

ESSAYS II/2024

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THE RIGHT NOT TO BE SUBJECT TO DISINFORMATION¹

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1. INTRODUCTION

Disinformation is often defined as any “*false information deliberately and often covertly spread (as by planting the rumours) in order to influence public opinion or obscure the truth.*”³ In today’s world, we may even say that the “often covertly” criterion may be excerpted from the definition, as a large amount of disinformation is spread directly and without any attempt to obscure the author.⁴

With the rise of social media, as well as other sophisticated means of communication allowing for seemingly anonymous and disembodied ways to promote subjective ideas and opinions, disinformation is on the rise.⁵ This became especially apparent during the COVID-19 pandemic when vast amounts of conspiracy theories regarding the COVID-19

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³ Disinformation. In: *Merriam-Webster*. [online]. 2009. [cit. 20. 10. 2024]. Available at: <https://www.merriam-webster.com/dictionary/disinformation>

⁴ See, in general, AÏMEUR, E. AMRI, S. BRASSARD, G. Fake news, disinformation and misinformation in social media: a review. In: *Social Network Analysis and Mining*. [online]. 2023, vol. 13, no. 1. [cit. 20. 10. 2024]. Available at: <https://link.springer.com/content/pdf/10.1007/s13278-023-01028-5.pdf>

⁵ *Ibidem*, p. 2.

vaccine and other medical issues have risen, often without any shred of evidence or backing by existent medical research.⁶

This paper aims to analyse the history of misinformation in order to identify its roots and documented effects on society and assess the possibility of the existence of a right (of a fundamental nature, perhaps) of persons not to be misled or otherwise wronged by disinformation spread by others.

2. HISTORY OF DISINFORMATION

Although the term “disinformation” only became widespread in the last few decades, the use of false information to influence some or all of society is an ancient practice.⁷ As Nougayréde put it: “The use of propaganda is ancient, but never before has there been the technology to so effectively disseminate it.”⁸ Using false information to manipulate the facts became one of the most prominent tools in the arsenal of certain countries and even so-called superpowers during the 20th century – be it Russia and the covert operations of its KGB⁹ or the dissemination of false information regarding the Chernobyl disaster,¹⁰ or the US and its cover-up of the discovery of Ja-

⁶ GRIMES, David Robert. Medical Disinformation and the Unviable Nature of COVID-19 Conspiracy Theories. In: *PLOS ONE*. [online]. 2021, 16, no. 3. [cit. 20. 10. 2024]. Available at: <https://doi.org/10.1371/journal.pone.0245900>

⁷ The use of propaganda and disinformation to undermine democratic processes was a well-established practice even in ancient Greece and Roman Empire. See, in general, CODEX Y. Unraveling the Veil of Deception: Unveiling Misinformation and Propaganda in Ancient Greece. In: *Yubetsu Codex History*. [online]. 2. 11. 2023. [cit. 20. 10. 2024]. Available at: <https://codex.yubetsu.com/article/33286fb9e3264d91b4bd9220c6fc9a3a>

⁸ NOUGAYRÉDE, N. In this age of propaganda, we must defend ourselves. Here's how. In: *The Guardian*. [online]. 2018. [cit. 29. 10. 2024]. <https://www.theguardian.com/commentisfree/2018/jan/31/propaganda-defend-russia-technology>

⁹ ROMERSTEIN, H. Disinformation as a KGB Weapon in the Cold War. In: *Journal of Intelligence History*. [online]. 2001, no. 1, p. 54. [cit. 20. 10. 2024]. <https://doi.org/10.1080/16161262.2001.10555046>.

¹⁰ According to official archives, the Chernobyl nuclear disaster's death toll was 31 people. According to UN estimates, the actual death toll is closer to 50 people with thousands of others suffering from long-term and often terminal effects. See The true toll of the Chernobyl disaster. In: *BBC*. [online]. 2019. [cit. 20. 10. 2024]. Available at: <https://www.bbc.com/future/article/20190725-will-we-ever-know-chernobyls-true-death-toll>

panese Unit 731 human experiments.¹¹ Realizing that these cover-ups may, in a point of view, amount to atrocities themselves and that the information currently available is just the tip of the iceberg, one may remember George Orwell's famous quote:

*"Who controls the past controls the future. Who controls the present controls the past."*¹²

But considering that disinformation has been a part of our lives for millennia, we must explore the ways our predecessors have dealt with those spreading it. And since we will also be discussing the issue of human rights, we shall look no further than to 18th century France during the French revolution, which is often considered one of the first movements to reiterate the importance of human rights in today's society.¹³

