# Consent management platforms under the GDPR: processors and/or controllers?

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

Cristiana Santos

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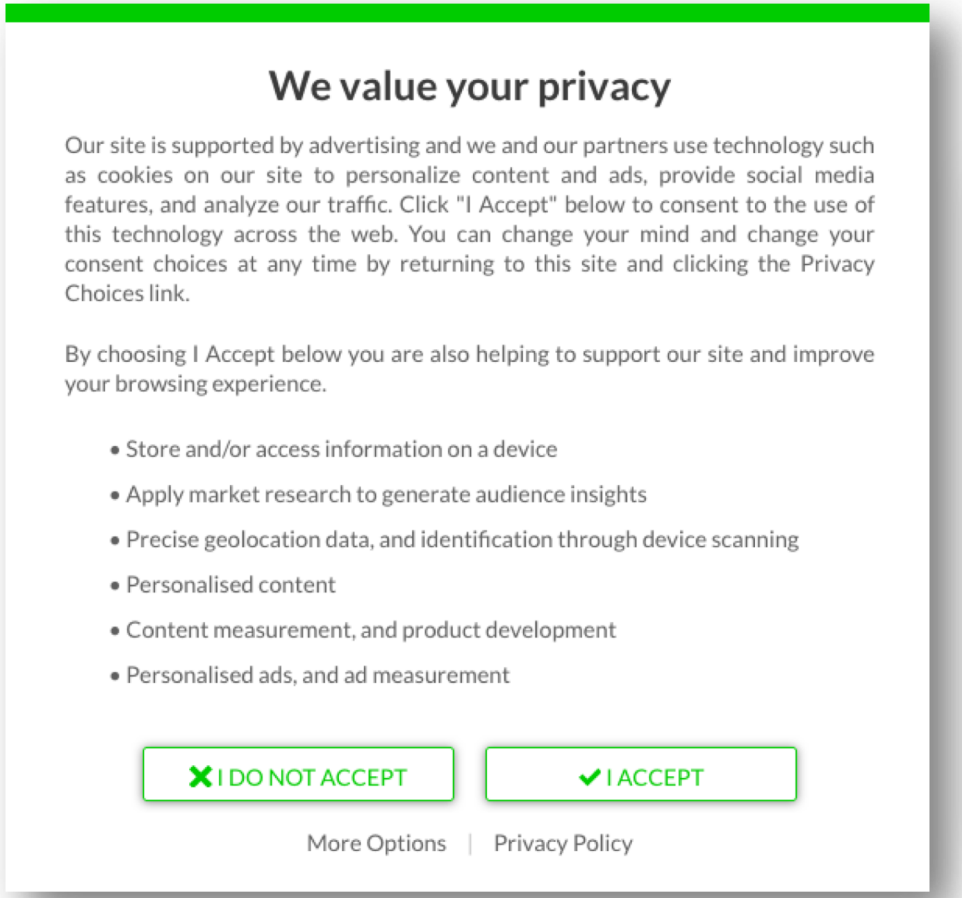
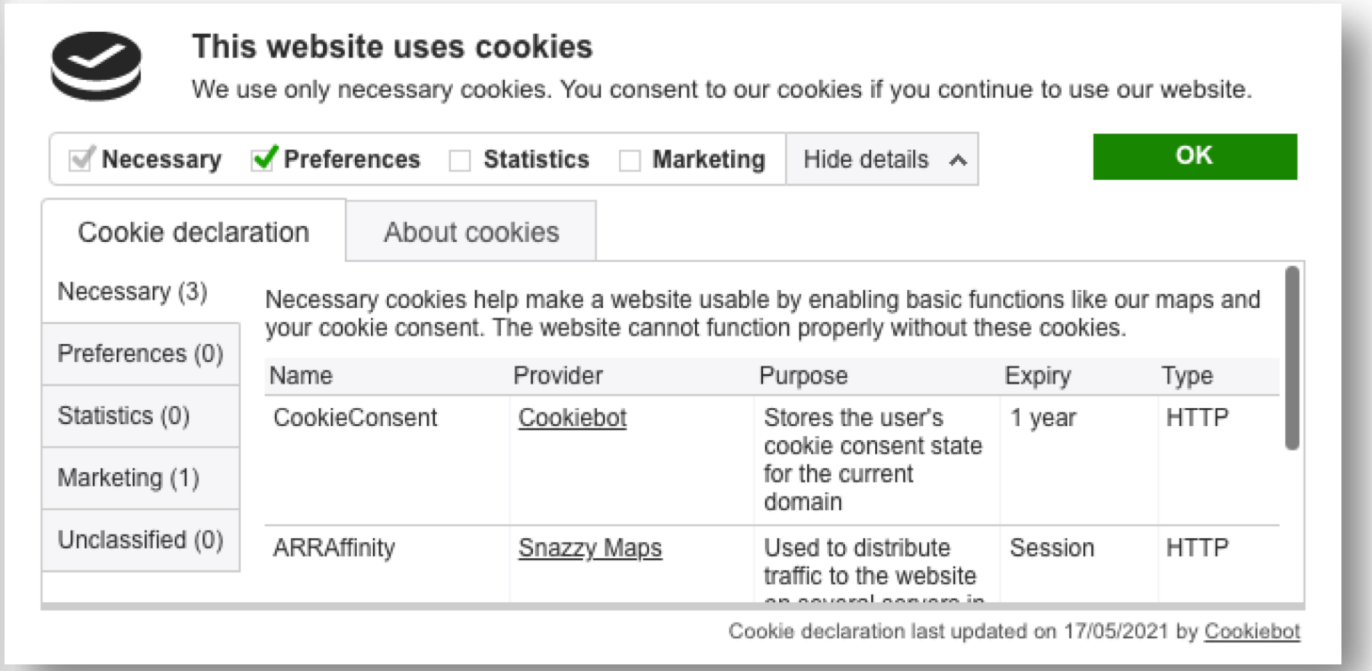
Michael Toth

