

Centre for Competition Law and Economics

(A non-profit initiative u/s 8, The Companies Act, 2013)

605, A1, 'Sree Utopia' Kadubisanahalli, Bengaluru 560103
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To

The Secretary

Department of Consumer Affairs
Ministry of Consumer Affairs, Food & Public Distribution
Government of India
Room No. 546 C
Krishi Bhawan
New Delhi 110001

27th September, 2023

Subject: Comments submitted by CCLE on Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023

Dear **Sir/Ma'am**,

Please find attached the comments submitted by us on the Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023.

Please let us know if you have anything to discuss and we will be looking forward to meet you in-person.

Best regards,

Sumit Jain

Founding Director

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Comments

1. It is submitted that the aim and objective of the CP Act is to secure the **rights of the end consumer**. That the strategic deployment of 'dark patterns' by various e-commerce firms is at the heart of deception, and detrimental to the consumer interest and welfare.
2. It is submitted that dark patterns are inevitably deployed by entities which have some **market power** and are intended to further cement their own position.
3. It is submitted that the purpose of enacting Dark Pattern guidelines may be to further strengthen the **enforcement framework** and empower the consumer to report defects/ deficiencies in goods/ services and unfair trade practices. Thus, the text of the law is intrinsically related to how it is implemented.
4. That the evolving jurisprudence on dark patterns may suggest that the Guidelines may set a **baseline** for any firm/ entity to be covered for deploying dark patterns. That the baseline may be in terms of the total users registered, annual turnover or any other criteria which is deemed appropriate by the legislator.
5. That once the baseline is set, the definition of 'dark pattern' as given in the draft regulations is exhaustive in nature. That the said definition is in line with the objectives of the Act.
6. It is submitted that while **Annexure 1** of the guidelines provides further information to a potential aggrieved consumer in identifying and reporting unfair trade practices to the consumer forum, the said list is exhaustive, and not inclusive in nature. The said nature may result in coverage of a few dark patterns within the ambit of guidelines but may exclude others.
7. It is submitted that section 5 of the guidelines may further suggest the exclusion of dark patterns which are not identified in **Annexure 1**. Section 5 of the guidelines reads as follows:

...“Conditions for dark patterns. - Any person, including any platform, shall be considered to be engaging in a dark pattern if it engages in any practice specified in Annexure 1 of the guidelines.”...

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It is submitted that the aim and objectives of the Act may be achieved if section 5 is amended in the following terms:

*... "Conditions for dark patterns. - Any person, including any platform, shall be considered to be engaging in a dark pattern if it engages in any practice, **including but not limited to** what is specified in Annexure 1 of the guidelines." ...*

8. In an alternative, the text of Annexure 1 may further include addition of clause xi which may read as follows:

"...Any other deceptive pattern or design which is not covered in the above clauses..."

9. It is further submitted that the enactment of the Dark Patterns Guidelines would have a bearing on how **digital markets** are governed in India.
10. That the combined aim of various legislations including the CP Act, the Competition Act and other legislations may be truly achieved when there is **synchronisation** in the implementation framework.