EU Law on dark patterns: challenges ahead

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A definition for dark patterns outside EU Law

Harry Brignull, founder of darkpatterns.org, spoke of, *"**tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something***".

The recent California privacy law defines a dark patten as *"**a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation"**.*

Related concepts:

1. "**nudge**", which refers to initiatives inviting people to take certain decisions by playing on their choice architecture but without constraining them

2. "**sludge**", defined as a means of inducing friction to steer the user away from certain choices or induce deliberation.

What is so wrong about dark patterns? They influence users' behaviour and can hinder their ability to effectively protect their personal data and make conscious choices.

 Source: BEUC, *"Dark patterns" and the EU Consumer Law Acquis. Recommendations for better enforcement and reform,* 7 February 2022

When it comes to EU Law we can find at least is 1 definition in the Digital Services Act

Recital 67

"Dark patterns on online interfaces of online platforms are practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions. Those choices can be used to persuade the recipients of the service to engage in unwanted behaviours or into undesired decisions which have negative consequences for them."

Article 25
(Online interface design and organisation)

"*1. Providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.*

2. The prohibition in paragraph 1 shall not apply to ***practices covered by Directive 2005/29/EC*** *or* ***Regulation (EU) 2016/679***".

The GDPR does not directly address dark patterns but the EDPB has suggested guidelines for “dark patterns in social media platform interfaces”

Why does the GDPR apply?

Signing up to a social media platform entails the processing of personal data so users become data subjects.

GDPR provisions that are highlighted by the EDPB

- Fair processing (article 5 (1) (a) GDPR) is considered a “starting point”
- Transparency, data minimisation and accountability (article 5 (1) (a), (c) and (2) GDPR)
- Purpose limitation (article 5 (1) (b) GDPR)
- Consent related articles articles 4 (11) and 7 GDPR
- Data Protection by design and by default (article 25 GDPR)

Definition of dark patterns according to EDPB (Page 7 paragraph 3)

*“**Deceptive design patterns**” are “interfaces and user journeys implemented on **social media platforms** that aim **to influence users** into making unintended, respectively unwilling, and/or potentially harmful decisions, often toward an option that is against the users’ best interests and in favour of the social media platforms interest, with regard to their personal data.”*

4 Source: EDPB, Guidelines 3/2022 on Dark Patterns in social media platform interfaces: how to recognise and avoid them, 14th february 2023

According to the guidelines of EDPB there are at least 6 categories of dark patterns applicable to social media providers

1. **Overloading**: users are confronted with an avalanche/large quantity of requests, information, options or possibilities in order to prompt them to share more data or unintentionally allow personal data processing against the expectations of the data subject.

2. **Skipping**: means designing the interface or user journey in a way that users forget or do not think about all or some of the data protection aspects

3. **Stirring**: affects the choice users would make by appealing to their emotions or using visual nudges

4. **Hindering**: means obstructing or blocking users in their process of becoming informed or managing their data by making the action hard or impossible to achieve.

5. **Fickle**: means the design of the interface is inconsistent and not clear, making it hard for the user to navigate the different data protection control tools and to understand the purpose of the processing.

6. **Left in the dark:** when an interface is designed in a way to hide information or data protection control tools or to leave users unsure of how their data is processed and what kind of control they might have over it regarding the exercise of their rights.

Directive 2005/29/EC or Unfair Commercial Practices Directive (UCPD) also applies to dark patterns

Article 5 UCPD

The UCPD provides the legal framework regulating **business practices affecting consumers' economic interests/behaviour** before, during and after the conclusion of a contract.

Deployment of dark patterns can materially **distort** the **economic behaviour of the average consumer within the meaning of Article 5 UCPD (Prohibition of unfair commercial practices)** and **lead them to take a transactional decision which they would not have taken otherwise**.

Idea: traders must **prevent consumers from being misled or influenced by a user interface** guiding them to take a certain decision without having the possibility to understand the consequences of such a decision

Annex I of banned practices

BEUC points out to Practice 6 and 7 directly related to dark pattern:

Practice 6: making an invitation to purchase a given product with the intention of making the consumer purchase a different one.

Practice 7: pushing consumers to take a quick decision instead of giving the opportunity to make an informed choice can also be induced via dark patterns as seen in the case of booking platforms (falsely stating that a product will only be available on particular terms for a very limited time).

Source: BEUC, *"Dark patterns" and the EU Consumer Law Acquis. Recommendations for better enforcement and reform,* 7 February 2022

At least 3 challenges ahead

1

Fragmentation of legal solutions

Dark patterns identified by the EDPB (e.g. stirring (emotional steering) or hindering (misleading information)) **are not mentioned in the annex of banned practices of said Directive.**

BEUC recommends including practices in the annex of banned practices of the UCPD.

2

Different legal approaches

The DSA states a **prohibition** (article 25) but the EDPB provides **recommendations** on *"how to assess and avoid dark patterns".*

In either case **actionable frameworks** to detect and measure what makes a dark pattern unfair are generally lacking.

"By using too low of a threshold for categorizing an information flow as a dark pattern, we risk the watering down of the concept itself: ***if everything is a dark pattern, then nothing is a dark pattern."*** (Coanta & Santos)

3

Cooperation among authorities

There is a clear need for cooperation between consumer , data protection authorities and Digital Services Coordinators in the Member States to **avoid contradictory interpretations** of law or **understanding of facts** as there is a strong overlap between the two legislations and high probability that a data and a consumer authority will have to rule on the same case or very similar facts, creating potential conflicting precedence.

Sources: BEUC, *"Dark patterns" and the EU Consumer Law Acquis. Recommendations for better enforcement and reform,* 7 February 2022; Catalina Coanta and Cristiana Santos, Dark Patterns Everything: An Update on a Regulatory Global Movement, *Network Law Review,* Winter 2023