Dynamic targeting as a service: when consumer profiling is friend of data protection – April, 2024

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Further reflection and proposals based on the initial study, by Luca Bolognini and Marco Emanuele Carpenelli, “Privacy Nutrition Labels vs. Privacy Dynamic Targeting - ex-ante and ex-post models for the administration of privacy information and the exercise of data subject rights” - Published in "Diritto, economia e tecnologie della privacy" - ISSN 2239-7671 (2021)

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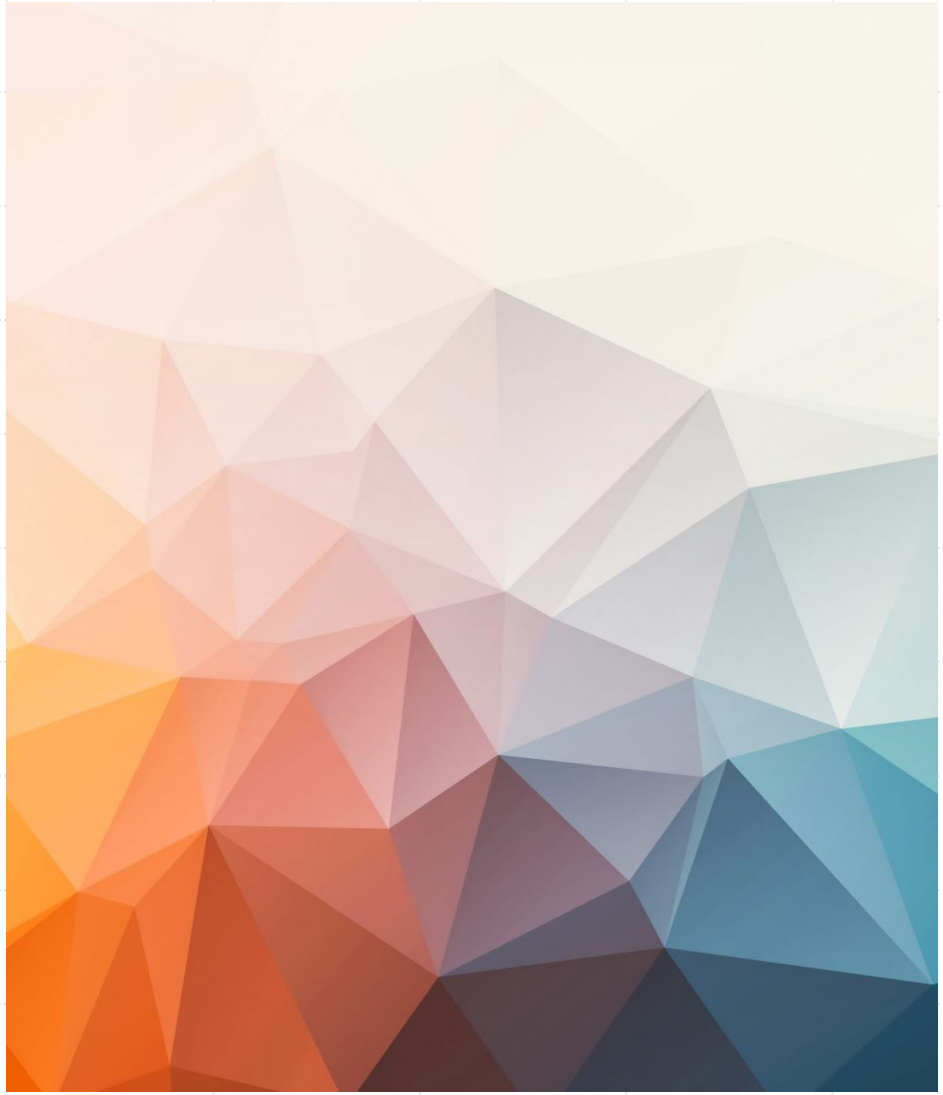
Istituto Italiano per la Privacy e la Valorizzazione dei Dati

Problems for online transparency

Digital privacy / data protection notices are far too long and not user friendly

Multiple layers of mandatory information, according to different regulations (e-privacy, data protection, DSA, DMA, in perspective AI Act…)

Static *ex ante* information, not easy to understand (*legalese*) or too abstract (“nutrition labels”)

