

Comments to the draft of EDPB-Guidelines 3/2022 on dark patterns in social me- dia platform interfaces

I. Introduction

On 21 March 2022, the draft of „*Guidelines 3/2022 on Dark patterns in social media platform interfaces*“ was submitted by the European Data Protection Board (EDPB) for public consultation. This document constitutes the contribution of dacuro GmbH to this process. The comments below refer to the paragraphs (further as “para.“ or „paras.“) of the draft.

II. Comments

- **Para. 47:** In paragraph 47 one can read as follows: *„Pursuant to the principle of transparency, data subjects have to be provided with information in a clear way to enable them to understand how their personal data are processed and how they can control them. In addition, this information has to be easily noticeable by the data subjects. However, information related to data protection, in particular links, are often displayed in such a way that users will easily overlook it“*. Unfortunately, the draft does not say how this information can be made visible to the data subjects. We would suggest a picture example in para. 47 (as it is the case in paras. 52 and 65) showing the proper display of data protection information on a social media website.
- **Para. 93:** In paragraph 93 one can read as follows: *„Given the principle of accountability laid down in Article 5 (2) GDPR, as well as the necessity for the controller to be able to demonstrate that data subjects have consented to the processing of their personal data under Article 7 (1) GDPR, it is crucial that the social media provider can prove having properly collected users' consent. This condition can become a challenge to prove, e.g. if users are supposed to provide consent by accepting cookies. Furthermore, data subjects might not always be aware that they are giving consent while they click quickly on a highlighted button or on pre-set options. Nevertheless, as Article 7 (1) GDPR underlines, the burden of proof that users have freely given consent relies on the controller.“* We would suggest a picture example in para. 93 (as it is the case in paras. 52 and 65) showing a GDPR-conform cookie-banner in order to avoid potential conflicting interpretations among data controllers regarding the placement, the form and the colour of buttons within a cookie banner. Our further suggestion would be that the EDPB adds a passage in para. 93 or a footnote explaining the GDPR-compliant way for controllers to collect users' valid consent through the acceptance of cookies.
- **Para. 116:** In paragraph 116 one can read as follows *„They could also wish to do so without having read the notice, just through their regular use of the social media, for example when they realise that an information posted on a social media platform (e.g. a photo at the beach with one's family) is shared with an undesired group of people (e.g. co-workers)“*. We would like to point out that this passage also touches on an important subject matter – the household exemption (art. 2 GDPR). The EDPB has already addressed this issue in the footnote 28 of its Guidelines 08/2020 on the targeting of social media users: *„Processing of personal data by a natural person in the course of a purely personal or household activity does not fall under the material scope of the GDPR (Art. 2(2)(c))“*. However, this exemption would not apply to the example in paragraph 116. It would be helpful, if the EDPB used this opportunity and added a footnote to para. 116 addressing the limits to the household exemption under art. 2 GDPR in connection with the social media activities.