

25 August 2023

Via public consultation
with confirmation email

Subject: Right holders must be afforded trusted flagger status in their own right

The signatories to this letter ask for your attention and support to ensure that in execution of article 22 of the Digital services Act (DSA) Intellectual property right holders can be afforded trusted flaggers status in their own right.

An alliance of companies that have a strong connection with The Netherlands, representing a wide range of industries, welcome the Dutch draft legislative proposal and the draft Explanatory Memorandum for the DSA Implementation Act.

The signatories are of the opinion that for the reasons set out below, Intellectual property right holders merit to be afforded with the trusted flagger status in their own right.

Regarding '4.3.4.3 Meldingen van illegale inhoud door betrouwbare flaggers' of the Explanatory Memorandum for the DSA Implementation Act, we all understand that article 22 and recital 61 of the DSA are the most relevant provisions.

Regarding article 22 you will recall that in a first DSA concept the article regarding trusted flaggers (former article 19) required trusted flaggers to *represent collective interests*. This requirement was dropped in order to allow individual right holders to become trusted flaggers, enabling right holders to play their role in addressing the sale of illegal content online. In doing so the European legislator has recognised the role of the right holders in protecting European citizens as well as the European branded goods manufacturing industry.

Recital 61 further stipulates that the *trusted flagger status should only be awarded to entities, and not individuals, that have demonstrated, among other things, that they have **particular expertise and competence** in tackling illegal content and that they work in a diligent, accurate and objective manner.*

The expertise and competence requirement is also covered in article 22 (a), which require trusted flaggers to demonstrate a **particular expertise and competence for the purposes of detecting, identifying and notifying illegal content**.

The signatories understand the mechanisms to tackle illegal expressions of terrorist content, to report child sexual abuse material or to notify illegal racist and xenophobic expressions, which topics largely relate to the freedom of expression.

When assessing the sale of products or the provision of services as illegal content under article 3 of the DSA, the signatories are of the opinion that for the following reasons right holders, even when they submit notice and take downs through a service provider, are the only ones that meet the particular expertise and competence requirement that is set by the European legislator:

1. They are the holder of the IP right (trade marks, designs, patents and copyrights) which they are seeking to protect, in line with (inter alia) Article 17 of the EU Charter of Fundamental Rights.
2. They have the expertise and competence to determine when a third party product is violating its rights, other than in cases of a fake or counterfeited product.
3. They are best placed to answer any question or push back that may be raised by a seller which advertisement is impacted by a notice and take down.
4. They are the only party that knows their products perfectly and can authenticate them, through both covert and overt means.
5. They know which product categories they do not manufacture, and can usually identify counterfeits via images.
6. Many right holders are working with platforms already and thus, they already have demonstrated to meet the requirements set forth in article 22.2 of the DSA.
7. From experience, we know that many of the notice and take downs that are issued by right holders are so accurate that they can be processed automatically without the need to extensive human verification.
8. This expertise is already recognised in law, including in the Customs IPR Regulation 608/2013.

The definition of illegal content set forth in article 3 of the DSA, implies that right holders should also be able to send notifications about goods that do not conform with other EU and national laws, such as consumer and product safety/standardisation rules.

In general, trade or industry associations will never meet the detailed and sophisticated level of expertise and competence, nor do these associations have the capacity or resources that are needed to accurately, promptly and diligently assess the sale of products or the provision of services as illegal content.

The signatories understand the preference to limit the number of trusted flaggers in order to avoid diminishing the added value of the mechanism to assess notices related to issues of freedom of expression. When assessing the sale of products or the provision of services as illegal content, the number of notices to be dealt with as a priority would solely depend on the volume of illegal content that is offered on a given platform. This number does not change depending on the entity that submits the notices.

Only in case a platform is flooded with illegal content, such platform may need to process a large volume of justified notices. This however would serve the interest of European citizens and European manufacturers of branded goods. A platform where only a small volume of illegal content is offered for sale, will also receive a small number of notices. Such platform will be safe for European citizens to buy products and such platform will facilitate a level playing field for European manufacturers of branded goods where they can compete with other manufacturers of products that do respect the Union Law.

Finally, we point out that should the trusted flagger status be abused, it can of course be withdrawn. As right holders are aware of this provision (article 22.7), they have no incentive to abuse this status.

Today already certain platforms apply a 'good faith' status to right holders that submit notices. The signatories are not aware of any rights holder that has lost its 'good faith' status due to the fact that too many notices were submitted that were not diligent, accurate or objective.

While the DSA has a potential to enable a sustainable digital framework, the signatories **ask for your support to ensure that**, in the interest of European consumers and businesses, **right holders can be afforded trusted flagger status in their own right.**

We kindly thank you for considering the foregoing and remain at your availability for any further discussion.

The signatories



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About the Signatories

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