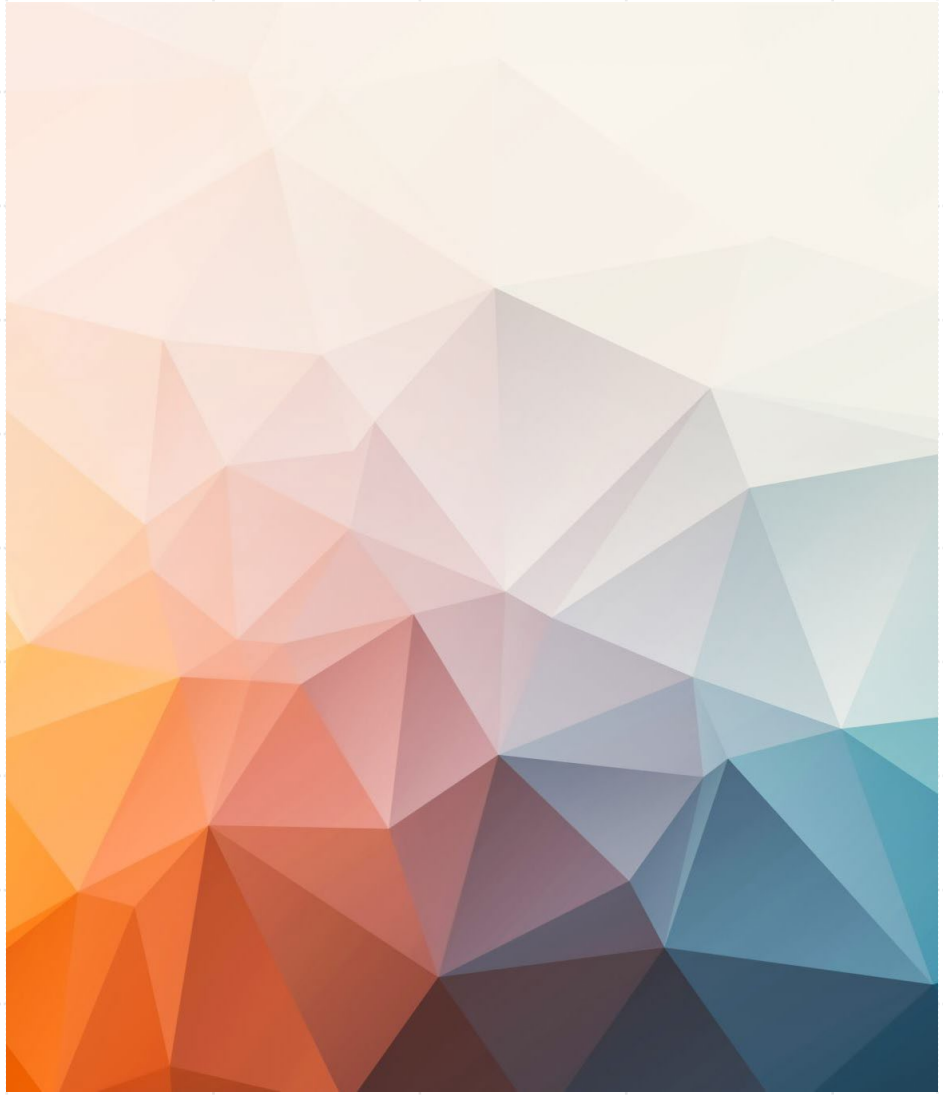


Questions

Is it possible to better comply with DSA + GDPR + e-privacy (+ etc.) transparency requirements, combining them together in the users'/data subjects' main interest?

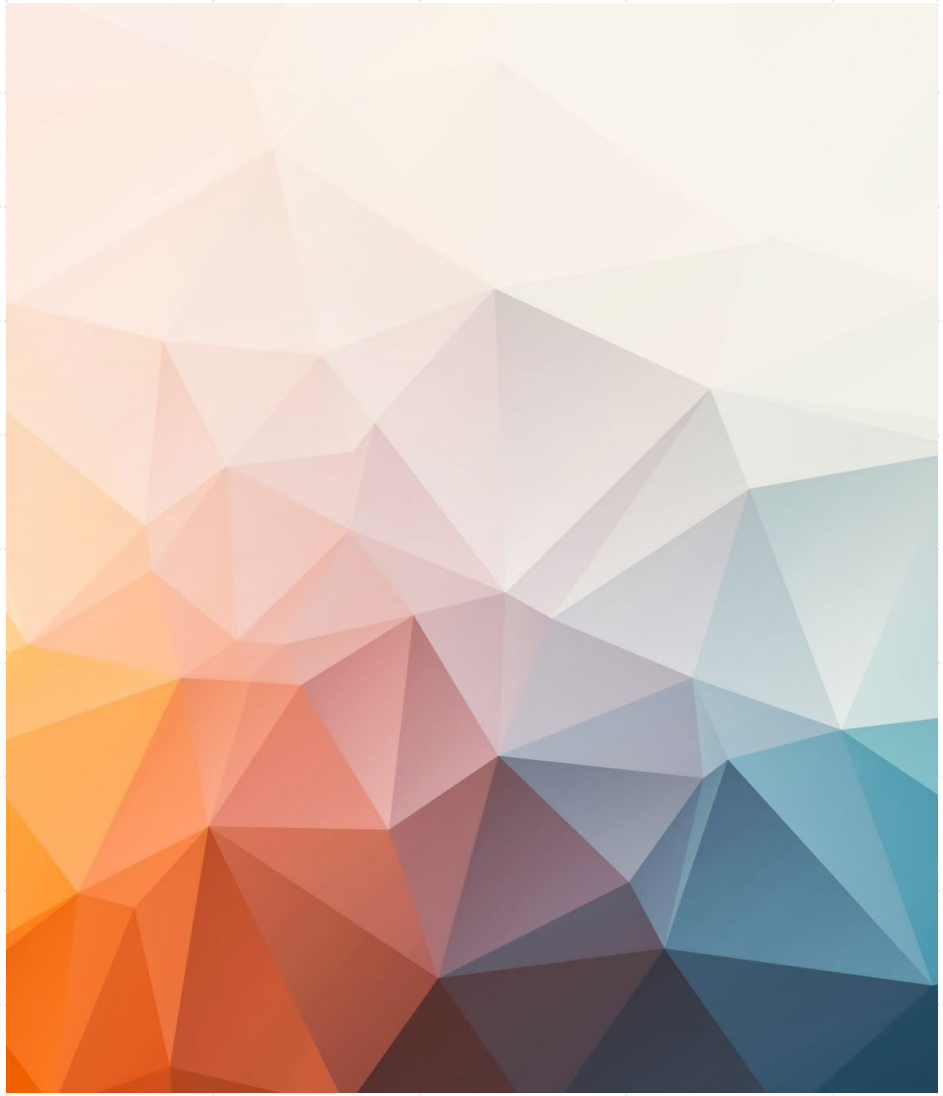
Is it possible to integrate information obligations with users'/data subjects' empowerment, facilitating the exercise of users'/data subjects' rights?

