

Primus Summary

Draft Guidelines For Prevention And Regulation Of Dark Patterns, 2023

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The Central Consumer Protection Authority has released the Draft Guidelines on Prevention and Regulation of Dark Patterns to prohibit any person from engaging in dark patterns. This document presents a summary of the guidelines and their significance for consumer protection and potential impact on digital markets.



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Introduction

The Guidelines once implemented will be applicable to e-commerce and other platforms, online sellers and advertisers.

In the era of digital commerce, the Central Consumer Protection Authority (CCPA) in India has taken a significant step with the aim to safeguard the rights and interests of consumers. With the rapid proliferation of e-market platforms, the use of deceptive design and behavioural manipulation techniques, often referred to as 'dark patterns,' has become a growing concern. Recognizing the need to address these practices, the CCPA has released draft guidelines aimed at regulating and preventing dark patterns. Comments and suggestions on the draft are invited till 5th October, 2023. These guidelines, after consultation and final gazette notification, would be applicable not only to e-commerce platforms but also extend their reach to advertisers and sellers operating within the Indian market. The new guidelines emanate from the powers conferred to CCPA under the Consumer Protection Act of 2019, and are in continuation to Department of Consumer Affairs' 2022 guidelines for 'Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements'.

This document seeks to provide an overview of the CCPA's guidelines, their significance in the context of consumer protection, and their potential impact on the digital marketplace in India. Understanding and implementing these guidelines will ensure a more equitable and consumer-centric online marketplace in India as dark patterns continue to evolve and challenge consumer trust.



Definition of 'Dark Patterns'

"Any practices or deceptive design patterns using UI/UX (user interface/user experience) interactions on any platform; designed to mislead or trick users to do something they originally did not intend or want to do; by subverting or impairing the consumer autonomy, decision making or choice; amounting to misleading advertisement or unfair trade practice or violation of consumer rights."

Understanding the above through a fictitious example, suppose for an E-Commerce platform XYZ; when users land on its website seeking a one-time purchase, they encounter a pop-up promising a 10% discount. Upon clicking, they are presented with a subscription form, pre-checked with a "Subscribe to our newsletter" option. Unaware, users proceed, unintentionally subscribing. This practice impairs consumer autonomy, leads to unwanted emails, and constitutes a misleading advertisement and violation of consumer rights. This is one of the many other possibilities that may occur and when the provisions of the guidelines will come under play.

The CCPA has also extensively listed 'specified dark patterns' that become relevant for enforcing the guidelines. The same has been summarised in a later section.

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Application And Key Provisions

This section lists the entities to whom the guidelines would eventually apply, and the key provisions mentioned in the draft

Application of the Guidelines

The guidelines apply to the following:

- ❖ **Advertisers** refers to a person who designs, produces and publishes advertisements either by his own effort or by entrusting it to others to promote the sale of his goods, products or services and includes a manufacturer and service provider of such goods, products or services.
- ❖ **Platforms**, meaning an online interface in the form of any software, including a website, and applications, including mobile applications.
- ❖ **Sellers**, who, during business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purposes. It also includes a service provider.



Key Provisions for Regulation and Prevention of Dark Patterns

- 1 The guidelines prohibit all persons including any platform, online advertiser or seller from engaging in any dark pattern.
- 2 Any person, including any platform, shall be considered to be engaging in a dark pattern if it engages in any practice listed in the 'specified dark patterns' under the guidelines. However, this list is not a final one and CCPA can make additions from time to time.
- 3 If a dark pattern is already regulated under any other law, the provisions contained in the new guidelines shall be read in addition to those and shall not contradict the former. This is a supplementary provision. The closest Indian laws have come to regulating dark patterns was through the 2022 Guidelines on Prevention of Misleading Advertisements, and some of the provisions of the Competition Act.
- 4 Interpretation- In case of any ambiguity or dispute in interpretation of the guidelines, the decision of the CCPA shall be final. The detailed powers of the CCPA have been listed in the Consumer Protection Act of 2019, which among others also encompasses CCPA's power to investigate matter of violations of consumer rights.
- 5 Contravention of guidelines- The provisions of the Act shall apply to any contravention of these guidelines. In other words, if someone doesn't comply with the guidelines, the Act's provisions will come into play

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Specified Dark Patterns

The guidelines cover the following dark patterns, what they mean and provide clarity through illustrations

False Urgency

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. This will also include showing false popularity of a product or service to manipulate user decision.

Illustration

Falsely creating time-bound pressure to make a purchase, such as describing a sale as an 'exclusive' sale for a limited time only for a select group of users.

Basket Sneaking

Inclusion of additional items such as products, services, payments to charity/donation at the time of checkout from a platform, without the consent of the user. This excludes 'necessary fees' such as delivery charges, gift wrapping, additional taxes, etc. disclosed at the time of purchase.

Illustration

A user purchases a single salon service, but while checking out a subscription to the salon service is automatically added.

