

# Contractual consent and dark patterns in the design of online contract interfaces

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- Do not uncheck this box if you wish to be contacted via email about product updates, upgrades, special offers and pricing

Source: @Omicron\_o

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## Dark patterns

Interface design techniques that use knowledge of human behaviour to attempt to deceive or steer users and nudge them into making decisions that are not in their best interests (Gray et al, 2018; Mathur et al, 2019)

The most prevalent (Lupiáñez-Villanueva et al., 2022):

1) Hidden information / false hierarchy

The screenshot shows a 'Trip Protection' section. On the left, there are three bullet points: 'IMPORTANT: Certain COVID-19-related trip expenses can be eligible for cash reimbursement (see links below).', 'Get back up to 100% for covered trip cancellation and interruption, including covered illness or injury of you, a family member, or travel companion; loss of an immediate family member; and more.', and 'Protection for your baggage or personal belongings that are'. On the right, there is a 'HIGHERLY RECOMMENDED' badge, a required selection prompt, and two radio button options. The 'Yes' option is highlighted with a red circle, and a warning message is displayed below it.

**Trip Protection**

**Peace of mind is only a click away**  
Protection from San Jose to Atlanta, and everywhere in between.

- ✓ **IMPORTANT:** Certain COVID-19-related trip expenses can be eligible for cash reimbursement (see links below).
- ✓ **Get back up to 100%** for covered trip cancellation and interruption, including covered illness or injury of you, a family member, or travel companion; loss of an immediate family member; and more.
- ✓ **Protection for your baggage** or personal belongings that are

**HIGHERLY RECOMMENDED**

\* **Required:** Select Yes or No to continue

**Yes, protect my trip for \$137.51 total.**

**!** **By selecting "No," I understand I may be responsible for non-refundable expenses for my trip.**

Source: @TRamzetta

The most prevalent (Lupiáñez-Villanueva et al., 2022):

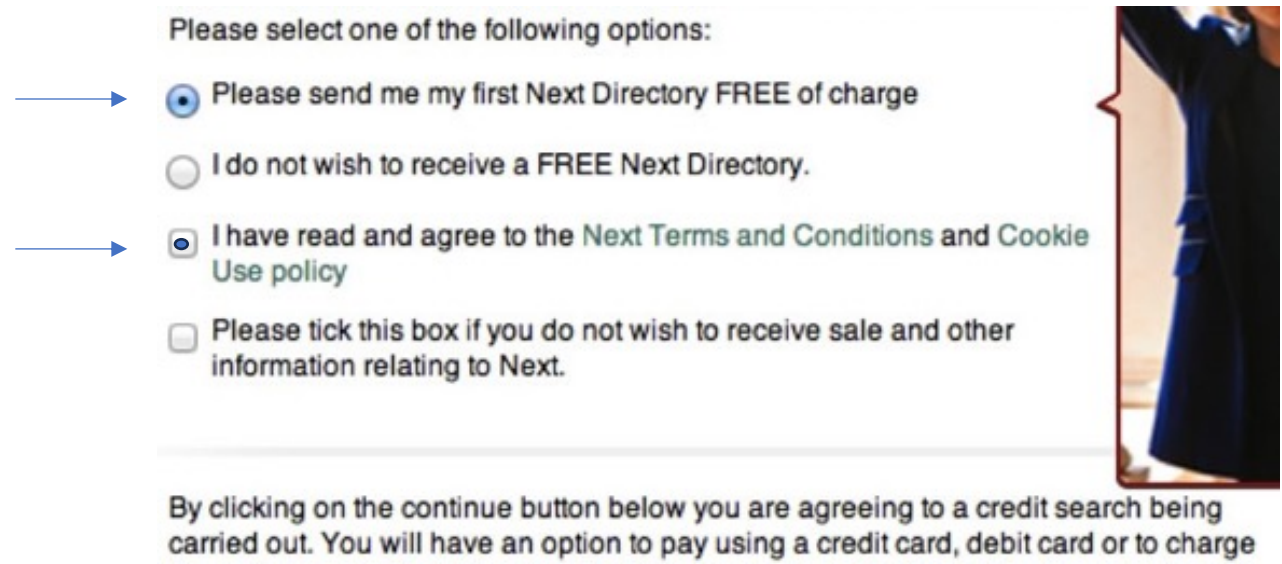
1) Hidden information / false hierarchy

2) Preselection

Please select one of the following options:

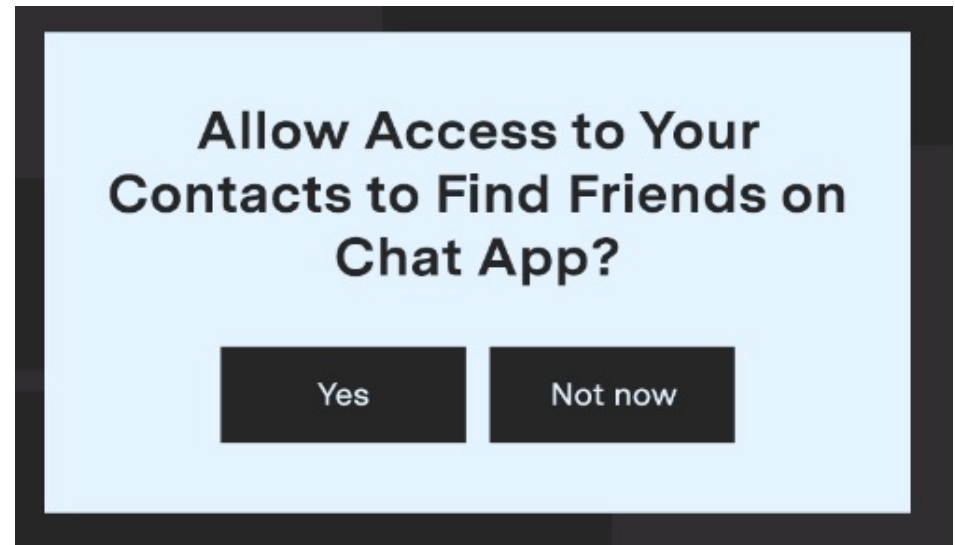
- Please send me my first Next Directory FREE of charge
- I do not wish to receive a FREE Next Directory.
- I have read and agree to the [Next Terms and Conditions and Cookie Use policy](#)
- Please tick this box if you do not wish to receive sale and other information relating to Next.

By clicking on the continue button below you are agreeing to a credit search being carried out. You will have an option to pay using a credit card, debit card or to charge

A screenshot of a web form with a blue dress on the right side. The form contains a heading 'Please select one of the following options:' followed by four radio button and checkbox options. The first two options are radio buttons, and the last two are checkboxes. The first and third options are selected. The first option is 'Please send me my first Next Directory FREE of charge'. The second option is 'I do not wish to receive a FREE Next Directory.'. The third option is 'I have read and agree to the Next Terms and Conditions and Cookie Use policy'. The fourth option is 'Please tick this box if you do not wish to receive sale and other information relating to Next.'. Below the form is a paragraph of text: 'By clicking on the continue button below you are agreeing to a credit search being carried out. You will have an option to pay using a credit card, debit card or to charge'. On the right side of the form, there is a vertical image of a blue dress.

The most prevalent (Lupiáñez-Villanueva et al., 2022):