Is it possible to leverage on behavioural profiling techniques to empower users'/data subjects' rights?



Recital (68) EU Digital Services Act

[...] providers of online platforms should therefore be required **to ensure that the recipients of the service have certain individualised information necessary for them to understand when and on whose behalf the advertisement is presented**. They should ensure that **the information is salient, including through standardised visual or audio marks, clearly identifiable and unambiguous for the average recipient of the service**, and should be adapted to the nature of the **individual service's online interface**. In addition, recipients of the service should have **information directly accessible from the online interface where the advertisement is presented**, on the main parameters used for determining that **a specific advertisement is presented to them, providing meaningful explanations of the logic used to that end, including when this is based on profiling**. Such explanations should include information on the method used for presenting the advertisement, for example whether it is contextual or other type of advertising, and, where applicable, the main profiling criteria used; **it should also inform the recipient about any means available for them to change such criteria.** [...]



Article 26 EU Digital Services Act

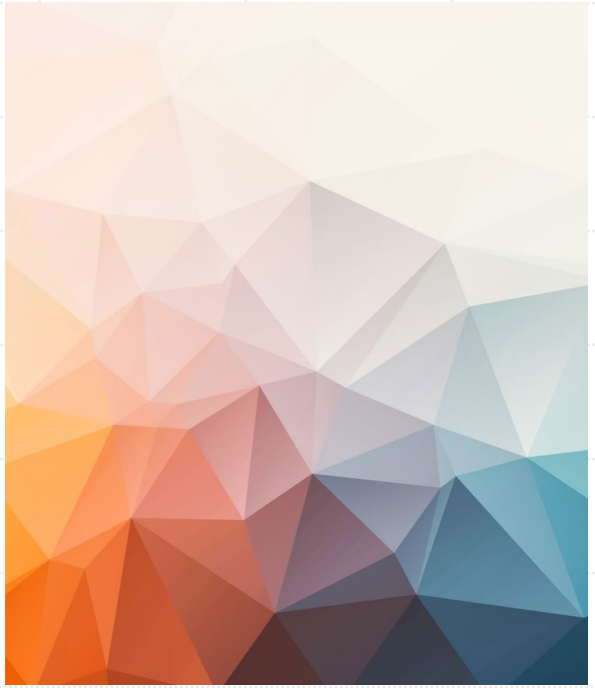
Advertising on online platforms

1. Providers of online platforms that present advertisements on their online interfaces shall **ensure that, for each specific advertisement presented to each individual recipient, the recipients of the service are able to identify, in a clear, concise and unambiguous manner and in real time, the following**:

(a) that the information is an advertisement, including through **prominent markings**, which might follow standards pursuant to Art. 44;

[...]

(d) **meaningful information directly and easily accessible from the advertisement about the main parameters** used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters.



Recital (59) GDPR

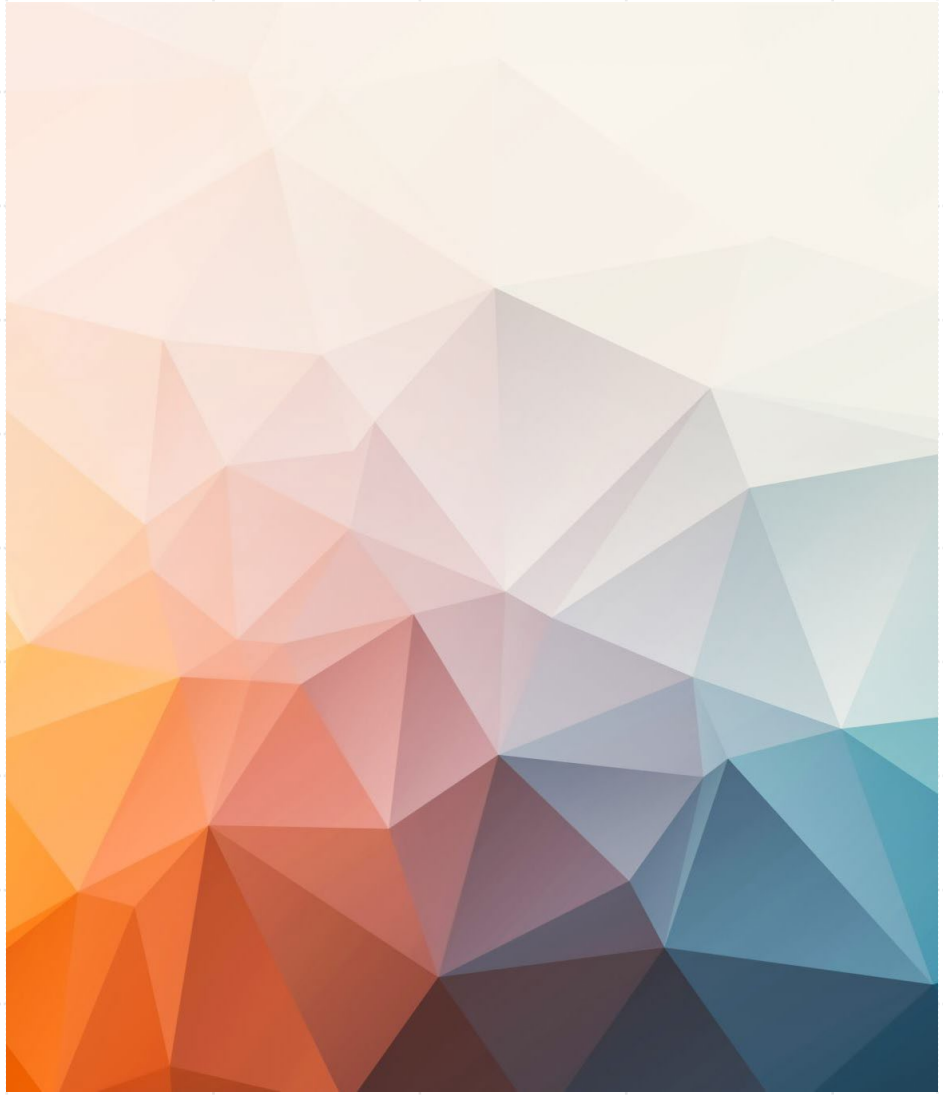
Modalities should be provided for facilitating the exercise of the data subject's rights under this Regulation, including mechanisms to request and, if applicable, obtain, free of charge, in particular, access to and rectification or erasure of personal data and the exercise of the right to object. The controller should also provide **means for requests to be made electronically**, especially where personal data are processed by electronic means. The controller should be obliged to respond to requests from the data subject without undue delay and at the latest within one month and to give reasons where the controller does not intend to comply with any such requests.

