EU DIGITAL MARKETS ACT (DMA)

Submission to European Commission's consultation on the template relating to the reporting on consumer profiling techniques

September 2023

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to provide feedback to the European Commission's consultation on the template relating to the reporting on consumer profiling techniques and audit of such reports ("draft template") that gatekeeper-designated companies will have to submit annually under Article 15 of the Digital Markets Act ("DMA")[1].

CCIA Europe represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. CCIA Europe is committed to protecting and advancing the interests of our members, the industry as a whole, as well as society's beneficial interest in open markets, open systems and open networks.

CCIA Europe supports the objectives of the DMA. CCIA Europe considers that in order to meet its stated goals, the DMA should protect the open market economy and free competition, preserve dynamic competition and innovation for the benefit of consumers, protect business freedom, prevent distortive regulatory dependencies, and ensure a framework for digital economic regulation that provides legal certainty and harmonisation across the EU.

CCIA Europe is concerned that the draft template, if adopted in the current form, would go against the DMA's objectives of contestability and fairness and go beyond principles of proportionality and necessity. CCIA Europe's submission to this consultation provides constructive suggestions to improve the draft template in line with the DMA's goals while ensuring effective and proportionate enforcement for the benefit of consumers.

The following comments include some general concerns as to the draft template as well as some more specific issues concerning the following:

- The nature and content of the draft template.
- Draft template's coherence with the GDPR.
- Proportionate enforcement of Article 15 DMA.

[1] 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), available here.

I. General remarks

1. Clarify the legal nature of the draft template

The draft template specifies, among others, "the minimum information that the Commission expects gatekeepers to provide to the Commission with the aim of meeting the objectives set out in recital 72 of the DMA."[2] While Article 46(1)(g) DMA empowers the Commission to adopt an implementing act specifying "the methodology and procedure for the audited description of techniques used for profiling of consumers provided for in Article 15(1)," neither the draft template nor the public consultation announcement clarifies if the draft template will become an implementing act. In light of the lack of clarity as to the legal nature of the draft template, CCIA Europe understands that the draft template, when adopted, will remain a non-binding guidance.

This non-binding framework enables greater flexibility and adaptability for gatekeeper-designated companies in selecting pertinent information, which can then be utilised to showcase their adherence to the DMA. This adaptability becomes especially important given the dynamic nature of digital markets. It promotes innovation, the ability to adjust, and the capacity to promptly respond to the needs of both the market and consumers. Given the above, CCIA Europe strongly believes that the draft template should continue to serve as a non-binding guidance.

However, in the event that the Commission intends for the draft template to be a binding framework, CCIA Europe urges the Commission to provide important clarifications and a meticulous alignment of the content of the draft template with the statutory requisites indispensable and commensurate for effective DMA enforcement. This should entail several changes to the draft template, including, opting for a suggestive, non-exhaustive catalogue of information which should be made available in lieu of the minimum information requirement, and the elimination of specific requirements, as explained below.

For companies that will be subject to the DMA, having clarification as to the legal nature of the draft template is key to ensure legal certainty pertaining to the processes and requirements of the DMA. Given its nascent enforcement, clarity from Day 1 of the DMA's implementation is essential to ensure its success.

II. General information on profiling description (Section 1 of the draft template)

[2] Introduction of the draft template, pp 1.

2. Limit the disclosure of company's staff involved in drafting of the description to a single point of contact

Section 1.1.2 of the draft template requires companies designated as gatekeepers to inform the Commission about the name of each employee who contributed to the drafting of the description of the consumer profiling techniques ("the description"). This requirement is disproportionate and could have several negative implications.

Disclosing the identities of all personnel engaged in the drafting process provides no added value for the Commission's oversight and enforcement tasks, and risks encroaching upon companies employees' individual privacy rights. In the event the Commission considers that the disclosure of identifiable information of all individuals involved in the drafting might be useful for unknown for us reasons, CCIA Europe notes that what might be "useful" does not automatically qualify as "necessary" under EU data protection acquis. CCIA Europe invites the Commission to seek advice from the European Data Protection Supervisor on the appropriate legal basis and adherence to the principle of purpose limitation and data minimisation.