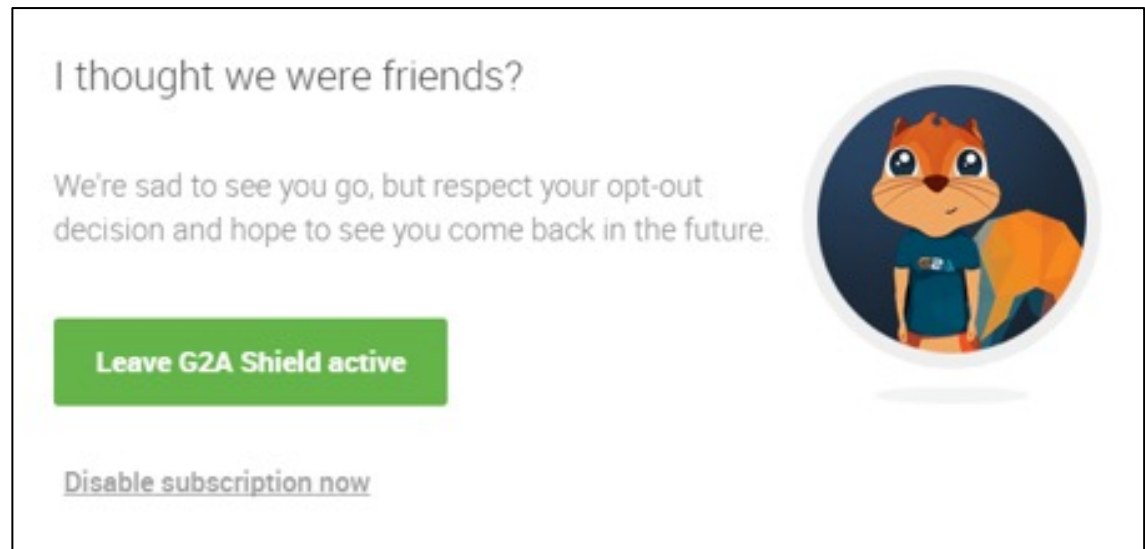
- 1) Hidden information / false hierarchy
- 2) Preselection
- 3) Nagging



Sorche: <https://themarkup.org>

The most prevalent (Lupiáñez-Villanueva et al., 2022):

- 1) Hidden information / false hierarchy
- 2) Preselection
- 3) Nagging
- 4) “Roach motel”



Source: <https://darkpatterns.uxp2.com>

# Some facts about dark patterns...

(Luguri & Strahilevitz, 2019; Lupiáñez-Villanueva et al., 2022)

1. 97% of the 30 most popular websites and apps used by EU consumers deployed at least one dark pattern.
2. Commonly combined.
3. Information seems not to be a real solution to all dark patterns.
4. Not all have the same impact on the user's behaviour.
5. User profile influences the effectiveness of dark patterns.



# Regulation under the EU Law

## **GDPR (Regulation (EU) 2016/679)**

- Principles:

  - Fairness, transparency, data protection by design... (arts. 5, 12, 25.1)

- Consent requirements (arts. 4(11), 7)

# Regulation under the EU Law

## **Consumer Rights Directive (Directive 2011/83/EU)**

- Precontractual information (arts. 6, 8)
- Express consent for additional payments (art. 22)

## **Unfair Contract Terms Directive (Directive 93/13/CEE)**

- Transparency (arts. 4(2), 5)
- No pre-ticked boxes for accepting general clauses.
- Unknown/difficult to avoid automatic renewals (Annex 1(h))

# Regulation under the EU Law

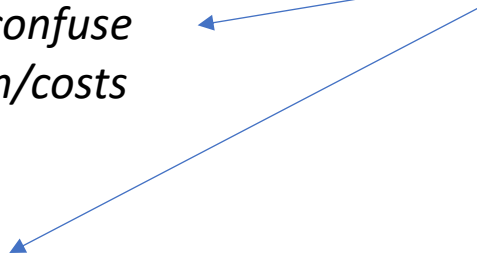
## Unfair Commercial Practices Directive (Directive 2005/29/EC)

- Prohibited commercial practices list (Annex I)
- Misleading & aggressive practices (arts. 6-7 & 8-9)
- General unfairness clause

*Bait and switch (no. 5, 6)*  
*Urgency (no. 7)*  
*Scarcity (no. 18)*  
*Prizes without awarding (no. 19, 31)*

*Trick questions to confuse*  
*Hidden information/costs*

*Nagging*  
*Confirmshaming*



# Regulation under the EU Law

## Digital Services Act (Regulation (EU) 2022/2065)

### Article 25. Online interface design and organisation

1. Providers of online platforms shall not design, organise or operate their **online interfaces** in a way that **deceives or manipulates** the recipients of their service or in a way that otherwise materially **distorts or impairs** the ability of the recipients of their service **to make free and informed decisions.**

3. The **Commission** may issue **guidelines** on how paragraph 1 applies to specific practices, notably:

- (a) giving more prominence to certain services or products than to others in order to influence the recipient of the service for a decision;
- (b) repeated or persistent requests for the recipient of the service to make a choice where that choice has already been made, especially by using dark patterns;
- (c) Roach motel that interfere with the user experience;
- (c) making the procedure for terminating a service more difficult than subscribing to it.

