

Dark Patterns and Competition Policy (1)

- There are concerns about dark patterns from the perspective of competition policy, which aims to maintain and promote fair and free competition among business operators, as follows.
 - For example, the use of the following dark patterns may hinder competition on merit focused on the price and quality of goods or services, potentially distorting consumers' ability to make appropriate choices.
 - Cases in which customers are misled into believing that products or services are superior or advantageous in terms of transaction-related matters (*), due to factors such as:
 - “hidden information” (②), in which important data for customers' product selection—especially information that is disadvantageous to them—is not displayed;
 - “activity messages” (⑩), which falsely indicate that products are in high demand or rare; or
 - “low stock message” (⑪), which creates a misleading sense of urgency by falsely suggesting that products are in limited supply.
 - Cases in which consumers are misled about matters related to transactions of goods, etc., even though they do not necessarily fall under the category of misperception of superiority or advantage, such as “disguised ads” (④) and “bait and switch” (⑨).
 - Cases in which consumers are induced to make a certain choice, even though it cannot be deemed as misleading them regarding matters related to transactions of goods, etc., such as “confirmshaming,” “toying with emotion” (⑤), and “nagging” (⑥).
 - Cases in which consumers are forced to purchase items they do not need, such as “sneak into basket” (⑧).

(*) Unjustly inducing customers of a competitor to trade with oneself by causing them to misunderstand that the substance of goods or services supplied by oneself, or its trade terms, or other matters relevant to the trade are much better or much more favorable than the actual ones or than those pertaining to the competitor. (Paragraph 8, Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982))

Note: The numbers in the circle correspond to “Example of Dark Pattern Practices” on page 5.

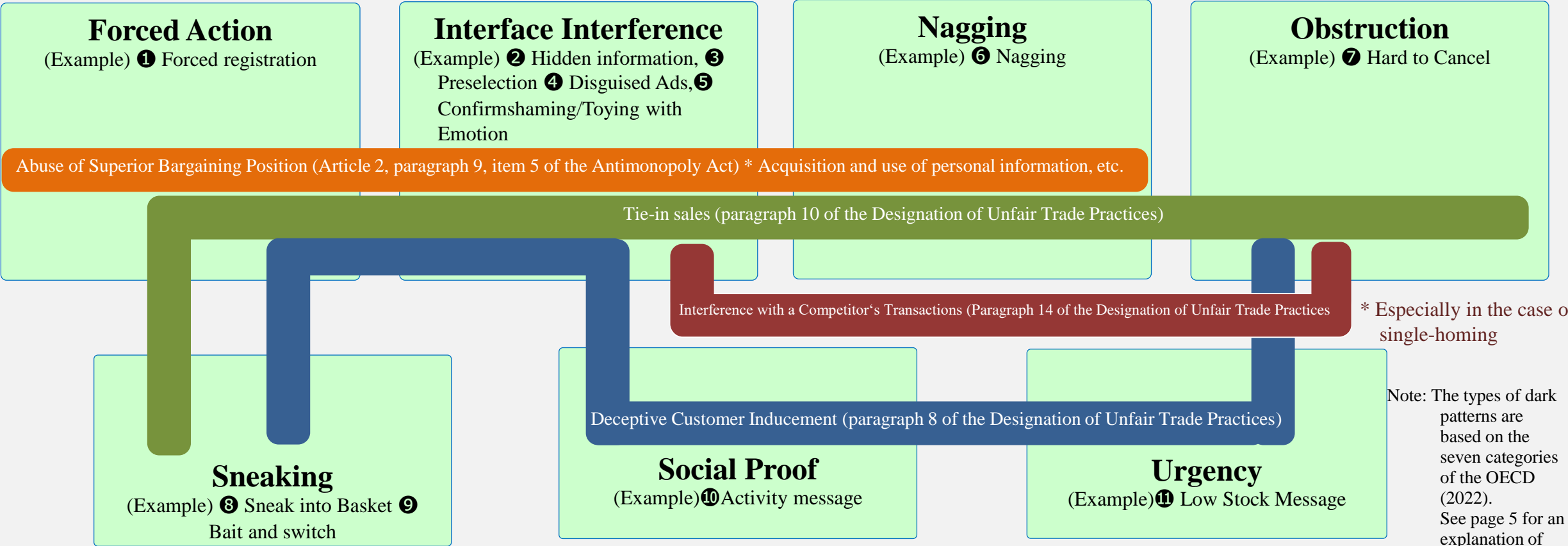
Dark Patterns and Competition Policy (2)

