

**UNCTAD Working group on Consumer Protection in e-commerce**

**Subgroup on Consumer Education and Business Guidance**

**Report on Consumer Education and Business Guidance on “Dark Commercial Patterns” \***

\*The subgroup was coordinated by: National Directorate on Consumer Protection and Consumer Arbitration (DNDCYAC) – Argentina and Competition Authority of Kenya (CAK).

## **BACKGROUND**

1. At its second session in 2017, the Intergovernmental Group of Experts on consumer protection law and Policy requested the UNCTAD Secretariat to convene a working group on consumer protection in e-commerce to highlight best practices, to facilitate information exchange and consultations, and to continue the work of the Group. It reports to the following annual session of the Intergovernmental Group of Experts, which have renewed its mandate since.
2. The Working Group established three subgroups, one of them, on Consumer Education and Business Guidance, currently co-lead by consumer protection agencies from Argentina and Kenya.
3. In an online meeting held in April 2021, the WG members agreed to focus on Raising consumer awareness on the use of their data in digital markets with a special focus on “dark commercial patterns”.
4. There is no agreed definition of the term “dark commercial patterns”. According to one definition by OECD, “dark commercial patterns are user interfaces used by some online businesses to lead consumers into making decisions that they would not have otherwise made if fully informed and capable of selecting alternatives”<sup>1</sup>. Some dark commercial patterns deceive users while others manipulate them to make choices that are not in their best interests.
5. The activities of this sub-group’s work plan were to:
  - Document what consumer authorities have identified within their jurisdictions as dark commercial patterns.
  - Document what kind of actions have been taken so far by consumer protection authorities to tackle dark commercial patterns.
6. In this regard, the subgroup prepared a questionnaire that was circulated among the E-Commerce Working Group members. The subgroup received replies from eleven countries, which are: Argentina, Brazil, Colombia, Germany, Kenya, Korea, Peru, Poland, Sweden, Switzerland and Turkey. This draft report is based on those responses.

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<sup>1</sup> Reference to the OECD Roundtable on Dark Commercial Patterns Online  
[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2020\)23/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2020)23/FINAL&docLanguage=En)

## SURVEY RESPONSE ANALYSIS

### **A. Types of Dark Commercial Patterns and identification methods.**

7. All agencies that participated in the survey reported that they have identified “dark commercial patterns” within their jurisdiction or misleading/unfair practices that could fall into the framework of “dark commercial patterns”. Recurrent deceptive commercial techniques that have been found are:
- default settings: are used to track and monitor a user's input without letting them know,
  - confirmshaming: methods to guilt the consumer into opting into something. The option to decline is worded in such a way as to shame the user into compliance,
  - urgency and scarcity cues: are used to indicate that the good, service or offer will soon run out,
  - roach motel: a consumer gets into a situation very easily, but then finds it is hard to get out of it,
  - hidden costs: new, additional, and often unusually high charges are added just before a consumer is about to complete a purchase,
  - sneaking: the site sneaks an additional item into the consumer’s basket without consent, perhaps through an opt-out radio button or a checkbox on a prior page,
  - among others.
8. In regards to the activities in which those practices have been identified, consumer protection authorities have referred to financial services<sup>2</sup>, tourism<sup>3</sup>, airlines<sup>4</sup>, insurance companies<sup>5</sup>, retailers<sup>6</sup>, telecommunications<sup>7</sup>, cases related to consumer data<sup>8</sup>, etc.
9. Some cases shared by authorities that could be mentioned are:
- i. Booking platforms for hotels often advertise rooms by stating there are only a few rooms left available even though rooms are still available on other platforms or can still be booked directly with the hotel.
  - ii. Investigation concerning a mobile application (“app”) created by a supplier to compare the nutrients of products in a supermarket, but, supposedly, induces the consumer to purchase specific products.

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<sup>2</sup> Kenya.

<sup>3</sup> Argentina, Germany, Korea.

<sup>4</sup> Peru.

<sup>5</sup> Peru.

<sup>6</sup> Colombia, Peru.

<sup>7</sup> Peru, Poland.

<sup>8</sup> Brazil, Peru.

