



## **Submission to the Consultation on the template relating to the reporting on consumer profiling techniques**

*Submitted by European Digital Rights (EDRi)*

European Digital Rights (EDRi) welcomes the European Commission's draft Template Relating to the Audited Description of Consumer Profiling Techniques as part of the enforcement of the Digital Markets Act (DMA).

The DMA's strength lies in its ability for the enforcement authority as well as for the public to obtain independent, reliable information about the gatekeepers' business conduct in the EU. The use of profiling techniques and the related intrusions into people's right to privacy are of particular importance as those intrusions are often invisible and the techniques used incomprehensible and opaque to non-expert eyes.

With the DMA, the EU legislators have taken a clear stand against deep consumer profiling and consider enhanced transparency as one of the main ways to achieve the regulation's objective. Recital 72 DMA explains that these techniques shall not be the industry standard because of their exclusionary effects on competitors and their impact on privacy. EDRi calls for all relevant DMA rules to be interpreted in light of this approach and goal.

### **Section 2 – Information about the profiling techniques of consumers**

The Commission is therefore correct in using the Template's Section 2 to require gatekeepers to provide a wide array of data about the techniques with which they profile people. In addition to agreeing with the entire list of Section 2, EDRi supports in particular the requirements for gatekeepers to provide:

- A complete list of personal data categories they process, including from where it has been taken (c);
- Full details about the inferences gatekeepers make from the personal data they process;
- A step-by-step description of how gatekeepers obtain consent (if any) and how people are being informed about the profiling techniques to which they are subjected (j, k).



It is crucial that the auditing reports provided by gatekeepers shed a public light onto the techniques which gatekeepers deploy to spy on their users (and sometimes non-users as part of shadow profiling), and how the knowledge gained from such spying is being used against people.

That is why EDRi, first, urges the Commission to clarify that **provision 2.1 (c)** 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 perspective, as 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.

Second, given the increased reliance by gatekeepers on automated decision-making and the limitations to its use under the GDPR, EDRi recommends that **provision 2.1 (h)**:

- Requires information not only on the "legal effects" but also on other effects that significantly affect people (in line with the provision of Article 22 (1) of the GDPR);
- Requires information on how people have given consent to be subjected to automated decision-making and what suitable measures gatekeepers have adopted to safeguard people's rights and freedoms, 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 algorithms, the results of such audits, and the changes made to address the issues raised by such audits.

And third, EDRi recommends that **provision 2.1 (k)** requires a detailed description (click-by-click) of the steps the gatekeeper requires people to go through to give, refuse or withdraw consent, including the precise wording presented in each of these steps and screenshots of those steps.

It should also explicitly cover the consent needed for third-party data and observed data obtained by the gatekeeper. 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.



## **Section 6 – Non-confidential overview**

At the same time, in order to increase transparency, the Template should require gatekeepers to include as much information and detail as possible in the non-confidential overviews, in particular all information contained in the audit that is not demonstrably covered under business secret. Otherwise, the overview risks becoming merely a vague summary that can be used by gatekeepers as a marketing pamphlet but is devoid of any meaningful, actionable information.

This should not be hard, given that a sizeable part of the required information under Section 6 is already supposed to be public under Article 13 GDPR. In practice, however, it must be expected that some gatekeepers will try to provide as little insight as possible in the publicly available overview and—as it is meant for the public—to misuse it as a marketing tool to fool both the public and the press into thinking that everything is in order as regards their profiling techniques.

That is why, in cases where the Commission considers that the non-confidential overview does not accurately or in sufficient detail represent the conclusions of the audit in such away that it meaningfully informs the public about the consumer profiling techniques deployed by the gatekeeper, the Template should make it clear that the Commission can request, at any time, a correction of the insufficient overview.

Where the gatekeeper repeatedly fails to provide such correction within a reasonable time frame, the Template should furthermore make clear that the Commission can publish parts or all of the audited description instead, taking into due consideration the objectively justified confidentiality of the gatekeepers' business information.

\*\*\*