



noyb – European Center for Digital Rights  
Goldschlagstraße 172/4/3/2  
1140 Vienna  
AUSTRIA

## **noyb’s comments on the Draft Guidelines 3/2022 on Dark Patterns in social media platform interfaces: how to recognize and avoid them**

noyb welcomes the initiative of the EDPB to provide guidance on dark patterns and how such patterns can violate the GDPR. We welcome the opportunity of a public consultation to send the following comments on the draft guidelines.

As a general comment, noyb considers the Guidelines as a useful and valuable document for designers of interfaces.

The present contribution is not going into details and will only address some points of the Guidelines, which can be found here below:

- These Guidelines should not be considered as a soft-law instrument or an invitation to re-examine marketing practices, but rather as a proper and valid assessment by Supervisory Authorities (“SAs”) of practices breaching one or more provisions of the GDPR.
  - The EDPB should therefore make it clear that the practices identified in the Guidelines are not compliant with the GDPR.
  - Supervisory Authorities should to take appropriate enforcement actions against the controllers using such practices.
- As underlined by the Guidelines, the list of dark patterns listed is not exhaustive and should not exclude other practices infringing the GDPR. Controllers should always remain responsible and accountable for ensuring the GDPR compliance.
  - We encourage the EDPB to continue monitoring and observing the further use of dark patterns.
  - We encourage the EDPB to make enforcement against dark patterns a priority, potentially through a cooperation in the spirit of the [statement](#) of the EDPB of 28 April 2022.
- noyb regrets that the Guidelines are limited to social media platforms, while dark patterns also exist in other environments where identical practices (deceptive cookies banners, misleading privacy policies) can be observed.
  - We therefore encourage the EDPB to broaden the scope of its Guidelines to address environments other than social media platforms.

- We welcome that the EDPB considers that “*consent cannot be considered valid under the GDPR when consent is obtained through only one mouse-click, swipe or keystroke, but the withdrawal takes more steps, is more difficult to achieve or takes more time*” (p. 14). This confirms that the absence of a “reject all” violates the GDPR when only an “accept all” button is displayed. This reasoning is in line with the decisions issued by the CNIL against [Google](#) and [Facebook](#) because their users could not refuse cookies as easily as to accept them. This also supports *noyb*’s [mass cookies complaint](#), where several dark patterns were already identified, like the use of one click to accept a cookies policy and the need to go through more than one click to reject the cookies.
  - We suggest that the EDPB makes it clear in the Guidelines that having to click more than one time to refuse cookies or a specific processing while clicking only once to accept them is a violation of the GDPR, considering that it is more difficult to refuse cookies than to accept them.
- *noyb* also welcomes the description of several dark patterns relating to the exercise of the data subject rights and especially the ones pertaining to the right of access in Section 3.4 of the Guidelines. In addition to that, we would like to mention two practices that we find problematic:
  - We experienced several platforms where the section supposed to help users to exercise their rights was limited to obtain a copy of their data, whereas the right under Article 15 of the GDPR also gives the right to have more information about the processing.
  - In the same vein, we also observed that some providers make it difficult to exercise the right of access, for example by requiring a copy of an ID or other information (see *e.g.*, *noyb*’s [complaint](#) against Grindr), or by obliging the user to use a specific communication channel (a dedicated communication platform) which is burdensome to use.
  - We suggest that the EDPB include these examples as additional illustrations of dark patterns violating the GDPR and in particular Article 12(2) and (6) GDPR.
- *noyb* also welcomes § 24 of the Guidelines stating that “*Social media platforms must not circumvent conditions, such as data subjects’ ability to freely give consent, through graphic designs or wording that prevents data subjects from exercising said will*”. We add that controllers must provide clarity about the nature of the consent that they ask to the users. In our 3 [complaints](#) against Instagram, Facebook, and WhatsApp, Facebook argued that the users agreed to terms and conditions, and not to the processing of their data, pretending to be able to rely on Article 6(1)(b) of the GDPR instead of Article 6(1)(a). However, a [study](#) shared by *noyb* showed that 64% of 1.000 users believed they gave consent, despite Facebook’s claims to the opposite. Depending on the question, only 1.6-2.5% thought they actually entered into a “data use contract” that includes a duty of Facebook to use their data for advertisement or research. This example shows that any ambiguity as to the nature of a

consent should be avoided, and such “affirmative action” should always be interpreted in the most favorable way for the users, as already required by the EU consumer law acquis.

- The EDPB should make clear that the interpretation of any consent or “affirmative action” by the users should always be done by reference to the average consumer and always benefit to them in case of doubts. Such a notion of the average consumer can be measured by polls, studies, or by reference to common practices in the same sector.
- In other words, the EDPB should qualify the presentation of a contractual agreement as a consent as a dark pattern violating the GDPR.

*noyb* remains at the disposal of the EDPB should it has any question on the present submissions.