- Could the use of dark patterns reduce transaction opportunities for competitors? For example, a “**hard to cancel**” (⑨) may prevent customers from moving to competitors, particularly when many customers use only one service (single homing).
- Is there a possibility that a dominant firm could use dark patterns to leverage its position to gain market power in a related market? (OECD (2022)) (* *) (For example, a business operator with a dominant position in a particular market may effectively force consumers to select its products in other markets through “**preselection**” (③)).

(**) OECD "Dark Commercial Patterns, OECD Digital Economy Papers, No. 336"
- Is there a possibility that digital platform operators, which hold a superior position over consumers who provide personal data, may use dark patterns to inhibit transactions based on the free and independent judgment of consumers, who are the other parties to the transactions, and to gain a competitive advantage over their competitors? (For example, they may acquire personal data against the will of consumers beyond the scope necessary to achieve the intended purpose through “**forced registration**” (①)).

Types of Acts Prohibited by the Antimonopoly Act That May Be Applicable to Dark Patterns

- The relationship between the types of dark patterns and the types of acts prohibited by the Antimonopoly Act that may be applicable to dark patterns is summarized below.



* Whether a specific act by a business operator using dark patterns violates the Antimonopoly Act shall be determined on a case-by-case basis in light of the provisions of the Act.

* The above figure illustrates the main provisions of the Antimonopoly Act that may be applicable to each type of dark pattern. However, depending on the specific case, other provisions not listed in the figure, such as private monopolization (Article 3 of the Antimonopoly Act), may also apply.

* Regarding the types of dark patterns to which multiple provisions of the Antimonopoly Act are applicable in the above figure, not all of these provisions are applicable to all practices belonging to the types (for example, it is considered that it is unlikely that the following practices exemplified in “Interface Interference” will be applied: ② Hidden Information and ④ Disguised Ads: Tie-in sales (paragraph 10 of the Designation of Unfair Trade Practices) and Interference with a Competitor’s Transactions (paragraph 14 of the Designation of Unfair Trade Practices)).

* There are also dark pattern techniques that are considered to be unlikely to be subject to the provisions of the current Antimonopoly Act (for example, ⑤ Confirmshaming/Toying with Emotion).

Direction of Future Responses

It is necessary to further examine competition policy and the Antimonopoly Act against dark patterns, taking into account trends in domestic and foreign regulations and the actual use of dark patterns. The issues to be considered in this context include (i) the degree of impact of dark patterns on market competition and (ii) the scope of application of each practice type prohibited by the Antimonopoly Act to various acts considered as dark patterns.

[Reference 1] Definition of Dark Patterns

There are various definitions of dark patterns. For example, the OECD (2022) describes the definition of dark patterns as follows.

"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."

[Reference 2] Main Japanese Laws and Regulations That May Be Related to Dark Patterns Other Than the Antimonopoly Act

Regulations on Consumer Protection	Regulations on the Protection of Personal Information	Regulations by Business Field
Act on Specified Commercial Transactions (Indication When Receiving a Specified Offer (Article 12-6)) Act against Unjustifiable Premiums and Misleading Representations (Prohibition of Misleading Representations (Article 5)) Consumer Safety Act (Consumer Alerts)	Act on the Protection of Personal Information (Proper acquisition of personal information (Article 20), Prohibition of Inappropriate use of personal information (Article 19), Restriction Due to Purpose of use use of personal information (Article 18, etc.) etc.)	Telecommunications Business Law (Explanation of Terms and Conditions for the Provision of Services(Article 26), Notification Concerning Information Transmission Order Communications) (Article 27-12))
[Examples of dark pattern types that may be relevant] Interface interference, Sneaking, Social proof, Urgency	[Examples of dark pattern types that may be relevant] Forced action, Interface interference, Nagging, Obstruction etc.	[Examples of dark pattern types that may be relevant] Interface interference, Sneaking etc.

