

**4th Interdisciplinary Summer School on Privacy (ISP 2019)**  
**September 6: “Dark patterns, legal aspects” (Mario Guglielmetti) [v 30.8.2019]**

**Recommended readings**, structured as **overview of topics** (‘From darkness to black holes- points of no return’?)

**I - Cases of users’ direct interaction with the online platform**

**1.1. The ‘mother (or father)’ of dark patterns’ cases: Facebook-Cambridge Analytica**

- Decision by ICO of 24 October 2018:

FB responsibility for third party app (see at para. 25 and 26)

<https://ico.org.uk/media/action-weve-taken/mpns/2260051/r-facebook-mpn-20181024.pdf>

And, **is this different** (‘Instagram scraping’)?

<https://www.cpomagazine.com/data-privacy/instagram-data-scraping-by-hyp3r-raises-privacy-concerns>

- List of ‘FB deception(s) by design’ reported by newspapers and put in a table on a twitter’s post: <https://twitter.com/ashk4n/status/1153739756712292353>

- FB declared in breach of consumer law by French Tribunal (Tribunal Grande Instance, Paris): <https://www.legalis.net/jurisprudences/tgi-de-paris-jugement-du-9-avril-2019/>

- and by Italian AGCM:

<https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes>

(Towards the wider ads’ ecosystem) - FB declared in breach of competition law (decision by German Competition Law Authority, *Bundeskartellamt*):

[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07\\_02\\_2019\\_Facebook.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html)

- Update (‘German Court decision’):

<https://techcrunch.com/2019/08/26/facebook-succeeds-in-blocking-german-fcos-privacy-minded-order-against-combining-user-data/>

- EDPS statement:

[https://edps.europa.eu/press-publications/press-news/press-releases/2019/press-statement-data-protection-and\\_en](https://edps.europa.eu/press-publications/press-news/press-releases/2019/press-statement-data-protection-and_en)

On online platform *business typologies* and on *FB-Bundeskartellamt* - “*Online platforms and pricing. Adapting abuse of dominance assessments to the economic reality of free products*”, Friso Bostoen, at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3395024](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3395024)

- *Plus*, CNIL-Google case:

<https://www.cnil.fr/en/cnils-restricted-committee-imposes-financial-penalty-50-million-euros-against-google-llc>

- Other ‘Google’s dark patterns’:

<https://www.cnbc.com/2019/05/17/google-gmail-tracks-purchase-history-how-to-delete-it.html>

- On Google's terms and conditions:

<https://www.nytimes.com/interactive/2019/07/10/opinion/google-privacy-policy.html?mtrref=www.linkedin.com&gwh=D9B936A86CB16C690CAEE35EAADD2964&gwt=pay&assetType=REGIWALL>

### **1.2. The *most recent* dark patterns:**

- Google speech assistant and Hamburg DPA (DPA enforcement):

[https://datenschutz-hamburg.de/assets/pdf/2019-08-01\\_press-release-Google\\_Assistant.pdf](https://datenschutz-hamburg.de/assets/pdf/2019-08-01_press-release-Google_Assistant.pdf)

- 'Apple Siri' class action (US class action):

<https://www.scribd.com/document/421179904/Fumiko-Lopez-v-Apple-Inc-Class-Action>

- FB facial recognition by default (US District Court for the Northern District of California):

<http://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/08/18-15982.pdf>

### **1.3. Recent 'dark patterns' decisions:**

- The FTC settlement:

<https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history>

[https://www.ftc.gov/system/files/documents/cases/182\\_3109\\_facebook\\_order\\_filed\\_7-24-19.pdf](https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf)

- and dissenting Statement of Commissioner Chopra:

[https://www.ftc.gov/system/files/documents/public\\_statements/1536911/chopra\\_dissenting\\_statement\\_on\\_facebook\\_7-24-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf)

- and dissenting Statement of Commissioner Slaughter:

[https://www.ftc.gov/system/files/documents/public\\_statements/1536918/182\\_3109\\_slaughter\\_statement\\_on\\_facebook\\_7-24-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf)

### **1.4. Dark patterns and AI, algorithms, in the gig economy (darkness *vis-à-vis* employees):**

- <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html>

- "Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers",

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2686227](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227)

