CUTS COMMENTS
on
DRAFT GUIDELINES ON PREVENTION AND REGULATION OF DARK PATTERNS

Background:

Consumer Unity & Trust Society (CUTS) expresses its gratitude to the Ministry of Consumer Affairs (MCA), Food and Public distribution, Department of Consumer Affairs for inviting comments on the draft guidelines on Prevention and Regulation of Dark Patterns, 2023 (draft guidelines).[1]

About CUTS:

CUTS in its 39 years of existence, has come a long way from being a grassroots consumer centric organisation headquartered in Jaipur, having centres in Delhi[2], and Kolkata[3], to now opening overseas Resource Centers in Vietnam[4], Kenya[5], Zambia[6], Ghana[7], Switzerland[8], and in the United States of America[9]. It continues to remain an independent, non-partisan, and non-profit economic policy think tank while opening various programme centres, namely: Centre for International Trade, Economics & Environment (CITEE)[10]; Centre for Consumer Action, Research & Training (CART);[11] Centre for Human Development (CHD)[12]; and Centre for Competition, Investment & Economic Regulation (CCIER) [13].

CUTS works on various issues to foster an inclusive digital economy[14] which include data protection[15], data localisation[16], children's data protection[17] and encryption[18] among others. CUTS also images with various ministries and government departments for advocacy efforts[19] on all

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[1] Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023
[2] CUTS Delhi Resource Centre
[3] Kolkata Office
[4] CUTS HRC
[5] CUTS Nairobi
[6] CUTS Lusaka
[7] CUTS Accra
[8] CUTS Geneva
[9] CUTS International
[10] CUTS Citee
[11] CUTS Cart
[12] Cuts CHD
[13] Cuts CCIER
[14] Inclusive Digital Economy - Ccier (cuts-ccier.org)
[15] Cdpp - Ccier (cuts-ccier.org)
[16] Understanding the Impact of Data Localization on Digital Trade - Ccier (cuts-ccier.org)
[17] Highlighting Inclusive and Practical Mechanisms to Protect Children's Data - Ccier
[18] Understanding Consumers' Perspective on Encryption - Ccier (cuts-ccier.org)
[19] Advocacy - Ccier

issues, more recently on selective banning of OTT services[20], digital competition[21], competitive neutrality[22], Caller Name Presentation[23], and Online Gaming[24]. CUTS is pleased to present their comments to the MCA on the draft guidelines and would be happy to work alongside the government to delve deeper into the important issue of dark patterns highlighted by the draft guidelines. These have been discussed in subsequent sections, along with a few recommendations to address them.

Preliminary Comments

CUTS acknowledges that presently, there are no specific regulations in place in most nations against dark patterns and commends the MCA for bringing out draft guidelines for this important and relevant issue. The guidelines will serve as the first step towards effective regulation of dark patterns. To aid the public policy process CUTS hereby to this end submits its comments:

a. Supporting Consumer Interest Groups and Adoption of Regulatory Impact Assessment (RIA) Mechanisms

The draft guidelines aim to protect consumers from the ill effects of dark patterns. For this purpose, interactive consultations have been conducted with stakeholders by the Department of Consumer Affairs (DoCA) along with Advertising Council of India (ASCI) in June 2023. The consultations resulted in creation of a task force which has submitted recommendations on identification and regulation of dark patterns.

It is important to conduct similar consultations with more stakeholders after the completion of the public consultation process. It is important to include consumer interest groups in the stakeholders for this issue to bring forth and include the interest of consumers. Additionally, support can be extended to said interest groups for conducting evidence-led studies to assess the widespread impact of the draft guidelines on multiple stakeholder groups as dark patterns align content/interactions with business goals, without helping users accomplish their own.[25] A balanced approach is required to manage the interests of consumers and businesses.

To this end, CUTS encourages use of Regulatory Impact Assessment (RIA)[26] which involves a participatory approach via a public consultation to assess such impact, determine costs and benefits, and select the most appropriate regulatory proposal. It also helps put checks and balances on the government while exercising its exclusive privilege to do things necessary to protect consumers from effects of dark patterns.