Furthermore, disclosing employee names should not steer away from the content of the document. This is especially important in cases where the document is to be updated or amended in the future. As Article 15(3) DMA requires that the description is updated annually, attributing names to earlier versions might inaccurately associate individuals with content that no longer reflects their current views. What is more, company employees may have a higher incentive to provide their insights and expertise to the drafting process when there are no concerns about personal recognition or attribution. Complex documents such as those drafted to describe profiling techniques entail collaboration between numerous staff across different teams or departments. Therefore, it might be burdensome, and simply impractical, to list all contributors, specially those whose contribution was minimal.

In view of the above, CCIA considers the requirement to list the names of all staff involved in the drafting of the description disproportionate. Instead, it should be sufficient for the gatekeeper-designated companies to list one company's point of contact.

III. Information about the profiling techniques of consumers (Section 2 of the draft template)

3. Convert minimum information requirements to an indicative list

Article 15(1) obliges a gatekeeper to submit to the Commission "an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services". While recital 72 of the DMA provides some context as to

what information could be helpful in showcasing compliance with Article 15[3], the information or categories of data that must be included in the description are not included in Article 15 DMA.

Mandating minimum information requirements exceeds the legal obligations of the DMA. Further, this is disproportionate in view of the necessity for ensuring the efficient enforcement of the DMA, which should be achieved while adhering to the data minimisation principle. To ensure proportionate enforcement of the DMA, CCIA Europe suggests that the information listed in Section 2 of the draft template remains indicative and serves as a non-binding guidance.

4. Clarify the link between GDPR and DMA

CCIA Europe is concerned that the draft template establishes additional requirements beyond the purview of Article 15 DMA. In so doing, the draft template is overlapping and going beyond several provisions of GDPR. Because the oversight and enforcement framework differ, we are concerned that the enforcement of DMA and GDPR may collide.

Section 2 of the draft template requires gatekeeper-designated companies to inform the Commission about numerous aspects related to consumer profiling techniques which, for many of them, replicate designated gatekeepers' GDPR transparency requirements vis-a-vis data subjects (Articles 13 and 14 GDPR). This includes disclosure of the legal basis to process personal data under Article 6(1) of the GDPR, transparency about certain automated decision-making, the processing applied, and the data categories processed and retention periods.

As the European Commission is well aware, designated gatekeepers are subject to a dedicated oversight mechanism under GDPR, whereby the data protection supervisory authority of the Member State where the designated gatekeeper has its "main establishment" is entrusted to take the lead in verifying gatekeepers' compliance with GDPR, including, among others, the disclosure of information set out in Articles 13 and 14 GDPR (the lawful use of either one of the legal bases under Article 6(1) GDPR).

As we explain in section 5 below, the level of granularity of information requested in the draft template far exceeds statutory requirements under GDPR.

We remind the European Commission that companies designated as gatekeepers are not accountable to the European Data Protection Board (EDPB) under GDPR. Any information

[3] "whether personal data and data derived from user activity in line with the GDPR is relied on, the processing applied, the purpose for which the profile is prepared and eventually used, the duration of the profiling, the impact of such profiling on the gatekeeper's services, and the steps taken to effectively enable end users to be aware of the relevant use of such profiling, as well as steps to seek their consent or provide them with the possibility of denying or withdrawing consent"

transmitted to the EDPB under Article 15 must be such that they do not undermine the GDPR oversight framework, including the One-Stop-Shop mechanism.

Further, any information collected within Article 15 DMA, and transmitted to the EDPB, must be fully aligned with GDPR. Yet, Recital 72 DMA contemplates expanding DMA's transparency requirements over profiling practices beyond those defined under the GDPR. The EDPB has no mandate to receive, let alone review, profiling techniques which fall outside the scope of GDPR.[4] CCIA Europe also strongly cautions against expanding the scope of DMA transparency requirements beyond profiling as defined under the GDPR, so as to ensure full consistency with Article 2(31) DMA. Articles should always prevail over conflicting recitals.