Nataliia Bielova

Vincent Roca

# ‘’CONSENT AS A SERVICE’’ & CONSENT MANAGEMENT PROVIDERS



# QUANTCAST & ONETRUST

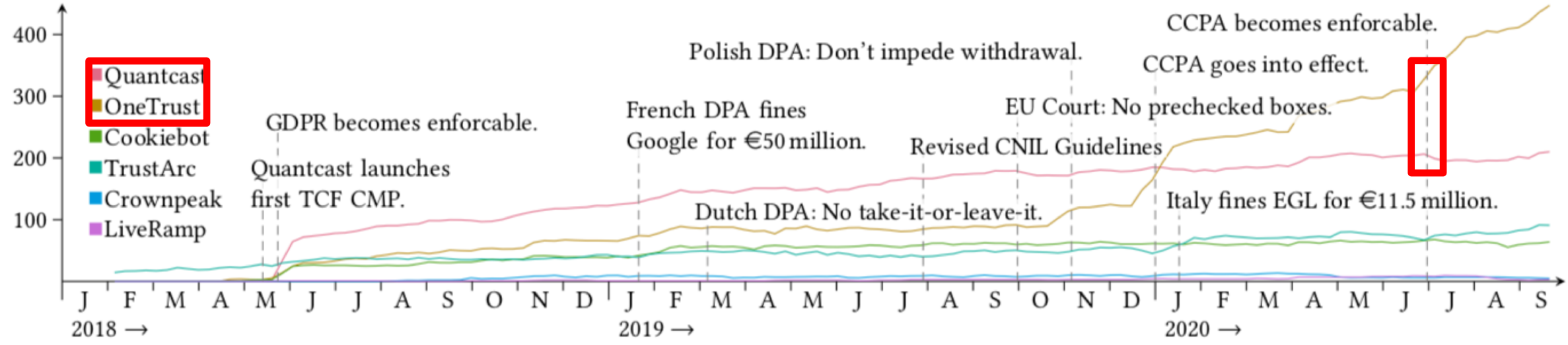



**Figure 6: Number of websites in the Tranco 10k toplist that embed a CMP. We include a non-exhaustive timeline of events with relevance to the GDPR and the CCPA.**

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

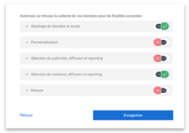
**Determination**: refers to having **decision-making power** over purposes and means:

