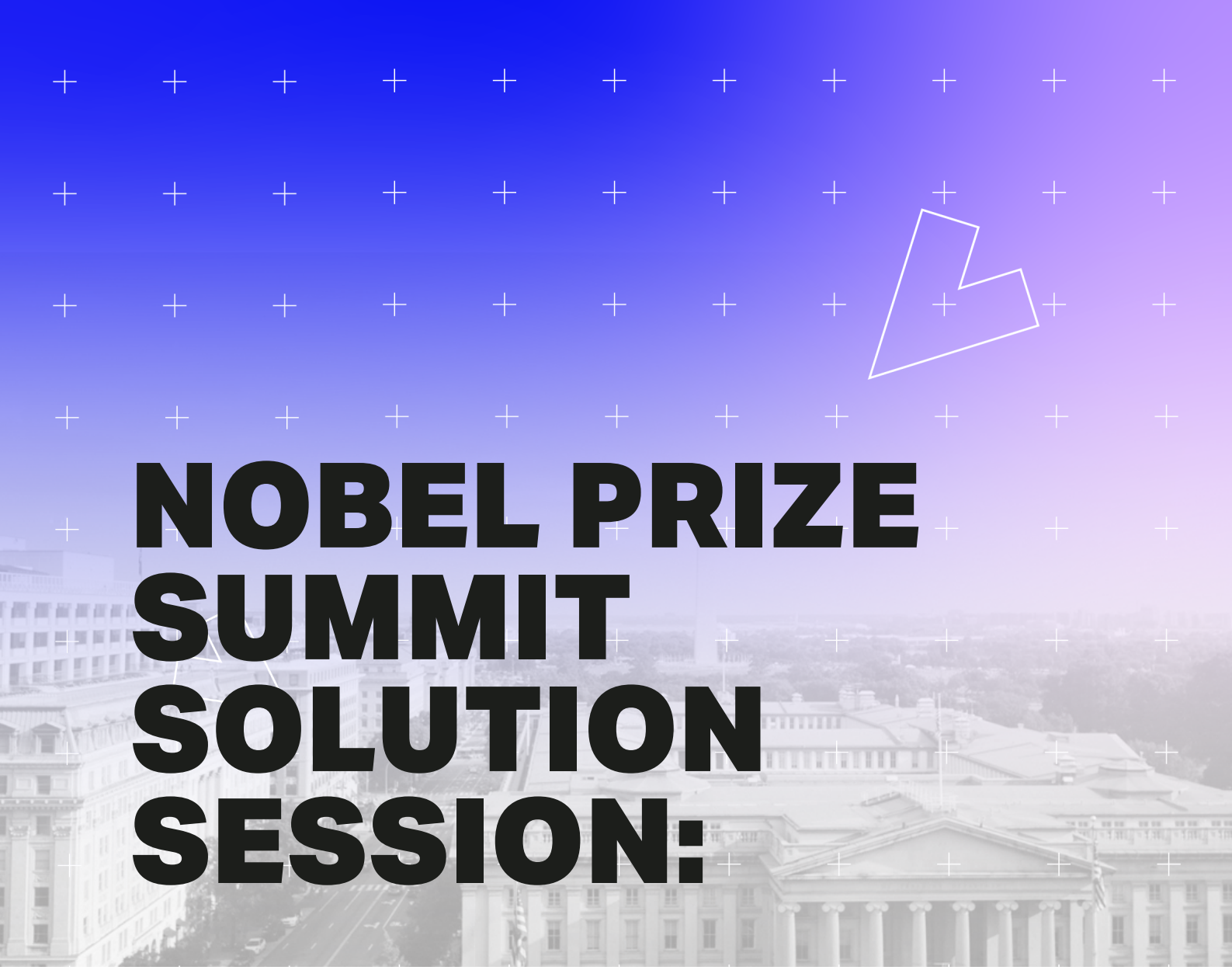

NOBEL PRIZE SUMMIT SOLUTION SESSION:

WORKSHOP ON DECEPTIVE DESIGN

JUNE 2023

Workshop summary report

MINDEROO CENTRE FOR TECHNOLOGY & DEMOCRACY

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Workshop Summary by Dr Ann Kristin Glenster, Minderoo Centre for Technology and Democracy

Minderoo Centre for Technology and Democracy

The Minderoo Centre for Technology and Democracy is an independent team of academic researchers at the University of Cambridge, who are radically rethinking the power relationships between digital technologies, society and our planet.