[Reference 3] Some Examples of Dark Patterns Seen on Websites and Others

Forced action

Acts of forcing consumers to subscribe to a membership or disclose personal information (e.g., age and gender) that is unnecessary for purchasing or viewing products.



- <<Example of Dark Pattern Practices>>
- ① “Forced registration” – The act of forcing a consumer to create an account or share information in order to complete a task.

Interface interference

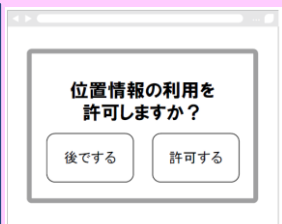
Acts that visually highlight options that are convenient for the business operator or obscure important information for the consumer.



- <<Example of Dark Pattern Practices>>
- ② “Hidden information” – Visually obscuring important information.
 - ③ “Preselection” – Preselection of a default that is advantageous to the business operator.
 - ④ “Disguised ads” – Inducing users to click on an advertisement that is not clearly identified as an advertisement.
 - ⑤ “Confirmshaming” or “Toying with emotion” – Using emotional manipulation to pressure consumers into making a specific choice.

Nagging

Requests made repeatedly to consumers to take actions that are convenient for the business operator, such as notification and location information settings.



- <<Example of Dark Pattern Practices>>
- ⑥ “Nagging” – Repeatedly requesting a consumer to take actions that are convenient for the business operator, such as setting notifications and location information.

Obstruction

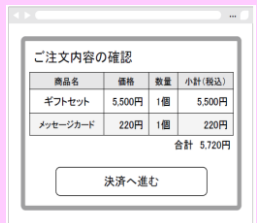
Acts that obstruct consumer behavior and choices, such as making registration easy but cancellation difficult, or complicating the process of changing settings to enhance privacy.



- <<Example of Dark Pattern Practices>>
- ⑦ “Hard to cancel” – Making it easy to sign up but difficult to cancel by requiring a cumbersome and time-consuming cancellation procedure.

Sneaking

Acts such as adding non-selected items to shopping baskets without the consent of consumers, adding new fees at the final stage of transactions, or automatically moving to subscription purchase after a trial period.



- <<Example of Dark Pattern Practices>>
- ⑧ “Sneak into Basket” – Adding items to a shopping cart without a customer’s consent.
 - ⑨ “Bait and Switch” – Advertising certain products or prices but offering different ones to customers.

Social proof

Acts of including false information or misleading expressions in indications of consumer behavior or statements, such as the number of current site visitors, purchase record, or product reviews.



- <<Example of Dark Pattern Practices>>
- ⑩ “Activity Message” – Displaying other customers’ behavior and interest in a product on the site (which may be false).

Urgency

Acts of emphasizing the rarity of a product by displaying “Stock is running low” or a countdown timer that announces the end of a sale.



- <<Example of Dark Pattern Practices>>
- ⑪ “Low Stock Message” – Indicating that the quantity of goods is limited (which may be false).

(Source)
[7 Explanatory text and figures of the types]
2024 White Paper on Consumers in Japan
(Prepared by the Consumer Affairs Agency with reference to the OECD (2022))
[Example of dark pattern practices ①～⑪]
Prepared by the Secretariat of the Competition Policy Research Center
(Prepared with reference to OECD (2022), “Bringing Dark Patterns to Light” by the U.S. Federal Trade Commission, and “Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation: final report” by the European Commission)