During this time, a famous journalist, Jean-Paul Marat, had started using his wits and journalistic background to purposefully steer the public's opinion on the French revolutionary movement, influencing many young minds to join the cause.¹⁴ He was well-known for his so-called "rhetoric of denunciation", where he would imply conspiracy theories connected to a person or a group of people and promote the idea of their contra-revolutionary standing – often basing the rhetoric on false or greatly exaggerated facts.¹⁵ After the separation of the revolutionary front into the Girondin and the Jacobin parties, Marat himself had become considered a person with contra-revolutionary standing by some of the French public,

¹¹ NIE, Jing-Bao. The United States Cover-up of Japanese Wartime Medical Atrocities: Complicity Committed in the National Interest and Two Proposals for Contemporary Action. In: *The American Journal of Bioethics: AJOB*. [online]. 2006, 6, no. 3, p. 24. [cit. 20. 10. 2024]. Available at: <https://doi.org/10.1080/15265160600686356>.

¹² ORWELL, G. 1984. London: Penguin Classics, 2021.

¹³ See, in general, HUNT, L. *The French Revolution and Human Rights: A Brief Documentary History*. Boston: Bedford Books of St. Martin's Pr, 1996. See also MAJER, D. The French Revolution 1789 as Background for the Development of Human Rights. In: *Journal of European History of Law*. [online]. 2016, 7, no. 2, p. 2-27. [cit. 20. 10. 2024]. Available at: https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jeuhis17§ion=39

¹⁴ JOHNSON, K. Revolutionary Events: Jean-Paul Marat and His Role. In: *Honors Theses*. [online]. April, p. 21. [cit. 20. 10. 2024]. Available at: https://scholarworks.wmich.edu/honors_theses/2047

¹⁵ Ibid.

as he continued his denunciations and condemnations, now targeted against the members of the Girondin party.¹⁶ His publications and rhetoric, often based on unreliable or demonstrably false facts, and the fact that his actions had directly or indirectly resulted in multiple riots and massacres, ultimately led to the decision that he must be dealt with. This was, sadly, not done in a lawful way, as he was murdered on July 13, 1793, by a young Girondin supporter, Charlotte Corday.¹⁷ However, during her trial, the young woman stated that she had “*killed one man in order to save a thousand*” – a reason oddly similar to the balancing test used when weighing the possibility of diminishing one’s fundamental right in order to secure another in the world of law.

Although the end of Marat’s story was unlawful on its own, we may find comparable scenarios¹⁸ in today’s world, such as the banning of certain social media users due to the nature of their statements made on the internet. Former US president Donald J. Trump was banned from the social media platform Twitter in 2021,¹⁹ as Trump’s tweets resulted in violent riots and the storming of governmental buildings in the Capitol, with over 1.200 defendants being charged with various crimes.²⁰ Although the ban itself was caused by Trump’s incitement of violence in the Capitol, his social media presence was under review multiple times due to his political statements which were, in many cases, found to be based on disinformation²¹ - I thus believe that Trump’s previous dissemination of disinformation had at least

¹⁶ *Ibid.*, p. 35.

¹⁷ *Ibid.*, p. 36.

¹⁸ I do not intend to compare social media bans to the value of human life. I however believe that in the context of modern technologies, where social media platforms serve as one of the most important platforms in the dissemination of both information and disinformation, such a ban can be, to an extent, viewed as a “murder” of the person’s digital identity.

¹⁹ As covered by multiple media, see FUNG, B. Twitter bans President Trump permanently. In: *CNN Business*. [online]. 9. 1. 2021. [cit. 20. 10. 2024]. Available at: <https://edition.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html>

²⁰ Three Years Since the Jan. 6 Attack on the Capitol. In: *US Department of Justice*. [online]. 5. 1. 2024. [cit. 20. 10. 2024]. Available at: <https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0#:~:text=Arrests%20made%3A%20More%20than%201%2C265,both%20District%20and%20Superior%20Court>

some impact on gathering the followers to then fulfil his incitement to attack the Capitol. Other users were, however, banned for spreading misinformation directly, such as Naomi Wolf and her anti-vaccine statements,²² or Jim Hoft and the spreading of fake news regarding the 2020 US presidential elections.²³

3. THE HUMAN RIGHTS ASPECTS

As I have demonstrated above, the spread of disinformation may result in violent and unlawful real-world impacts. Although one may argue that participation in a riot incited by a public figure is a matter of free will (free decision), this argument does not stand up to the well-documented and researched phenomena of mass psychosis.²⁴ Such a psychological state, which can be induced by previously portrayed disinformation, may be on par with the definition of legal insanity as understood in many states worldwide.²⁵ The purpose of this paper is not, however, to investigate the possible guilt of the people manipulated by the disinformation – but to assess whether their right not to be manipulated in the first place exists.