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ABOUT THE SESSION

Introduction

As one of the Solution Sessions at the Nobel Prize Summit 2023 in Washington D.C., the Minderoo Centre for Technology and Democracy at the University of Cambridge, the Transatlantic Consumer Dialogue (TACD), and the Electronic Privacy Information Center (EPIC) hosted a two-part workshop bringing together legislators, regulators, policymakers, academics, and representatives from civil society. In the spirit of the Summit's theme of 'truth, trust, and hope,' the purpose of the workshop was to identify and explore possible solutions to the problems of deceptive designs online.

The proliferation and sophistication of deceptive designs pose serious and pressing challenges for legislators, regulators, policymakers, and industry on both sides of the Atlantic Ocean. With the view of identifying solutions, this workshop discussed how the regulatory frameworks in the EU and the US can be used to protect consumers from deceptive designs online.

The background to the workshop was ongoing research on how to redress deceptive designs by Dr Ann Kristin Glenster of the Minderoo Centre for Technology and Democracy at the University of Cambridge. This research builds on the recent reports by the Organisation for Economic Cooperation and Development (OECD), the Federal Trade Commission (FTC), the European Consumer Organisation (BECU), and the European Commission.[1] While there is no universal definition of deceptive

[1] OECD (2022), "Dark commercial patterns", OECD Digital Economy Papers, No. 336, OECD Publishing, Paris, https://doi.org/10.1787/44f5e846-en; Federal Trade Commission, Bringing Dark Patterns into Light (Staff Report, September 2022); BEUC The European Consumer Organisation, "Dark Patterns" and the EU Consumer Law Acquis: Recommendations for better enforcement and reform (BEUC-X-2022-013 – 07/02/2022; European Commission, Directorate-General for Justice and

designs or 'dark patterns', the working definition for this workshop was taken from the OECD's report Dark Commercial Patterns, published in 2022:

> "Dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interface, 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."[2]

The purpose of the workshop was to gather contributions to the ongoing research which will culminate in a policy report on possible transatlantic regulatory principles and practices for deceptive designs, to be published by the Minderoo Centre for Technology and Democracy in the autumn of 2023.

The key takeaways were:

1. The elusive nature of the concept of deceptive designs makes it hard to pin down in specific and effective rules for regulatory enforcement action.
2. There is a lack of commercial incentives for business not to use deceptive designs.
3. Deceptive designs are problematic as they contribute to the overall erosion of trust in the online digital ecosystem.
4. The legal rules must be principle-based, technology neutral, and flexible.
5. Part of the solution can be found in an exchange of information between jurisdictions.

Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F.et al., Behavioural study on unfair commercial practices in the digital environment – Dark patterns and manipulative personalisation : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2838/859030.

[2] OECD supra note 1, p. 5.

WORKSHOP SUMMARY

The first part of the workshop was a public-facing panel moderated by Finn Lützow-Holm Myrstad from the Transatlantic Consumer Dialogue (TACD) with presentations by:

- Dr Ann Kristin Glenster, Senior Policy Advisor on Technology Governance and Law at the Minderoo Centre for Technology and Democracy at the University of Cambridge who gave an overview of the problems and challenges with deceptive designs for legislators, regulators, and consumers on both sides of the Atlantic Ocean.
- Dr Harry Brignull, Head of Innovation at Smart Pension and founder of deceptive.design who offered insights into why business incentives make deceptive designs so hard to eradicate from the online digital ecosystem.
- M.R. (Mark) Leiser, Professor of Digital, Legal and Platform Regulation at VU-Amsterdam and Legal Director of deceptive design who gave a summary of the European Union's legislative efforts to address deceptive designs.
- Kat Zhou, Senior Product Designer and creator of <Design Ethically> who offered additional insights into how technical design can be used to address deceptive designs.
- John Davisson, Director of Litigation & Senior Counsel at EPIC who presented case studies, illustrating how EPIC was able to use research by the Norwegian Consumer Council on Amazon's deceptive design practices in the context of the United States.

The panel discussion was followed by the second part of the workshop, which was an invite-only event with participants, including legislators, regulators, policymakers, academics, and representatives from civil society organisations.