# Regulation under the EU Law

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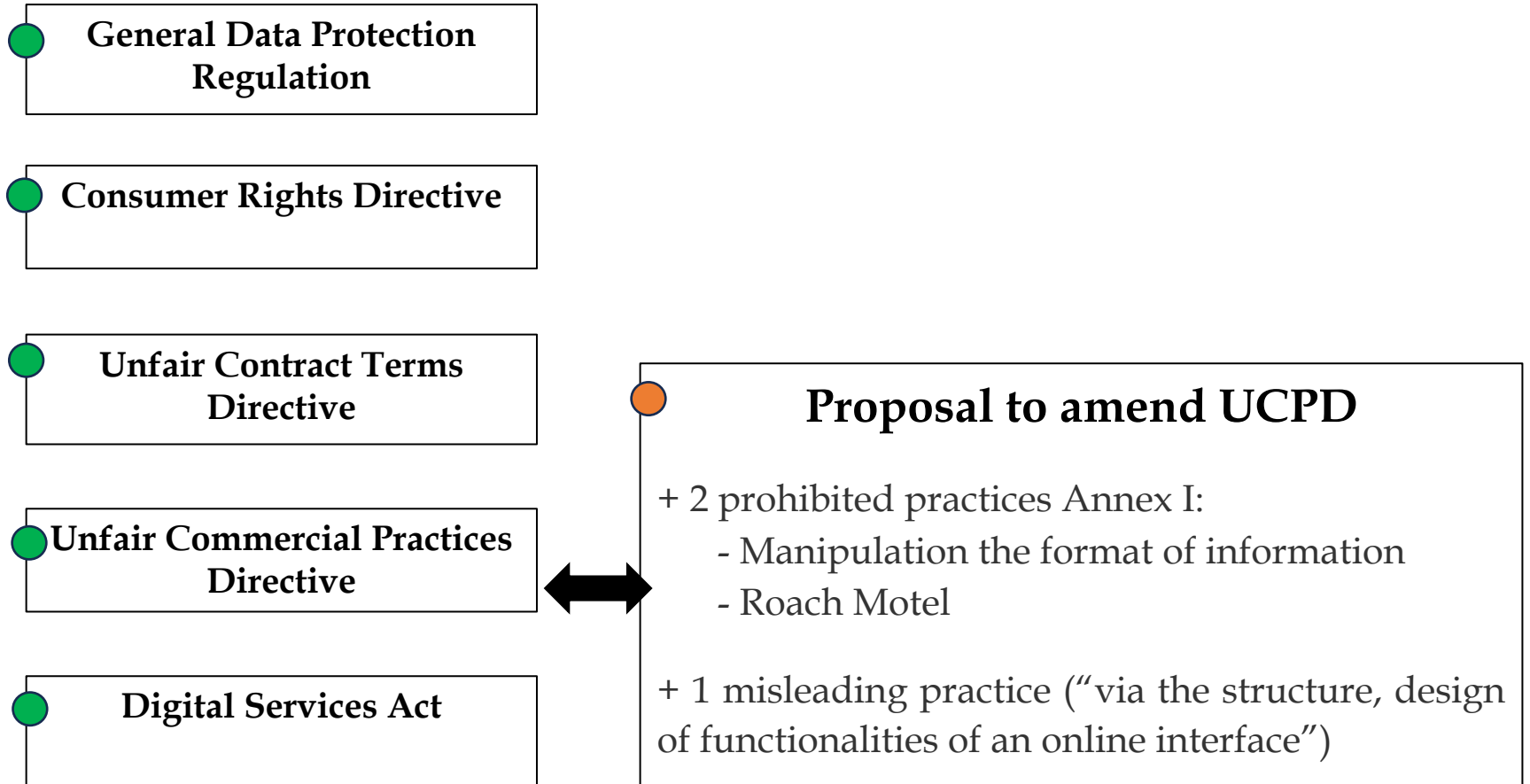
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2. The prohibition in paragraph 1 shall not apply to practices covered by Directive 2005/29/EC or Regulation (EU) 2016/679.

