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General comments

The Guidelines on dark patterns (later also Guidelines and Guidelines 3/2022) are definitely a valuable asset to service providers in the field and help to ensure compliance with the GDPR requirements on social media platform interfaces. In general, this type of guidance provides a good starting point for both designers and data subjects on how to avoid and recognise potentially deceptive designs.

Very often, Guidelines are written in a form, where best practices (rather than forbidden actions) are presented and explained. EDPB's Guidelines have taken a different approach by describing deceptive dark patterns, especially for designers and end-users to detect and understand. This approach may be good at this point, since EDPB has already given several other guidelines defining GDPR requirements in a somewhat more positive way. These previous guidelines are also referenced in the draft Guidelines on dark patterns.

The best practices presented in the Guidelines are very good and should be highlighted more. However, as the intended target audience is very wide, at least when it comes to the amount of social platforms and users of social platforms, this makes it harder to provide detailed guidance and generalise the guidance to match all the tens of different social media platforms.

The structure of the Guidelines is somewhat not clear and the described examples and different definitions used throughout the Guidelines are sometimes hard to understand. When Guidelines are targeted to services and their designers also the language should follow the terminology generally used, for example, the term layered design should be explained in more

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detail. Then again, even the settings have become quite complex nowadays thus sometimes there is a need to add more hierarchy and categorisation into the UI so all the issues are easier to find. According to a blog post by Germain (2022) Facebook has 22 pages of settings. There is also feedback on the definition of "dark pattern" (See detailed comments > Terminology - What is a dark pattern?).

In general, the Guidelines do not take into account the already existing processes in design, which ensure that the services and systems comply with the requirements they are faced with. Then again, it is understandable that the focus of these Guidelines is on the legal perspective. Nevertheless, since the explanation of deceptive design is so detailed, the basics of design thinking could be explained at least shortly (e.g., when and how the Guidelines should be taken to use in a design process). It is also a fact that in addition to GDPR, services have to comply with several other requirements. GDPR related issues are only some - though utterly crucial - of the UI design requirements among many others.

The given feedback focuses on the following points:

- Scope and target audience of the Guidelines

- Structure

- Design processes in general.

There is also some further feedback on minor issues of the Guidelines in the Detailed comments chapter later on.

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Design Thinking driven processes

The Design Council (2005) introduced the baseline for Design Thinking driven processes

with a diverge-converge pattern and four distinct phases; discover, define, develop and deliver.

These stages give a template for different modes of thinking designers use, and where to actually

utilise different requirements related to the designs they create. The Double Diamond (figure 1)

is a visual representation of the design process. **Discover** - The process begins by questioning the

challenge and quickly leads to research to identify user needs. This phase also contains any other

requirement related to the product being built with market insights, legal requirements etc., and

can be defined as a 'phase of divergent thought'. A good product is always a compromise of

several requirements, also requirements related to law. *So, these types of Dark Pattern*

Guidelines should come as an input at the very beginning of the design process. This should be

stated more clearly. This is though somewhat taken into account also in the *EDPB Guidelines*

4/2019 on Article 25 Data Protection by Design and by Default and in the Guidelines on Dark

patterns. The requirement described in Article 25 is for controllers to have data protection

designed into the processing of personal data and as a default setting and this applies throughout

the processing lifecycle. (EDPB Guidelines 4/2019, p. 5 and see also EDPB Guidelines 3/2022,

p. 3 and para. 17). These kinds of statements might be somewhat unclear and unnecessary since

of course in each necessary design process state service providers should examine thoroughly

which requirements are valid. Discover can also be redesigning the existing solution based on the

newly found requirements. **Define** - The second phase focuses on making sense of the findings,

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and understanding how the user needs and the problems align. The result is a design brief that

clearly defines the challenges based on these insights. **Develop** - The third phase concentrates on

developing, testing, and refining multiple potential solutions. This phase allows us to ensure that

the solution works for the end-users and that they understand it correctly without deceptive or

misleading designs. In the Develop and Define phase, there is a possibility to validate that, e.g.

the requirements related to the personal data handling (and any other requirements relevant for

the solution) are adequate in a way that the users understand them, and the solution is ready for

the next phase. **Deliver** - The final phase involves selecting the solution that works and

preparing it for launch.

A good thing to keep in mind is that the designers bring one view to the development

work of a digital solution, and the same applies to end-users. There are several stakeholders

involved in the product development process. As important as the process and principles

organisations adopt, is the culture of an organisation and how it connects with citizens and

partners. This Double Diamond model (2019) also includes **Engagement**, which is needed with

people delivering the ideas and receiving them, but also with other partners who might have

other ideas or requirements. Developing connections and building relationships is as important as

creating ideas. Some of the partners and stakeholders to engage with are for example public

authorities and society where digital solutions run in.