- ✓ **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

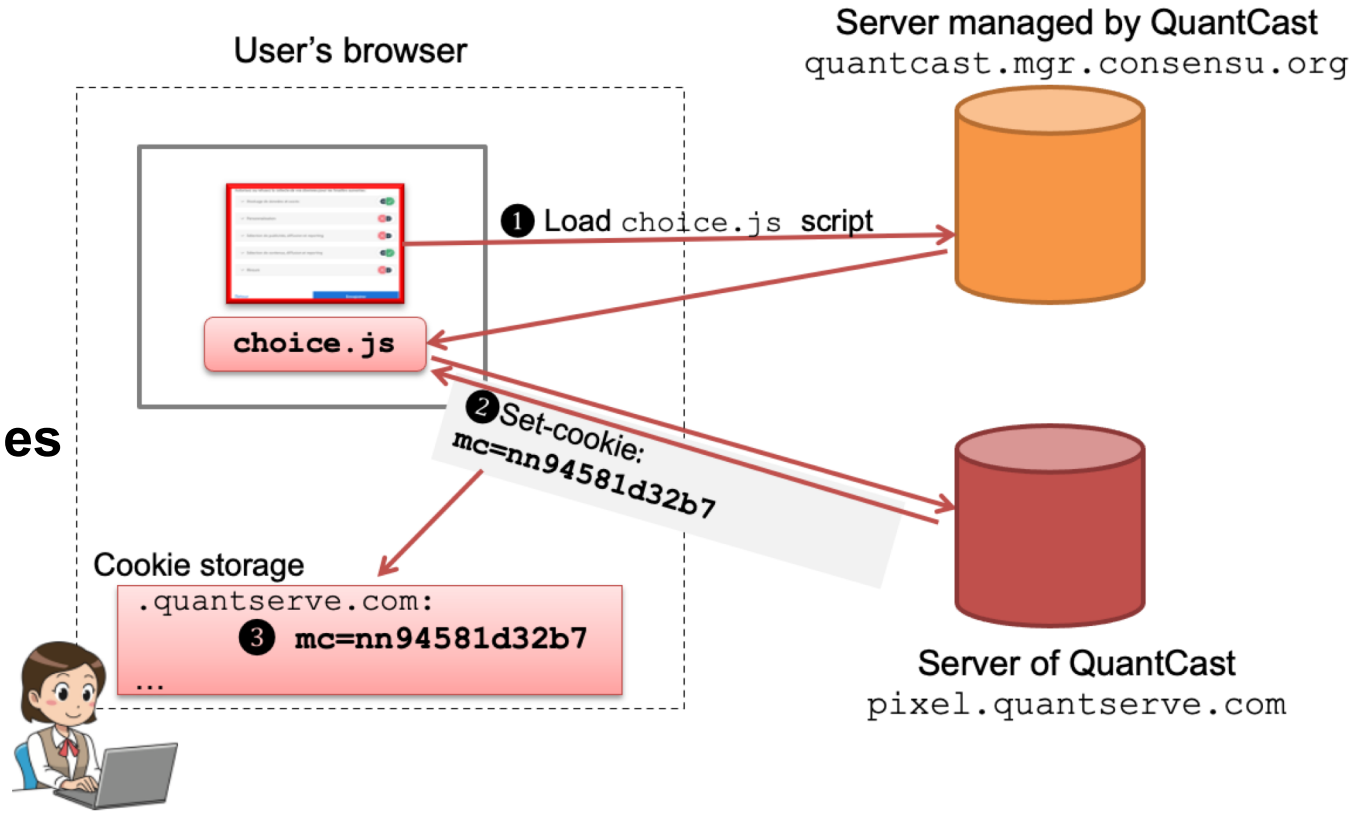
**Essential means** (reserved only to the controller)
Eg: i) type data processed, ii) users, iii) duration, vi) recipients