- iii. Financial services that offer the opportunity to take up loans through the mobile phone, coupled with lack of disclosure and transparency by the digital financial providers, causing exorbitant fees and charges for consumers.
  - iv. An insurance supplier had a pop-up on its app; the consumer had to acquire the insurance to access the app's menu.
  - v. Trial periods often require that the consumer attaches a credit card to the subscription account and agrees to the subscription. At the time of consent, the consumer is unaware that he/she is agreeing to an automatically renewable subscription, the price of which can only be found in the terms and conditions, which the consumer usually does not read.
  - vi. Traders use clocks counting down the last hours of campaigns, just to be reset to count down again.
  - vii. Consumers purchasing a product and would choose a "free" shipping method. It is only later in the purchase process that they discover they were signed up for a paid subscription that is automatically renewed. Information about these additional costs is included in the T&Cs.
10. The major avenues by which Agencies have identified dark commercial patterns are investigations<sup>9</sup>, complaints filed by consumers<sup>10</sup>, sweep exercises<sup>11</sup>, surveillance<sup>12</sup>, advisory services<sup>13</sup> and lawsuits<sup>14</sup>.

## **B. Legislative provisions on dark commercial patterns**

11. Concerning legal and regulatory framework, most authorities have stated that they did not have specific legislation or rules on dark commercial patterns, although most jurisdictions have general consumer protection laws and in many cases, specific rules on commercial practices, which include certain clauses that cover those deceptive practices. For example, Argentina recently issued Resolution 994/2021 - it updates Resolution 53/2003- that forbids some deceptive clauses, for example, to sneak into the basket additional products, to presume consent when consumers navigate suppliers's websites, to limit consumers' right of withdrawal. Also, Resolution 424/2020 establishes the "withdrawal button" for remote transactions.
12. Both Argentina and Germany have instituted a rule on the "Cancellation button" and made it mandatory. This rule had forced companies to provide an easy, accessible and readable button that enables the consumers to cancel a subscription in a fast and straightforward way in their online systems.

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<sup>9</sup> Brazil, Kenya, Poland,

<sup>10</sup> Kenya, Korea, Peru, Poland,

<sup>11</sup> Germany,

<sup>12</sup> Argentina, Peru,

<sup>13</sup> Peru

<sup>14</sup> Peru,

13. In Brazil, Act 12.965/2014 on Civil Rights Framework for the Internet and Act 13.709/2018 on General Data Protection Law – LGPD (amended by Act 13.853/2019) establish principles, guarantees, rights and obligations applicable to some categories of dark commercial patterns.
14. In addition, the provisions of Chapter VI of the Consumer Protection Statute of Colombia (Law 1480 of 2011) can be extended to protect consumers in digital environments from deceptive practices or conduct that may constitute "dark commercial patterns". Its article 50 states the obligation for suppliers and retailers to provide the general conditions, a summary of the purchase and the possibility to correct the order if necessary. It also includes the right of withdrawal (article 47) and the reversal of payment (article 51) to protect consumers once the transaction has been carried out.
15. In Kenya, Part VI of the Competition Act No. 12 of 2010 dealing with Consumer Welfare contains provisions such as false or misleading representations and unconscionable conduct, which the Authority relies upon to deal with dark commercial patterns.
16. Peru issued Resolución 39-2021- PRE/INDECOPI on the "Proposals for Consumer Protection on e-commerce and Product Safety", which contains a minimum standard of compliance related to transactions that happen through digital channels and their implementation (relevant information, contracts terms and conditions, pre-selected options, confirmation of purchases, and others) as well as to guarantee consumer safety by strengthening institutions and measures to be adopted in case of a product entries into the market and represent an unforeseen risk for health or life.
17. In Switzerland, depending on the circumstances, those practices could fall under at least 3 provisions of the federal law against unfair competition (LCD), such as, article 2, which protects against any commercial practice contrary to good faith (general clause); article 3, dealing with inaccurate and false information given to promote one's activity, products, services; and the conditions that must be respected when offering goods, works or services by means of electronic commerce (information on identity, purchase process, confirmation email, etc).
18. Respecting community law, at the European Union level, there is specific consumer protection legislation that regulates certain dark patterns. For example, the Directive 2005/29/EC on "Unfair Commercial Practices", which states what shall be understood as unfair, misleading and aggressive practices and also establishes a list of certain prohibited practices in its Annex 1 (the "blacklist"). The Directive 2011/83/EU on consumer rights prohibited the use of default options which the consumer is required to reject in order to avoid additional payment.

19. On the other hand, the Resolution 37/2019 of Mercosur on consumer protection in e-commerce, stipulates consumers' right to information, to retract, and other provisions that cover certain deceptive practices.