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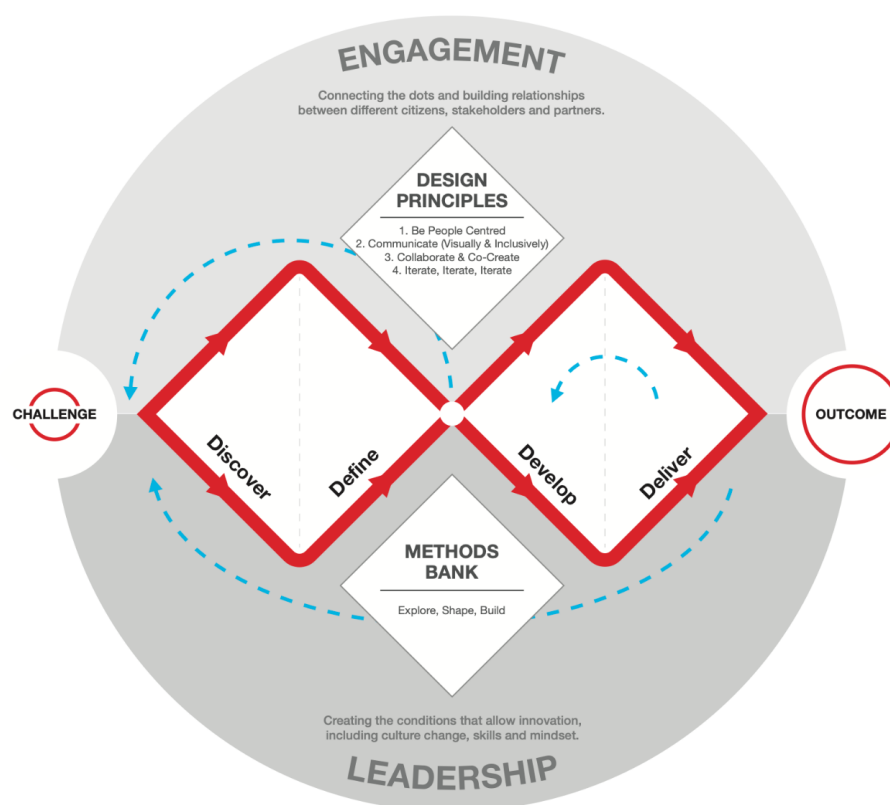
Figure 1. *The latest updated Double Diamond Model of Design Process* (2019)

The five different use cases help somewhat in understanding how the Guidelines design

principles help implement GDPR requirements through the life cycle of the social media

account, but as the question is about creation of digital designs, the design process could also be

highlighted. *Generally speaking, GDPR related issues are only some - though utterly crucial - of*

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the UI design requirements among many others. Note that the described examples and different definitions used throughout the Guidelines are sometimes hard to understand. The main focus should be on the social media service providers that bear the ultimate responsibility when it comes to ensuring compliance with GDPR. Usually guidelines are written in a form, where best practices (rather than forbidden actions) are presented and explained. These Guidelines take a different approach by describing deceptive dark patterns especially for designers and end-users to detect and understand.

It would be also interesting to know how much of Discovery, Define and Develop were done for these Guidelines, e.g. via user research. The examples provided in the Guidelines quite often focus on user preferences and how users feel and act, i.e. statements which should be validated as well. Part of good design is also that a certain solution works for a certain group of people, for example this document has been created with quite a broad audience in mind, and could be divided into separate sections for end-user guidance, service provider guidance and guidance for the designers.

Detailed comments

Scope and target audience of the Guideline

The Guidelines are for both social media providers and its users. The audience of these Guidelines is quite large and therefore also its potential impact is huge. Its effect could possibly be wider when properly implemented and if the target audience would be more restricted. Globally, there are at least 30 social platform services with at least 100 million users. Many of

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these social media platforms (like Facebook, YouTube, TikTok etc.) operate also in Europe ("List of social", 2022). In 2022, social networking sites are estimated to reach 3.96 billion users globally and figures are expected to grow as mobile device usage and mobile social networks increasingly gain traction in previously underserved markets (Statista Research Department, 2022).