²¹ See for example Trump's views on climate change as described in Existence of Climate Change Questioned by President Trump. In: *Columbia Law School – Sabin Center for Climate Change Law*. [online]. 2019. [cit. 20. 10. 2024]. Available at: <https://climate.law.columbia.edu/content/existence-climate-change-questioned-president-trump-2>

²² Covid: Twitter suspends Naomi Wolf after tweeting anti-vaccine misinformation. In: *BBC*. [online]. 6. 6. 2021. [cit. 20. 10. 2024]. Available at: <https://www.bbc.com/news/world-us-canada-57374241>

²³ DELLINGER, A. J. Twitter suspends 'Gateway Pundit' Jim Hoft. In: *Forbes*. [online]. 6. 2. 2021. [cit. 20. 10. 2024]. Available at: <https://www.forbes.com/sites/ajdellinger/2021/02/06/twitter-suspends-gateway-pundit-jim-hoft/>

²⁴ Mass psychosis is a social phenomenon where a group of people develop similar symptoms that do not have an identifiable physical cause and often result in negative socio-psychological implications such as diffusion of responsibility. This phenomena was even used, to an extent, as a defense strategy by some of the accused at the Nuremberg trials, as the nationwide authoritarian mindset in the Third Reich seemed to exonerate individuals from any personal guilt. For more information on mass psychosis (especially in totalitarian regimes) see Mass Psychosis & Totalitarian Takeover. In: *Transcendingsquare*. [online]. 3. 6. 2021. [cit. 20. 10. 2024]. Available at: <https://transcendingsquare.com/2021/06/03/mass-psychosis-totalitarian-takeover/>

²⁵ For more information on legal insanity, see Meynen, G. *Legal Insanity: Explorations in Psychiatry, Law, and Ethics* [online]. 2016. [cit. 20. 10. 2024]. Available at: <https://doi.org/10.1007/978-3-319-44721-6>

According to the Universal Declaration of Human Rights published by the United Nations, each human being has the right to freedom of thought²⁶ and freedom of expression²⁷ on one hand, while on the other having the right not to be subject to arbitrary interference with their privacy, family, home and correspondence.²⁸ Everyone is also entitled to a remedy when their fundamental rights are violated.²⁹ These rights and freedoms are, in some way, shape or form, reiterated in other documents, such as the European Charter of Human Rights or in national laws (mostly as a part of the constitution of the state).

Coming up with conspiracy theories, inferring misleading information and other forms through which disinformation may be generated in someone's mind, can be viewed as a manifestation of freedom of thought. In this stage, the information³⁰ is only available to the person who created it and thus does not interfere with any rights of other persons. Furthermore, freedom of thought is often viewed as one of the most important fundamental rights (not disregarding the right to life), as a person's thoughts are often what defines – or better, individualizes – them in a society.³¹ As such, this right receives absolute protection and may almost never be interfered with.

The problem comes in the second stage of the formation of disinformation – its sharing (“spreading”). From a legal perspective, conveying the generated information to other persons should be covered under the right to freedom of expression. However, the persons receiving the information also benefit from the aforementioned freedom of thought. What if they do not want to be misled by the disinformation? What if they wish

²⁶ Art. 18 Universal Declaration of Human Rights.

²⁷ Art. 19 Universal Declaration of Human Rights.

²⁸ Art. 12 Universal Declaration of Human Rights.

²⁹ Art. 8 Universal Declaration of Human Rights.

³⁰ As the information was not spread at this stage, it cannot be considered disinformation *stricto sensu*.

³¹ MCCARTHY-JONES, S. The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century. In: *Frontiers in Artificial Intelligence* [online]. 2019. [cited 20. 10. 2024]. Available at: <https://doi.org/10.3389/frai.2019.00019>

not to come in contact with specific expressions which they find wrong? Does the conveying of disinformation give rise to a conflict of fundamental rights? And does the receiving party have any remedy from the other's interference with its freedom of thought? These are the questions not covered by the 1948 Declaration, which need to be answered as soon as possible due to the current stage of evolution of our society.

4. THE CONFLICT OF FUNDAMENTAL RIGHTS

According to the UN's High Commissioner for Human Rights, Art. 18 of the Declaration distinguishes between the freedom of thought and freedom to manifest the thought (especially in relation to religion).³² Freedom of thought on its own does not permit any limitations whatsoever, as it is the right of everyone to hold opinions without interference.³³ On the other hand, freedom of expression covers the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.³⁴ It thus encompasses the communication of every form of idea and opinion capable of transmission to others.³⁵ It can, however, be limited in certain cases, such as when the expression is regarded as deeply offensive. In practice, limitations of freedom of expression are often put in place where other fundamental rights of others, such as the right to the protection of privacy, may be interfered with.

The conflict between freedom of thought and freedom of expression gives rise to multiple complex questions. I will attempt to answer one of them.