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https://cuts-ccier.org/pdf/comments-on-trai-cp-on-regulatory-mechanism-for-ott-services-and-selective-banning.pdf
21

https://cuts-ccier.org/pdf/advocacy-joint-open-letter-by-stakeholders-to-the-mca-on-the-digital-competition-bill.pdf
22 Promoting Competitive Neutrality in Government Using Advocacy
23 CUTS Comments on the TRAI Consultation Paper on Calling Party Name Presentation Facility
24 CUTS Comments on the Draft Amendments to The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 relating to Online Gaming
25 Dark Patterns — Deceptive UX design | by Naveen Bodapati.
26 REGULATORY IMPACT ASSESSMENT TOOLKIT

b. Effective Coordination Mechanism

There is a need for an effective coordination mechanism between different ministries and government departments working on the issues of information technology, consumer affairs, finance, women, and child welfare. This will ensure a comprehensive and cohesive approach to addressing dark patterns in online platforms. In most jurisdictions, consumer protection laws and data protection laws are used to regulate dark patterns.[27] The draft guidelines should reflect the need and require for such coordination to be periodic and structured.

c. Raising Awareness in Consumers

As dark patterns aim to influence users' behaviour and can hinder their ability to effectively protect their personal data and make conscious choices.[28] It is important that Central Consumer Protection Authority (CCPA), through the guidelines, requires and supports relevant stakeholders such as centre and state governments, businesses etc. undertake user awareness generation and capacity building activities as part of their responsible business activities in India. For this purpose, groups that work in favour of consumer interest should be involved in the awareness and capacity building process. This will empower consumers to recognise "dark patterns" sufficiently to their advantage.

d. Increasing the Scope of the Guidelines

In India, some dark patterns such as **hidden costs** may fall under the remit of the Consumer Protection Act, 2019 (CPA).[29] Section 11(ii) of CPA considers the deliberate withholding of important information as a deficiency in service that is punishable under the Act. Similarly, Section 28(iv) of CPA considers it as 'misleading advertisement'.

Other dark patterns such as **confirm shaming**, however, are harder to fit into this existing consumer protection framework. Additionally, deceiving someone into paying for items or services that they did not want or intend to purchase is another frequent dark pattern. Similarly, trick questions, roach motel, forced continuity, hidden cost[30] also lead to unfavourable tendencies. They might cost consumers time and money in addition to decreasing consumer confidence in the market. Hence, such patterns must be covered under dark patterns and should be regulated.

Additionally, dark patterns allegedly interfere with democratic procedures and influencing voters' political decisions. These intrusions on user autonomy severely deprive individuals of their rights and influence in the digital economy. [31] The restricted scope of the draft guidelines could significantly constrain the regulator's effectiveness in regulating their use. Therefore, the scope of the draft guidelines should be expanded before the guidelines are brought in force.

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[27] Yes, Or Yes? The Reality of Dark Patterns | SCC Blog.

[28] Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognise and avoid them Version 1.0

[29] 1 THE CONSUMER PROTECTION ACT, 2019 _____ ARRANGEMENT OF SECTIONS Last Updated:17-9-2021

[30] Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023

[31] Digital Advertising and Marketing- Dark Patterns - S.S. Rana & Co.

Annexure Specific comments:

1. **Clause (v):** The clause is technical in nature and is not sufficient to convey its meaning with clarity. Illustrations can be added to explain **subscription trap** as a category of dark pattern so that it is more comprehensive. For example, subscription[32] to social network e.g., LinkedIn Premium; Digital media e.g., Wall Street Journal; Streaming video service / OTT e.g., Netflix; Hosting service e.g., HostGator; SAAS software e.g., Salesforce.