## **II - The wider targeted ads' ecosystem:**

- See: <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906.pdf>

- Update (on possible future ICO enforcement):

<https://www.ft.com/content/ff7af558-c5b8-11e9-a8e9-296ca66511c9>

- *Behavioural advertising*:

<https://www.law.kuleuven.be/citip/blog/real-world-consequences-for-real-time-bidding-15-national-supervisory-authorities-urged-to-investigate-behavioural-advertising-practices/>

- CNIL Vectaury decision:

<https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000037594451&fastReqId=974682228&fastPos=2>

- Is the cost (of behavioural ads) worth it?

<https://www.wsj.com/articles/behavioral-ad-targeting-not-paying-off-for-publishers-study-suggests-11559167195>

- “Online Tracking and Publishers’ Revenues: An Empirical Analysis”, Veronica Marotta, Vibhanshu Abhishek, and Alessandro Acquisti, at:

[https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS\\_2019\\_paper\\_38.pdf](https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf)

- ‘In the realm of shadows (1)’, *data brokers* (recent complaint by PI):

<https://privacyinternational.org/advocacy/2426/our-complaints-against-acxiom-criteo-equifax-experian-oracle-quantcast-tapad>

And FB interaction with Acxiom to build custom audiences:

<https://www.acxiom.co.uk/wp-content/uploads/2014/01/Facebook-Case-Study-Final-no-bleed.pdf>

- ‘In the realm of shadows (2)’, *FB shadow profiles* (currently before CJEU for one-stop-shop issues):

<https://www.stibbe.com/en/news/2015/november/brussels-court-orders-facebook-to-stop-collecting-personal-data-of-non-members>

<https://www.law.kuleuven.be/citip/blog/cookies-and-other-illegal-recipes-to-track-internet-users-latest-episode-of-the-facebook-saga/>

(Similar decisions on FB by Spanish DPA)

- ‘In the realm of shadows (3)’, *hidden tracking on (Google) Android*:

Julien Gamba, Mohammed Rashed, Abbas Razaghpanah, Juan Tapiador, Narseo Vallina-Rodriguez. "An Analysis of Pre-installed Android Software".

[https://haystack.mobi/papers/preinstalledAndroidSW\\_preprint.pdf](https://haystack.mobi/papers/preinstalledAndroidSW_preprint.pdf)

- In general, see also “*A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia*”, Brigid Richmond, at:

[https://cprc.org.au/wp-content/uploads/CPRC-Research-Report\\_A-Day-in-the-Life-of-Data\\_final-full-report.pdf](https://cprc.org.au/wp-content/uploads/CPRC-Research-Report_A-Day-in-the-Life-of-Data_final-full-report.pdf)

- “*Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*”, Draft: July 17, 2019, at:

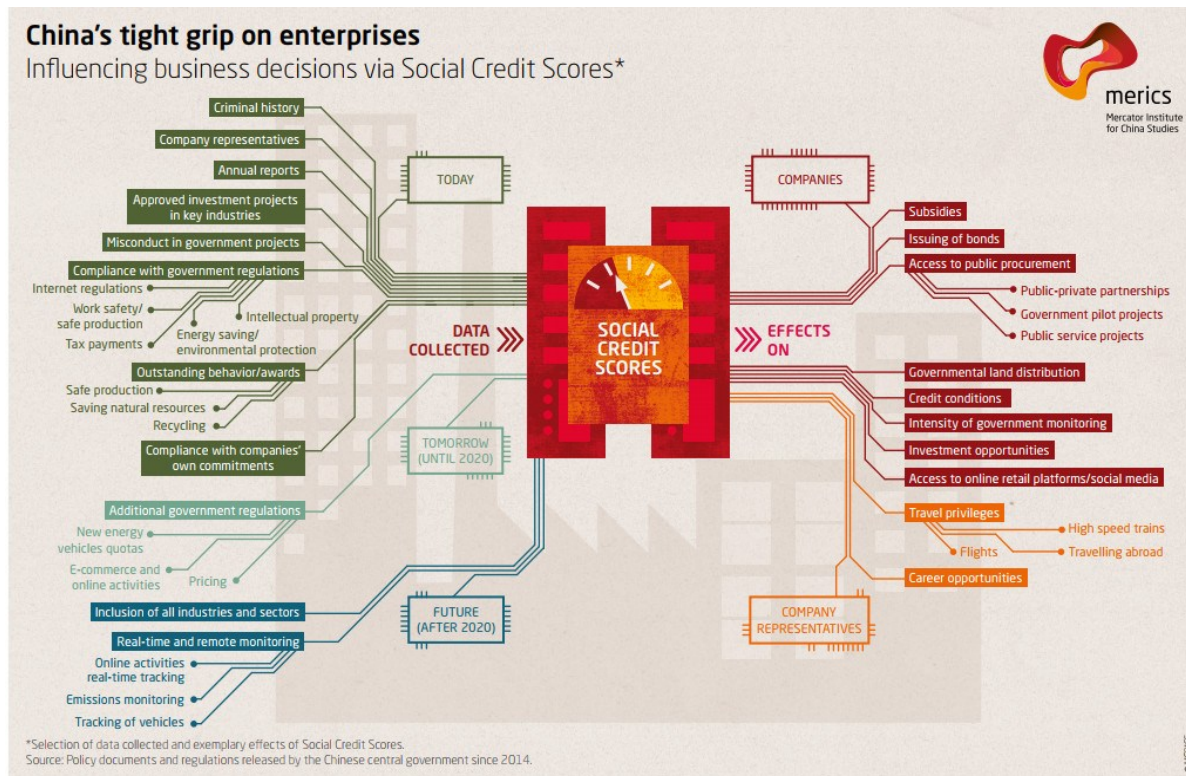
<https://arxiv.org/pdf/1907.07032.pdf>

### **III - From dark patterns to ‘black holes as points of no return’? (As ‘ecology of connected systems’ leading to ‘scoring society’)**

- See: <https://www.technologyreview.com/s/613962/how-wechat-censors-private-conversations-automatically-in-real-time/>

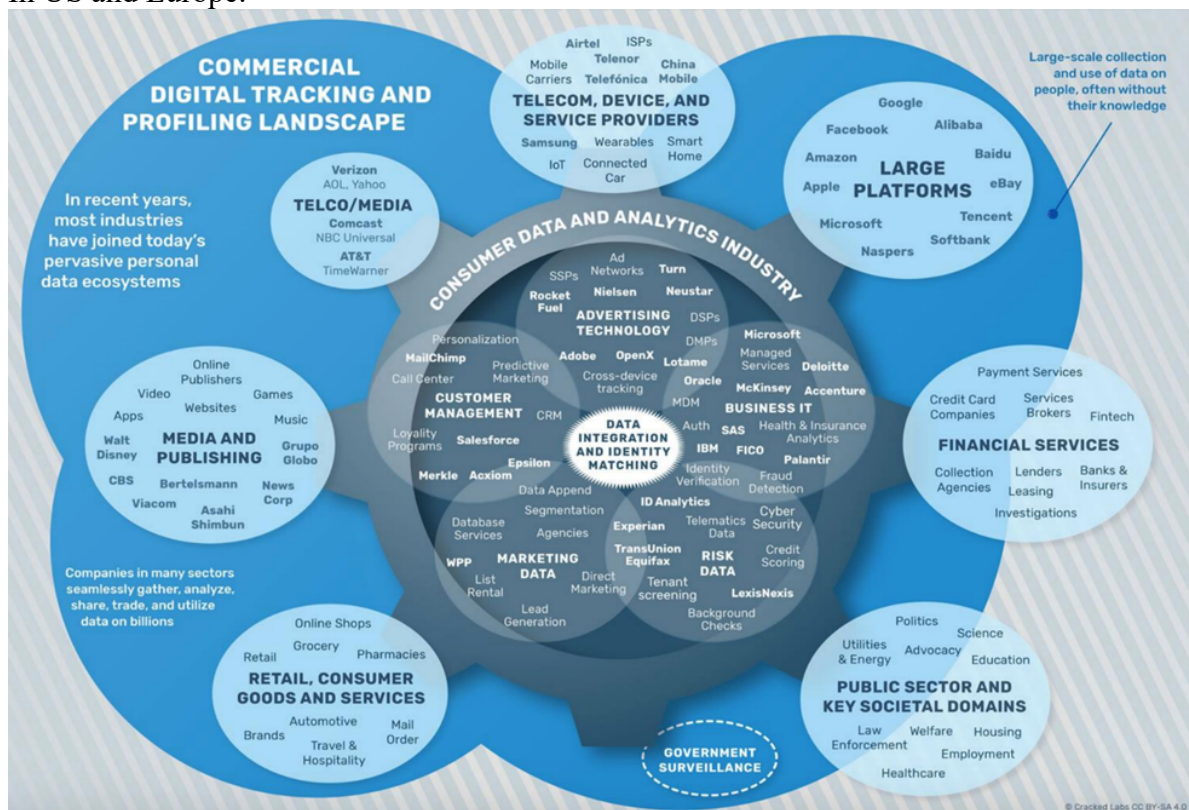
- *China’s Social Credit System: An Evolving Practice of Control*, Rogier Creemers, University of Leiden, at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3175792&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175792&download=yes)