Confirm Shaming

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. This is when the user is nudged to act in a certain way that results in the user purchasing a product or service from the platform.

Illustration

A platform for booking flight tickets using the phrase "I will stay unsecured", when a user does not include insurance in their cart.

Forced Action

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, other than the one originally intended.

Illustration

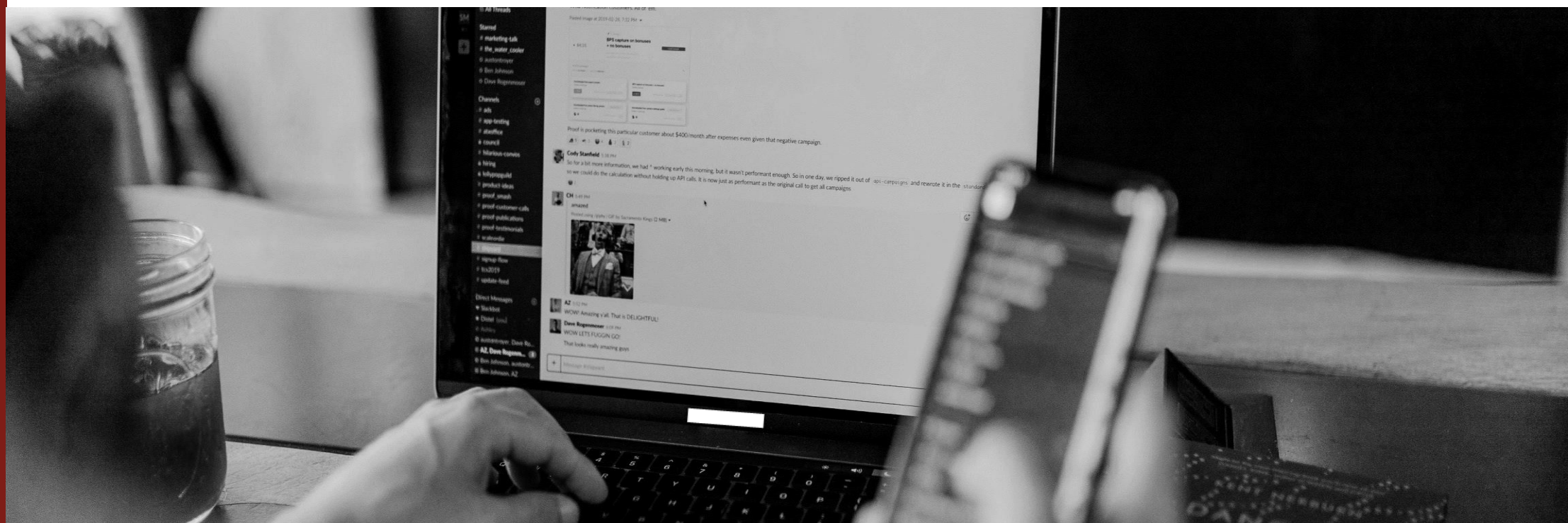
A user downloads app, X, meant for listing houses for renting. Once the user downloads X, they are forced to download another app, Y, for hiring a painter. Without downloading Y, the user is unable to access any services on X.

Subscription Trap

Process of making cancellation of a paid subscription impossible, complex or confusing, or lengthy. This also includes forcing a user to provide payment details for auto debits in availing a free subscription.

Illustration

After using the free trial, a user decides not to continue with a paid subscription. The user finds that she/ he has to navigate through multiple pages and click on various links, making the cancellation process complex and lengthy.



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Interface Interference

A design element that manipulates the user interface highlighting certain specific information; and obscuring other relevant information, thus misdirecting the user.

Illustration

Designing a virtually less prominent (say, a light colored) option for selecting “No” in response to a pop-up asking a user if they wish to make a purchase.

Bait & Switch

The practice of advertising a particular outcome or product based on the user’s action but deceptively serving an alternate outcome or product.

Illustration

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.

Drip Pricing

A pricing practice that involves hidden or undisclosed costs within the user experience, charging higher amounts post-purchase confirmation, advertising products as free without revealing in-app purchase requirements, or requiring additional purchases for a paid service already obtained.

Illustration

While confirming a hotel booking online, the user discovers that there are additional charges that were not disclosed upfront, raising the final bill significantly.

Disguised Advertisement

Practice of camouflaging advertisements to appear as different content types, like user-generated posts, news articles, or fake promotions. the responsibility of making the disclosure that such content is an advertisement shall be on such seller or advertiser.

Illustration

While scrolling through social media, the user finds what appears to be an unbiased skincare product review but turns out to be advertisement disguised as user generated content

Nagging

Users face an overload of requests, information, options, or interruptions, which are unrelated to the intended purchase of goods or services.

Illustration

Platforms asking users to give their phone numbers for supposedly security purposes



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Our Opinion – Why is this Important!