   A subscription is a set price each month for a specific package. The company or service provider ("Merchant") take our credit card information when we sign up for it ("credit card on file"). The "electronic-mandate" provision found in most subscription terms and conditions allows the merchant to charge your credit card on a recurring basis for the fixed monthly cost without first getting your permission.[33]

2. **Clause (vi):** The definition of interface interference can include ethical designs that can improve the overall framework on dark patterns and its regulations. For example, it may be possible to decrease friction and improve convenience for consumers when using behavioural data to learn their preferred payment methods and changing the user interface to display the most popular payment method first. Online platforms can establish ethical design guidelines that discourage the use of dark patterns.

   Encouraging responsible design practices and conducting independent audits can help identify and rectify dark pattern issues, which can be added to the guidelines.[34]

3. **Clause (vii):** The definition of **Bait and Switch** as provided in the guidelines can be elaborated upon. There are websites that use the "bait and switch" dark pattern whereby they advertised "free cars! "As an advertisement and the users found themselves facing high fees. Such illustrations can be added to the definitions. Here the choice of words used by the companies to deceive the customer to fulfil its business goals must be identified.[35]

   ASCI has been addressing such issues through its existing code on misleading ads. ASCI code applies across media, including online advertising (including companies' own websites, pages, and handles).[36]

4. **Clause (ix):** The definition of **disguised entertainment would** require an illustration that can be useful in conveying its meaning to the users. The illustration for instance can be that, a website displaying advertisements with a prominent download button that closely resembles the actual download button for the desired software. This leads users to mistakenly click on

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[32] What Is Subscription Trap?
[33] What Is Subscription Trap?
[34] Dark Patterns: Explained, pointwise.
[35] Dark Patterns — Deceptive UX design | by Naveen Bodapati.
[36]
https://www.ascionline.in/the-asci-code/https://www.mondaq.com/india/dodd-frank-consumer-protection-act/1358384/asci-guidelines-on-dark-patterns-and-the-way-forward

the ad, thinking they are downloading the software.[37] Often, it leads users to an unsafe website or is a common way for malware and viruses to enter the device. It is also used as a means of accessing unsecured user data.

5. **Expanding the scope of Annexure 1**: One of the illustrations of dark patterns is a misleading or deceptive UI/UX design that tries to manipulate or trick the human user into acting in a way they might not have otherwise.

   For instance, when cancelling a subscription to a streaming service or mailing list, if the "unsubscribe" button is presented before the option to cancel, is presented in a misleading colour, is buried in paragraphs of text, or is preceded by other offers of maintaining the subscription, the company is probably attempting to discourage the user from cancelling by using dark patterns.

   The use of countdown clocks on e-commerce platforms, which encourage customers to hasten their decision-making process before making any purchases, is another illustration of dark patterns.[38] These illustrations can be added to the annexure as well as other categories of dark patterns as it may expand the entire framework on web based dark patterns.

   Illustrations are of vital importance when it comes to interpreting the intention of the legislature and cannot be ignored without justifi ed reasons.[39] They are useful to avoid ambiguity and increases accessibility of the law to the public.

Guideline Specific Comments:

6. **Definitions Clause (e):** CUTS commends the detailed explanation of dark patterns provided in the guidelines. The given detailed types of dark patterns and the definition can be further divided into content-based patterns and interface-based patterns. Content- based patterns refer to the actual content and therefore also to the wording and context of the sentences and information components. These interface-based patterns are related to the ways of displaying the content, navigating through it, or interacting with it.[40] This distinction can be useful, as some patterns are specifically targeted for sectors, and consumers. The approach will allow targeted awareness, audit, and reporting interventions. Such a classification will help in identifying dark patterns more so that they don't go unnoticed as well as it will lead to better understanding of the different categories of dark patterns.

7. **Definitions Clause (j)**: In these guidelines, the term "user" corresponds to any person who accesses or avails any computer resource of a platform. The current focus by implications may be on graphical user interfaces (e.g., used for computer and smartphone interfaces). However, dark patterns' impact also apply to voice-controlled interfaces (e.g., used for smart speakers) or gesture-based interfaces (e.g., used in virtual reality) which should be added in the guidelines.

