

Effect of the New guidelines on Dark Patterns in India and other countries

In the last week of November 2023 the Guidelines for Prevention and Regulation of Dark practices, 2023 (GPRD) were issued by the Department of Consumer Affairs under the section 18 of the Consumer Protection Act, 2019 ¹which prohibits sellers and various online platforms to follow dark patterns by protecting consumer privacy and market autonomy.

Dark patterns involve any deceptive trade practices by a person on any platform which misleads or tricks the customers in doing something or even buying something which they did not actually intend to. These guidelines impact all the sellers, advertisers and all the other platforms offering their goods and services across India but also businesses which are set up outside India which target Indian consumers.²

These manipulative techniques can be used to persuade users, particularly vulnerable consumers, to engage in unwanted transactions and to deceive users by nudging them into decisions on data disclosure transactions or to unreasonably bias the decision-making of the users of the service, in a way that subverts and impairs their autonomy, decision-making and choice.

Existing Legal Framework in India

A. Consumer Protection Act, 2019

The consumer protection act is an act which protects the interest of the consumers. The following are the relevant sections under the consumer protection act that are applicable for dark patterns-

1. **Section 2(47)** of the act which states that any online advertisement or user interface which is deceptive or manipulative, will be construed as undermining consumer interest and may be questioned as unfair trade practice.

¹ <https://www.indiacode.nic.in/bitstream/123456789/15256/1/a2019-35.pdf>

² https://en.wikipedia.org/wiki/Dark_pattern

2. **Section 2(9)** talks about advertisements and design patterns of various websites which manipulates the choice of the user and has an overall adverse effect on the right to make an informed choice by the customer.
3. **Section 2(28)** involves the deliberate concealment of relevant information by the seller so that the consumer ends up buying their product.³

B. Rules regarding misleading advertisements, informed consent and fair practices

Ministry of Consumer Affairs has enacted:

1. **The Consumer Protection (E-Commerce) Rules, 2020** which attempts to combine the teeth of the Consumer Protection Act 2019, Indian exchange control laws (IEC Regulations) and the Information Technology Act 2000, to ensure fair play in technology and data- driven ecommerce environment⁴
2. **The Consumer Protection (Direct Selling) Rules, 2021** which set out duties of e-commerce entities and direct sellers respectively towards consumers.⁵

C. Advisory and regulations advised by the Consumer Affairs

These are the various regulations which are imposed by the consumer affairs along with the government of India in order to spread awareness about the dark patterns.

The various types of Dark patterns are

1. **False Urgency-** This involves falsely stating or involving facts by the seller which develops a sense of urgency within the customer to avail the goods or services offered by the seller under false representations.

³ <https://www.indiacode.nic.in/bitstream/123456789/15256/1/a2019-35.pdf>

⁴ www.icsi.edu/media/webmodules/Consumer_Protection_E-Commerce_Rules_2020.pdf

⁵ <http://www.bareactslive.com/ACA/act3995.htm>

2. **Forced Action**- This is a type of dark pattern which forces the customer to buy additional goods or sign up for an unrelated service or share personal information in order to buy or subscribe to the product or service originally intended by the user.
3. **Basket Sneaking**- Including additional items without the consent of the customer which increases the overall net payable of the consumer at the time of the purchase of the goods he or she originally intended to buy.
4. **Confirm Shaming**- Nudging the customer or the user in a certain way that he or she buys the product or subscribe to their services without originally intending to.
5. **Subscription trap**- It means making the customer to subscribe services offered by the buyer and making it impossible for them to cancel it, hiding the option of cancelation of the subscription and forcing the user to provide their payment details for authorization for automatic debits.
6. **Interface Interference**- An element usually on websites which is specifically designed for the purpose of misdirecting the customers to buy the goods and services.
7. **Bait and Switch**- This involves deceiving the users by serving an alternate outcome by initially offering the user what they actually desire to buy.
8. **Disguised Advertisements**- practice of posing, masking advertisements as other types of content such as user-generated content or new articles or false advertisements, which are designed to blend in with the rest of an interface in order to trick customers into clicking on them.
9. **Nagging**- It is a dark pattern practice due to which a user is disrupted and annoyed by repeated and persistent interactions, in the form of requests, information, options, or interruptions, to effectuate a transaction and make some commercial gains, unless specifically permitted by the user.
10. **Trick Question**- the deliberate use of confusing or vague language like confusing wording, double negatives, or other similar tricks, in order to misguide or misdirect a user from taking desired action or leading consumer to take a specific response or action
11. **SaaS billing**- refers to the process of generating and collecting payments from consumers on a recurring basis in a software as a service (SaaS) business model by exploiting positive acquisition loops in recurring subscriptions to get money from users as surreptitiously as possible.

12. Rogue Malwares- means using a ransomware or scareware to mislead or trick user into believing there is a virus on their computer and aims to convince them to pay for a fake malware removal tool that actually installs malware on their computer.

