**Comments on the draft Guidelines 03/2022 of the European Data Protection Board**

*This paper exclusively reflects the views of its author.*

On 21 March 2022, the European Data Protection Board published its draft Guidelines 03/2022[1] *"on Dark patterns in social media platform interfaces: How to recognise and avoid them"* (hereinafter referred to as Draft Guidelines or Draft).

Reading the Draft Guidelines, one may have the feeling that the Draft Guidelines are not about providing guidance on how to design social media platforms in line with the requirements of the GDPR but about proving that compliance with the GDPR (as interpreted by the EDPB) is impossible: however a social media platform is designed, there will always be something that data protection authorities can consider a breach of the GDPR. It is also worrying that the Draft overly states that "compliance" with the GDPR necessarily means a worse experience for *both* the designer of the social media platform *and* the users—in contradiction with recital (4) of the GDPR, which states that *"the processing of personal data should be designed to serve mankind"*, i.e. not only for the sake of data protection authorities.

In addition to this general feeling, there are other issues spanning over the entire Draft, namely *inter alia*

(a) the way the Draft thinks of the general characteristics of a "standard" user;
(b) the misinterpretation of the legal nature of the relationship between the user and the social media platform provider.

## *1. The "standard" user in the eyes of the Draft*

Reading the Draft, one cannot decide if the Draft regards the user of social media platform as

(a) a conscious person who knows his/her rights[2] or
(b) an "average user",[3] without specifying what an "average user" looks like, or
(c) a person who needs help down to the smallest detail and confused by the slightest change.[4]

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[1] See at the following link https://edpb.europa.eu/system/files/2022-03/edpb_03-2022_guidelines_on_dark_patterns_in_social_media_platform_interfaces_en.pdf

[2] See e.g. paragraph 80 (*"users expect the information according to Article 26(2) phrase 2 GDPR to be given in one piece"*), paragraph 158 (*"users expect that the consent they give during the registration or afterwards only covers data processing during their active use of the account"*), paragraph 159 (*"users reasonably expect that only necessary data processing will take place during the time of deactivation"*) etc.

[3] See paragraphs 67, 80, 86 and 174.

[4] See e.g. paragraph 125 (*"Users who have previously changed their other settings are likely to be used to the 'usual' order of settings one to nine."*), paragraph 146 (*"Confronted with interfaces across different devices that convey the same information through various visual signifiers, users are likely to take more time or have difficulties finding controls they know from one device to another. In the example above, this is due to the use of different symbols or icons to direct users to the settings. Confusing users in such a way could be considered conflicting with the facilitation of data subject rights as stated in Article 12 (2) GDPR."*) etc.

I am afraid that treating users by the EDPB according to in point (c) above is a new level of "data protection guardianship" and humiliating for most of the users.

***2. Misinterpretation of the legal nature of the relationship between the user and the social media platform provider***

The Draft is inconsistent in its interpretation of the legal nature of the relationship between the user and the social media platform provider by randomly "roaming" from contract[5] to consent-based relationship[6] and to "legitimate interest"-based relationship.[7]

The operation of a social media platform is providing information society service falling under the Electronic Commerce Directive[8], and the relationship between the user and the social media platform is purely contractual. Opening an account, using the social media platform in accordance with the agreed terms and conditions and deletion of the account are all different steps in a contractual relationship. Choosing options during opening a social media account or during the life of the account (the contract) means nothing else but creating a unique combination of the contractual conditions. No one has any (constitutional) right to have social media account and even less right for conditions as he/she wishes. (Therefore, *"user's requests to delete their social media account"* is not *"implicit withdrawal of consent"*[9] but simply a contractual statement falling under Article 6(1)(b) of the GDPR).

In a contractual relationship, as in the case of a social media contract, if the user "withdraws" its "consent" (or, in the legally correct form: "terminates the contract"), he/she cannot claim that any consequences resulted from the "withdrawal" of the "consent" are "detrimental". In other words: "consent" with regard to a social media contract is "contractual consent" falling obviously and unequivocally under Article 6(1)(b) of the GDPR. Anyway, GDPR-like "consent" under a contractual relationship cannot exist by nature: anything that may be subject of agreement of the parties belongs to the terms and conditions of a contract (as they agreed on them). The concept of consent, which suggests—under the GDPR—superior position of an individual, simply cannot exist in a democratic society: an individual can be subordinate to a public authority (by constitutional law) or at the same level with other persons (be it natural or legal persons) falling under civil law. The relationship of persons at the same level, like in the case of a social media account, is fundamentally contractual.

Lastly, in the absence of offering different options to the users regarding the services under the conditions set by the social media platform provider, and in the absence of the different conditions set by the different social media platform providers, social media services would be uniform. Such intention, implicitly visible in the Draft, would violate both the individuals' right and the freedom of the companies to conduct a business.

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[5] Paragraphs 26, 111, 160, 163,

[6] E.g. paragraphs 22-26, 92-111, 154, 158, 161

[7] Paragraph 159

[8] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

[9] See the legally totally wrong argument in paragraph 154.

In sum, the Draft Guidelines suffer from serious conceptual defects and are a provoking sign of “data protection guardianship”.

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