This discussion was led by Dr Glenster who began by asking if barriers to effective regulatory measures against deceptive designs were due to:

> (a) Inadequate resources available to legislators, regulators, and courts, including technical expertise?
>
> (b) Difficulties obtaining evidence given that deceptive designs are often personalised in real-time and deceptive in nature, thereby 'tricking' consumers who may not have the means to capture these as evidence?
>
> (c) The pacing gap between rulemaking and rules coming into effect in which the designs have evolved to such an extent that the solution no longer fits the problem?
>
> (d) A lack of clarity of the rules, given that many facets of deceptive design are already covered by legal rules, but that these are scattered across the legal landscape, making coherent and consistent enforcement difficult? Or –
>
> (e) The elusiveness of the concept?

The discussion which followed addressed several of these questions, which can be summarised as five key takeaways.

KEY TAKEAWAYS

The following are the key takeaways from the workshop discussion:

1. **The elusive nature of the concept of deceptive designs makes it hard to pin down in specific and effective rules for regulatory enforcement action**.

The concept of deceptive designs must be broad to accommodate the plethora of its uses, yet the broadness also makes it difficult to pin down in a meaningful way in law. To frame the discussion, Dr Glenster cited the definition of 'dark commercial patterns' used by the OECD in her presentation.[3] However, this is just one of many taxonomies of deceptive designs or what is sometimes known as 'deceptive patterns' or 'dark patterns.'

Since Dr Harry Brignull coined the phrase 'dark patterns' in 2010 the concept has evolved, and many commentators now find the term 'deceptive designs' to be more accurate and more aligned with legislative and regulatory language. However, the use of the word deceptive is problematic as it not only comes with both legal technical and colloquial meanings, but also, these still do not fully capture the gamut of practices used to steer consumers online.

[3] OECD supra note 1.

Further, the use of the word deception in a legal context leads to thorny questions regarding intention and reasonable consumer expectations. Another key challenge with the notion of deceptive design is that deception is hard to evidence, particularly as designs are personalised and micro-targeted in real-time.

It is difficult to draw a line between marketing techniques that are merely persuasive and those that cross the line and become deceptive. As one workshop participant noted, these design practices are spread over a broad continuum, and it is difficult to pinpoint exactly when they become deceptive in a way that gives meaning in law. Persuasive design is not only acceptable but may also in many instances be desirable and many consumers want marketing that is tailored to their preferences and profiles. Thus, clear and enforceable, principle-based technology neutral legal rules are needed to set out the test for deception or illegal manipulation or steering of consumers in relation to deceptive designs and what action should be taken once designs meet that threshold.

One workshop participant referenced how the European Union's Digital Services Act (DSA) imposes requirements of risk assessments to ensure that vulnerable groups are not exploited through the use of deceptive design.[4] This designation of additional protection for certain groups however, is problematic as deception suggests that all consumers exposed to these designs are made vulnerable, especially as the design techniques often exploit personal psychological and cognitive vulnerabilities using personal data that has been obtained through the inescapable online commercial surveillance architecture. Hence, some workshop participants noted, with the personalisation of deceptive designs, it is difficult to determine what would qualify as a vulnerable or marginalised group.

[4] Recital 67 of the 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) (Text with EEA relevance) PE/30/2022/REV/1 OJ L 277.

Still, workshop participants highlighted the problems stemming from an absence of marginalised experiences when the rules concerning deceptive designs were interpreted and enforced, and how these absences often lead to systemic injustices and inequalities. Thus, as an overarching observation, one workshop participant noted that the term deception indicates that deceptive designs are inherently unfair.

The distinction between deceptive and acceptable persuasive marketing techniques becomes further complicated given that much of the harm from deceptive design derives from the aggregate effect of these designs where it is not one service provider or company's discrete use, but the cumulative impact of deceptive designs across the online digital ecosystem. The concept of deceptive designs is likely to become even harder to define as designs are integrated in haptic and sensory environments, metaverses, or other forms of augmented and virtual realities. One workshop participant also queried whether generative AI systems are inherently deceptive and therefore would fall under the rubric of deceptive designs. The same goes for artificial intelligence and automation.

Given these difficulties, there may be merit in considering alternative wordings, for example the term 'abusive' design.[5] Other jurisdictions deploy the term 'manipulative' designs.[6] Still, overall, workshop participants did not feel that there would be a great benefit in pinning down the concept of deceptive designs in law because the concept is too multi-faceted. A specific legal definition would therefore likely leave gaps in the law and could also risks violating the principle of technological neutrality in legislation and regulation. Instead, workshop participants asked for a flexible and pragmatic approach to the enforcement of legal and regulatory rules to address the proliferation of deceptive designs online.

