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CONSENT MANAGEMENT PLATFORMS UNDER THE GDPR: PROCESSORS AND/OR CONTROLLERS?



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“CONSENT AS A SERVICE” & CONSENT MANAGEMENT PROVIDERS



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- Personalised ads, and ad measurement

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Cookie declaration

Necessary (3) Necessary cookies help make a website usable by enabling basic functions like our maps and your cookie consent. The website cannot function properly without these cookies.

Name	Provider	Purpose	Expiry	Type
CookieConsent	Cookiebot	Stores the user's cookie consent state for the current domain	1 year	HTTP
ARRAffinity	Snazzy Maps	Used to distribute traffic to the website on several servers in	Session	HTTP

Cookie declaration last updated on 17/05/2021 by [Cookiebot](#)

QUANTCAST & ONETRUST

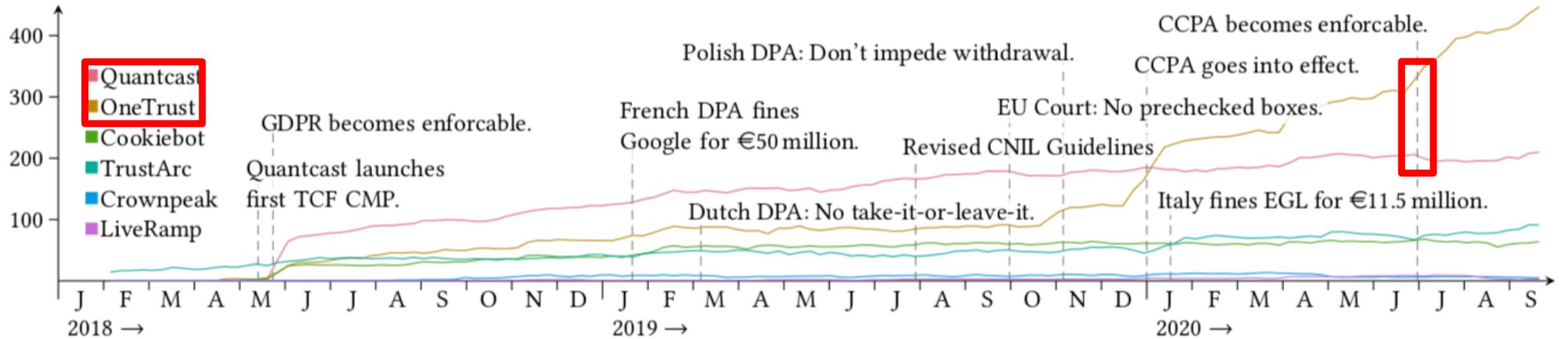


Figure 6: Number of websites in the Tranco 10k toplist that embed a CMP. We include a non-exhaustive timeline of events with relevance to the GDPR and the CCPA.

Measuring the Emergence of Consent Management on the Web. Hils, M., Woods, D.W., and Böhme, R. *Internet Measurement Conference (IMC'20)*.

CONTROLLERS AND/OR PROCESSORS?

Art. 4 GDPR Definitions

- (7) 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
- (8) 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

OUR METHOD

- Are **CMPs data processors**?

- Very likely! CMPs follow instructions of website owners!



- But when are **CMPs data controllers**?

- **Legal analysis** on how to apply “determines the purposes and means of processing” in practice
- **Empirical data** gathered on our website by deploying Quantcast and OneTrust
- **4 scenarios describing that CMPs are controllers**, for each:
 - ✓ Technical description of a scenario detected on real CMPs
 - ✓ Legal analysis



CMP: CONTROLLERS



Determination: refers to having **decision-making power** over purposes and means:

- ✓ **professional competence** (legal or implicit) (EDPB)
- ✓ **influence** based on facts, circumstances of the processing (e.g. contract, real interactions) (EDPB)
- ✓ **image given to data subjects** and their reasonable expectations on the basis of this visibility (EDPB)
- ✓ **who “organizes, coordinates and encourages”** data processing (CJEU)
- ✓ **interpretation or judgment** to perform a professional service (ICO)