**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?

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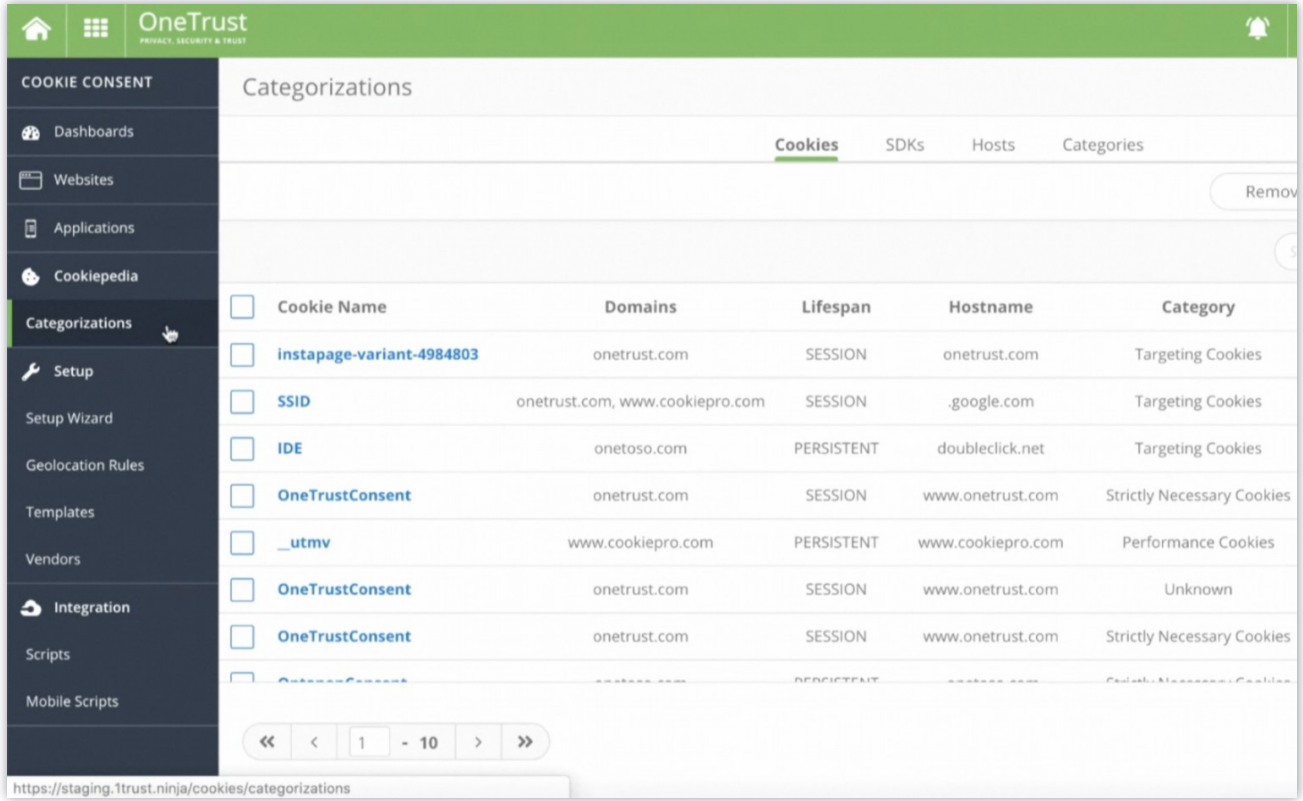
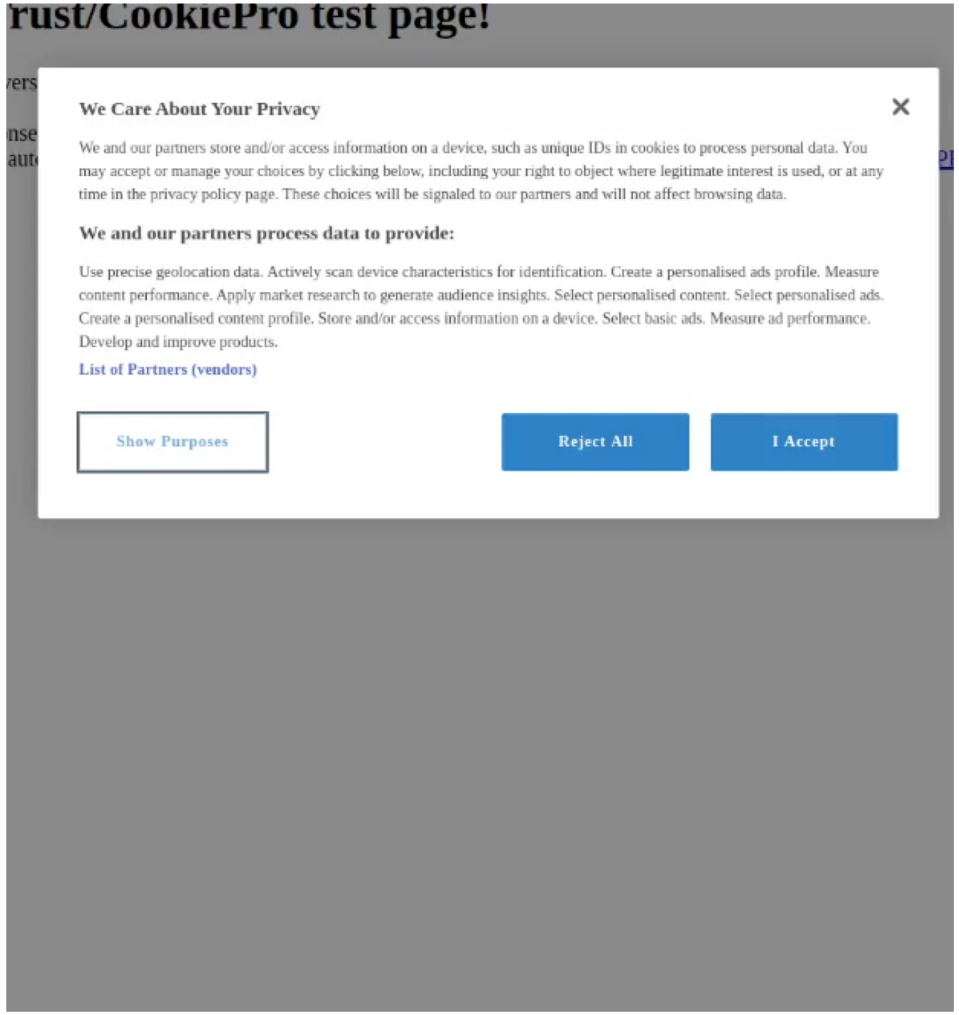