Recital (60) + Articles 12-13-14 GDPR

The principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes. **The controller should provide the data subject with any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed**. Furthermore, the data subject should be informed of the existence of profiling and the consequences of such profiling. Where the personal data are collected from the data subject, the data subject should also be informed whether he or she is obliged to provide the personal data and of the consequences, where he or she does not provide such data. **That information may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner, a meaningful overview of the intended processing. Where the icons are presented electronically, they should be machine-readable**.

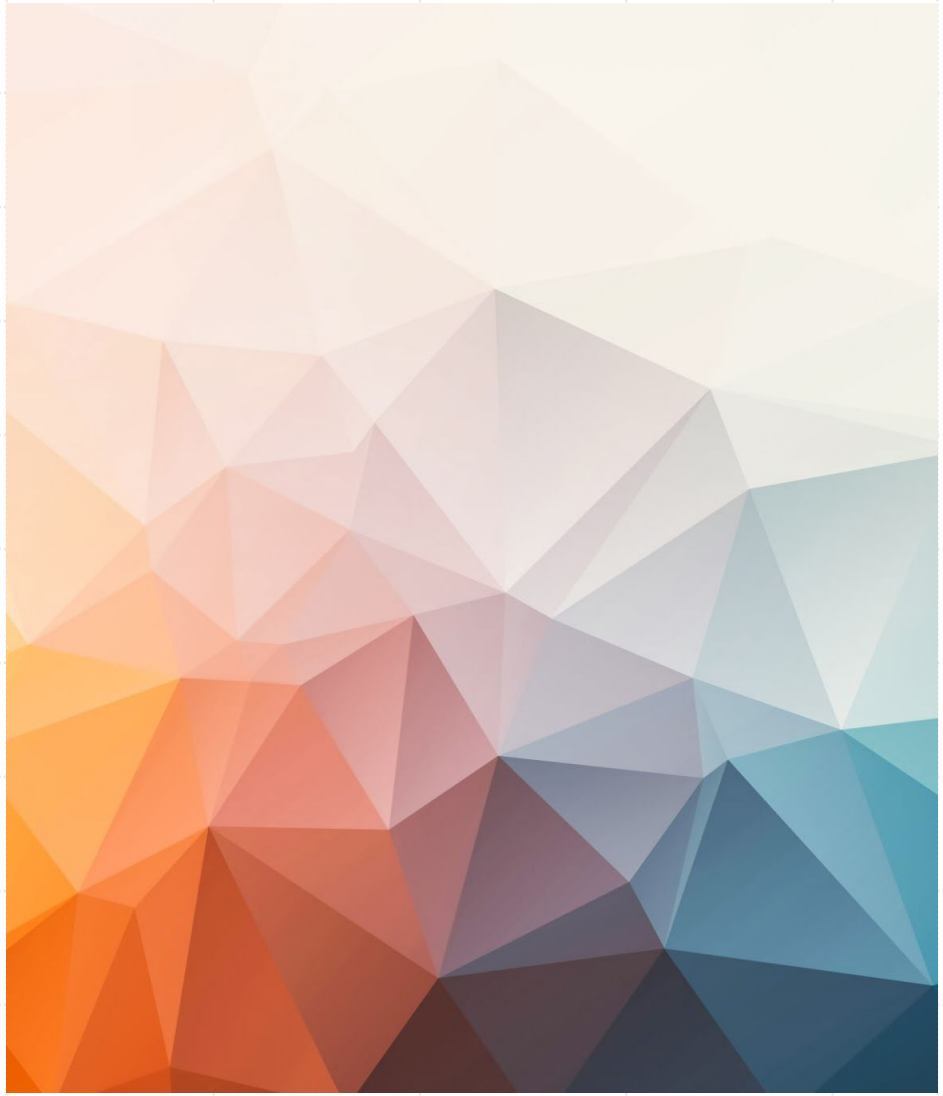
Recital (78) GDPR

The protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met. In order to be able to demonstrate compliance with this Regulation, the controller should adopt internal policies and implement measures which meet in particular the principles of **data protection by design and data protection by default.** Such measures could consist, inter alia, of minimising the processing of personal data, pseudonymising personal data as soon as possible, **transparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing**, enabling the controller to create and improve security features [...]