- See graph below at: <https://technode.com/2017/08/23/chinas-social-credit-system-ai-driven-panopticon-or-fragmented-foundation-for-a-sincerity-culture/>



- 'Scoring society' in Japan: <https://linecorp.com/en/pr/news/en/2019/2771>

In US and Europe:





#### IV - 'Solving' dark patterns:

- US draft bill *Voter Privacy Act*:

[https://www.feinstein.senate.gov/public/\\_cache/files/4/4/44e9fcb2-66cf-43e0-ad73-f0502997010a/A0E53C2716084310E677BCA6621967B5.voter-privacy-act.pdf](https://www.feinstein.senate.gov/public/_cache/files/4/4/44e9fcb2-66cf-43e0-ad73-f0502997010a/A0E53C2716084310E677BCA6621967B5.voter-privacy-act.pdf)

- US DETOUR Act “*Deceptive Experiences To Online Users Reduction Act*”:

<https://www.congress.gov/bill/116th-congress/senate-bill/1084/text>

- US SMART Act “*Social-Media-Addiction-Reduction-Technology-Act*”:

<https://about.bgov.com/news/hawley-seeks-ban-on-autoplay-infinite-scrolling-on-websites/>  
<https://www.hawley.senate.gov/sites/default/files/2019-07/Social-Media-Addiction-Reduction-Technology-Act.pdf>

- EU legislative initiative on *transparency and consumer law (information duty on personalised price)*, ‘New Deal for Consumers’:

<http://recent-ecl.blogspot.com/2019/0nv4/new-rules-on-personalised-pricing-and.html>

On this issue, see: Frederik Zuiderveen Borgesius, Joost Poort, *Online Price Discrimination and EU Data Privacy Law*, at:

<https://link.springer.com/article/10.1007/s10603-017-9354-z>

- D. Clifford, I. Graef, P. Valcke, *Pre-Formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections*, at:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126706](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126706)

- In the employment context, “*A Seat at the Table: Negotiating Data Processing in the Workplace. A National Case Study and Comparative Insights*”,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3403729](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403729)

Plus, take into account: Opinion of the Advocate General Szpunar, 21 March 2019, **Case C-673/17, Planet49 GmbH**, at:

[http://curia.europa.eu/juris/document/document\\_print.jsf?docid=212023&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=10229140](http://curia.europa.eu/juris/document/document_print.jsf?docid=212023&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=10229140)

- And, as good practices: <https://www.cnil.fr/fr/publication-du-6eme-cahier-innovation-prospective-du-laboratoire-dinnovation-numerique-de-la-cnil>

#### V - Other useful sources

- The Cracked Lab online library (dark patterns divided according to clusters/topics):

<http://beta.trackingthetrackers.net/researchdb/>

- Shoshana Zuboff, *The Age of Surveillance Capitalism*

- And, of course, here last but not first to explore this issue and probably give birth to the ‘dark patterns studies’: “*Deceived by design, how tech companies use dark patterns to discourage us from exercising our rights to privacy*”, at:

<https://www.forbrukerradet.no/undersokelse/no-undersokelsekategori/deceived-by-design/>