## Conclusion

- 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**
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## 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?

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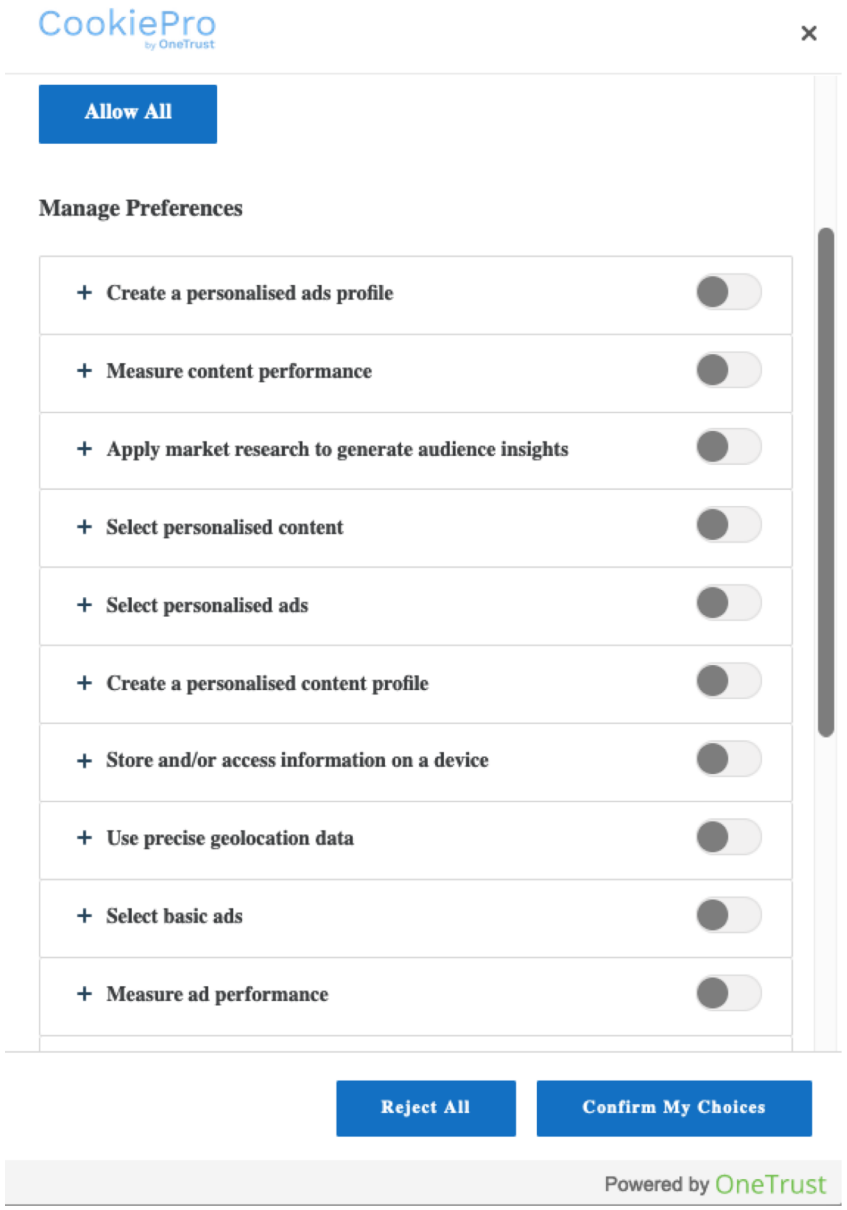
