

leads to the guidelines integrating policy statements that ought to be outside the scope of the document. The guidelines define dark patterns as “a way of designing and presenting content” which substantially violates the GDPR requirements of lawfulness, fairness, transparency, purpose limitation and data minimisation “while still pretending to comply”. This definition should clearly exclude legitimate attempts by social media platforms to solicit user agreement for data processing for advertising purposes. The inclusion of “continuous prompting” (see para. 110) – which is not related to the completeness, clarity or formatting of the information disclosures that are necessary for data subjects to make informed choices – should be further clarified to exclude unintentional use cases, for example, the deletion of previously stored data by end-user agents which can cause the resurfacing of a request to provide data or to consent to data processing purposes, or the resurfacing of a consent request intended to inform the data subject of another data processing purpose or recipient as legally required.

Similarly, the guidelines stray from their stated objective when they suggest that failure to provide an identical experience to users who withhold or withdraw consent for data processing for advertising constitutes “dark pattern” behaviour susceptible of infringing the GDPR (see para. 26 on p. 13, and p. 14, esp. reference to “any detriment” and the need to ensure there is no lowering of service levels in the event of consent withdrawal). The assertion that the law confers on data subjects an entitlement to an identical experience is not supported by the GDPR and would be at variance with sound public policy, which needs to protect the possibility for providers of social media platforms and other online content and services to finance the provision of their offering. The problem could be addressed either by the deletion of the phrase “without lowering service levels” on p. 14 or by the insertion of the phrase “for example, by providing the data subject with a fair, reasonable and equivalent alternative if he or she withdraws consent”, so that the full sentence reads, “The easy withdrawal of consent constitutes a prerequisite of valid consent under Article 7(3) phrase 4 GDPR and should be possible without lowering service levels, for example, by providing the data subject with a fair, reasonable and equivalent alternative if he or she withdraws consent”.

Clarifying that the GDPR already protects data subjects from making choices that will be “harmful”

The guidelines state that dark patterns are “interfaces and user experiences... that lead users into making unintended, unwilling and potentially harmful decisions regarding the processing of their personal data” (see p. 2). IAB Europe considers that it is important that the guidelines clarify that if other provisions of the GDPR are complied with, dark patterns alone cannot induce consumers to make “harmful” decisions (though they may indeed be induced to make decisions they did not intend to make). The GDPR requires data controllers to make information disclosures on the basis of which users make choices and to render a set of data subject rights, all within a context of privacy by design and default, and the data processing principles laid down in Article 5. If privacy by design and default and the requirements of Article 5 have been complied with, data subjects should not even be able to make “harmful” choices. It is important that industry stakeholders, civil society and individual consumers reading the guidelines understand that the GDPR already precludes “harmful” data processing.

Ensuring that EDPB policy guidance is evidence-based

The guidelines repeatedly refer to consumer expectations (e.g., para. 159, “users reasonably expect”, para. 174, “from the point of view of users, the options are placed in a setting that is out of context and does not match user expectations”) and how certain practices may offend against those expectations, but without adducing any empirical research or other evidence to support the EDPB’s interpretation of what those expectations are likely to be. While in most of the examples cited in the guidelines, the Board’s interpretations seem intuitively right, as a matter of public policy it would seem desirable for them to be substantiated by evidence from consumer research.