The responsibility of the service provider is quite clearly stated in the Guidelines. It is the service provider who has the responsibility to design its services in compliance with the GDPR, when it comes to designers they merely do their work in between different requirements affecting the design work, one requirement being requirements regarding GDPR. When it comes to end-users, the design perspective should be emphasised, e.g. with design process. This could be more easily done via using service or/and legal design tools. The Guidelines aim to somehow grasp the perspective of legal design, but fail a little by not clearly taking this perspective openly in the beginning of the document. Legal design is a nascent movement that aims to make the legal systems and requirements work better for people. It has been developed out of work in human-centred design and participatory policy-making. It brings a lawyerly focus on abstract complexities (e.g., what rights we have, what risks we face, what rules constrain us) with a designerly focus on lived experience (how we do things, how things look and feel to us, how things serve us). Both the lawyerly focus and designerly focus share a core similarity: to strategically improve people's outcomes in a system, to solve complex problems, to be in service. (Hagan, 2020).

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The Guidelines are also interesting from a user experience point of view. In general, one can argue that a good designer knows how to design certain features in mind, e.g. how to promote a certain feature of making a sale in user interfaces. There is also a fine line between trying to make the user decide in a favourable way from the point of view of the promoted service and marketing the product, and actually trying to deceive the user, e.g. to give information they do not want to enclose. It is stated that these Guidelines are meant for designers and users of social media, but one can argue that this should rather educate the end-users and not the designers. However, this document indicates that these types of patterns are recognised by the EDPB and serves also as a point of reference for data protection authorities when it comes to organisations who aim to use these kinds of dark patterns to deceive end-users.

As said, these Guidelines should be first and foremost for social media providers, secondly to designers and end-users and not as it is currently stated in the Guidelines, i.e. "these Guidelines offer practical recommendations to designers and users of social media platforms". It is good that the responsibility and accountability of the social media providers in ensuring the GDPR compliance of their platforms is clearly mentioned in the Guidelines. However, the Guidelines seem to place quite a lot of responsibility on the designers (working and creating designs for the social media platforms) and end-users, even though they are not the ones responsible. It is important to spread information related to deceptive patterns to the end-users, but it is also good to note that a good design should never contain deceptive user interface elements on purpose.

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Structure

The structure of the Guidelines should perhaps be reconsidered. Annex can be seen as the main point of the Guidelines. It would be beneficial to move this annex to the beginning of the document. Also the division of content- and UI-based dark patterns should be explicitly stated (so that the Guidelines would be coherent). It would also be beneficial to separate the best practices into their own chapter as they often overlap.

Here are suggestions on how restructuring of the Guidelines could be done:

- Move the annex to the beginning

- Highlight the best practices and dedicate one chapter to them (since also according to the Guidelines, best practices are applicable for different use cases)

- The contents of the document could be rearranged in the following way: 1. GDPR requirement(s) and data subject -/user rights 2. How to implement the requirements (best practices for different cases) 3. Possible use cases involved 4. Dark patterns

- The Guidelines could be divided into separate sections for end-user guidance, service provider guidance, and guidance for the designers.

    - A glossary where the important terminology (user interface, user experience, dark pattern, content-based pattern, interface-based pattern,

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user journey etc.) is explained should be added. Also, it should be clearly

explained what a layered design means.

What is desirable design and what is deceptive design?

The general problem in the Guidelines is how to find a balance between different

practices. What is in fact a dark pattern and what is a suitable feature, function, language and

action? This always depends on the context, the user, and the online service. The Guidelines do

not give direct answers to this although it is stated that breaches of GDPR requirements need to

be assessed on a case-by-case basis (see Guidelines 3/2022 p. 7).

It is definitely not easy to evaluate what kind of a dark pattern would violate the GDPR.

This is a problem especially when it comes to the evaluation of the content of a web service.

What makes the evaluation even harder is that according to the Guidelines the content should be

evaluated differently when the user is a child. However, examples on what the difference is in

practice are missing.

Terminology - What is a dark pattern?

The dark patterns addressed within the Guidelines are very much alike, and hard to grasp

as such. How have these patterns been detected? Is the aim also to set some sort of standards for

the listed dark patterns? It is noted that a good user experience design is about providing the

users with fluent interactions with products. Good design has the user's best interest in mind and

should not be deceptive. One can also wonder whether there is a reason for creating new

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categories / new classification for dark patterns instead of using some of the existing ones (e.g. Brignull, n.d.; Bösch, 2016; Gray et al., 2018)?