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[37] https://www.deceptive.design/types/disguised-ads
[38] How to Spot—and Avoid—Dark Patterns on the Web | WIRED
[39] Illustrations in Statutes: A Forgotten Statutory Practice: | Economic and Political Weekly.
[40] Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognise and avoid them Version 1.0

CUTS in its survey on users' perspective found that users of digital technologies are evolving and have multiple sub-categories in them.[41] The users which may be subdivided into gender, class, education, geography have various limitations and advantages. Their interactions with the web are unique and varied thus cannot be put into one category and must be treated with nuance and in a graded manner.

8. **Guideline 3**: The guidelines apply to all platforms, systemically offering goods and services in the country, advertisers, and sellers. These are general terms which may have far reaching implications within individual sectors. The guidelines' application on specific issues of dark patterns in various sectors such as e-commerce, telecom, social media platforms, fin-tech etc. need to be established and elaborated upon. For this purpose, to understand the scope of application and possible manifestations of the dark patterns in these sectors, industry specific research should be supported and subsidised by the government.

9. **Guideline 4:** It is prohibited for any person including platforms to engage in dark patterns. The guideline is straight- jacketed and lacks a graded approach. It would be beneficial for the stakeholders to understand the degrees of engagements and possible outcomes of the same. As a user may not be aware of their engagement due to their lack of ability to identify **dark** patterns. As dark patterns can be both manipulative in nature or with fraudulent intent, different modes of handling may be required for each as certain dark patterns that lack clear deception may not fall within the scope of current general prohibitions on deceptive commercial practices.[42] Voluntary disclosure on account of online platforms and users and enforceable transparency measures can keep consumers safe.[43]

10. **Guideline 6:** The guidelines lack a reporting mechanism whereby the users can report such cases on dark patterns. The existing National Consumer Helpline[44] should be customised for reporting of dark patterns users witness or interact with. The customisation should include a comprehensive list of dark patterns as mentioned in the annexures with an option of reporting new dark patterns which the user's witness. In order to provide for an alternate recourse, consumer assistance centres might be set up on the lines of CUTS Grahak Sahitya kendra which are specifically focussed on consultation and conciliation on consumer complaints.[45]

Additionally, online platforms must be required to conduct periodic audits to identify and rectify dark patterns.[46] Identifying dark patterns through trusted flaggers as under the Digital Marketing Act[47]for finding dark patterns is one way to regulate such practices and tracking dark patterns.[48] These audits should be standardised and monitored by the CCPA and could look for designs that foster deceptive and unsuitable selling or nudge users to share excessive

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[41] USERS' PERSPECTIVES ON PRIVACY AND DATA PROTECTION

[42] Dark Patterns: Understanding, Recognizing, And Combatting.

[43] Guidelines For Prevention and Regulation of Dark Patterns 2023 - Consumer Trading & Unfair Trading - India

[44] National Consumer Helpline

[45] https://cuts-cart.org/consumer-support-centre-grahak-sahayta-kendra/

[46] Department of Consumer Affairs (DoCA) and Advertising Standards Council of India (ASCI) host consultation with stakeholders on "Dark Patterns"

[47] https://www.meity.gov.in/writereaddata/files/DIA_Presentation%2009.03.2023%20Final.pdf

[48] https://law.yale.edu/sites/default/files/area/center/isp/documents/trustedflaggers_ispessayseries_2022.pdf

personal information. Lessons can be drawn from the audits designed to prevent algorithmic bias to promote compliance in the automated systems.[49] Consumers must not be forced or directed towards unintended consequences without their express consent. Consumers shall be aware of what they are signing up for and should be able to get out of the same.[50]

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[49] UNDERSTANDING DARK PATTERNS AND THEIR IMPLICATIONS FOR CONSUMER PROTECTION IN THE DIGITAL ECONOMY
[50] Department of Consumer Affairs (DoCA) and Advertising Standards Council of India (ASCI) host consultation with stakeholders on "Dark Patterns"