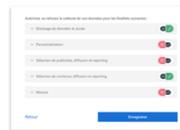
Purposes



Means



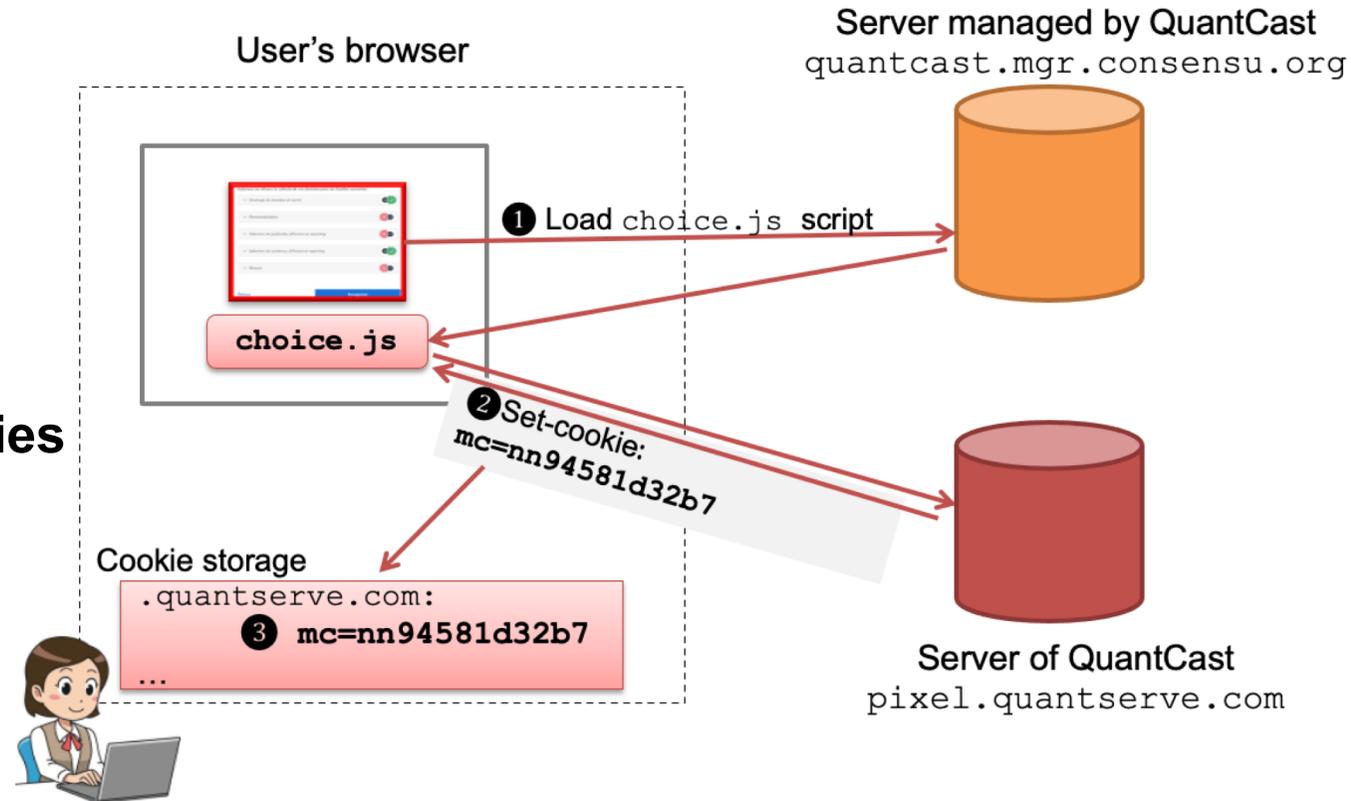
Essential means (reserved only to the controller)
Eg: i) type data processed, ii) users, iii) duration, vi) recipients



Non-essential means (can be delegated to the processor)
Eg: i) type of hardware or software, ii) security measures, iii) methods to store or retrieve data

WHEN ARE CMPS DATA CONTROLLERS?

