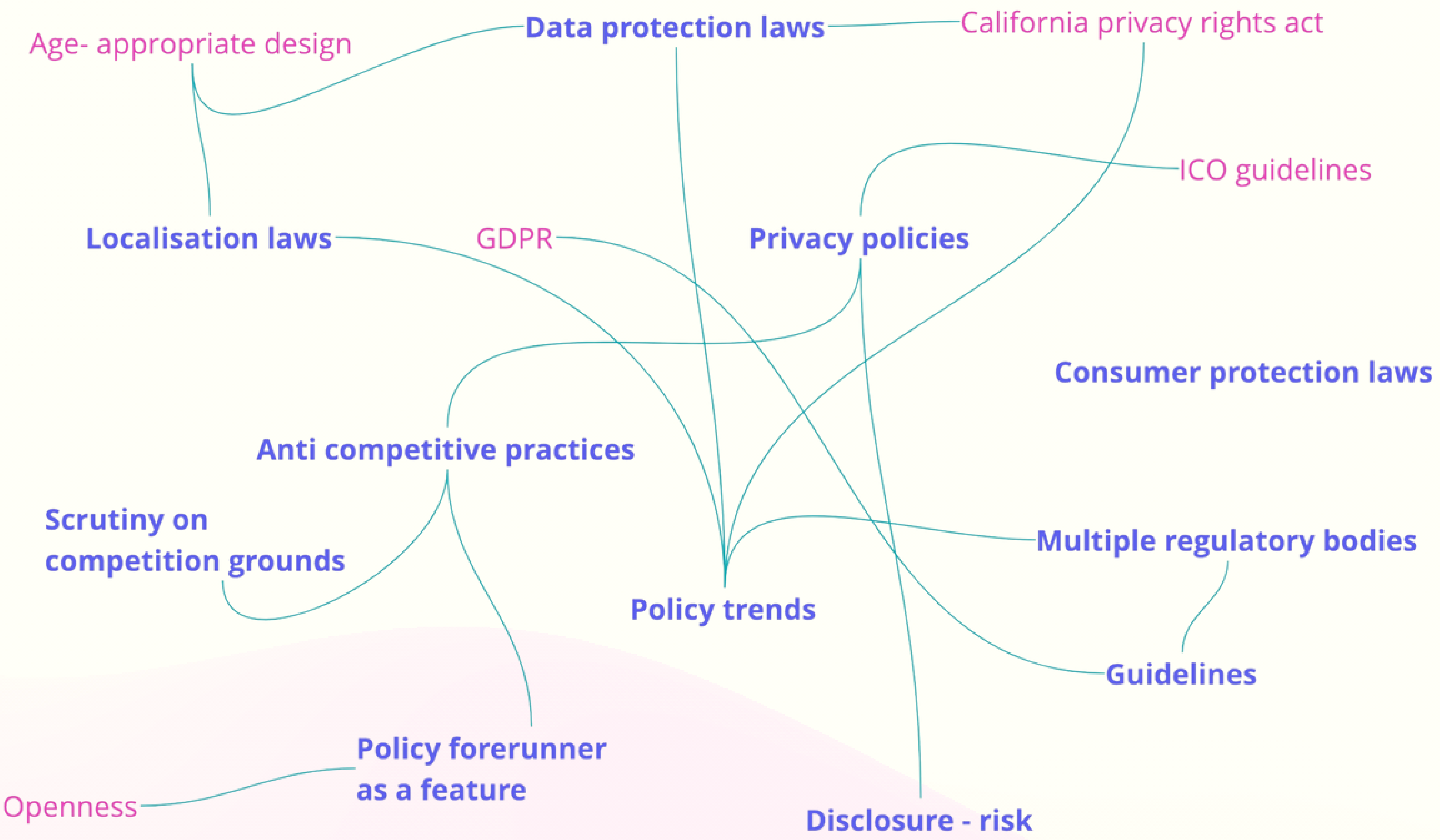
06 Where Regulation meets Design

Concept mapping



Where Regulation meets Design

Deceptive design has moved beyond being just a design question. It is increasingly on the agenda of regulators worldwide.