Is it possible for one's expression to interfere with another's thoughts? As I have demonstrated above, statements of certain people – especially

³² CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). In: *UN Human Rights Committee (HRC)*. [online]. 30. 7. 1999, p. 1. [cit. 20. 10. 2024]. Available at: <https://www.refworld.org/legal/general/hrc/1993/en/13375>

³³ Ibid.

³⁴ General comment No. 34 – Article 19: Freedoms of opinion and expression. In: *International Covenant on Civil and Political Rights*. [online]. 12. 9. 2011. [cit. 20. 10. 2024]. Available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

³⁵ Ibid.

those recognized by the public in a position of power – may affect the public and formulate their views.³⁶ Although it is nigh impossible to force an idea into someone's head, it is possible to influence a large group of people, where the individuals susceptible to manipulation will accept disinformation as relevant information and convey it as such further.³⁷ In groups where the individuals are more interconnected or communicate often, this may give rise to peer pressure or other forms of societal pressure to accept the presented disinformation,³⁸ or otherwise be ostracized, often leaving them with only two options – accept the disinformation or leave the group. The inherent need of a person to be a part of society may then overcome the notion of what is “right”, resulting in the acceptance of false information only due to external influence.

One may point out that the reasons mentioned above are of a purely societal nature – and I would agree. It is important to realize, that the law is oft defined as a system of rules which a particular community recognizes as regulating their individual actions (...) ³⁹ – and thus the regulation of peer pressure and societal ostracization is exactly what the law is made

³⁶ “Celebrities” or public figures are able to both mobilize the population itself, and to affect the persons who further influence the public, such as journalists – MAJIC, S. O’NEILL, D. BERNHARD, M. Celebrity and Politics. In: *Perspectives on Politics*. [online]. 2020, 18, no. 1, p. 6. [cit. 20. 10. 2024]. <https://doi.org/10.1017/S1537592719004602> ; The aggregation of multiple individual views may then form a so-called public opinion, which has a well-documented effect on our society. For the various possible effects, see in general, LASSWELL, H. D. The Impact of Public Opinion Research On Our Society. In: *The Public Opinion Quarterly*. [online]. 1957, 21, no. 1, p. 36. [cit. 29. 10. 2024]. Available at: <https://www.jstor.org/stable/2746787?seq=1>

³⁷ Shin et al. found a close connection between the amount of public acceptance (likes, comments) of a social media disinformation and its credibility in the eyes of the public. See SHIN, I. WANG, L. LU, Y. T. Twitter and Endorsed (Fake) News: The Influence of Endorsement by Strong Ties, Celebrities, and a User Majority on Credibility of Fake News During the COVID-19 Pandemic. In: *International Journal of Communication*. [online]. 2022, p. 2589. [cit. 20. 10. 2024]. <https://ijoc.org/index.php/ijoc/article/view/18187>

³⁸ ASCH, S. E. Studies of Independence and Conformity: I. A Minority of One against a Unanimous Majority. In: *Psychological Monographs: General and Applied*. [online]. 1956, 70, no. 9, p. 69. [cit. 29. 10. 2024]. <https://doi.org/10.1037/h0093718>.

³⁹ Human law. In: *Oxford English Dictionary*. [online]. 23. 7. 2023. [cit. 29. 10. 2024]. https://www.oed.com/dictionary/law_n1?tab=meaning_and_use#39477446

for. With this in mind, we shall analyse the currently effective understanding of the two rights colliding herein.

The expressing party is basing its statement on their freedom of expression. This fundamental right is recognized by the Declaration but may be limited under certain circumstances. The right itself does not provide for an obligation of the other party to listen or accept the conveyed message – this obligation is, however, often induced by societal influence.

The receiving party benefits from freedom of thought. This is an absolute fundamental right which cannot be limited in any way, shape or form. This party also benefits from freedom of expression so it has the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. If we choose to accept this definition, we may ask ourselves whether the right to receive information can be also interpreted as a negative obligation – a right not to receive information from an unwanted source, such as the expressing party. As we have demonstrated above, some may have accepted such interpretation and, due to the lack of legal remedy necessary for the protection of their fundamental rights, proceeded to take action in the matter – be it the assassination of Marat, or the banning of certain users from Twitter.⁴⁰

If the information – or in the present case, disinformation – is conveyed and then, through societal pressure, forced onto the receiving party, we may identify that both of their aforementioned fundamental rights have been interfered with.