1. Include additional processing activities
2. Scan and sort tracking technologies
3. Control third-party vendors
4. Deploy dark patterns

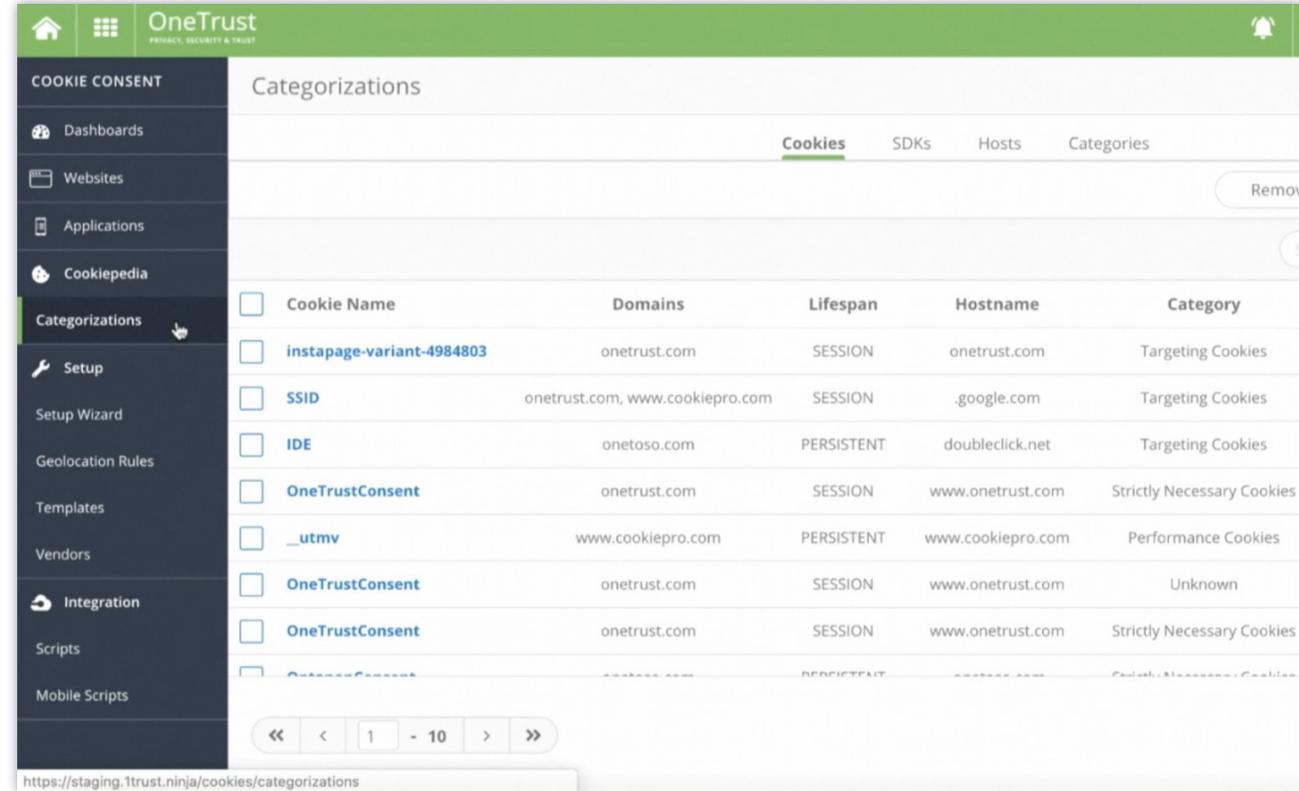


Conclusion

- The tracking cookie enables a CMP to process data for its **own tracking and measurement purposes**, regardless of any instructions from the publisher, nor from the specifications of the IAB Europe TCF
- We observed factual circumstances that demonstrate the **decision-making power of the CMP**

WHEN ARE CMPS DATA CONTROLLERS?