Article 12 GDPR – Transparent information, communication and modalities for the exercise of the rights of the data subject

1. The controller shall take **appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34** relating to processing to the data subject in **a concise, transparent, intelligible and easily accessible form**, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, **or by other means, including, where appropriate, by electronic means**. […]
2. **The controller shall facilitate the exercise of data subject rights under Articles 15 to 22**. […]
7. The information to be provided to data subjects pursuant to Articles 13 and 14 **may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing**. Where the icons are presented electronically they shall be machine-readable […]



Article 25 GPPR – Data protection by design and by default

1. Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, **the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures**, such as pseudonymisation, **which are designed to implement data-protection principles**, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects. [...]

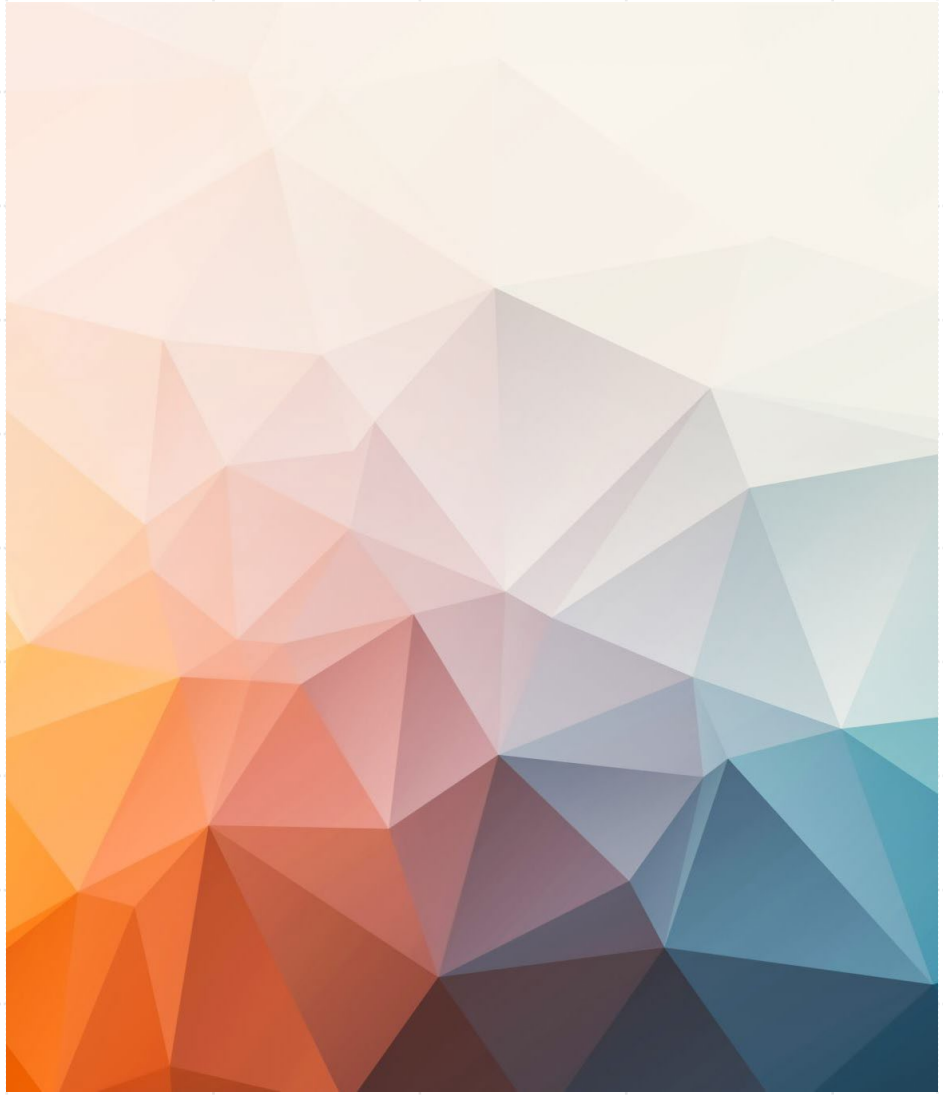
3. An approved **certification mechanism** pursuant to Article 42 may be used as an element to demonstrate compliance with the requirements set out in paragraphs 1 and 2 of this Article.

Recital (66) Directive 2009/136 amending E-privacy Directive 2002/58

Third parties may wish to store information on the equipment of a user, or gain access to information already stored, for a number of purposes, ranging from the legitimate (such as certain types of cookies) to those involving unwarranted intrusion into the private sphere (such as spyware or viruses). **It is therefore of paramount importance that users be provided with clear and comprehensive information when engaging in any activity which could result in such storage or gaining of access. The methods of providing information and offering the right to refuse should be as user-friendly as possible.** Exceptions to the obligation to provide information and offer the right to refuse should be limited to those situations where the technical storage or access is strictly necessary for the legitimate purpose of enabling the use of a specific service explicitly requested by the subscriber or user**. Where it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application**. […]

Possible answers to our questions
First proposal – **Dynamic explanation + empowerment mechanism (DEEM)**

