Enforcing Unfair Competition Law Against AI-Driven Dark Patterns

Dark patterns are deliberate design techniques for creating e-commerce environments inducing consumers into actions that benefit a business through some form of deception, coercion, manipulation or other undue influence. Fake urgency, guilt-tripping, visual-salience tricks are some typical examples. A large-scale ticketing system implementing such a scheme was urging consumers to obtain ticket insurance through terrorizing messages suggesting, among others, that consumers would be “responsible for whatever happens.” The context of the purchase also created the false impression that procuring ticket insurance is mandatory. Another example is when the process of taking an action that is detrimental to the economic interests of a business is made overly complicated. Finding the cancellation button to end a subscription may occasionally feel like an attempt to escape from a labyrinth.

Machine-learning models enable the creation of adaptive and personalised dark patterns increasing their perniciousness. Scarcity messages conveyed by a travel or retail platform may be algorithmically adjusted to target those consumers who most are susceptible to urgency-based pressure. AI sentiment models can analyse the consumers’ browsing behaviour and figure out their weak spots and moments. AI may also facilitate the design of the most labyrinthine menus for a given user.

The primary instrument for scrutinizing the legality of such practices under EU law is the Unfair Commercial Practices Directive (UCPD). The UCPD prohibits misleading as well aggressive practices and imposes obligations of due care with respect to commercial communications to consumers. Similar rules can be found in the UK Digital Markets, Competition and Consumers Act 2024. In the US, dark patterns have been deemed unlawful under section 5 of the FTC Act.

The approaches adopted in different states diverge significantly with respect to the enforcement of the relevant rules. In Germany, the system relies on private enforcement primarily driven by particularly strong trader and consumer associations. The Competition and Markets Authority (CMA) is the administrative body entrusted with the authority to enforce the relevant rules in the UK. Since 2022 the CMA has launched a dedicated enforcement programme on Online Choice Architecture. CMA’s wide administrative and investigative powers along with its specialized data analytics and technology unit offer particularly effective possibilities for deterring dark patterns. Notably, the CMA can be fast in reaching binding decisions, issue interim-stop orders, and impose fines. In the US, the Federal Trade Commission (FTC) constitutes a predominantly litigation-based enforcement authority, but which has some limited rule-making authority. As of current, the FTC is preparing the adoption of rules against manipulative AI-driven dark patterns.

What is the optimal enforcement structure for rules against unfair competition the primary purpose of which is to protect consumers against AI-driven unfair commercial practices?

Bibliography

(no comparative analysis from the perspective of alternative enforcement regimes is available)

J.Luguri & L.J. Strahilevitz, Shining a Light on Dark Patterns, 13 J.Leg.Anal., 43-109 (2021).

FTC Report, Bringing Dark Patterns to Light, https://www.ftc.gov/reports/bringing-dark-patterns-light

CMA, Discussion Paper, Online Choice Architecture: How Digital Design Can Harm Competition and Consumers,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1066524/Online_choice_architecture_discussion_paper.pdf

Dr Apostolos Chronopoulos