1. Include additional processing activities
- 2. Scan and sort tracking technologies**
3. Control third-party vendors
4. Deploy dark patterns



The screenshot shows the OneTrust interface for managing cookie consent. The left sidebar contains navigation options: COOKIE CONSENT, Dashboards, Websites, Applications, Cookiepedia, Categorizations (selected), Setup, Setup Wizard, Geolocation Rules, Templates, Vendors, Integration, Scripts, and Mobile Scripts. The main content area is titled 'Categorizations' and has tabs for Cookies, SDKs, Hosts, and Categories. A table lists various cookies with columns for Cookie Name, Domains, Lifespan, Hostname, and Category. The table includes cookies like 'instapage-variant-4984803', 'SSID', 'IDE', and 'OneTrustConsent'.

<input type="checkbox"/>	Cookie Name	Domains	Lifespan	Hostname	Category
<input type="checkbox"/>	instapage-variant-4984803	onetrust.com	SESSION	onetrust.com	Targeting Cookies
<input type="checkbox"/>	SSID	onetrust.com, www.cookiepro.com	SESSION	.google.com	Targeting Cookies
<input type="checkbox"/>	IDE	onetoso.com	PERSISTENT	doubleclick.net	Targeting Cookies
<input type="checkbox"/>	OneTrustConsent	onetrust.com	SESSION	www.onetrust.com	Strictly Necessary Cookies
<input type="checkbox"/>	_utmv	www.cookiepro.com	PERSISTENT	www.cookiepro.com	Performance Cookies
<input type="checkbox"/>	OneTrustConsent	onetrust.com	SESSION	www.onetrust.com	Unknown
<input type="checkbox"/>	OneTrustConsent	onetrust.com	SESSION	www.onetrust.com	Strictly Necessary Cookies
<input type="checkbox"/>	OneTrustConsent	onetrust.com	PERSISTENT	www.onetrust.com	Strictly Necessary Cookies

Conclusion

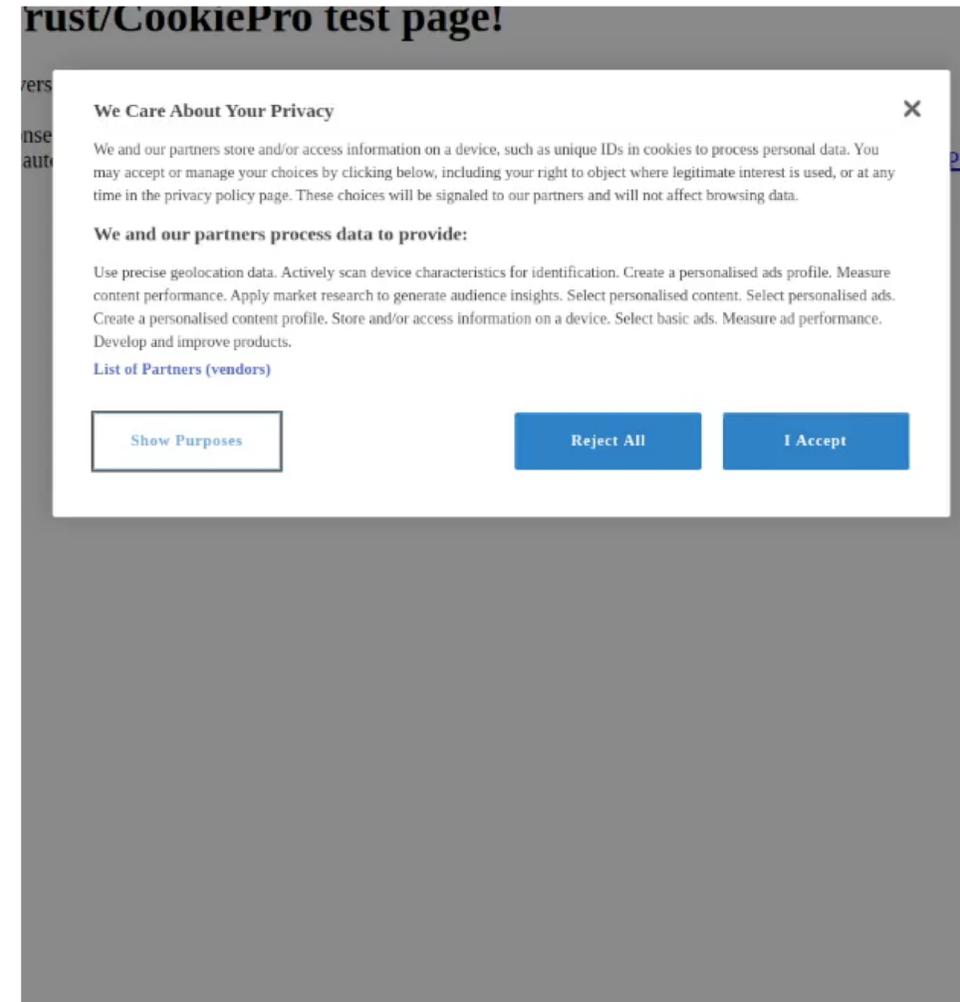
- By providing additional services of scanning and presorting tracking technologies into pre-defined purposes, CMPs **contribute to the definition of purposes**
- We observed factual circumstances that demonstrate the **decision-making power of the CMP**