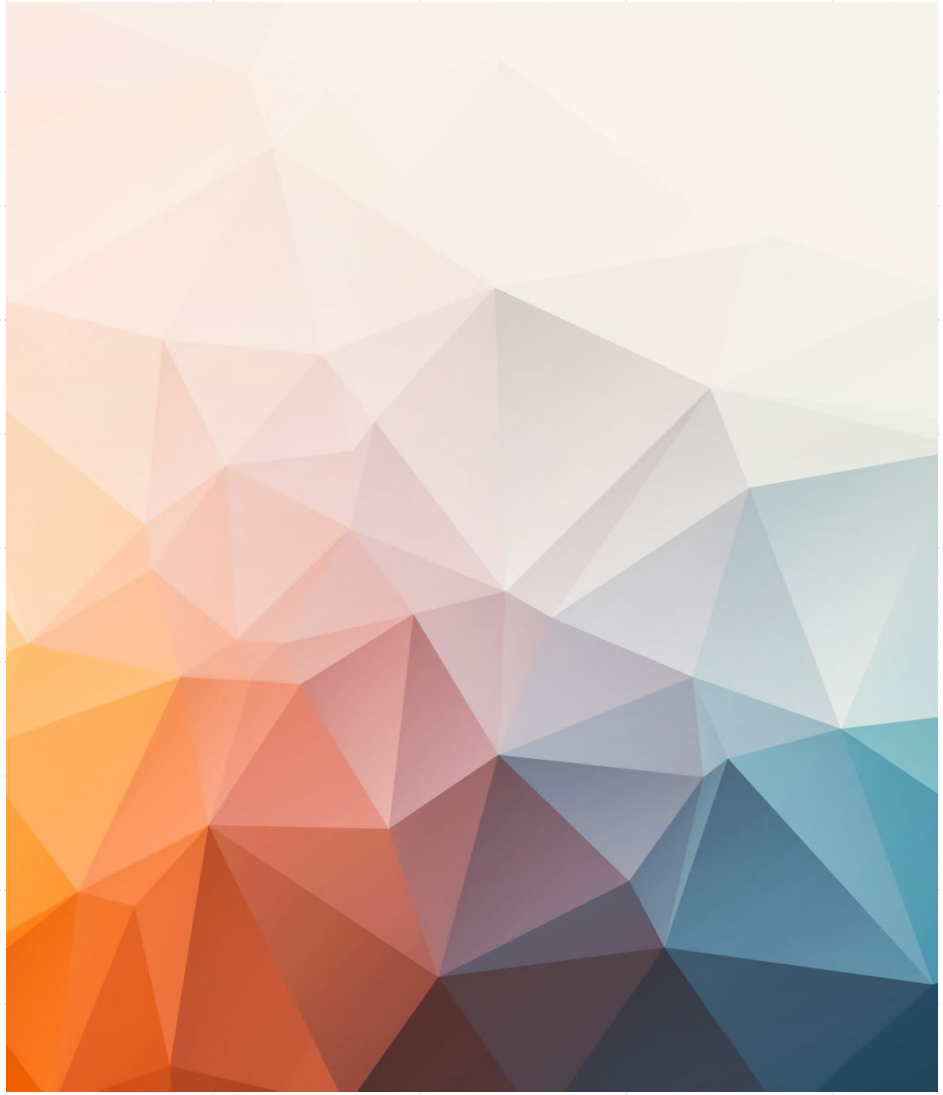
Goal: **replacing the *ex-ante* summary approach (information notices ex artt. 13-14 GDPR + static Privacy Nutrion Labels) with a more agile and dynamic solution that communicates the information throughout the different and granular phases of digital profiling**, informing data subjects in a more analytical way about the purposes of processing, the data processed, the recipients and other elements that are only significant in concrete terms at the moment and in the context in which the processing is conducted via the screen of a PC or smartphone. **This dynamic atomises the information, which is then recombined and given sense (and actual relevance) in the digital space and times of the websites and apps where the processing takes place.**



Possible answers to our questions
First proposal – Dynamic explanation + empowerment mechanism **(DEEM)**

Information + granular rights exercise empowerment – Combining the information functions with the **features for the exercise of the rights provided for under articles 15-22 of the GDPR, which could finally turn the concept of privacy into something live and interactive**.

DEEM would address together the objectives of article 12 (7) and Recitals 58-59 GDPR with article 26 and Recital 68 EU DSA + Recital 66 Directive 2009/136 (amending E-privacy Directive)



Possible answers to our questions Second proposal - Privacy Dynamic Targeting **(PDT)**