The Best practice recommendations described in chapter 3 *The life cycle of a social media account* are in general what is needed to address the issues presented in the Guidelines. A good designer follows best practices of design, e.g. heuristics. On some level this guidance is the opposite of one of the most popular heuristics of *10 Usability Heuristics for User Interface Design* by Jacob Nielsen already published in 1994 (Nielsen Norman Group, 2020). To highlight the best practices of design and good user experience, the dark pattern categories could be explained with well-known design guidance (especially if targeted for Designers). Table 1. is an example of this more positive approach the Guidelines could be taking. This approach focuses on usability heuristics and how GDPR requirements are effectively taken into account when designing user interfaces to avoid dark patterns. The editors have the power to take this approach if they want.

Table 1. *Dark pattern versus usability heuristic* (Nielsen, 2020)

Dark pattern	Sub-pattern	Nielsen's corresponding Usability heuristic	Description
Overloading	Continuous prompting Privacy maze	#1: Visibility of system status #8: Aesthetic and minimalist design	Communicate clearly to users what the system's state is — no action with consequences to users should be taken without

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	Too many options		informing them. Don't let unnecessary elements distract users from the information they really need.
Skipping	Deceptive snugness Look over there	#1: Visibility of system status	Build trust through open and continuous communication.
Stirring	Emotional Steering Hidden in plain sight	#2: Match between system and the real world #8: Aesthetic and minimalist design	Ensure users can understand meaning without having to go look up a word's definition. Keep the content and visual design of UI focus on the essentials.
Hindering	Dead end Longer than necessary Misleading information	#10: Help and documentation	Ensure that the help documentation is easy to search. Whenever possible, present the documentation in context right at the moment that the user requires it. List concrete steps to be carried out.
Fickle	Lacking hierarchy Decontextualising	#4: Consistency and standards #10: Help and	Improve learnability by maintaining both types of consistency: internal and external.

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		documentation	
		#2: Match between system and the real world	Whenever possible, present the documentation in context right at the moment that the user requires it. Never assume your understanding of words or concepts will match those of your users.
Left in the dark	Language discontinuity Conflicting information Ambiguous wording or information	#4: Consistency and standards #10: Help and documentation #2: Match between system and the real world	Improve learnability by maintaining both types of consistency: internal and external. Whenever possible, present the documentation in context right at the moment that the user requires it. Never assume your understanding of words or concepts will match those of your users.

Dark pattern vs. deceptive design and sanctioning deceptive designs

The Guidelines make it clear that authorities are aware of some service providers using

somewhat undesirable design implementations, which are not in compliance with the GDPR.

Nevertheless, there is a need for real-life cases where more thorough practical analysis is made

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regarding these kinds of breaches to enhance stakeholders' awareness and the required deterrent effect.

It is clear that it is only a matter of time when data protection authorities give their first sanction in these matters (also maybe explicitly using the term dark pattern). The current version of the Guidelines give some vague examples of dark patterns in different use cases. Though data protection authorities have imposed several sanctions on matters related to dark patterns, as a term, the dark pattern is somewhat ambiguous. It seems that there has been a will to create a buzzword for describing deceptive design patterns.

Division between content-based and interface-based patterns

The Guidelines divide the dark patterns based on their effects on users' behaviour (para. 5. and chapter 4: *Annex: list of dark patterns categories and types*) and also on content-based patterns and interface-based patterns. In the Guidelines, interface-based patterns specifically address aspects of the user interface or user experience. Content-based patterns refer to the actual content and therefore also to the wording and context of the sentences and information components. In addition, however, there are also components that have a direct influence on the perception of these factors. These interface-based patterns are related to the ways of displaying the content, navigating through it or interacting with it (p. 8, para. 6. of the Guidelines).

Nevertheless, interfaces cannot be designed without content, and also these Guidelines take the content into account when describing the cases via the life cycle of social media accounts. There is no user interface without content. In the examples provided in the Guidelines,

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it is not always clear why the dark pattern in question is categorised as content-based or interface-based. See e.g. example 29 on page 35 where the content has to be checked in order to know if humour is used in the UI the "wrong way" ("the wrong way" meaning in this case that the UI is not in compliance with the GDPR). As stated above, there is no UI without content and this division might be somewhat challenging in these Guidelines. For example, "hindering – dead end" is used as an example of an interface-based dark pattern in examples 10, 18 and 30, but later on it is also used as an example of a content-based dark pattern in example 43. Broken hyperlink in a privacy notice is a content-based dark pattern (example 43) but if the privacy policy is missing important hyperlinks, it is an interface-based dark pattern (example 18)?

Accountability

The document mentions that user journeys can be used to document how well the issues related to the user's data are handled. However, the document uses a term which is not properly described, i.e. a "user journey". It also mentions qualitative and quantitative user research methods, such as A/B testing, eye tracking or user interviews, their results and their analysis to support demonstration of compliance. Nevertheless, it has not been noted that this type of data collection can also be processing of personal data which falls under the GDPR. It is important that the design process is used properly when designing any solutions, social media features included. This feedback is also addressed in the beginning of the document with the Double Diamond Model of Design Process (Design Council, 2019).