Firstly, the receiving party was not able to make a free choice regarding the source of the information or acceptance thereof.⁴¹ If we take the example of Marat – even people who did not read his articles or listen to his speeches were affected by his rhetorics, as it was conveyed further by his supporters. A person who found themselves surrounded by these supporters had to either accept the worldview, or they would face negative con-

⁴⁰ In Twitter's case, the bans were based on contractual clauses between the users and the platform. It is however unclear whether these clauses were proportional to the limitation of freedom of expression they provided for and thus cannot be viewed as „legal“ without further analysis.

sequences, such as losing their friends or even loved ones and thus being cast out of society.⁴²

Secondly, prolonged exposure to a certain ideological standpoint may directly influence a person's worldview, giving rise to changes in their opinions and outlook on society and life as a whole. Even if the receiving party does not accept the disinformation, the fact that it is being presented by different persons, on multiple occasions, through many different means and at irregular times, may result in the development of paranoia⁴³ or a feeling of resignation.⁴⁴ Since this consequence may be linked directly to the exposure to disinformation, it may be viewed as a direct effect thereof, thus constituting the expression's interference with the right of freedom of thought of the receiving party.

5. CONCLUSION

The purpose of this paper was to assess the possible existence of an unwritten fundamental right not to be subject to disinformation. From an analysed historical case, during which a disinformation disseminator had been murdered as a result of their actions, and considering recent disinformation-related scenarios, the author derived that there exists a societal need for the regulation of the expression and retrieval of information.

⁴¹ Especially due to the peer pressure as viewed by *Asch*. *Studies of Independence and Conformity: I. A Minority of One against a Unanimous Majority*, p. 69. The problem of a "forced" conformity has been well-documented especially in connection to disinformation shared on social media. See COLLIANDER, J. "This Is Fake News": Investigating the Role of Conformity to Other Users' Views When Commenting on and Spreading Disinformation in Social Media'. In: *Computers in Human Behavior*. [online]. 2019, 97, p. 208. [cited 29. 10. 2024]. <https://doi.org/10.1016/j.chb.2019.03.032> ; See also WIJENAYAKE, S. et al. Effect of Conformity on Perceived Trustworthiness of News in Social Media. In: *IEEE Internet Computing*. [online]. 2021, 25, no. 1, p. 18. [cit. 29. 10. 2024]. <https://doi.org/10.1109/MIC.2020.3032410>

⁴² This would be even more problematic since Marat supported the Jacobins, who were known for their bending of the law and fondity of the guillotine, on which many unaccepting frenchmen have faced the consequences of not supporting the revolutionary cause described and promoted by, inter alia, Marat.

⁴³ In the sense of feeling the need to actively confirm the sources of received information.

⁴⁴ In the sense of realizing that there is just too much disinformation for the person to handle and thus resulting in them not participating in the public discourse on a certain topic.

This regulation may be derived from the freedom of thought and freedom of expression provided for by the UN Declaration of human rights, where the freedom of expression shall be interpreted in a negative manner – the right not to receive information from an unwanted source – in combination with the absolute right not to be subject to any external sensations that may force a person to change their thinking.

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DECEIVING THE DECEIVER: ON THE POSSIBLE REGULATION OF DARK PATTERNS¹

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1. INTRODUCTION

The fact that consumers in the digital age face the danger of being manipulated almost constantly is irrefutable. While digital marketing presents clients with unparalleled autonomy, it also brings about the threat of misleading them through deceptive design and manipulation of decision-making.³ The so-called dark patterns, which will be the subject of this essay, are precisely one of these fraudulent tactics. Described as designs that strongly influence the choices of their target groups, dark patterns usually force or subtly convince consumers to give up more information about themselves than they would normally allow. Moreover, they may trick the users into consenting to various unwanted consequences, such as tracking or preventing them from opting out of an agreement.⁴

Given the fact that codifying privacy law is near impossible due to the flexible nature of one's right to be let alone, dark patterns, which are more than capable of violating this right, have not yet been complexly reg-

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³ DARMODY, Aron. ZWICK, Detlev. Manipulate to empower: Hyper-relevance and the contradictions of marketing in the age of surveillance capitalism. *Big Data & Society*. [online]. 2020, vol. 7 [cit. 13. 10. 2024]. Available at: <https://doi.org/10.1177/2053951720904112>

⁴ MORISSON, Sara. Dark patterns, the tricks websites use to make you say yes, explained. In: *vox.com*. [online]. 1. 4. 2021. [cit. 13. 10. 2024]. Available at: <http://www.vox.com/code/22351108/dark-patterns-ui-web-design-privacy>

ulated. Notable examples of attempts at partial prohibition include the California Consumer Privacy Act⁵, The Digital Services Act⁶ or guidelines introduced by several respective nations or supranational institutions.⁷ However, these endeavours are often insufficient and do not grasp the entirety of the issue, leaving loopholes in the law for further misuse. Whether these efforts have any substantial impact is therefore up to debate.⁸

This essay aims to answer the question of whether there are generally effective ways to combat this unfair method of marketing via proper and up-to-date legislative regulation and, potentially, what other measures should be taken to remedy the situation. Seeking an answer to this question will require researching methods of regulation that are already employed and subsequently comparing them with newly proposed ones.