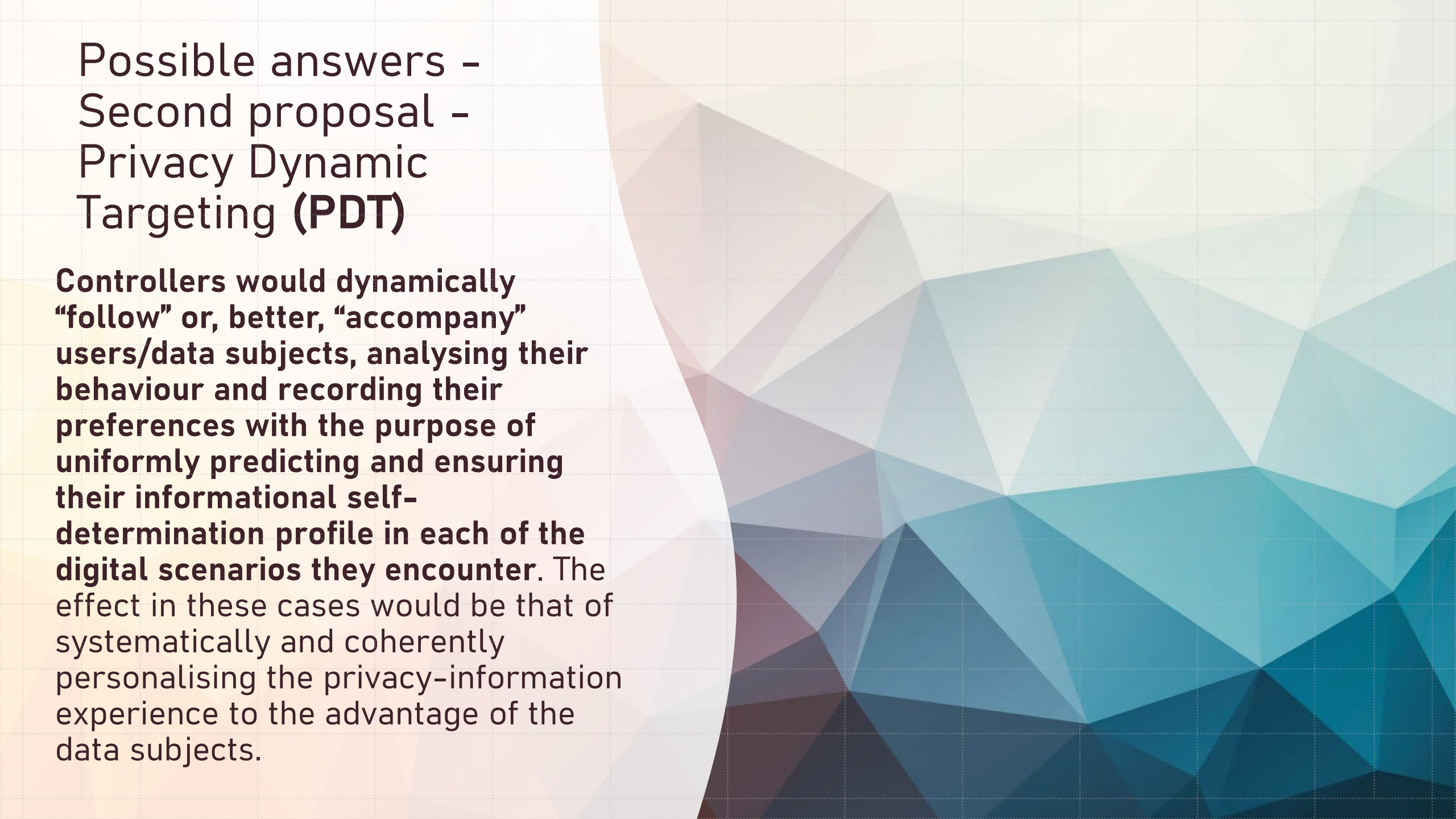
Aikido-move: **behavioural targeting and AI-driven predictions to better focus on user's privacy preferences**

Possible answers - Second proposal - **Privacy Dynamic Targeting (PDT)**

Our proposal is to direct the potential of AI-driven techniques, making the personalised profiling of data subjects more pro-privacy through a sort of **behavioural targeting intended to favour greater uniformity in the experience of the various virtual spaces visited by users**. This way, for example, if site x registers an objection to processing, this objection is also proposed in site y so as to ensure that the experience effectively and organically adheres to the privacy preferences expressed by the data subject.

Possible answers – Second proposal – Privacy Dynamic Targeting **(PDT)**

Controllers would dynamically "follow" or, better, "accompany" users/data subjects, analysing their behaviour and recording their preferences with the purpose of uniformly predicting and ensuring their informational self-determination profile in each of the digital scenarios they encounter. The effect in these cases would be that of systematically and coherently personalising the privacy-information experience to the advantage of the data subjects.



Possible answers - Second proposal - Privacy Dynamic Targeting **(PDT)**

… to be fine-tuned after the definition of the case «Belgian Data Protection Authority (APD) against IAB Europe and the Transparency & Consent Framework (TCF)"

Waiting for the conclusion of the proceedings before the Belgian Market Court – meanwhile, see the CJEU decision CURIA - Documenti (europa.eu)

Possible answers - Second proposal - Privacy Dynamic Targeting **(PDT)**

At least 5 key conditions

1. Never contradict user's pre-set options

2. Solely cover processings which have not already been opted-in/out by users

3. Never use such PDT-data to target ads content targeting

4. Legal basis of PDT data processing: data subject's explicit consent

5. Assess this PDT profiling in light of Art. 22 GDPR

Possible answers to our questions
Sedes materiae for such proposals?
Standards, Codes of conducts, Certification mechanisms

Recital (102) EU Digital Services Act

To facilitate the effective and consistent application of the obligations in this Regulation that may require implementation through technological means, it is important to **promote voluntary standards covering certain technical procedures, where the industry can help develop standardised means to support providers** of intermediary services in complying with this Regulation, such as allowing the submission of notices, including through application programming interfaces, or standards related to terms and conditions or standards relating to audits, or **standards related to the interoperability of advertisement repositorie**s. In addition, such standards could include **standards related to online advertising, recommender systems, accessibility** and the protection of minors online. Providers of intermediary services are free to adopt the standards, but their adoption does not presume compliance with this Regulation. At the same time, by **providing best practices, such standards could in particular be useful for relatively small providers of intermediary services**. The standards could distinguish between different types of illegal content or different types of intermediary services, as appropriate.

Possible answers – *Sedes materiae* for such proposals? Standards, Codes of conducts, Certification mechanisms

Article 44 EU Digital Services Act – Standards

1. The Commission shall consult the Board, and shall support and promote the development and implementation of **voluntary standards set by relevant European and international standardisation bodies**, at least in respect of the following: [...]

(b) **templates, design and process standards for communicating with the recipients of the service in a user-friendly manner** on restrictions resulting from terms and conditions and changes thereto; [...]

(g) **transmission of data between advertising intermediaries in support of transparency obligations** pursuant to Article 26(1), points (b), (c) and (d);

(h) **technical measures to enable compliance with obligations relating to advertising** contained in this Regulation, including the obligations regarding **prominent markings for advertisements and commercial communications** referred to in Article 26;

(i) **choice interfaces and presentation of information on the main parameters of different types of recommender systems**, in accordance with Articles 27 and 38; [...]

