



This is a joint submission from the Electronic Frontier Foundation (EFF) and ARTICLE 19 in response to a consultation by the European Commission on the Guidelines on the trusted flagger mechanism under Article 22 of Regulation (EU) 2022/2065 (Digital Services Act).

We welcome the opportunity to contribute to this consultation. Both of our organisations have been closely involved in the negotiations of the Digital Services Act (DSA) to ensure that it will live up to its promise to further human rights online, enhance freedom of expression, and maintain key principles for free expression online, such as conditional immunity from liability and the prohibitions on general monitoring obligations.

Feedback to the Commission Guidelines

Illustrative examples: In general terms, we appreciate the initiative by the EU Commission and support its focus on good practices and illustrative examples to ensure the well-functioning of the DSA's trusted flagger (TF) mechanism rather than directing platforms towards specific actions through legal interpretation.

Definition of illegal content: We support the clarification in the Guidelines that the Regulation (EU) 2022/2065 itself does not define what 'illegal content' is, as this is question is determined by national law in compliance with Union law or in other applicable Union law (para 11). In legal as well as practical terms, it is important to ensure that TF don't effectively decide whether content should be restricted. We therefore welcome the referring to the receipt of a "precise and substantiated notice from a TF falling within its area of expertise".

Risks associated with priority treatment: As regards the requirement under the DSA to treat notices by TF with priority (para 5.3), the Guidelines should acknowledge the risk and evidence that the platforms concerned might be less thorough in their assessment as to whether any user-generated content that a TF alleges to be illegal is, in fact, illegal. We support the clarification (para 83) that TF notices shall not override the fundamental obligation of providers of online platforms to process all notices in a timely and fair manner, without discrimination, resulting in informed and diligent decisions that are compatible with the freedoms of expression and of information. We also would like to stress that while one might expect trusted flagger notices to be more accurate compared to ordinary notices (para 6), such notices will not necessarily be legally relevant or lead to content moderation decisions or to the restriction of content.

Cross-border assessments of illegality: However, we caution against suggesting that the diligent assessment of TF notices may, without further qualification, allow providers to identify the illegality of the relevant content in other Member States (para 83). While sufficiently precise and substantiated notices under the DSA may enable providers to identify illegal content without detailed legal analysis in a specific jurisdiction, this principle should not simply be extended to cross-border assessments where the legality may depend on completely different national frameworks.

Risk of over-reliance on TF for systemic risks: Regarding the identification of systemic risks (para 13), we agree that the information provided by TF can be relevant, but the Guidelines should acknowledge that care must be taken not to over-rely on observations relating to individual moderation decisions, as the DSA's systemic risk framework focuses on the larger platform architecture—and it should be clear that systemic risks with respect to the dissemination of illegal content do not only stem from flawed content moderation systems, but also from design choices linked other features, for example recommender systems.

Law enforcement abuse: As regards eligible entities, we strongly support the suggestion (para 31), that national authorities empowered to issue orders to act against illegal content should not commingle those powers with trusted flagger status. Law enforcement authorities already possess statutory powers and can issue orders under Article 9 DSA. The Guidelines should also highlight rule of law concerns: giving law enforcement agencies TF powers risks could undermine fundamental rights, in particular the right to due process, risk enforcement overreach, and risk that platforms might treat TF notifications as de facto removal orders without safeguards attached to formal legal orders. For these existing human rights concerns and global experiences with law enforcement requests, we stress again that national DSCs should generally refrain from granting the TF status to law enforcement authorities.

Impartiality: We welcome the Guidelines consideration in paragraph 42(a) that "DSCs should verify that the applicant entities have a sufficiently high degree of impartiality and of freedom from political or other influence that may undermine their objectivity in submitting notices". We also suggest highlighting the risks in situations where the TF status might be awarded to entities with law enforcement powers or which show undue proximity to government actors.

Role of NGOs: The Guidelines should also acknowledge the important role of non-government entities to report human rights abuses and illegal content. CSOs operating as TF may expose themselves to risk and require adequate protection. The participation of civil society entities could necessitate the creation of adequate mechanisms to shield these organisations from abusive campaigns that risk undermining their independence and ability to act within their areas of expertise.

Trusted partnership programs: We agree with the Guidelines that notifying illegal content should not be more restrictive for TF than for other recipients of the services or for partners in the framework of voluntary cooperations (para 80). Also, the Guidelines should generally recommend that the TF program complements rather than undermines existing trusted partnership programs maintained by online platforms, ensuring that CSOs without TF status and non-EU groups with global and regional experiences are not sidelined.

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