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DSA's "Trusted Flaggers" provisions must reinforce the standards that exist today

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The draft Digital Services Act (DSA) recognises that counterfeits and other illegal products that do not comply with EU and national law pose a significant risk to EU consumers.

In the absence of sufficient proactive measures implemented by providers of intermediary services, the "notice and action" mechanism is one of the most used tools, globally, by brand owners to protect consumers from online offers of illegal products, by requesting such providers to remove illegal products from their services as quickly as possible. The fight against counterfeiting is in the public interest and, just as in the established customs procedure, only the right holder can accurately and rapidly authenticate its goods. Through today's "trusted flagger" relationship with providers, including platforms, brands play the biggest role in notifying the presence of illegal products online and thus contributing to a safer online environment for all.

Recommendations

We welcome the concept of trusted flaggers as introduced in the European Commission's proposal. However, we have one key recommendation - the deletion of Art 19(b) in its entirety - and two specific further recommendations:

1. **Deletion of the ~~"(b) it represents collective interests [...]"~~ requirement: brands must be allowed to apply for trusted flagger status, as is currently the case**

The signatories of this letter call on policymakers to ensure that the DSA will not lower the standards of current practice by limiting "trusted flagger" status only to "collective interest" bodies. As has been the case for many years, intellectual property right holders must continue to be granted "trusted flagger" status and their notices thus treated with priority.

- The trusted flagger mechanism should serve to reduce the unnecessary deployment of resources on all sides while ensuring that those with the relevant expertise are called upon to authenticate content.
- Brands have the most accurate knowledge of their own products and are best placed to provide promptly quality notices on products infringing their rights, helping providers to keep illegal and non-compliant products off their services.
- Collective interest bodies – as they exist today – do not have the required resources, funding and expertise to represent all their members in a timely and diligent manner. This will create additional burdens and unnecessary investment for such bodies, as well as unnecessarily imposing duplicated time and cost expenditure.

- Restricting "trusted flagger" status only to collective interest bodies will, by default, exclude SMEs, who cannot afford to outsource such monitoring and action to paid third parties, let alone deploy additional resources in constantly retraining these collective bodies on their individual brands and new product launches.
- The sale of products is predominant on online platforms and marketplaces, thus collective interest representatives do not play as large a role here as in other (inter alia) IP fields.
- Recital 46[1] explains that online platforms should give similar treatment to notices submitted by other entities or individuals which are not awarded trusted flagger status. However, we would like to draw attention to the fact that leaving this treatment to the discretion and resources of platforms may lower consumer protection standards and lead to a significant risk for commercial leverage from the platforms.
- It is also important to underline that in the case of a trusted flagger being a collective interest body, losing such status should be linked to each individual client so that other clients are not unfairly affected.

Awarding brands trusted flagger status is a consumer protection measure, contributing to trust in the online environment by ensuring that consumers are not duped into buying counterfeits instead of the high-quality products that they (understandably) believe they are choosing. The grant of such status on individual right holders by the Digital Services Coordinator will be aligned with practices implemented today, allowing all parties to benefit from the expertise and knowledge developed to date without creating additional burdens and unnecessary transfer of knowledge and funding from brands of all sizes to collective interest bodies. In order to mitigate any concerns around abusive use of the "trusted flaggers" privilege by certain entities, brands also fully welcome transparency and regular checks/re-certification by the Digital Service Coordinator.

2. Deletion of ~~*"(b) […] is independent from any online platform"*~~ requirement as it is not future proof

Business models evolve and any trusted flagger may develop (in some cases, already has developed) proprietary online platforms. This does not obstruct their competences as a trusted flagger and it should not be a criterion for excluding them from this status, or leading to this status being revoked should they decide to develop an online platform in the future.

We understand the intention may have been to secure independence from the online platform towards which the trusted flagger submits a notice, but we must allow for this criterion to encompass both current and future business models. There is significant lack of clarity as to how this criterion as currently worded will bring any meaningful value to the "notice and action" mechanism or the objective of protecting consumers from illegal and non-compliant content and goods.

We believe:

- The criteria laid out in paragraphs (a) and (c), i.e. an entity's "***particular expertise and competence for the purposes of detecting, identifying and notifying illegal content***" that carries out "***activities for the purposes of submitting notices in a timely, diligent and objective manner***" (with an emphasis on "objective"), represent legitimate eligibility requirements for the submission of a "trusted flagger" application to the Digital Services Coordinator.
- That the concept of "independence from any online platform" as intended by the European Commission in the DSA can be captured by asking for the trusted flaggers to "not be unduly

[1] The rules of this Regulation on trusted flaggers should not be understood to prevent online platforms from giving similar treatment to notices submitted by entities or individuals that have not been awarded trusted flagger status under this Regulation from otherwise cooperating with other entities, in accordance with the applicable law, including this Regulation and Regulation 2016/794 of the European Parliament and of the Council

influenced by any online platform"[2]. Trusted flaggers that currently have, or will develop, proprietary online platforms should still demonstrate that their decision-making process for the purposes of their status is not unduly influenced by such an online platform.

3. **Deletion of the inclusion of this addition in the draft Compromise Amendment being considered by IMCO for Article 19(1): "~~*The use of automated notices by trusted flaggers without effective human review shall not be accepted as a valid means of submission*~~."**

The DSA is intended to be a horizontal Regulation: while this addition may be appropriate for some user-generated content it is not for the offer of illegal, including counterfeit, goods. Established practice in this field between platforms and right holders allows for brands to be granted trusted flagger status (after the requisite quality checks and behavioural criterion are verified), thus permitting rapid processing of their notices, minimising time and resource expenditure on both sides for the ultimate, shared, goal of consumer protection. Article 19 of the draft DSA already provides for an effective guarantee through an appeal mechanism allowing users whose content has been removed to appeal that removal decision and ensure the reinstatement of any content removed by mistake.

To insist on "effective human review" of each notice for each individual listing of illegal content will, quite simply, neutralise any benefit of this system, resulting in consumers being confronted with a massive volume of offers for illegal goods and services despite brands' best efforts to protect them. This would be, we respectfully stress, both a huge step backwards and a consumer harm, rather than consumer protection, measure.

4. **Unintended consequences of specific deadlines for content removal**

We would also caution against introducing deadlines for removal of content, particularly if made dependent on the type of illegality in question. This would need a judgement call from platforms about the content, and put them in a role of judging the illegality, rather than depending on the notice. This would also be a step backwards compared to the situation today.

Introducing specific timelines would risk creating confusion, or even contradict, the trusted flagger mechanism; it would also risk products that are obviously illegal not being removed rapidly, even where there is operational ability to do so. Article 19 provides that platforms shall process and decide upon notices from trusted flaggers "with priority and without delay". This rapid removal of illegal content, with the applicable appeal mechanism, ensures that consumers are not confronted with offers of illegal content for any longer than is necessary.

Conclusion

We know that policymakers recognise that the exponential growth in online offers of counterfeit and non-compliant products is a significant challenge to EU consumers, creators and the internal market. We hope that you will take into account the above suggestions in your upcoming deliberations on the DSA. The signatories of this letter look forward to your response and remain available to discuss the above points with you at any time.

[2] Which is aligned with the "independence criterion" approach preserved in Article 14(3)(d) of Regulation 2019/1150 (Platform to Business Regulation): "*their decision-making is not unduly influenced by any third party providers of financing, in particular by providers of online intermediation services or of online search engines*"

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