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Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognize and avoid them

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We thank you for the opportunity to comment on the new Guidelines on Dark patterns in social media platform interfaces. Although we hardly have any social media providers in Austria, we would still like to give a few remarks.

We fear that the framing of "dark patterns" for social media provider is shifting the boundary between what is legally permissible (refined, tricky, and suggestive in advertising), and what is no longer permissible - for all sectors. The guidelines could set a new standard for previously unproblematic transactions. Wherever this framing comes from, it has potential beyond the guidelines as a lever to regulate visual-commercial communication beyond what is necessary.

These "dark patterns" introduce indeterminate (legal) terms, which make it even more difficult for designers of platforms in general to stay in compliance with the law. Actually, there is extensive case law on B2B business transactions as well as on the B2C relationships. E.g., there is a lot of jurisdictions on the legal term “misleading”. In addition, it is doubtful whether those new legal terms actually describe non-transparency towards data subjects and therefore unlawfulness (e.g., why would an emotional appeal such as humor be misleading and therefore unlawful).

Although we understand the necessity for regulations of privacy terms of specific social media providers, the present proposals go too far and generalize too much. We are particularly critical of some of these proposals:

- **Overloading**: We would like to point out that there are a lot of obligations to provide certain information while being as clear and concise as possible. In the telecommunications industry, we refer to the extensive information requirements prior to the conclusion of a contract. Differentiation and variety in contracts are valuable and must be protected.
- **Privacy Maze**: Surely there are limits whether something is really too hard to find. Nevertheless article 12 GDPR states “layered privacy statements” (with specific information in sublevels/subsites) as leading example of transparency. Layered privacy statements usually give information, options, and specifications in sublevels.
- **Continuous prompting**: Multiple requests can also be the result of embedding external content in a platform's offering. Such framings can be static or dynamic and do not release the framed content provider from requesting its own consent.
- **Too many options**: Options can be useful and transparent as well. Where is the limit, what is too many?
- **Skipping**: This is quite a difficult subject. As an example, providers would have a disadvantage or an obligation to redesign if their platform is particularly attractive and users "forget" about their privacy options. Privacy is an important criterion, but it should not be the reason why users choose a specific platform.
- **Inconsistency**: It is not clear what the EDPB means by “unstable and inconsistent” design. For example, is there an obligation for user interfaces to implement a uniform set of colors and fonts? What is the benchmark? If “decontextualization” means applying facts, skills, or concepts to a different situation and not just in the context in which they were originally presented, we do not recognize the danger for data subjects´ rights. There is no legal security in these provisions.

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