**C. Powers or capacity to investigate dark commercial patterns**

20. Most Agencies reported that they have the necessary capacity and powers to intervene in cases related to dark commercial patterns. Some of them specified that they have both administrative and judicial powers, e.g. Colombia, and to take legal action when collective interests are threatened or harmed, e.g. Switzerland.

21. Germany indicated that in terms of cross border enforcement, the investigative powers provided by the regulation (EU) 2017/2394 were considered sufficient as it even contained powers to conduct searches. But the problems rather occurred when applying the regulation, especially in terms of preservation of evidence, which requires a high expertise on technical questions.

22. Regarding the updating of legal and regulatory framework, some authorities (Poland, Sweden and Switzerland) consider that their current legislation is sufficient to address dark commercial patterns, and some others (Brazil, Argentina, Colombia, Kenya, Korea, Peru) that they need to complement it. However, taking into account the nature of these practices, most authorities understood that they may need to adapt or implement new regulations or standards on dark commercial patterns in the future.

23. The UOKiK of Poland informed that in their opinion, there was a need to successively update the EC guidelines to the UCPD in order to ensure as much consistency as possible in the qualification of particular behaviors as dark patterns.

24. The Swedish Consumer Agency indicated that it is working to build capacity on the understanding of how specific dark patterns and other commercial practices affect consumers choices in the online environment. And they are also working on IT tools which, hopefully, could allow the identification of infringements which could be difficult to detect, and overall, more effectively enforce digital markets.

**D. Enforcement actions on dark commercial patterns**

25. One of the key points of the survey was to know more about enforcement actions taken by consumer protection authorities to tackle dark commercial patterns.

26. The DNDCYAC of Argentina informed that it has imposed fines<sup>15</sup> on suppliers that, for example, have not included the Cancel button, the Withdraw button or the standard form contract in their websites.
27. The VZBV of Germany objected to the design of the cookie banner of a large online retailer for electronic devices in Germany. The button to reject all cookies was not recognizable. The company signed a cease-and-desist letter.
28. The Competition Authority of Kenya reported that it has taken enforcement action to tackle some of the dark commercial patterns in the digital financial services sector. It has also investigated such violations in the e-commerce sector. Most notably, the Authority required e-commerce platforms to revise various clauses in their terms and conditions which were perpetuating the conduct. In its investigations, the Authority noted that various terms and conditions were not clear. There were also instances where the shipping costs were disclosed much later in the purchase process, which misrepresented the prices of goods. The Authority also notes that there is need for more work to be undertaken to understand the consumer protection issues around dark commercial patterns.
29. Moreover, Poland reported various examples of the enforcement actions taken, among them, a UOKIK President decision obliging the operator Orange Polska to compensate subscribers and change its behavior concerning direct billing and flash SMS. The proceedings questioned the lack of indication that clicking the "OK" button means that the order has to be paid. Also a proceeding against Logo-Sharing -provider of electric scooters-, which created the impression that the consumer bought a one-time scooter ride, while it was in fact an automatic paid subscription. And finally, a proceeding against VINTED -the Lithuanian company running a website that enables users to sell clothes online- because of the failure to clearly communicate at the appropriate stage that a product can be purchased without "buyer protection", a fee charged by default.
30. The Swedish Consumer Ombudsman, which is part of the Swedish Consumer Agency, has taken legal actions against traders using clocks counting down the last hours of campaigns, just to be reset to count down again. The Agency has also acted against bad default settings in relation to flights.
31. State Secretariat for Economic Affairs SECO shared an example of enforcement in which several consumers complained about a website that made it quite difficult to understand that when you bought something and chose free shipping, you were automatically enrolled in a paid subscription that automatically renewed. SECO contacted the company to make the purchase process simpler and clearer and to make it easier to access

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<sup>15</sup> <https://www.argentina.gob.ar/produccion/defensadelconsumidor/multas>

information about delivery and subscription costs (pop-up window, disclaimer, information in the confirmation email). Thanks to this extra-judicial intervention it was not necessary to file a civil action or criminal complaint against the company.

