

## ERGO

*Analysing developments impacting business*

### ASCI GUIDELINES ON DECEPTIVE DESIGN PATTERNS IN DIGITAL MEDIA ADVERTISEMENTS

Advertising Standards Council of India (ASCI) had earlier published self-regulatory guidelines for Online Deceptive Design Patterns in Advertising (ASCI Guidelines) in order to address the issue of deceptive design patterns (Dark Patterns) prevalent in online advertising. The ASCI Guidelines are stated to be applicable from 1 September 2023.<sup>1</sup>

#### **BACKGROUND**

‘Dark Pattern(s)’ are deceptive designs found in websites or mobile applications which subtly nudge or manipulate users to provide sensitive information, or to purchase or sign up for services which they do not wish to opt for. For instance, while one avails free trial subscription to a social media platform, the platform seeks financial information which is used to charge the user at the end of the trial period unless the subscription is ‘unsubscribed’. Thus, while availing free services, consumers are nudged into paid memberships. Similarly, design features on online platforms which are likely to deceive users, resulting in extended user engagement, and collecting user data, have detrimental effect on user trust, informed decision-making, and privacy. Regulators across the globe have identified techniques such as false urgency, basket-sneaking, subscription traps, nagging, bait and switch, privacy deception, disguised ads, roach model, forced continuity, hidden expenses et al, as ‘Dark Patterns’. A review of advertisements by ASCI found that as many as 29% of the advertisements published in 2021-22

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<sup>1</sup> <https://www.ascionline.in/wp-content/uploads/2023/05/Guidelines-for-Online-Deceptive-Design-Patterns-in-Advertising.pdf>

were disguised ads from influencers who had concealed that those were paid content.

## EXISTING LEGAL FRAMEWORK IN INDIA

### a. Consumer Protection Act, 2019

Consumer Protection Act, 2019 (Act) is the law protecting interests of consumers. Any online advertisement or user interface which is deceptive or manipulative, will be construed as undermining consumer interest and may be questioned as 'unfair trade practice', a term defined under Section 2(47) of the Act. Further, any advertisement or design pattern which manipulates user choice and adversely affects the right to make an informed choice would be infringing 'consumer rights' under Section 2(9) of the Act. Additionally, any deliberate concealment of important information in relation to a product or service, would fall within the ambit of 'misleading advertisement', a term defined under 2(28) of the Act.

### b. Rules pertaining to misleading advertisements, informed consent and fair practices

Ministry of Consumer Affairs has enacted the Consumer Protection (E-Commerce) Rules, 2020 (E-Commerce Rules) and the Consumer Protection (Direct Selling) Rules, 2021 (Direct Selling Rules) which set out duties of e-commerce entities and direct sellers respectively towards consumers. While E-Commerce Rules *inter alia* cast a duty that consent of a consumer can only be recorded through an explicit and affirmative action, and that no entity shall record consent automatically, including in the form of pre-ticked checkboxes, the Direct Selling Rules *inter alia* holds an entity accountable for any misleading, deceptive, or unfair trade practices in direct selling. Additionally, Central Consumer Protection Authority, a regulatory authority set up under the Act, has issued the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (CCPA Guidelines) to prevent false or misleading advertisements and endorsements. The CCPA Guidelines *inter alia* specify conditions for a "non-misleading and a valid advertisement", "free claims advertisement" and non-bait advertisements.

### C. **Advisory issued by the Department of Consumer Affairs**

On 30 June 2023, the Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India, issued an advisory urging online platforms to refrain from adopting 'Dark Patterns' (DCA Advisory). The Ministry also enlisted the following examples which are considered 'Dark Patterns':

- i. False Urgency: This tactic creates a sense of urgency or scarcity to pressure consumers into making a purchase or taking an action.
- ii. Basket Sneaking: Websites or apps use dark patterns to add additional products or services to the shopping cart without user consent.
- iii. Subscription Traps: This tactic makes it easy for consumers to sign up for a service but difficult for them to cancel it, often by hiding the cancellation option or requiring multiple steps.
- iv. Confirm Shaming: It involves guilt as a way to make consumers adhere. It criticizes or attack consumers for not conforming to a particular belief or viewpoint.
- v. Forced Action: This involves forcing consumers into taking an action they may not want to take, such as signing up for a service in order to access content.
- vi. Nagging: It refers to persistent, repetitive and annoyingly constant criticism, complaints, and requests for action.
- vii. Interface Interference: This tactic involves making it difficult for consumers to take certain actions, such as cancelling a subscription or deleting an account.
- viii. Bait and Switch: This involves advertising one product or service but delivering another, often of lower quality.
- ix. Hidden Costs: This tactic involves hiding additional costs from consumers until they are already committed to making a purchase.

- x. Disguised Ads: Disguised ads are advertisements that are designed to look like other types of content, such as news articles or user-generated content.

## ASCI GUIDELINES

According to ASCI, ‘dark commercial patterns’ are *“business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice. They often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances”*.

The ASCI Guidelines identify four types of deceptive techniques which are used in online advertising namely drip pricing, bait and switch, false urgency, and disguised ads. The ASCI Guidelines are self-regulatory and cite few examples of online deceptive patterns in order to make stakeholders aware of what amounts to Dark Pattern in digital advertising.

## CONCLUSION

While the consumer protection law in India does not define Dark Patterns, the ASCI Guidelines and the DCA Advisory enumerates certain Dark Patterns.

Authorities such as Central Consumer Protection Authority and Consumer Commissions, which are enforcing the rights of consumers and have penal powers will rely upon the ASCI Guidelines and the DCA Advisory to identify misleading advertisements and unfair trade practice to initiate action under the Act.

Having stated the above, it would also be challenging for the authorities to differentiate between advertisements which are persuasive and those which are manipulative. It is imperative to acknowledge that not all design nudges are inherently bad. The industry would argue that what may be termed as manipulative is in effect ‘persuasive’ marketing strategy.

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