Regulators are concerned about deceptive design

2022 marked a watershed moment for policymaking around deceptive design worldwide. The EU's Digital Markets Act and America's Federal Trade Commission both took notice of the various harms caused by deceptive design to consumers, digital markets and the digital economy at large. At the US federal level, the Federal Trade Commission indicated interest in regulating the use of dark patterns and held a public workshop on the topic in April 2021 in an effort to evaluate the issue and its impact on consumers and chart the course for future regulation. In its public release, the FTC has clearly stated that it is "ramping up its enforcement in response to a rising number of complaints about the financial harms caused by deceptive sign up tactics, including unauthorised charges or ongoing billing that is impossible to cancel."

Consumer protection agencies including those in the Netherlands, Australia, California and U.K have also begun to publish empirical work and reports which document the voice of consumers on how they have been tricked, manipulated, coerced or suffered financial or data loss. These reports show increasing evidence from across countries on how deceptive design ultimately undermines trust and may lead to long-term consequences for digital businesses as well. There is also a rise in academic literature which presents evidence of the harms of deceptive design online. They also provide important evidence for regulators and policymakers across the world to work on regulatory mechanisms to tackle deceptive design.

The data protection moment for deceptive design?

With increased evidence and regulatory awareness around the issue, digital design including UI/UX, online consent architectures and interface design are likely to become regulatory issues. Just as data protection laws across the world dictate what companies can do with digital data, policy is likely to soon dictate the limits of interface and consent design among others. Some early examples of this include the EU's discussion paper on online choice architecture, the FTC's staff report titled 'Bringing dark patterns to light' the UK's Age Appropriate Design Code.

As the regulatory focus towards consumer protection online, spanning from ecommerce to fintech increases, we are likely to see a slew of new guidelines worldwide which seek to protect communities and vulnerable user groups which are likely to be more affected by deceptive design practices. Some of these are likely to act as regulatory mandates for companies to implement as a part of their product development process in order to be legally compliant.

UK's Age Appropriate Design Code

An early example of regulatory attention was the UK's Age Appropriate Design Code released by the UK Information Commissioner's Office in 2019. The code, companies were expected to adopt within 12 months, lays out guidelines for products and services which children (defined as aged below 18 years) are "likely" to use. The code applies to connected toys and games and edtech but also online retail and for-profit online services such as social media and video sharing platforms. The code stipulates that such services must adopt "high privacy" settings by default, including keeping geolocation and profiling off by default. The code also warns app makers to avoid using "nudge techniques" to push children to provide "unnecessary personal data or weaken or turn off their privacy protections."

California Privacy Rights Act: Consent through deception legally invalid

In March 2021, California adopted the Consumer Privacy Rights Act which proposes amendments to the California Consumer Privacy Act. The Consumer Privacy Rights Act prohibits the use of deceptive user interfaces that have "the substantial effect of subverting or impairing a consumer's choice to opt-out". The Consumer Privacy Rights Act defines a "dark pattern" as "a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation." Finally, the law directs that a business obtaining consumer consent to such sale or sharing of consumer personal data "does not make use of any dark patterns”.

Most importantly, the California Privacy Rights Act adds a new definition of "consent" which explicitly states that "Agreement obtained through the use of dark patterns does not constitute consent."

Consumer Protection Guidelines for Fintech Companies

In 2019, a Princeton University study of 11,000 shopping websites and over 53,000 product pages found over 1,800 instances of deceptive design patterns, costing consumers an estimated $1.9 billion per year. Consumer protection agencies too are developing guidelines for fintech companies and banks to ensure that users are not nudged to buy products, or make financial decisions which may be to their detriment, especially vis-a-vis digital lending and loan apps. These efforts will help tackle financial harms which result from deceptive design, and secure consumers while transacting in the digital economy.

Stay ahead of the curve to gain an early-mover advantage

In many ways the movement towards regulating deceptive design practices mirrors the early stages of data protection regulation before the GDPR was passed. Designers, teams and organisations that are early adopters of responsible design practices will gain an early-mover advantage and contribute to setting the industry standard by evolving design best practices. Designers and teams also have the opportunity to actively engage in this conversation and contribute to shaping the movement towards responsible digital design.

We also believe that adopting responsible design practices from the get-go can help a company in numerous ways. Not only does user-centricity and privacy become closely associated with the company brand itself, it also holds the key to building long term trust with consumers.

Stay ahead of the curve by adopting practices which balance business with consumer safety.