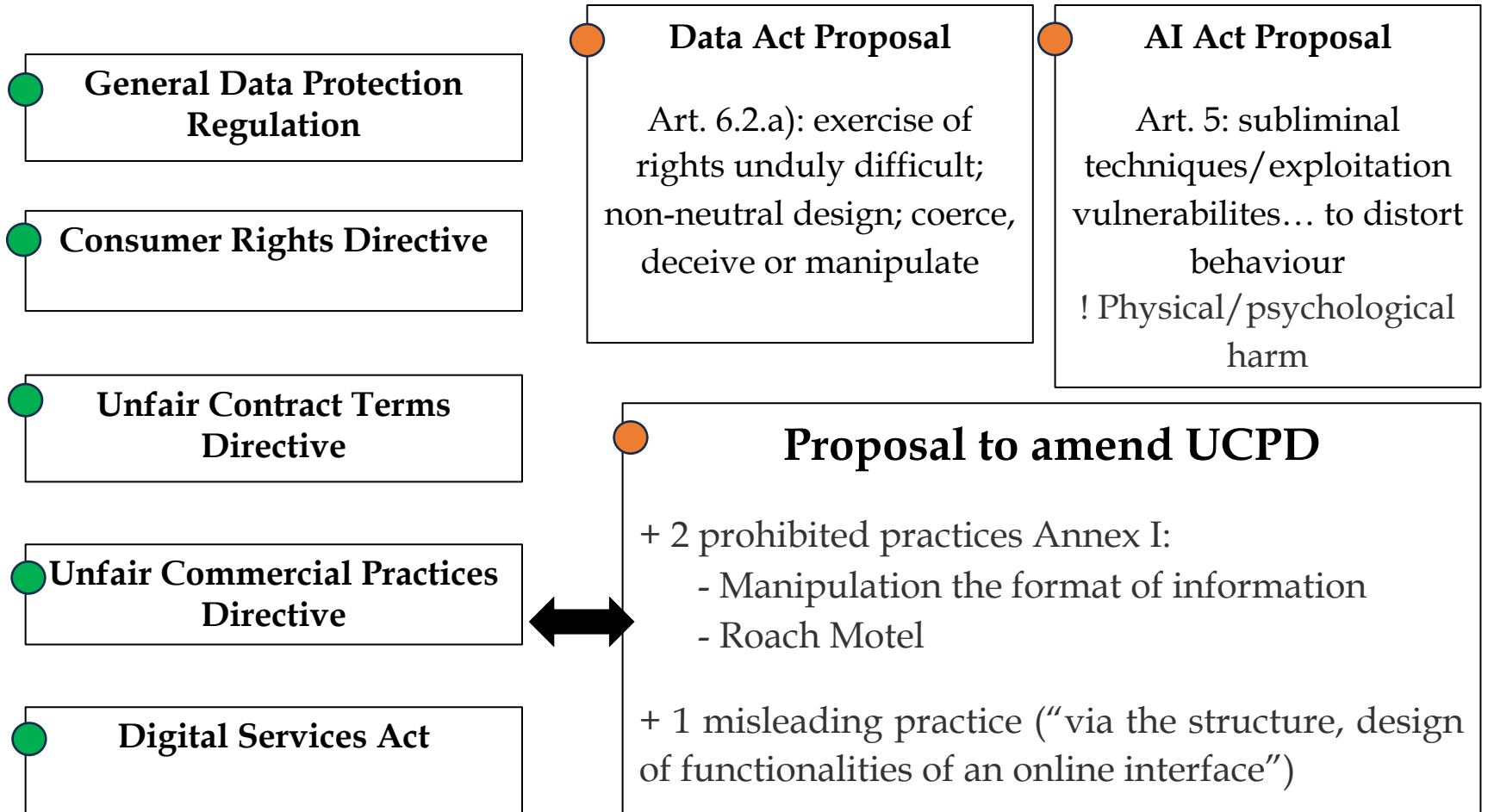
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# Regulation under the EU Law



# Regulation under the EU Law



- Interaction between legal norms?
- Specific bans and... many general clauses
- Average consumer vs. Vulnerable consumer?



Thank you for your attention