

FEDMA answer to EDPB consultation on draft Guidelines 3/2022 on dark patterns

FEDMA thanks the EDPB for the opportunity to comment on the draft Guidelines 3/2022 on [Dark patterns in social media platform interfaces: How to recognise and avoid them](#).

Legislative overlaps and cooperation among authorities

The EDPB should clarify how these guidelines will interact with the recently published **Commission Guidance on the interpretation and application of Directive 2005/29/EC** of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive). This Guidance provides substantial developments on dark patterns in pages 124 to 128. **FEDMA sees a need for cooperation between consumer and data authorities to avoid contradictory interpretations of law or understanding of facts** as there is a strong overlap between the two legislations and high probability that a data and a consumer authority will have to rule on the same case or very similar facts, creating **potential conflicting precedence**. Best practices are confusing because they cannot be enforced by the data protection authorities (competent supervisory authority), only by consumer authorities.

Similarly, it appears from the political agreement reached by the institutions on the Digital Services Act (DSA), that several of its provisions are related to the regulation of dark patterns. As a reminder, the DSA applies to online platforms that includes social media platforms, which is the exact scope of the EDPB guidelines. As a consequence and for the sake of regulatory coherence and legal certainty, the final EDPB guidelines must take this overlap into account and clarify how the DPAs, the EDPB and the Digital Service Coordinators in the Member States in charge of implementing the DSA will work jointly together.

Clarification of scope of the guidelines

It will be important that the EDPB clarifies the scope of its guidelines in order to provide legal certainty to the myriad of digital actors of the ecosystem who do not fall under the **definition of social media platforms**, in full alignment with the law.

By setting these high standards of accountability, transparency and protection by design, **the EDPB is aiming for strong data protection, necessary and proportionate use of data in the context of social media**. This is understandable in the context of social media which tends to be high processing environment, including in some cases of sensitive data. However, this is not the case of every data processing context for data marketing purposes. In addition, some companies have already taken strong commitments to not engage in the processing of sensitive data for marketing purposes or not to engage in activities involving minors **FEDMA therefore hopes that these guidelines will not discourage European companies, SMEs, and responsible actors, engaged in practices outside social media platform interfaces, to the benefit of major multinational companies** in monopolistic situations, creating walled gardens, who have the resources to do the detailed assessments needed to reach such high standards of accountability.

Risk-based approach of the GDPR

Not all data processing is dangerous or high risk for an individual. It seems that any presentation which promotes or visually supports processing of data in the context of social media and online targeted ad could become a dark pattern. The underlying message of these guidelines is that, either the options which minimize processing of data must be highlighted or all options must be presented the same way, which is in contradiction with the risk-based approach. **These guidelines should not set principles, which will extend as such, to practices, outside of social media, which can be less risky.** For example, if a small online shop has a broken link in their privacy notice to the DPA or promotes providing an email address to receive a newsletter, authorities should leverage the risk-based approach and article 83 of the GDPR to make a balanced decision. This should not automatically be considered as “left in the dark” or “emotional steering”. In addition, **these high standards aimed at social media context should not apply to other balanced marketing practices in different contexts.** For example, a controller needs to retain some **minimal necessary data for suppression lists** (this is by default) and should not be considered as deceptive snugness (or emotional steering if the organisation explains that this is in the interest of the data subject). When these lists are managed centrally, **controllers should not be accused of hindering because they refer the data subject to the organisation’s website which manages the national suppression list for direct mail or telemarketing. Organisations must be able to refer to the Youronlinechoice website**, managed by the European Digital Advertising Association, to educate consumers on how to manage their choices without having to worry about hindering or overloading.

Reading of the guidelines

FEDMA stresses the excessive length of the guidelines. FEDMA suggests the guidelines may be more easily read by providing outcomes for organisations to reach, together with a checklist to help them verifying that the interfaces they develop do not include dark patterns.