WHEN ARE CMPS DATA CONTROLLERS?

1. Include additional processing activities
2. Scan and sort tracking technologies
- 3. Control third-party vendors**
4. Deploy dark patterns

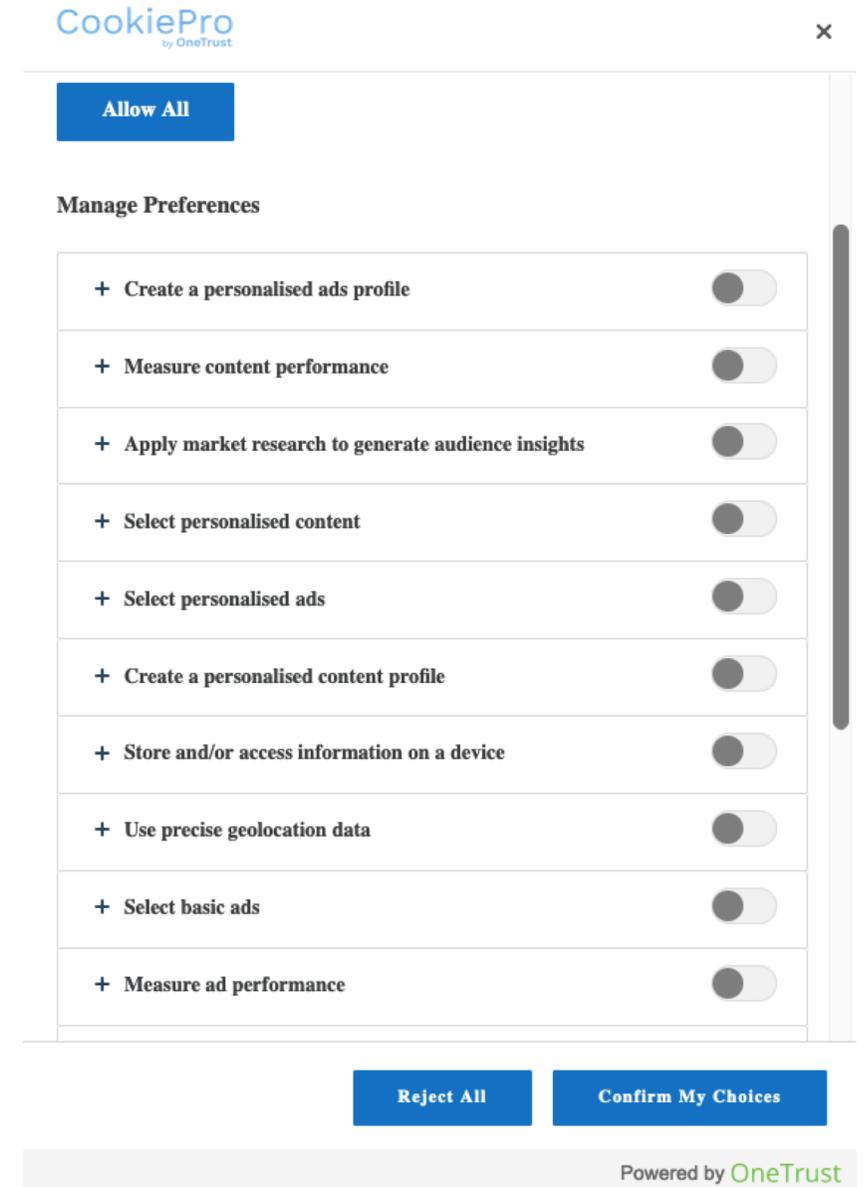
Conclusion

- CMPs are in a position to restricting the ability of the publisher to (de)select vendors
- With such factual decision-making power over the display of purposes rendered to users, it can be observed that CMPs **exert influence over the determination of purposes**



WHEN ARE CMPS DATA CONTROLLERS?

1. Include additional processing activities
2. Scan and sort tracking technologies
3. Control third-party vendors
4. **Deploy dark patterns**



The screenshot displays the CookiePro interface, which includes a close button (X) in the top right corner. A prominent blue button labeled "Allow All" is positioned at the top left of the main content area. Below this, the "Manage Preferences" section is visible, containing a list of ten items, each with a plus sign icon and a toggle switch. All toggle switches are currently turned off. At the bottom of the interface, there are two blue buttons: "Reject All" and "Confirm My Choices". A footer at the bottom right of the interface states "Powered by OneTrust".

Preference	Toggle Status
+ Create a personalised ads profile	Off
+ Measure content performance	Off
+ Apply market research to generate audience insights	Off
+ Select personalised content	Off
+ Select personalised ads	Off
+ Create a personalised content profile	Off
+ Store and/or access information on a device	Off
+ Use precise geolocation data	Off
+ Select basic ads	Off
+ Measure ad performance	Off

WHEN ARE CMPS DATA CONTROLLERS?

When they deploy dark patterns

- provide banners with dark patterns by default to websites
- choose how exactly those purposes are presented to the end-user
- including dark patterns increases consent optimization rate, which goes beyond their primary goal.

Conclusion

- Image given to data subjects and their reasonable expectations
- Who “organizes, coordinates and encourages” data processing

