeper takes to guarantee a neutral presentation of choices to the end user, and the level of facility or ease (e.g. how many clicks) for an end user to refuse or change their consent. The consequences of such refusal or withdrawal should also be clear from the description."

³⁹ [EDPB Guidelines 05/2020 on consent under Regulation 2016/679 Version 1.1](#), Adopted on 4 May 2020, Section 4.

⁴⁰ The EDPB and EDPS suggest, insofar as relevant, to offer gatekeepers the possibility of providing the materials requested under point j) and k) together (to the extent such visuals relate to how consent for processing is requested). In any event, gatekeepers should be requested to provide a complete overview of the user engagement flow.

and the EDPS recommend first asking gatekeepers whether they make available to consumers a version of their core platform service that does not involve profiling, and what are the conditions for consumers to access such version. Information on such conditions may serve as a relevant factor when assessing whether consent to carry out profiling was freely given and, thus, valid, notably where strong network effects are present in the gatekeeper's market⁴¹ or the gatekeeper enjoys a dominant position⁴².

The EDPB and the EDPS recommend redrafting point l) of Section 2.1. of the template as follows:

'statistics on how many consumers choose to undergo or not to undergo profiling, information on the version(s) of the core platform service which does not involve profiling, as well as a detailed description of the specific conditions that apply to consumers that opt for such version(s) (e.g. access to different or limited content, paid access) and information on which version is the default, if any~~if they are given a choice~~

Concerning m) 'whether and when the profiling technique has been the object of a data protection impact assessment'⁴³ and the conclusion of such assessment'

The EDPB and the EDPS underline the important role of data protection impact assessments ('DPIAs') under Article 35 GDPR as an accountability tool for controllers in relation personal data processing activities that are likely to result in a high risk to the rights and freedoms of natural persons⁴⁴.

In many instances of profiling by gatekeepers, a DPIA would be required, either because the data processing would fall directly under Article 35(3)(a) of the GDPR, or because it would fulfil at least two of the criteria laid out in the EDPB guidelines on DPIAs (e.g., evaluation or scoring, processing of sensitive personal data, large scale processing, vulnerable data subjects given imbalances of power in digital markets)⁴⁵. The EDPB and the EDPS suggest that the explanatory footnote to point m) of Section 2.1. of the template include a reference to these EDPB guidelines.

Access by the Commission and supervisory authorities to the summaries of the DPIAs carried out by gatekeepers - and not merely to their conclusions - in relation to their profiling techniques could

⁴¹ [EDPB Guidelines 05/2020 on consent under Regulation 2016/679 Version 1.1](#), Adopted on 4 May 2020, paragraph 24: "Imbalances of power are not limited to public authorities and employers, they may also occur in other situations. As highlighted by the WP29 in several Opinions, consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences (e.g. substantial extra costs) if he/she does not consent. Consent will not be free in cases where there is any element of compulsion, pressure or inability to exercise free will."

⁴² Judgment of the Court of Justice of 4 July 2023 *Meta Platforms and others (Conditions générales d'utilisation d'un réseau social)* (C-252/21), ECLI:EU:C:2023:537, paragraphs 149 and 150: "149. Furthermore, the existence of such a dominant position may create a clear imbalance, within the meaning of recital 43 of the GDPR, between the data subject and the controller, that imbalance favouring, inter alia, the imposition of conditions that are not strictly necessary for the performance of the contract (...) 150. Thus, those users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations."

⁴³ "A data controller must carry out a data protection impact assessment under Article 35 of Regulation (EU) 2016/679 in certain circumstances that may also involve profiling."

⁴⁴ See Article 35(7) GDPR.

⁴⁵ [Article 29 Data Protection Working Party Guidelines on Data Protection Impact Assessment \(DPIA\) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679 \(WP 248 rev.01\)](#), As last Revised and Adopted on 4 October 2017, pages 9-11.

provide regulators with much needed transparency concerning how gatekeepers have considered and addressed the risks for data subjects that may arise from personal data processing in that context.