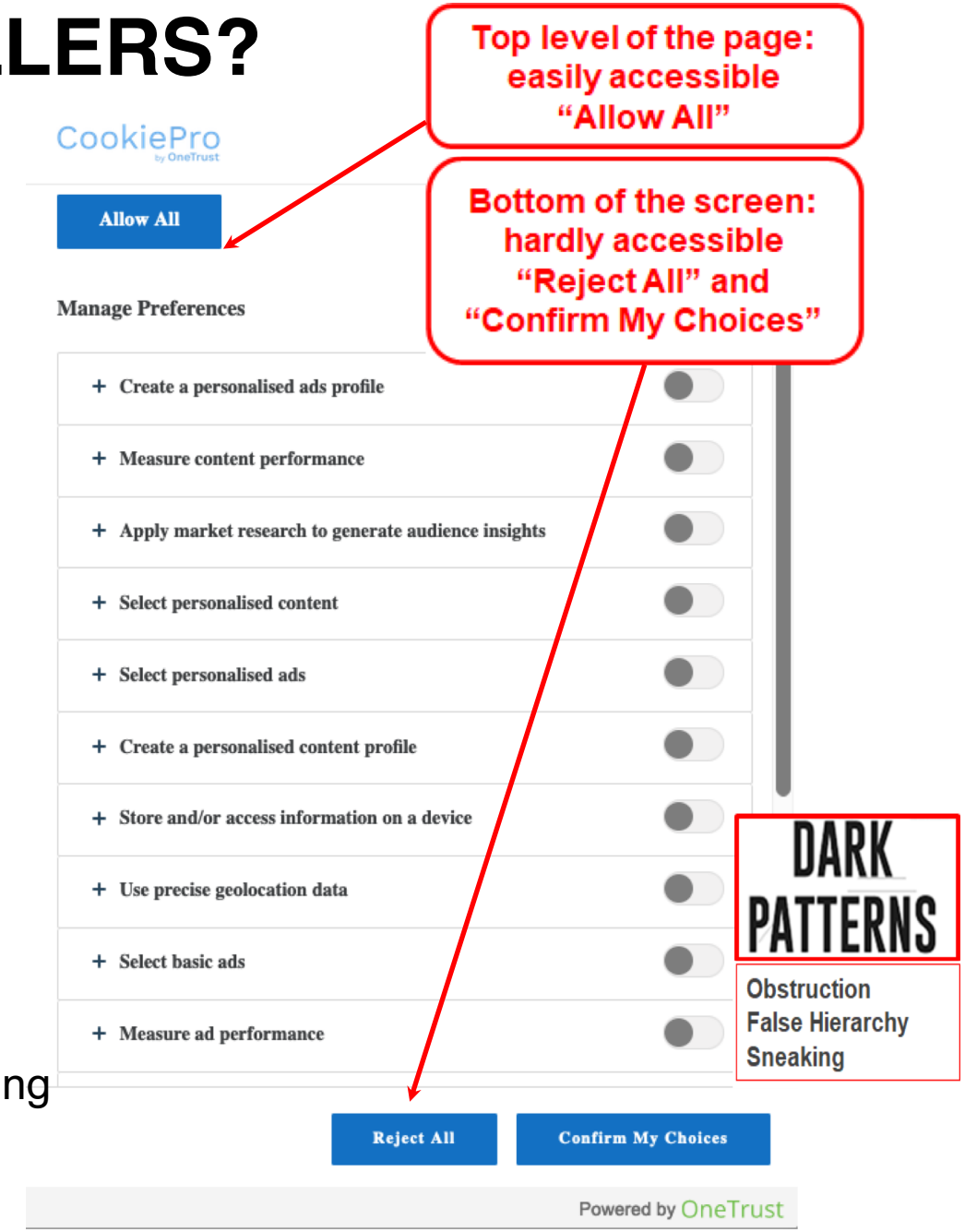


# WHEN ARE CMPS DATA CONTROLLERS?

**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

# 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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