2. CHARACTERISTICS OF DARK PATTERNS

2.1 DEFINING DARK PATTERNS IN GENERAL

In order to fully understand the necessity to regulate dark patterns, this phenomenon has to be defined as clearly as possible. Mathur et al. distinguish several types of definitions, which all constitute their hard-to-grasp essence. Dark patterns, as mentioned above, present themselves as interfaces which coerce the consumer into a decision that would not have been necessarily made.⁹ Apart from that, the limitation of user autonomy, the designer's intent to mislead and the balancing of benefits and harms also add to the intricate nature of these deceptive designs. This, however, is

⁵ Ibidem.

⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

⁷ Guidelines 03/2022 on Deceptive design patterns in social media platform interfaces: how to recognise and avoid them. In: *edpb.europa.eu*. [online]. 24. 2. 2023. [cit. 13. 10. 2024]. Available at: https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032022-deceptive-design-patterns-social-media_en

⁸ MAMIDWAR, Aryan. BHUTKAR, Ganesh. An Overview of Guidelines on Dark Patterns. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720, p. 1. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper10.pdf>

the closest we have been able to get to defining dark patterns so far and provides us with an answer as to why dark patterns are yet to be comprehensively regulated.¹⁰

To bring an empirical factor to the debate regarding dark patterns, we must focus on their real-life appearances. The deceptive tactics on which dark patterns rely can be divided into several subtypes – OECD lists hostile countdown timers, fake free trials, or intentionally confusing fine print among the most notorious examples of cheating consumers.¹¹ This list, however, is not exhaustive by any means. Digital marketers keep finding new crafty ways to gain an advantage over particularly vulnerable parties, as can be demonstrated with the case of unethical paywalls or unsolicited advertisements in pregnancy tracking apps.¹² Another instance of meddling in a consumer's choice can be seen with virtual assistants, such as Amazon Alexa or Google Assistant. Although these programs offer consumers a hands-free approach and positive demeanor, they excessively collect data through their vocal interfaces and tailor responses to bring the owner more “personalized content”.¹³ Instances of these dark patterns prove to be exceptionally difficult to discern and subsequently regulate since the assistant's prompts can fall both under the category of deceptive design and useful service.

⁹ MATHUR, Arunesh, KSHIRSAGAR, Mihir, MAYER, Jonathan What Makes a Dark Pattern... Dark?: Design Attributes, Normative Considerations, and Measurement Methods. In: *CHI '21: Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems*. [online]. 2021, vol. 1. p. 2-3. [cit. 13. 10. 2024]. Available at: <https://doi.org/10.1145/3411764.3445610>

¹⁰ Ibidem, p. 4

¹¹ LAGORCE, Natalia. Six ‘dark patterns’ used to manipulate you when shopping online. In: *Organisation for Economic Co-operation and Development*. [online]. 16. 9. 2024. [cit. 13. 10. 2024]. Available at: <https://www.oecd.org/en/blogs/2024/09/six-dark-patterns-used-to-manipulate-you-when-shopping-online.html>

¹² ALSEBAYEL, Ghada. TROIANO, Giovanni. HARTEVELD, Casper. “Not Nice!”: Towards Understanding Dark Patterns in Commercial Health Apps. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720, p. 4. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper2.pdf>

¹³ DE CONCA, Silvia. The present looks nothing like the Jetsons: Deceptive design in virtual assistants and the protection of the rights of users. *Computer Law & Security Review*. [online]. 2023, vol. 51, p. 1-2. [cit. 13. 10. 2024]. Available at: <https://www.sciencedirect.com/science/article/pii/S0267364923000766#sec0002>

2.2 DO ALL DARK PATTERNS TRULY POSE A THREAT?

As was already mentioned, the threshold between downright unfair practices and standard interface designs can be rather tough to identify. Many features similar to deceptive designs provide the consumer/user with a beneficial ability, after all. In the case of virtual assistants, profiling and data storage are what allow the program to answer questions accurately. Nevertheless, it is exactly through more engagement that virtual assistants gain the opportunity to sneak in conversational inputs such as “by the way” to ease the consumer into giving up more information or relenting to a request.¹⁴ For the sake of not clouding the objective judgment of dark patterns, the authors of the article pertaining to the dark patterns in pregnancy apps suggest a joint effort of legal, health and interface design professionals to evaluate the harmfulness of specific deceptive designs, which may accelerate and improve the discerning process overall.¹⁵ As a consequence, the necessity to not leave the consumer with insufficient information becomes quite apparent. Concerning the need to curb the usage of dark patterns in bad faith, we have to take into account the hard evidence confirming the widespread nature of this trend. In an extensive review conducted by the International Consumer Protection and Enforcement Network, more than three quarters of the scrutinized websites contained at least some marginal or potential form of dark patterns, most frequently relating to obscuring information vital to the customer’s purchase choices.¹⁶ Due to this, it is vital that we approach