Therefore, the EDPB and the EDPS recommend redrafting point m) of Section 2.1. of the template as follows:

*‘whether, ~~and~~ when **and why** the profiling technique has **or has not** been the object of a data protection impact assessment, **a summary** ~~and the conclusion~~ of such assessment, **information about how often the assessment is reviewed and updated, and the measures implemented by the gatekeeper to address the risks to the rights and freedoms of data subjects identified in such assessment**’*

Concerning n) and o) ‘any alternative measures to profiling that have been implemented and their description, including reasons for choosing them’;⁴⁶ alternative measures to profiling that have been considered and the reasons for not choosing them’

As also mentioned under point j), the EDPB and EDPS consider that it would be appropriate to seek information about why gatekeepers have or have not provided consumers with additional controls in relation to how they are profiled in core platform services, like enabling consumers to adjust or select the parameters that gatekeepers rely on for profiling purposes.

Therefore, the EDPB and the EDPS recommend redrafting points n) and o) of Section 2.1. of the template as follows:

*‘any alternative measures to profiling that have been implemented and their description, **as well as additional controls for consumers in relation to how consumers are profiled, including reasons for choosing them; alternative measures to profiling, or additional controls for consumers in relation to how they are profiled, that have been considered and the reasons for not choosing them**’*

5. RECOMMENDATIONS FOR ADDITIONAL POINTS IN SECTION 2.1

As mentioned above, one of the goals of the Commission’s transmission of the audited description of consumer profiling techniques to the EDPB is to inform the enforcement of Union data protection rules. In order to increase transparency and accountability in this context, the EDPB and the EDPS recommend enlarging the scope of the elements of information that the current wording of the template would require gatekeepers to provide to the Commission.

In particular, the EDPB and the EDPS highlight the importance of having gatekeepers clearly identify special categories of personal data⁴⁷ that are provided by consumers in a broad sense (i.e., both data which is actively provided by data subjects and data that is observed from their online activities) and that gatekeepers derive or infer based on the data that are provided by consumers or observed by gatekeepers, in the light of recent CJEU case law⁴⁸.

⁴⁶ “Asking for alternatives to profiling allows assessing whether gatekeepers have considered less intrusive measures and is particularly informative in terms of accountability.”

⁴⁷ Article 9(1) GDPR.

⁴⁸ Judgment of the Court of Justice of 1 August 2022 *OT v Vyriausioji tarnybinės etikos komisija*, C-184/20, ECLI:EU:C:2022:601, paragraphs 118 and 127: “Article 9(1) of the GDPR provide for the prohibition, inter alia, of processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of data concerning a natural person’s sex life or sexual orientation”; Article 9(1) GDPR “cannot be interpreted as meaning that the processing of personal data that are liable indirectly to reveal sensitive information concerning a natural person is excluded from the strengthened

In addition, the EDPB and the EDPS recommend including in Section 2.1. specific points on:

- *how the rights of data subjects under Chapter III of Regulation 2016/679 are ensured, a description of the technical and organisational measures in place that ensure that consumers can exercise these rights, especially when personal data has been combined from different sources;*
- *whether the gatekeeper transfers personal data to a third country or international organisation within the context of the processing applied for consumer profiling and, if applicable, the ground(s) under Chapter V GDPR that the gatekeeper relies on to carry out such transfers and a description and copy of the appropriate safeguards applied by the gatekeeper;*
- *a detailed description of the special categories of data processed by the gatekeeper in the context of consumer profiling (in particular, distinguishing special categories of data actively provided by consumers from observed special categories of data and from derived or inferred special categories of data); and*
- *the third parties involved in the processing and their role in that regard, as well as the recipients⁴⁹ of personal data, if any.*

6. COMMENTS TO SECTION 3.1. OF THE TEMPLATE

Concerning b) ‘overview of the professional qualifications, including domains of expertise, certifications, as applicable and descriptions of the responsibilities and work the respective member undertook during the audit’

The EDPB and the EDPS consider that an explanatory footnote in point b) of Section 3.1. of the template could point towards existing and available standards for auditors’ professional qualifications⁵⁰, as a way of illustrating the level of expertise that the Commission expects auditors to have.

