

Bits of Freedom  
Prinseneiland 97hs  
1013 LN Amsterdam  
The Netherlands

Lotje Beek  
Policy advisor  
+31 6 1947 0011  
lotje@bitsoffreedom.nl

bitsoffreedom.nl  
IBAN: NL73 TRIO 0391 1073 80  
BIC: TRIONL2U  
Chamber of Commerce: 34 12 12 86

## Fitness check on European consumer law: deceptive patterns

Bits of Freedom would like to provide **input on the public consultation of the European Commission on the fitness check of European consumer law**. We also want to express our gratitude to the European Commission for giving us a chance to do so.

In January, the European Commission issued a [press release](#) about a check on deceptive patterns on retail websites. They found that nearly 40% of the online shopping websites rely on manipulative practices to exploit consumers. To tackle this problem, the European Commission announced to contact traders that used deceptive patterns. While we agree that this issue does need to be addressed, it is important to realize these deceptive patterns are also used on websites that do not sell tangible products. **The practice of misleading the user needs to be addressed on all websites.**

### Deceptive patterns

Deceptive patterns are design tactics used to manipulate people to make a certain choice. More specifically, people are being tricked in doing things they didn't mean to. In the context of retail websites, one could think of fake countdown timers, directing consumers to certain choices through visual design or choice of language, or hiding significant information like delivery costs.

But deceptive patterns are all over the internet. We all have come across cookie banners that scream "Accept" and mumble "Reject" by making the Accept-button big and bright and the Reject-button tiny and grey. Other examples are having to provide information to continue using a website, or it being nearly impossible to cancel a subscription.

These are often deceptive patterns that do not necessarily move a consumer towards a purchase, but are still harmful to consumers and users of online platforms. Consumers and users do not always pay with actual money. They can pay with their personal data, attention, and time spent as well. **A consumer does not need to be directed to a monetary transaction to be the victim of deceptive patterns.** Accepting cookies on a website does not mean that that website receives money instantly, but it does mean that the consumer or user is being tracked and is meant to increase advertisement revenues for the website. It is still a commercial practice.

## Deceptive patterns in EU law

Deceptive patterns are not regulated in one single EU legislation, but make an appearance in the General Data Protection Regulation (GDPR), Digital Services Act (DSA) and Unfair Commercial Practices Directive (UCPD). Currently, the UCPD solely focuses on commercial practices leading to transactional decisions. The DSA aims to ban deceptive patterns completely on online platforms, but excludes those that are already covered by the GDPR and UCPD. This patchwork of interventions creates legal uncertainty and does not send the clear message that is so desperately needed. That is why we strongly advise the European Commission to ban all deceptive patterns, including those that do not lead to a transaction directly.

## Deceptive patterns in EU consumer law

**All deceptive patterns, being misleading commercial practices, should be banned under the Unfair Commercial Practices Directive.** The rise of online platforms and mechanisms like tracking of users all over the internet has led to novel consumer protection issues. Consumers are often nudged towards choices by websites that they otherwise would not make. These choices lead towards consumers giving up their personal data, attention, or time. These represent something of (monetary) value in our economy, just like someone buying a pair of shoes after being nudged towards that choice represents worth in the economy.

The current EU framework on consumer protection is no longer sufficient with these new practices, since it does not treat consumers that pay with data and time equal to consumers that pay with money. The fitness check on EU consumer law is the perfect opportunity to bring the Directive up to date.

## Terminology (and why to avoid “dark patterns”)

The problem with using the term “dark” in this context is that it’s used to mean “bad”. **Language that puts a positive connotation on white and/or light and a negative or mysterious one on black and/or dark reinforces colourist stereotypes.** The use of the term “dark” is acceptable in situations where the word is used to describe a literal visual descriptor (such as “dark mode”), not value judgments. In this particular context, it is used as a value judgment, and we should use more descriptive words. We choose to stick with the term “deceptive patterns”.