#### **E. Consumer Education and Advocacy on Dark Patterns**

32. Apart from enforcement actions, some jurisdictions have shared very interesting initiatives to increase awareness among consumers against dark commercial patterns. Among them:

- i. Social media campaigns on special dates such as Cyber Monday, Black Friday, Christmas Eve, developed by the DNDCYAC, Argentina.
- ii. Website with specific information provided by VZBV, Germany.
- iii. Online Guidelines to shop safely on special dates published by Indecopi, Peru.
- iv. Simulator of dangers that await consumers on the Internet ([konsument.edu.pl](http://konsument.edu.pl)), which also brings a special menu for teachers "Resources for educators", prepared by the Office of Competition and Consumer Protection of Poland, together with the ProPublika Foundation.
- v. Video available on the web in which authorities interviewed a professor of psychology who explains what the phenomenon of dark patterns is and how it can affect consumers. This initiative is currently being prepared by Sweden and it is planned to be launched in 2022.
- vi. Website with a lot of information on how to shop online and with tips on how to avoid the more common forms of deception, created by SECO, Switzerland.
- vii. Competition Authority of Kenya utilizes infomercials uploaded to social media sites such as YouTube to create awareness.

33. On the other hand, regarding education programs targeted to vulnerable/hyper-vulnerable consumers, the Secretariat of Internal Trade of Argentina issued Resolution 561/2020 that created the "Contest of consumers association's projects to promote and protect hyper-vulnerable consumers". In this context, the Secretariat allocated funds to a project that aimed to raise awareness to hyper-vulnerable consumers related to deceptive and unfair trade practices. Although no other specific action to raise awareness to vulnerable/hyper-vulnerable consumers were reported, it could be considered that some of the initiatives mentioned above indirectly targets them.

34. In order to raise consumer awareness on dark commercial patterns and guide businesses to prevent or avoid engaging in those practices, some Agencies have taken actions such as:

- i. Best Practices Guide and Voluntary Business Pledge: The DNDCYAC of Argentina participates in the Technical Committee N° 7 on Consumer Protection of Mercosur,

which is working on a Best Commercial Practices Manual to provide guidance to businesses about consumer protection in e-commerce. This Committee also developed a Voluntary Pledge for Businesses with principles and standards for consumer protection in digital environments. Although these initiatives don't specifically aim at dark commercial patterns, they may cover some of those deceptive practices.

- ii. Turkey is planning to publish a guide including certain types of prominent dark patterns in order to inform the sector and protect consumers in the near future.
- iii. Website: Switzerland authorities (SECO) have created a website with a lot of information on how to shop online and with tips on how to avoid the more common forms of deception. Although the site does not specifically address dark patterns, the advice provided may indirectly address these unfair practices as well.
- iv. Call for complaints: the Federation of German Consumer Organisations (VZBV) published a call for consumer complaints in 2021 and more than 150 cases were reported.

#### **F. Research on dark commercial patterns**

35. In regards to empirical research done by the Agencies, Argentina informed that it has recently carried out an online sweep to identify dark commercial patterns used by suppliers who commercialize their products and services in the country. This research was a first approach to those practices that allowed authorities to identify categories and its frequency by each swept website and activity, among other information. The final report has not been published yet.

36. In 2021, the Swedish Consumer Agency commissioned a report to identify dark patterns, and re-categorized them according to their impact on consumers. The report was based on a literature review and interviews, the mapping showed 26 different dark patterns. This document is available on their website<sup>16</sup>.

37. The Federation of German Consumer Organisations (VZBV) published a call for consumer complaints in 2021 and more than 150 cases were reported. The results of this call have not been published yet.

#### **CONCLUSION**

38. The survey results note that member states have undertaken a lot of initiatives aimed at addressing dark commercial patterns, either through enforcement action or undertaking changes in the legislations, in order to effectively tackle the vice.

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<sup>16</sup> <https://www.konsumentverket.se/globalassets/publikationer/produkter-och-tjanster/ovriga-omraden/underlagsrapport-2021-1-barriers-digital-market-konsumentverket.pdf>

39. The survey response from member states reveals that there is still much work to be done, in identifying what would actually entail dark commercial patterns, considering that, due to advancements in technology, these patterns will present themselves in different ways.
40. The varied responses reflect the need for more cross border cooperation to address dark commercial patterns.

## **RECOMMENDATIONS**

41. There is need for enhanced cross border cooperation facilitated by UNCTAD in order to discuss and understand how dark commercial patterns manifest; the tools that would enable agencies to better deal with such patterns; and general sharing of information, through both formal and informal means.
42. There is need for a guide for businesses, a self- assessment tool for them to identify if their conduct amounts to facilitating dark commercial patterns. The self- assessment tool will enable them to commit to change their conduct. This can be monitored for compliance by the member states.
43. There is need for member states to adopt enhanced educational programs and awareness activities for consumers, including reporting mechanisms where such issues can be investigated and addressed in a timely manner.