Concerning c) ‘declaration of interests by each auditing organisation, which contributed to the drafting of the submitted description, specifying in particular any relationship (including commercial or contractual) to the audited gatekeeper’

The EDPB and the EDPS also recommend the inclusion of an explanatory footnote in point c) of Section 3.1. of the template with a reference to applicable EU law on the prevention of conflicts of interests

*protection regime”. See also Judgment of the Court of Justice of 4 July 2023 *Meta Platforms and others (Conditions générales d’utilisation d’un réseau social*, C-252/21, ECLI:EU:C:2023:537, paragraphs 68, 78 and 79: “For the purposes of applying Article 9(1) of the GDPR, it is important to determine, where personal data is processed by the operator of an online social network, if those data allow information falling within one of the categories referred to in that provision to be revealed”; “as regards, first, visits to websites or apps to which one or more of the categories referred to in Article 9(1) of the GDPR relate, it should be noted that the user concerned does not in any way thereby intend to make public the fact that he or she has visited those sites or apps and the data from those visits which can be linked to his or her person”; “Thus, it cannot be inferred from the mere visit to such websites or apps by a user that the personal data in question were manifestly made public by that user within the meaning of Article 9(2)(e) of the GDPR.”*

⁴⁹ Article 4(9) GDPR.

⁵⁰ As an example, see ISO/IEC 17065:2012(en) Conformity assessment — Requirements for bodies certifying products, processes and services, point 6.1.2.1.

in statutory audits⁵¹ as a point of reference on the independence of the auditors from the audited party (i.e., the gatekeeper).

7. COMMENTS TO SECTION 4.1. OF THE TEMPLATE

Concerning ‘A description of the audit procedures performed by the independent auditor or auditing organisation, the methodologies used to perform the audit (including, where applicable, a justification for the choice of standards, benchmarks, sample size(s) and sampling method(s))’

The below recommendations are without prejudice to the fact that the EDPB and the EDPS stress that the template should not serve as a replacement for the implementing act which the Commission may adopt pursuant to Articles 15(2) and 46(1)(g) DMA to develop the methodology and procedure of the audit.

The EDPB and the EDPS consider that point 4.1. could serve an opportunity for the Commission to illustrate the degree of independence it expects gatekeepers’ auditors to have. This could be achieved via an example in an explanatory footnote to existing standards for assessing auditors’ independence⁵².

The EDPB and the EDPS are also concerned about the current absence of specific Commission-vetted quality standards for gatekeeper audit methodologies. This entails the risk that the test and detail levels of each gatekeepers’ audits pursuant to Article 15(1) DMA will vary considerably before the Commission adopts the implementing act under Articles 15(2) and 46(1)(g) DMA. Therefore, the EDPB and the EDPS recommend including an explanatory footnote in point 4.1. to provide examples of well-known audit methodologies that gatekeepers may leverage⁵³.

8. COMMENTS TO SECTION 5.1. OF THE TEMPLATE

Concerning a) ‘an assessment of “positive”, “positive with comments”, or “negative”, that the description provided is based on sufficient evidence derived from sufficient information provided by the gatekeeper’

The EDPB and the EDPS recommend replacing the reference to ‘sufficient information’ with ‘complete and accurate information’.

9. RECOMMENDATION FOR ADDITIONAL POINT IN SECTION 5

The EDPB and the EDPS recommend that gatekeepers be required to share with the Commission the final audit report(s) produced by the auditor(s) or auditing organisation(s). This disclosure under Article 15(1) DMA could be limited to the strict extent necessary to observe the rights and freedoms

⁵¹ Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts *OJ L 158*, 27.5.2014, p. 196–226, Article 1(14). See also Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC.

⁵² As an example, see ISO/IEC 17065:2012(en) Conformity assessment — Requirements for bodies certifying products, processes and services, point 4.2.

⁵³ As a possible example, see ISO/IEC 17020:2012(en) Conformity assessment — Requirements for the operation of various types of bodies performing inspection.

of third parties, including trade secrets. To this effect, the EDPB and the EDPS suggest that the Commission adds a new point 5.2. to Section 5.