The screenshot shows a CookiePro consent banner with the following elements:

- Top level of the page: easily accessible "Allow All"**: A blue button labeled "Allow All" is positioned at the top left of the banner.
- Bottom of the screen: hardly accessible "Reject All" and "Confirm My Choices"**: Two blue buttons, "Reject All" and "Confirm My Choices", are positioned at the bottom right of the banner.
- Manage Preferences**: A section containing a list of 11 consent options, each with a toggle switch. The options are: "Create a personalised ads profile", "Measure content performance", "Apply market research to generate audience insights", "Select personalised content", "Select personalised ads", "Create a personalised content profile", "Store and/or access information on a device", "Use precise geolocation data", "Select basic ads", and "Measure ad performance".
- DARK PATTERNS**: A red box highlights the "Reject All" and "Confirm My Choices" buttons, with a list of associated dark patterns: "Obstruction", "False Hierarchy", and "Sneaking".

RECOMMENDATIONS FOR POLICY MAKERS



- **Concepts of controller and processor** in the GDPR need to be clarified
 - on defining purposes in practice: CMP may be co-responsible for determining purposes
 - on the role of deploying dark patterns by CMPs
 - on the contractual agreement between publishers and CMPs
- Guidelines needed on “**provision of services**” for data processors
- DPAs should **scale up auditing of CMPs**: some analysis is possible for
 - the presence or absence of certain consent options (e.g., a reject button)
 - interaction flows (e.g., number of clicks to access an option)
 - default settings (e.g., checked or unchecked choices)
- **Proof of consent validity** still cannot be audited at scale
- Guidance needed on **validity of pre-registration of vendors**: consent today is being collected for *future and unforeseen potential processing*

We hope that policy makers take our arguments into account!

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