Therefore, CCIA Europe invites the European Commission to reconsider the relevance of the requirements in Section 2 of the draft template in order to avoid duplication and possible enforcement conflicts with GDPR.

5. Ensure that all the requirements are justified

Within the draft template, certain information requested by the Commission for gatekeeper-designated companies appears unjustified for achieving the DMA's objectives. These requirements go beyond Article 15 and guidance of Recital 72 appearing contradictory to the principles of necessity and proportionality, hence unnecessary for the purpose of enforcing the DMA.

First, Sections 2.1.c and d require designated gatekeepers to provide the Commission with a "detailed description of each category of personal data and data derived from user activity and sources for each of these categories of data and personal data processed for profiling consumers applied to or across the CPS". This section also obliges companies to "distinguish data and personal data originating from the gatekeeper's services, including CPS, from data and personal data originating from third parties" and to provide a "detailed description of the inferred data about consumers from the processing of the data".

This goes beyond the obligations of both DMA and GDPR. Article 30(1) GDPR requires controllers to maintain a record of processing activities ("ROPA"), which must contain, among other things, "a description of the categories of data subjects and of the categories of personal data" (Art. 30(1)(c)). However, it does not require the controller's ROPA to describe the sources of the data, nor to distinguish data originating from the controller's services from that originating from third parties.

[4] Unless the EDPB initiates a dispute resolution procedure in a cross-border case where the Lead Supervisory Authority and Concerned Supervisory Authorities disagree over the investigated party's compliance with its obligation to disclose information to data subjects under Articles 13 and 14 is subject to a dispute resolution procedure under Article 65 GDPR.

Second, Section 2.1.f requires "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'. This requirement goes beyond what is necessary and proportionate for enforcing Article 15 DMA.

Third, quantitative data required under Sections 2.1.h, i, and l, namely: the number of automated decisions, quantitative impact or importance of the profiling techniques in question for the business operations of the gatekeeper and statistics on how many consumers choose to undergo profiling if they are given a choice, risk creating a disclosure of sensitive commercial information. This can lead to a loss of competitive advantage and hinder designated gatekeepers' ability to innovate and differentiate themselves on the market. Moreover, disclosing sensitive data could create legal risks for the companies involved. Furthermore, it is also imperative to acknowledge that the disclosure of consumer preference data ("statistics on how many consumers choose to undergo profiling if they are given a choice") might not yield unequivocal conclusions, considering the probable influence of consumer biases. Finally, disclosing sensitive commercial information is not necessary to achieve transparency of profiling.

Fourth, Section 2.1.e requires designated gatekeepers to inform the Commission of the "retention duration of each category of data and personal data listed in points c) and d) and of the profiling itself." While Recital 72 DMA suggests that information on the "duration of profiling" might be useful in showcasing compliance with Article 15 DMA, the requirement of disclosing "retention duration" significantly surpasses what has been recommended. It is also questionable how retention duration of the source data used for profiling would help foster the goal of transparency of profiling. In view of that, CCIA Europe would like to ask the Commission for appropriate clarifications.

Fifth, the adherence to the obligation of formulating an internal Data Protection Impact Assessment ("DPIAs") (Section 2.1.m) extends beyond the purview delineated in Article 15 DMA. These impact assessments serve data protection objectives and have no relevance to the purposes of the DMA enforcement. Further, we remind the European Commission that DPIAs are only required when an organisation engages in "systematic and extensive" profiling if such profiling leads to "decisions that produce legal effects concerning the natural person or similarly significantly affect the natural person," per Article 35(3)(a) GDPR. The guidelines of the EDPB on DPIAs further explains that such may be the case if "the processing may lead to the exclusion or discrimination against individuals." However, "processing with little or no effect on individuals does not match this specific criterion."[5] The EDPB further states in a separate opinion that "in many typical cases the decision to present targeted advertising based on profiling will not have a similarly significant effect on

[5] 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, Article 29 Working Party, WP 248 rev.01, page 9

individuals."[6] As such, they should not be encompassed within the ambit of the transparency mandate under Article 15 DMA.