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Transparency

According to the Guidelines, content-based patterns refer to the actual content and therefore also to the wording and context of the sentences and information components. Evaluating content might not always be easy, especially when it comes to evaluating emotional steering. Services, users, and context vary widely and it can be said that general guidelines might end up being too general. What is advertising and what is a dark pattern (deception) and is it about GDPR or something else. In general, the topic of emotional steering is interesting as it has been also used in marketing and sales, and even politics, thus making it difficult to draw the line between appropriate and inappropriate conduct in practice. However, this is a separate topic, which falls out of the scope of this feedback. Every authority knows their own competences but already because of transparency it is clear that cooperation in creating this type of multidisciplinary guideline between different authorities is a must, e.g. with consumer authorities, and people with various types of skill sets and knowledge in e.g., marketing, sales and design. Though the Guidelines also refer to the CNIL's report on Shaping Choices in the Digital World (Chatellier et al., 2019). The CNIL report is apparently a result of collaboration between professionals and authorities from different fields.

Data protection by design and default

The content of Article 25 should be explicitly stated in the Guidelines. Data protection by Default should also be included and explained as it is mentioned later in the examples. The

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current wording also seems to imply that processing personal data in compliance with Article 25 is voluntary (p. 3).

Consent

The Guidelines could also contain a reference (e.g., in the form of a footnote) to the recent case regarding Facebook and the use of contract as a legal basis for processing referred to the CJEU by the Austrian Supreme Court, in case a judgement on this case has already been given at this point.

Joint controllership

The Guidelines mention joint controllership in para. 80. The Guidelines could perhaps include a reference to chapter 3 (Definition of joint controllers) of the EDPB Guidelines on the concept of controller and processor (07/2020) for the sake of clarity. In addition, example 19 is rather general and could perhaps be further developed in order to point out difficulties that are especially typical to joint controllership and Article 26(2). Also, while other dark pattern examples are under the same headline, example 19 seems to differ from this structure as it is presented before the 'Dark pattern' headline, making this section seem detached from the rest of the guidelines.

Benchmarking and impact assessment needed

There are quite a few social media platforms available. It would be interesting to know which platforms have been benchmarked for this guidance. In order to gain a broad understanding of how multiple social media platforms work, it is necessary to require

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background material on how the user registers to them, how they use them, and in the end how they stop using them. According to Wikipedia (2022) there are tens of social media platforms with more than 100 million global users, Then again - according to our own limited experience (related to the actual amount of different social media platforms) - very often social media platforms use similar account creation processes and similar ways in which they function but they still differ quite a lot. There is no need to make concrete proposals on how the UI functions with UI mock-ups. It should be enough to list the detailed well-reasoned requirements, which should be taken into account when including GDPR related requirements into any social media services.

Vulnerable people - children, elderly people and novice users

Before even opening a social media account, there is a phase of understanding the data handling and rights of users when it comes to their own data. The Guidelines emphasise children but also any novice user without understanding how social media platforms (or even any ICT solution) function should be taken into account. In addition elderly people might also be regarded as vulnerable when it comes to using social media services.

In general, the solutions should provide enough information for the users to grasp how their data is being handled no matter the age. Note that for many social media accounts there is an age limit e.g., "As per our terms, we require people to be at least 13 years old to sign up for Facebook or Instagram" (Diwanji, 2021).

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Adaptiveness of solutions as a general rule

A good design is always adaptive, e.g. the guidance says that the usage of mobile devices should be taken into account when registering an account i.e. there should not be a case where content gets hidden when a mobile device is being used. These types of requirements could be rather general, and not related to a specific use case. The usage of mobile devices as an access to social media platforms has increased. Statista (2022) reports that as mobile devices offer flexibility in terms of on-the-go service access, it is hardly surprising that online usage is shifting towards mobile. Some networks, such as Facebook, started out as web-based and then extended towards access through mobile browsers and smartphone apps, while other networks, such as Instagram, were initially mobile-only and later transitioned into cross-platform availability as well. An increasing number of social networks are therefore accessible through multiple platforms in order to offer users access to different features according to their needs, time and preferred device.

About the confidentiality of communication

It could be highlighted that when and if a user's chat messages are disclosed to an unauthorised party, this may also be regarded as a violation of confidentiality of communication (p. 29, para. 81. of the Guidelines 3/2022).

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