[5] See for example the Consumer Financial Protection Bureau's (CFPB) Guidance to Address Abuse Conduct in Financial Markets.
[6] e.g. Norway.

2. **There is a lack of commercial incentives for business not to use deceptive design.**

As some of the panellists in the first part of the session explained, business reaps great financial reward from using deceptive designs, yet there are very few tangible economic incentives for businesses to change their models. The cost of eliminating deceptive designs cannot be justified without clear incentives. Many companies depend on the income generated from deceptive designs. Thus, solutions cannot only address the work of designers, but must cover the entire value chain, including the decisions and accountability at the executive level. It may also be a fruitful avenue of investigation to consider whether a wider range of actors, including online platforms, could be made accountable for the presence of deceptive designs online.

One workshop participant introduced the idea of affording consumers direct and automatic compensation, but this idea was largely seen as impracticable. In general, it was noted that fines often did not have the desired effect of changing practices, but that enforcement action requiring businesses also to delete data could offer a more persuasive incentive.[7] Compensation for financial losses or other damages caused by deceptive designs could also be effective as a deterrent. A requirement to delete the algorithm trained on the data could also be an effective measure to ensure compliance. Workshop participants also considered whether antitrust/competition law should play a greater role in combatting deceptive designs.

3. **Deceptive designs are problematic as they contribute to the overall erosion of trust in the online digital online ecosystem.**

The proliferation of deceptive design not only affect consumers, but also the overall trust individuals have in the digital online ecosystem. As such, deceptive

[7] See for example the European Data Protection Board, Binding Decision 1/2023 on the dispute submitted by the Irish SA on data transfers by Meta Platforms Ireland Limited for its Facebook service (Art. 65 GDPR), Adopted on 13 April 2023.

designs undermine societal trust, which is a democratic problem and makes it harder to address misinformation and disinformation online. Deceptive design techniques are not only used to sell services and products, but also to sell political ideas and content. Thus, the proliferation of deceptive designs is not only an issue for consumer protection but also an issue of the protection of rights of citizens, particularly as these designs are included in designs used to extract data or steer conduct by public actors, from law enforcement to social welfare agencies.

4. **The legal rules must be principle-based, technology neutral, and flexible.**

The workshop participants did not believe that more detailed legal rules would offer a robust solution to the proliferation of deceptive designs. There were concerns that detailed rules would quickly become outdated or too narrow or technical to be useful. Instead, workshop participants advocated for a principle-based, technology neutral approach, flexible approach. There was a general view that there was a need for effective enforcement mechanisms, which would require a clarification of existing rules and regulatory frameworks.

One workshop participant presented a framework for classifying deceptive design according to harm as a way to design enforcement rules. Other workshop participants were concerned with finding solutions that would work upstream and did not depend on individual instances of harm but rather ensured that these designs were not present in the online digital ecosystems at all.

5. **Part of the solution can be found in an exchange of information between jurisdictions.**

Workshop participants particularly identified the benefit of regulators and courts sharing information about enforcement actions. The example of the use of EPIC of the Norwegian Consumer Council's research to inform enforcement action pursued in a different jurisdiction was drawn upon as a positive example of the

benefits of knowledge-exchange.[8] There was an appetite, if not yet clarity on the path, for the sharing of information in a more formal or structured way so that civil society and regulators in one jurisdiction could argue for enforcement actions using examples from other jurisdictions. As explained by workshop participants, pointing to a specific example in one country of illegal deceptive design by a specific company could help civil society and regulators take action against the same company in their own jurisdiction, thereby changing overall company' practices and strengthening consumer protection globally.

Conclusion

While the workshop did not reach consensus around a single solution, participants identified a need for clarification of the existing regulatory regimes, greater resources for enforcement, and more knowledge and understanding of deceptive designs and how they are being addressed around the globe. The solution is likely to be multifaceted, where legislation and new regulatory rules may form part of the answer. Fundamentally, the workshop participants noted a societal need for the humanisation of systems, redressing the imbalance between individuals and the technical environment which amplifies designs and their impact on an inhuman scale. Thus, in order for the solution to deliver on the Nobel Prize Summit's vision for a future of truth, trust, and hope, the regulation of the online digital ecosystem must be underpinned by a commitment to human-centric design.

[8] The FTC has decided now decided to take legal action against Amazon < https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their>

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