¹⁴ DE CONCA, Silvia. The present looks nothing like the Jetsons: Deceptive design in virtual assistants and the protection of the rights of users. *Computer Law & Security Review*. [online]. 2023, vol. 51, p. 5-6. [cit. 13. 10. 2024]. Available at: <https://www.sciencedirect.com/science/article/pii/S0267364923000766#sec0002>

¹⁵ ELSEBAYEL, Ghada. TROIANO, Giovanni. HARTEVELD, Casper. “Not Nice!”: Towards Understanding Dark Patterns in Commercial Health Apps. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720, p. 5. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper2.pdf>

¹⁶ GREENLER SEXTON, Kathleen. FTC, ICPEN, GPEN Announce Results of Review of Use of Dark Patterns Affecting Subscription Services, Privacy. In: *Federal Trade Commission*. [online]. 11. 6. 2024. [cit. 14. 10. 2024]. Available at: <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-icpen-gpen-announce-results-review-use-dark-patterns-affecting-subscription-services-privacy>

this topic with a sufficient amount of instances of dark pattern regulation in mind if we are to come up with one truly efficient and applicable to most cases.

3. METHODS OF REGULATING DARK PATTERNS

3.1 RECENT METHODS OF REGULATING DARK PATTERNS

Although many attempts with varying degrees of success have been made at codifying dark patterns legislation, we have yet to see a thorough and comprehensive unification. Considering the broad nature of dark patterns outlined in the previous chapter, it is no wonder that numerous laws prohibiting general unfair practices and unconsented acts are often applied to deceptive designs.¹⁷ In order to ameliorate and specify the method of regulation, dark patterns have been included both in notable EU legislation and somewhat novel guidelines. We will now examine both of these instances with a focus on efficiency.

The Digital Services Act (DSA), entering into effect in late 2022, mainly aims to regulate the prospect of reporting illegal activities via platforms themselves and to protect fundamental rights within the digital sphere. However, the core benefit of this legislation for the purposes of this essay lies in Article 25, whose provisions state that platforms are forbidden from interfering with user's choices through manipulative design.¹⁸ As we come to find out through Recital 67 of said legislation, this also encompasses dark patterns, effectively coining the term in a legal manner. In combination with Article 40, certified researchers could be granted access to the data of these online platforms with the idea of achieving utmost transparency.¹⁹ The process of this legislation's harmonization on a national level could prove to be a major setback though, as was to be expected.

¹⁷ BRIGNULL, Harry et al. Deceptive patterns – user interfaces designed to trick you. In: *deceptive.design.com*. [online]. 1. 5. 2024 [cit. 15. 10. 2024]. Available at: <https://www.deceptive.design/laws>

¹⁸ HINE, Emmie et al. Safety and Privacy in Immersive Extended Reality: An Analysis and Policy Recommendations. *Digital Society*. [online]. 2024, vol. 3. p. 25. [cit. 13. 10. 2024]. Available at: <https://link.springer.com/article/10.1007/s44206-024-00114-1>

¹⁹ Ibidem.

What is more, the cited Article 25 comes with several issues of its own. Not only does it use the vague term “online platforms”, which may not encapsulate quickly advancing deceptive designs, such as those used in virtual assistants or virtual reality programs, but it also introduces the problematic second paragraph.²⁰ The legislator states there that complete disallowing of deceptive design does not come into play in cases which are covered by the Unfair Commercial Practices Directive and by the General Data Protection Regulation.²¹ Does this mean that the DSA serves as only a piece of surplus legislation? And if deceptive designs prohibited by the DSA meet requirements set by these other regulations, will they slip through the cracks and deem themselves legal? These are some of the issues that stem from the not so practical application of the DSA.

The guideline²² which more or less accompany the Digital Service Act have been drafted and published by the European Data Protection Board in 2022 and later revised in early 2023, urging platform providers to refrain from using deceptive designs on (not only) social media networks via specific guidance. They bring forth specific conditions for maintaining sufficient transparency and simultaneously come up with a list of possible enforcement mechanisms in the event of transgressions connected with dark patterns – these may range from administrative penalties or legal actions to outright injunctions.²³ Types of dark patterns themselves are also somewhat covered, although not nearly as completely as should be required (with reference to the types listed in chapter 2.1.). Moreover, what both

²⁰ ALSEBAYEL, Ghada. TROIANO, Giovanni. HARTEVELD, Casper. “Not Nice!”: Towards Understanding Dark Patterns in Commercial Health Apps. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720, p. 16. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper2.pdf>

²¹ Ibidem.

