



Privacy International's submission to European Commission's consultation on template relating to the audited description of consumer profiling techniques pursuant to Article 15 of the Digital Markets Act (Regulation 2022/1925)

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Introduction

Privacy International (PI) welcomes the opportunity to contribute to the European Commission's consultation on the template relating to the audited description of consumer profiling techniques pursuant to Article 15 of the Digital Markets Act (Regulation 2022/1925).¹

Profiling is about recognizing patterns, revealing correlations and making inferences. Through profiling, highly sensitive information can be inferred, derived or predicted from other non-sensitive data. As a result, data about an individual's behaviour can be used to generate previously unknown information about someone's likely identity, attributes, behaviour, interests, or personality.²

This includes information revealing or predicting an individual's likely racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health, sexual behaviour or sexual orientation. Because of the inherently probabilistic nature of profiling, individuals are frequently misidentified, misclassified or misjudged as having certain attributes or characteristics.³ Based on profiling, decisions (including fully automated decisions) are made that affect individual's human rights, as noted by the UN General Assembly and the UN Human Rights Council.⁴

As such, PI welcomes that the European Commission's draft template provides clear, precise and detailed instructions on the information gatekeepers need to include in audited description of consumer profiling, to allow for the effective monitoring and assessment of gatekeepers' practices and their compliance with the obligations under the DMA and other relevant legislation, including the EU General Data Protection Regulation (GDPR.)

¹ Available at: https://digital-markets-act.ec.europa.eu/system/files/2023-08/DMA_article15_report_template.pdf

² See, for example, https://privacyinternational.org/sites/default/files/2018-04/data%20points%20used%20in%20tracking_0.pdf

³ See <https://privacyinternational.org/news-analysis/3735/why-were-concerned-about-profiling-and-micro-targeting-elections>

⁴ See UN General Assembly resolution 77/211 and UN Human Rights Council resolution 48/4.

PI believes that the draft template published by the European Commission is a very good start. While PI strongly supports the existing draft, this submission provides some additional suggestions, which we believe would help to achieve the main objectives of Article 15 of the DMA, namely enhancing transparency and accountability regarding gatekeeper's profiling techniques.

Section 2

PI welcomes the list of information detailed in section 2 of the draft template. We would like to offer the following recommendations to strengthen and clarify some of the provisions.

On Section 2.1.c

PI recommends that this provision explicitly requires gatekeepers to provide information on how each category of data is shared and used across the platform's services (e.g., how data collected on Gmail is used on Google Ads or YouTube) and what are the corresponding legal bases. The use of personal data across different services raises significant concerns from a data protection and competition perspectives. For example, among the main commitments made by Google to allay the European Commission's concerns on the merger with Fitbit was that "Google will not use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices."⁵ Hence, information about the way data is used across gatekeepers' services is necessary to better understand the way gatekeepers use the data they process to profile individuals and thereby to strengthen their capacity to target them with their services and to limit contestability.⁶

On Section 2.1.h

PI welcomes the inclusion of information about automated decision-making given its relevance to profiling.⁷ Given the increase reliance by gatekeepers on automated decision making and the limitations to its use under GDPR, we recommend that this provision:

- requires information not only on the 'legal effects' but also on other effects that similarly significantly affect the consumer (in line with the provision of Article 22.1 of the GDPR);
- requires information on how the consumers have given their consent to be subjected to automated decision-making and what suitable measures have the gatekeeper adopted to safeguards consumers' rights and freedoms and legitimate interest, including any information on the exercise of their right to obtain human intervention (in line with the provision of Article 22.2 of the GDPR);
- further outlines the details of the description of the algorithms involved in the automated decision mechanism, and the measures taken to regularly audit such

⁵ See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484

⁶ See, for example, <https://privacyinternational.org/campaigns/advertisers-facebook-who-heck-are-you-and-how-did-you-get-my-data>

⁷ See <https://ec.europa.eu/newsroom/article29/items/612053>

algorithms, the results of such audits and the changes made to address the issues raised by such audits.

On Section 2.1.k

Section 2.1.k) requires information on consent to profiling. PI believes that this provision should explicitly cover not only demonstration of consent for first party data, but also for third party data obtained by the gatekeeper and observed data. This is particularly important considering the practice of some companies to obtain data by relying on third parties. Meta, for example, routinely tracks users, non-users and logged-out users outside its platform through Facebook Business Tools. App developers share data with Facebook through the Facebook Software Development Kit (SDK), a set of software development tools that help developers build apps for a specific operating system.⁸ The concerns that third party data may not have been processed in compliance with GDPR have been recently illustrated in the decision taken on 15 June 2023, by the French data protection authority, CNIL, which sanctioned the data broker company Criteo for failing to verify that the people whose data it processes have given their consent.⁹

On Section 6 - Non-confidential overview

PI recommends that this section is strengthened. The profiling practices of gatekeepers remain often secretive and require significant efforts to be unmasked.¹⁰

Recital 68 of the DMA states that the "clear and comprehensible non-confidential [...] publication should enable third parties to assess whether the gatekeepers comply with the obligations laid down in this Regulation."

To allow such compliance assessment by third parties, including civil society organisations, the overview needs to provide detailed information on the profiling techniques applied by gatekeepers. PI notes that the categories of information listed under section 2 reflects by and large the information that data subjects are entitled to receive under Articles 12 to 14 of the GDPR. Hence PI recommends that the Commission requests that all information contained in the audit that is not demonstrably covered under business secret is made public.

In this regard, PI recommends that Section 6 of this draft reflect the approach taken by the Commission in Section 4 of its draft Template for reporting pursuant to Article 11 of the DMA.¹¹

⁸ See for more information: <https://privacyinternational.org/appdata>

⁹ See: <https://www.cnil.fr/fr/publicite-personnalisee-criteo-sanctionne-dune-amende-de-40-millions-deuros>

¹⁰ See, for example, <https://privacyinternational.org/long-read/4398/companies-control-our-secret-identities>

¹¹ Available here: file:///Users/administrator/Downloads/DMA_template_-_Compliance_report_consultation.pdf

In light of the above, Section 6 should require that the non-confidential overview:

- comprises self-standing texts that give a faithful comprehensive and meaningful picture of the report's content;
- notes that relevant information may be omitted in the non-confidential overview only if it constitutes the gatekeepers' business secrets or if the information is otherwise confidential;
- follows the same structure to that contained in Section 2, with all headings be visible and all sections and sub-sections be covered.

Further, to facilitate transparency and accountability, PI recommends that the Commission considers setting up a process whereby third parties, including civil society organisations, can request disclosure of information the gatekeeper deems confidential.