13. Drip Pricing- elements of prices are not revealed upfront or are revealed surreptitiously within the user experience or revealing the price post-confirmation of purchase, i.e. charging an amount higher than the amount disclosed at the time of checkout.⁶

Legal framework regarding Dark patterns in EU

EU does not have a single legislation which regulates dark patterns, rather it has a combination of various acts such as-

1. Digital Services Act

It is an EU law regarding illegal content, transparent advertising, and disinformation.⁷ Digital Services Act along with the Digital Markets Act came into effect on 15 December 2020 by the European Commission to the European Parliament and the Council. Digital services include simple services provided online such as accessing websites, online shopping, etc. Their main objectives are-

- i. To create a safe digital space for the users so that their fundamental and legal rights don't get violated.
- ii. To establish a level playing field which encourages competition, innovation and growth in the European market and globally.⁸

2. Unfair Commercial Practices Directive

This directive regulates and controls the commercial transactions during and after a business-to-consumer transaction has taken place and boost

⁶ <https://iapp.org/news/a/ongoing-dark-pattern-regulation/>

⁷ https://www.verdictum.in/pdf_upload/central-consumer-protection-authority-dark-patterns-guidelines-watermark-1565354.pdf

⁸ <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

consumer confidence and make it easier for businesses, especially small and medium-sized enterprises, to trade across borders.⁹ These directives help enforced by the EU helps in curbing broad range of unfair business practices against the consumers such as-

- i. Consumer reviews and endorsements
- ii. Consumer lock-in
- iii. Enforcement of penalties
- iv. Consumer lock-in
- v. data-driven personalization and dark patterns
- vi. Dual quality marketing of goods

3. Digital Markets Act

The Digital Markets Act (DMA) establishes a set of clearly defined objective criteria to identify “gatekeepers”. Gatekeepers are large digital platforms providing so called core platform services, such as for example online search engines, app stores, messenger services. Gatekeepers will have to comply with the do’s (i.e. obligations) and don’ts (i.e. prohibitions) listed in the DMA.¹⁰ The Digital Services act along with DMA under the EU regulation aims to make the digital markets a safe space for the consumers by fostering innovation and growth and by imposing penalties on the

4. General Data Protection Regulation

regulates and prevents the adverse effect that the dark patterns have. Thus promoting customer privacy and autonomy.¹¹

The European Data Protection Board has a major influence in describing what are dark patterns and how it has an adverse effect on the proper functioning of the economy. The EDPB states various categories of dark patterns which are –

1. Skipping
2. Hindering
3. Overloading

⁹ https://commission.europa.eu/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en

¹⁰ https://digital-markets-act.ec.europa.eu/index_en

¹¹ <https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2023/09/Dark-Patterns.pdf>

4. Fickle
5. Stirring
6. Left in the dark¹²

Legal framework regarding Dark patterns in US

The Federal Trade Commission supervises and regulates matters regarding dark patterns for businesses. The section 5 of the FTC act gives it powers to combat unfair and deceptive practices. These are the practices that mislead the consumers in doing something or even buying something which they did not actually intend to.¹³

The California Privacy Rights Act and Colorado Privacy Act also have regulations relating to the use of dark patterns in obtaining consent from consumers.

California Privacy Rights Act

The California Consumer Privacy Act of 2018 (CCPA) gives consumers more control over the personal information that businesses collect about them and the CCPA regulations provide guidance on how to implement the law. This landmark law secures new privacy rights for California consumers, including:

1. The right to know about the personal information a business collects about them and how it is used and shared;
2. The right to delete personal information collected from them (with some exceptions);
3. The right to opt-out of the sale or sharing of their personal information; and
4. The right to non-discrimination for exercising their CCPA rights.¹⁴

Colorado Privacy Act

¹² <https://www.insideprivacy.com/eu-data-protection/the-eu-stance-on-dark-patterns/>

¹³ <https://iapp.org/news/a/ongoing-dark-pattern-regulation/>

¹⁴ <https://privacyrights.org/resources/california-privacy-rights-act-overview>

The Colorado Privacy Act is particularly intended to protect consumers in their online activities. It gives them certain rights over their personal data, including making inquiries or requests to data controllers or data processors about it.¹⁵

Legal framework regarding Dark patterns in UK

Under current UK law there are no laws that specifically reference dark patterns. However certain consumer laws could be breached indirectly. These are –

1. UK General Data Protection Regulation Act (GDPR)

This act functions alongside with, data protection act 2018 which protects and manages the processing of personal data. It came in effect on 1st January 2021. The UK GDPR applies to UK businesses and organizations and International businesses and organizations who collect and process personal data of UK citizens. Lawfulness, fairness, transparency, Purpose limitation, data minimization, accuracy, storage limitation, Integrity and confidentiality (security) and accountability are the principles of the UK GDPR.¹⁶

2. Data Protection Act 2018

As the name suggests it is responsible for the protection of data and privacy of the citizens in UK. The Data Protection Act 2018 controls how your personal information is used by organizations, businesses or the government.¹⁷

3. Consumer Rights Act 2015

The Consumer Rights Act 2015 is an Act of Parliament of the United Kingdom that consolidates existing consumer protection law legislation and also gives consumers a number of new rights and remedies. Provisions for secondary ticketing and lettings came into force on 27 May 2015¹⁸

¹⁵ <https://usercentrics.com/knowledge-hub/colorado-privacy-act/>

¹⁶ <https://privacyterms.io/en/gdpr/what-is-the-uk-gdpr/>

¹⁷ <https://www.gov.uk/data-protection>

¹⁸ <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

4. Consumer Protection from Unfair Trading Regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008 is a statutory instrument in the United Kingdom made under the European Communities Act 1972. It came into force on 26 May 2008. It is effectively the successor to the Trade Descriptions Act 1968, which it largely repeals. It is designed to implement the Unfair Commercial Practices Directive, as part of a common set of European minimum standards for consumer protection.¹⁹

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¹⁹ https://en.wikipedia.org/wiki/Consumer_Protection_from_Unfair_Trading_Regulations_2008