



September 2023

Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023

The Department of Consumer Affairs (“DoCA”) published the Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023 (“**Draft Guidelines**”) after holding stakeholder consultations. The DoCA has sought public comments on the Draft Guidelines, which can be e-mailed to js-ca@nic.in until October 5, 2023.

The Draft Guidelines, issued under Section 18 of the Consumer Protection Act 2019, disallow individuals or platforms from engaging in “dark patterns”. The Draft Guidelines also list down specific activities as “Specified Dark Patterns”. The Persons/platforms engaged in these activities will be deemed to be engaged in dark patterns. Draft Guidelines will also cover such additional patterns that the Central Consumer Protection Authority may specify from time to time.

Who is impacted?

The Draft Guidelines will be applicable to sellers, advertisers, and all platforms that are ‘systematically’ offering goods and services in India. Notably, not only businesses set up in India, but also businesses set up outside India that target Indian citizens for the sale of goods or services, are covered by the Draft Guidelines.

What is the implication for e-commerce websites and online sellers?

The discussion on dark patterns is closely linked to user autonomy under India’s privacy regime. The fact of manipulation and attention diversion using dark patterns can invalidate user consent leading to unlawful collection and processing of personal data by platforms. The Draft Guidelines showcase the government’s focus on user interface design as a critical means to protect consumer privacy and purchase autonomy on the internet. Companies designing product user interfaces and crafting consent requests should carefully consider the attention being given to the issue of dark patterns by the Indian regulator.

Predictably, e-commerce websites, ticket-booking agencies, and hotel reservation portals will be immediately impacted once the Draft Guidelines come into effect. Routine business practices followed by such entities, such as falsely creating a sense of demand surge, adding hidden costs such as handling fee at the time of check-out, and forcibly selling subscription along with other products/services, will have to be reconsidered by these platforms and possibly withdrawn.

What are Dark Patterns?

A dark pattern means a user interface/experience that is designed to mislead or trick users into doing something they originally did not intend or want to do. Such design practices manipulate users into making choices that are

detrimental to their interest by subverting/impairing their autonomy, decision-making, or choice. These choices may include paying a higher amount for a product than originally disclosed, sharing data, or buying expensive products over cheaper alternatives.

What are Specified Dark Patterns?

1. **False Urgency:** means falsely stating or implying the sense of urgency or scarcity so as to mislead a user into making an immediate purchase or take an immediate action, which may lead to a purchase. For instance, a hotel-booking platform may present false data on high demand of the hotel room stating, *“Only 2 rooms left! 30 others are looking at this right now”*.
2. **“Basket Sneaking”** means inclusion of additional items such as products or services at the time of checkout from a platform, without the consent of the user, such that the total amount payable by the user is more than the amount payable for the product(s) and/or service(s) chosen by the user. Notably, addition of “necessary fees” which is required to fulfil the order completion, such as, delivery charges, gift-wrapping charges, or taxes will not amount to basket sneaking. For instance, automatically adding travel insurance while a user purchases a flight ticket.
3. **“Confirm Shaming”** means using a phrase, video, audio or any other means to create a sense of fear or shame or ridicule or guilt in the mind of the user, so as to nudge the user to act in a certain way that results in the user purchasing a product or service from the platform. For instance, a platform that adds a charity in the basket using a phrase *“Charity is for rich, I don’t care”*.
4. **“Forced Action”** means forcing a user into taking an action that would require the user to buy any additional good(s) or subscribe or sign up for an unrelated service, in order to buy or subscribe to the product/service originally intended by the user. For instance, forcing a user to subscribe to a newsletter in order to purchase a product.
5. **“Subscription Trap”** means a process wherein platforms make cancellation of a paid subscription impossible or a cumbersome task for the customers. For instance, hiding the cancellation option for a subscription on the user interface, forcing a user to provide payment details and/or authorisation for auto-debits for availing a free subscription, and making the instructions related to cancellation of subscription ambiguous, latent, or confusing.
6. **“Interface Interference”** means a design element that manipulates the user interface in ways that (a) highlights certain specific information; and (b) obscures other relevant information relative to the other information; to misdirect a user from taking an action desired by her. For instance, an ‘X’ icon on the top-right corner of a pop-up screen leading to opening-up of another ad rather than closing it.
7. **“Bait and Switch”** means the practice of advertising a particular outcome based on the user’s action but deceptively serving an alternate outcome. For instance, a seller offers a quality product at a cheap price but when the consumer is about to pay/buy, the seller states that the product is no longer available and instead offers a similar looking product but more expensive.
8. **“Drip Pricing”** means the practice of not revealing the total price of a product upfront to the customers but revealing the elements of the cost “surreptitiously within the user experience” or stages of making a purchase. For instance, a consumer may have chosen a flight ticket for a certain amount displayed on the checkout page but is being charged a higher amount while making the actual payment.
9. **“Disguised Advertisement”** means the practice of posing, masking advertisements as other types of content such as user generated content or new articles or false advertisements.
10. **“Nagging”** means a dark pattern due to which users face an overload of requests, information, options, or interruptions; unrelated to the intended purchase of goods or services, which disrupts the intended transaction. For instance, websites asking a user to download their app, repeatedly.

Consumer Protection Practice

JSA has a vast experience on matters relating to consumer protection laws and related matters. We have advised clients (both domestic and global), across sectors and industries on complex queries around consumer protection laws and rules thereunder, and its interplay with other related legislations, like data privacy and exchange control laws.

We have developed a leading consumer protection practise supported by a group of extraordinarily gifted and experienced solicitors with knowledge of the essential consumer law sector. Our team has experience in managing complex consumer cases at the national level in India. We are renowned for our proficiency in successfully defending the interests of our clients.

Our key areas of advice include:

- Analysis of business activities from consumer protection laws perspective including import regulations and foreign trade policy of India;
- Advise on registration and licensing requirements;
- Advising on e-commerce rules;
- Advise on single brand retail and multi-brand retail from foreign exchange laws perspective;
- Advise on product liability issues and compliances;
- Advising on standards issued by the BIS and quality control orders including advisory in relation to inspection and enquiries by authorities;
- Advising on advertisement, packaging and labelling requirements.

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