²² Guidelines 03/2022 on Deceptive design patterns in social media platform interfaces: how to recognise and avoid them. In: edpb.europa.eu. [online]. 24. 2. 2023. [cit. 13. 10. 2024]. Available at: https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032022-deceptive-design-patterns-social-media_en

²³ MAMIDWAR, Aryan. BHUTKAR, Ganesh. An Overview of Guidelines on Dark Patterns. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720, p. 5. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper10.pdf>

the EU adopted digital services legislation and the corresponding guidelines lack is the aforementioned enforcement procedure itself. The author of this essay believes that European Union's inaction is ultimately one of the main culprits of the open nature of using dark patterns nowadays.

3.2 PROPOSED METHODS OF REGULATING DARK PATTERNS

With two quite recently developed pieces of legislation hindered by significant oversights and loopholes, many propositions on how to deal with dark patterns have been naturally brought up. A good deal of these predominantly engages with specific dark pattern occurrences, such as in the matter of cookie disclaimers, whose dark pattern potential could be a subject of their own essay. To avoid sanctions, providers of cookie disclaimers could have to prove an absence of a “nudging effect”, i.e. pressuring an internet user to accept cookies via complicating the rejecting process or via presenting the acceptance as an objectively better option.²⁴ This is but one of numerous newly introduced curbing methods and proves that taking on dark patterns will call for dozens, if not hundreds of hundreds of specific legal modifications, depending on the issues at hand.

The author of this essay believes that European Union's inaction is ultimately one of the main culprits of the open nature of using dark patterns nowadays. The studies conducted by Mamidwar et al. shed light on the painfully obvious differences between, for example, the transparency or periodic revision criteria included in European and Indian guidelines, respectively.²⁵ By not accounting for dissimilarities in these guidelines (not only those issued by the European Data Protection Board), legislators unavoidably create an environment in which platform providers may include dark patterns without even realizing it.²⁶ This is particularly true in the case of global platforms, which most certainly would require differ-

²⁴ BERENS, Benjamin Maximilian et al. Cookie disclaimers: Dark patterns and lack of transparency. *Computers & Security*. [online]. 2024, vol. 136. p. 8. [cit. 13. 10. 2024]. Available at: <https://doi.org/10.1016/j.cose.2023.103507>

²⁵ MAMIDWAR, Aryan. BHUTKAR, Ganesh. An Overview of Guidelines on Dark Patterns. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720. p. 4. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper10.pdf>

ent guideline applications across the globe, inevitably creating a double standard.

Last but not least, a sine qua non condition of a functional anti-dark pattern system is the already mentioned effective and consistent enforcement system.²⁷ Even though mandatory built-in reporting systems are assumed by the European DSA, there is scarce evidence of them in use at the time of writing this essay, as experts in the field keep highly recommending their proper implementation.²⁸

4. CONCLUSION

The goal of this essay was to survey and consequently compare modern legislation concerning dark patterns with an optimal state of regulation proposed by researchers and experts. By first clarifying the core features of dark patterns and exploring their near-unlimited subtypes, we were able to apply this knowledge to their various occurrences with a keen focus on tackling each dark pattern in a specific way. After that, multiple insufficient aspects of already employed legislation were pointed out, further highlighting the need to enlist new tactics touched upon in the last chapter.

With dark patterns seeping into our everyday lives more and more, it is vital that both the legislator and the academic community come to terms with the fact that supranational harmonization of legislation is the best current starting point for a successful anti-dark pattern campaign. Moreover, providing grounds for an effective enforcement system remains a key cornerstone yet unreached, as mere guidelines most likely will not suffice in curbing dark patterns. Unless dark patterns are completely understood

²⁶ MAMIDWAR, Aryan. BHUTKAR, Ganesh. An Overview of Guidelines on Dark Patterns. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720. p. 9. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper10.pdf>

²⁷ MAMIDWAR, Aryan. BHUTKAR, Ganesh. An Overview of Guidelines on Dark Patterns. *Mobilizing Research and Regulatory Action on Dark Patterns and Deceptive Design Practices 2024*. [online]. 2024, vol. 3720. p. 9. [cit. 13. 10. 2024]. Available at: <https://ceur-ws.org/Vol-3720/paper10.pdf>

²⁸ HINE, Emmie et al. Safety and Privacy in Immersive Extended Reality: An Analysis and Policy Recommendations. *Digital Society*. [online] 2024, vol. 3. p. 34. [cit. 13. 10. 2024]. Available at: <https://link.springer.com/article/10.1007/s44206-024-00114-1>

and properly regulated, they will continue to limit the rights of consumers without even being discovered. Therefore, they definitely pose a significant threat to modern privacy as we know it today.

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