Lastly, the draft template also requires gatekeeper-designated companies to specify "any alternative measures to profiling that have been implemented and their description, including reasons for choosing them" (Section 2.1.n) and "any alternative measures to profiling that have been considered and the reasons for not choosing them" (Section 2.1.o). This requirement also surpasses the scope of Article 15 DMA, which is solely about transparency and should not be interpreted as imposing any substantive obligations beyond reporting. Disclosing internal decision-making strategies and plans as well as submitting information on the considered alternatives, which were never or will never be implemented, seems inefficient and disproportionate. Disclosure of internal deliberations might cast doubts on the company's stability, decision quality and management practices ultimately undermining investor and consumer trust while not contributing to better transparency of profiling in any aspect. Furthermore, as it is not clear what the scope of "alternative measure to profiling" is, there is a risk that any processing other than profiling could be seen as such an "alternative measure". If this requirement remains, it is likely to create unnecessary legal uncertainty for the designated gatekeepers.

Taking all that into consideration, CCIA recommends that the Commission review the list of requirements in the Section 2 of the draft template. If the Commission is to make it a binding document, it should ensure that all the requirements are proportionate and necessary to achieve the DMA's objectives and thus, not mandate extensive minimum information requirements as presented in the current draft template.

IV. Information about audit procedure and audit conclusions (Section 4 and 5 of the draft template)

6. Clarify certain information requirements relating to the audit procedure

Section 4.2 of the draft template requires designated gatekeepers to submit to the Commission information relied upon as audit evidence, including a description of "type and source of audited information" (Section 4.2.a) and "any other relevant information" (Section 4.2.d). These terms are ambiguous and require clarification from the Commission to ensure predictability and legal certainty for the companies designated as the gatekeepers.

Furthermore, Section 4.3 of the draft template obliges gatekeeper-designated companies to provide the Commission with "a detailed description of data sources of potential relevance to Section 2 that were not included in the scope of the audit, including (...) details

[6] Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/67, Article 29 Working Party, WP251rev.01, page 21.

on any steps taken to mitigate the consequences of non-inclusion of such data (...)" CCIA would welcome some clarification from the Commission in this regard.

7. Clarify the "grading system" in the audit conclusions

Section 5.1(a) of the draft template obliges the auditor(s) / auditing organisation(s) to include in the audit conclusions "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." However, the draft template lacks further explanation of this "grading system", in particular, what constitutes "positive", "positive with comments" and "negative" assessments. Lack of clarity and transparency on that could lead to inaccurate assessments and create a division on how audits of different companies are assessed. Therefore, CCIA would like to ask the Commission to make appropriate clarifications.

IV. Non-confidential summary (Section 6 of the draft template)

8. Safeguard trade secrets and other confidential information in a public, non-confidential overview of the audited description

Article 15(3) DMA requires gatekeeper-designated companies to "make publicly available an overview of the audited description." CCIA would like to underline the utmost importance of preserving the integrity and confidentiality of trade secrets and other confidential information. Publicly exposing such sensitive details would entail substantial risks for companies designated as gatekeepers. This is particularly important in the early years of enforcement while the DMA rules and obligations remain ambiguous and untested. CCIA Europe recommends the European Commission to ensure that no such sensitive commercial information transpires from the overview of the audited description.

Conclusion

CCIA Europe welcomes the Commission's efforts to offer guidance on the template relating to the reporting on consumer profiling techniques and audit of such reports. In this regard, it is crucial for the Commission to provide clarification on the role of the draft template, which, in CCIA Europe's perspective, should serve as non-binding guidance.

Several other aspects of the draft template remain unclear, raise questions regarding their necessity for the proportionate enforcement of the DMA and risk creating unintended consequences for the gatekeeper-designated companies. Therefore, CCIA Europe suggests that the Commission carefully assess the requirements outlined in Section 2 of the draft

template. Should the Commission intend to establish this as a legally binding document, it should take care to ensure that all the requirements are both proportionate and necessary for accomplishing the objectives of the DMA. The Commission should also avoid possible enforcement conflicts between the DMA and GDPR.

About CCIA Europe

The Computer & Communications Industry Association (CCIA Europe) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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