A deep dive on how the guidelines are going to impact the users/consumers and the industry

1. Significance of the Guidelines in the Context of Consumer Protection

Enhancing Transparency and Trust: The implementation of guidelines for preventing and regulating dark patterns will bolster transparency in digital interfaces, fostering greater trust between businesses and consumers. This will significantly benefit Indian consumers, ensuring they make informed choices while shopping or using online services.

Reducing Unfair Commercial Practices: Dark patterns can lead to unfair commercial practices, where consumers are coerced into making purchases or even sharing information without their consent. By enforcing these guidelines, India can curb such practices, thereby safeguarding consumers.

Empowering Consumers: The guidelines will particularly benefit vulnerable populations in India, such as the elderly and individuals who are not tech-savvy. By making digital interfaces more user-friendly and less manipulative, these guidelines can empower these groups, ensuring they are not exploited through deceptive practices.

Boosting E-commerce and Digital Markets Growth: A regulated digital marketplace is more attractive to consumers, encouraging them to engage in online commerce without the fear of being misled. This boost in consumer confidence can result in increased e-commerce growth in India, benefiting both consumers and businesses.

Legal Recourse and Enforcement: The guidelines emanate from the Consumer Protection Act, now enabling consumers to seek redress and hold businesses accountable for practices like dark patterns. This enforcement mechanism is vital for safeguarding consumer rights and ensuring that businesses adhere to ethical principles while advertising their products and services.

Global Cues

In regions such as the European Union and the United States, there exist data privacy laws and guidelines aimed at recognizing and regulating deceptive design tactics equivalent to dark patterns. Researchers have determined that these dark patterns can be harmful and, as a result, require vigilant oversight from regulatory authorities. For instance, France's data protection authority has asserted that dark patterns invalidate user consent by manipulatively diverting their attention. Additionally, the European Data Protection Board had issued guidelines in 2022 addressing dark patterns in social media platforms and how certain practices may violate the provisions of the European Union's General Data Protection Regulation. The Digital Services Act, which is currently in implementation phase, also calls for prohibition of "dark patterns".

Likewise, USA's California Consumer Privacy Act entailed promotion of transparent and voluntary practices when obtaining user consent, which also eventually led to prohibition of certain UI methods.

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2. Potential Impact on the Digital Marketplace in India

Compliance Costs: Advertisers, sellers, and platforms will need to invest in revising their practices, websites, and digital interfaces to ensure they do not engage in any prohibited dark patterns. This could involve significant compliance costs, including redesigning user interfaces, retraining staff, conducting legal reviews, auditing of organization's design practices.

Consumer Trust: One of the most immediate impacts will be on consumer trust. Dark patterns are manipulative and can erode trust in online services. By prohibiting these practices, the guidelines aim to rebuild trust in digital markets. Companies that adhere to these guidelines may benefit from improved customer loyalty and reputation.

Innovation and Creativity: Companies may need to find alternative ways to engage users and drive sales without resorting to dark patterns. This could stimulate innovation

in user experience design and marketing strategies, thereby promoting ethical and customer-centric approaches.

Regulatory Enforcement: The guidelines indicate the Consumer Protection Act of 2019 empowering the CCPA to investigate matters of consumer rights. This suggests that regulatory enforcement may increase, and companies found in violation may face penalties including fines and other actions provisioned by the Act.

Continuous Adaptation: The provision allowing for the CCPA to notify additional dark patterns over time means that companies will need to stay updated on evolving regulatory requirements and adapt their practices accordingly. This could create an ongoing compliance burden.

References:

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BENGALURU

91 Springboard Business Hub
175, 176 Bannerghatta Rd,
Dollars Colony,
Bengaluru – 560076



CHANDIGARH

2nd Floor, Netsmartz,
Plot No. 10, Rajiv Gandhi
Chandigarh Technology Park,
Chandigarh – 160019



DELHI

Upper Ground Floor,
ALPS Building,
56 Janpath,
New Delhi – 110001



KOLKATA

Siddhartha Apartments
4th Floor, 188/2,
Block J, New Alipore,
Kolkata - 700053



MUMBAI

601, 6th floor,
Raheja Centre,
Nariman Point,
Mumbai - 400021



www.primuspartners.in



Primus Partners India



[@partners_primus](https://twitter.com/partners_primus)



feedback@primuspartners.in





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BENGALURU

91 Springboard
Business Hub 175, 176
Bannerghatta Rd,
Dollars Colony,
Bengaluru – 560076



CHANDIGARH

2nd Floor, Netsmartz,
Plot No. 10, Rajiv
Gandhi Chandigarh
Technology Park,
Chandigarh – 160019



DELHI

Upper Ground Floor,
ALPS Building,
56 Janpath,
New Delhi – 110001



KOLKATA

Siddhartha Apartments
4th Floor, 188/2,
Block J, New Alipore,
Kolkata – 700053



MUMBAI

601, 6th floor,
Raheja Centre,
Nariman Point,
Mumbai – 400021