Possible answers – *Sedes materiae* for such proposals? Standards, Codes of conducts, Certification mechanisms

Article 46 Digital Services Act – Codes of conduct for online advertising

1. **The Commission shall encourage and facilitate the drawing up of voluntary codes of conduct** at Union level by providers of online platforms and other relevant service providers, such as providers of online advertising intermediary services, other actors involved in the programmatic advertising value chain, or organisations representing recipients of the service and civil society organisations or relevant authorities **to contribute to further transparency for actors in the online advertising value chain beyond the requirements of Articles 26** and 39.

2. […] The Commission shall aim to ensure that the codes of conduct at least address the following:

(a) **the transmission of information held by providers of online advertising intermediaries to recipients of the service** concerning the requirements set in Article 26(1), points (b), (c) and (d);

[…]

4. The Commission shall encourage **all the actors in the online advertising value chain** referred to in paragraph 1 to endorse the commitments stated in the codes of conduct, and to comply with them.

Possible answers – *Sedes materiae* for such proposals? Standards, Codes of conducts, Certification mechanisms

Art. 40 GDPR – Codes of Conduct

[…] 2. Associations and other bodies representing categories of controllers or processors may prepare **codes of conduct**, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to:

(a) **fair and transparent processing**;

[…]

(e) **the information provided to the public and to data subjects**;

(f) **the exercise of the rights of data subjects**; […]

Possible answers – *Sedes materiae* for such proposals? Standards, Codes of conducts, Certification mechanisms

Recital (100) GDPR

Art. 42 GDPR – Certification

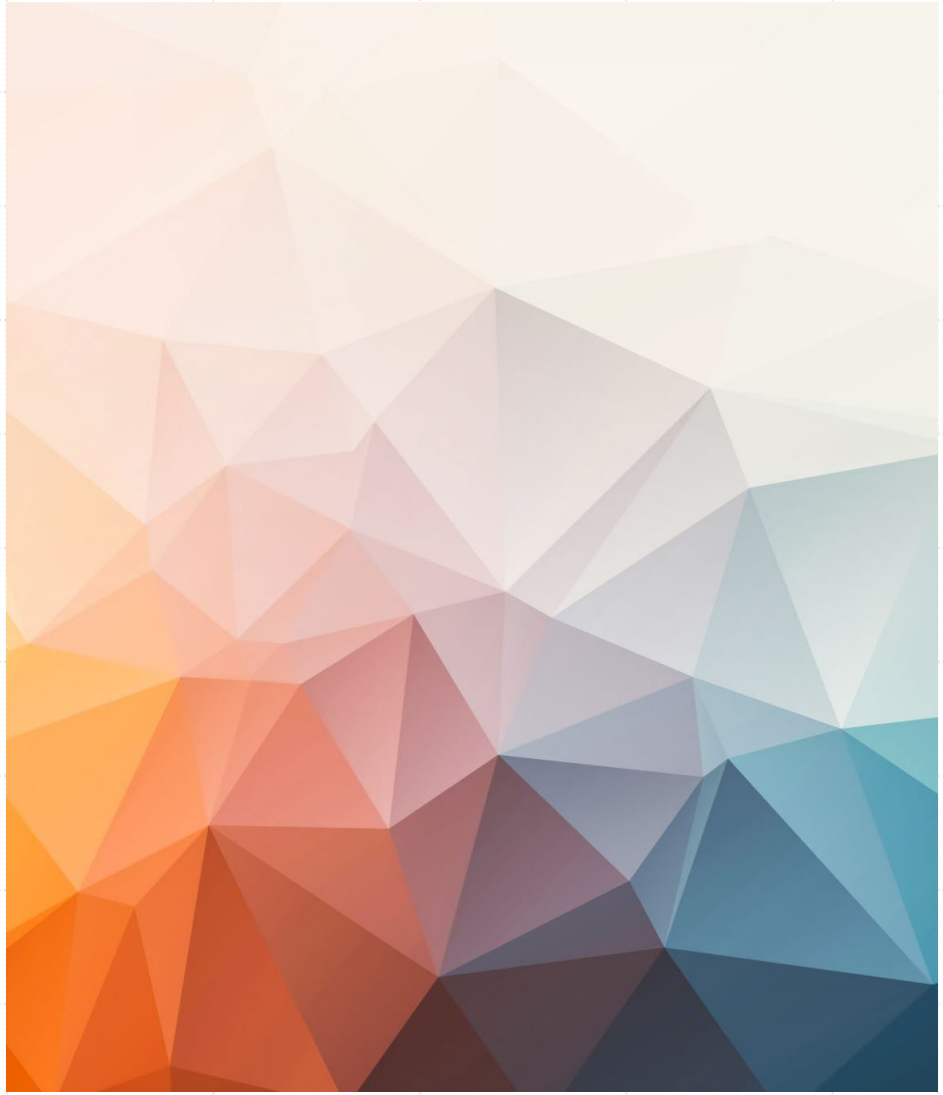
1. The Member States, the supervisory authorities, the Board and the Commission shall encourage, in particular at Union level, the establishment of **data protection certification mechanisms and of data protection seals and marks**, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors. The specific needs of micro, small and medium-sized enterprises shall be taken into account. [...]

Possible answers to our questions
Sedes materiae for such proposals?

Standards, Codes of conducts,
Certification mechanisms

Could these standards and/or codes of conduct and/or certification mechanisms – adopted according to different regulations – be unified together in a single text?

Why not?



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Thanks for your attention!

Q&A?

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