

European Commission

DG for Communications Networks, Content and
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**Austrian FMA's contribution to the European Commission's consultation on the
Guidelines on the trusted flagger mechanism under Article 22 of Regulation (EU)
2022/2065 (Digital Services Act)**

Dear Sir or Madam,

Having regard to the European Commission's targeted consultation on the Guidelines on the trusted flagger mechanism under Article 22 of Regulation (EU) 2022/2065 (Digital Services Act) we would like to provide you with the following official contribution of the Austrian Financial Market Authority (FMA).

**Comment regarding the consultation on the Guidelines on the Trusted Flagger
mechanism under Article 22 of Regulation (EU) 2022/2065 (Digital Services Act)**

We would like to comment on Point 31 of the Guidelines as follows:

We view this requirement very critically, as **it may create difficulties for authorities seeking to become Trusted Flaggers**. Pursuant to Article 22 DSA, the activity of a Trusted Flagger is not legally subject to the condition that no other means against the illegal content are available. This requirement would therefore clearly go beyond the DSA and, if introduced through non-binding guidance, would create legal uncertainty. It would also undermine the objectives of the DSA: Recital 61 explicitly states that public bodies, such as law enforcement authorities, may act as Trusted Flaggers. Since public bodies may only act within their legal mandate and regularly have other means available to act against illegal providers and their content — means that may vary in effectiveness — the legislator obviously did not perceive any contradiction in this regard. Otherwise, public authorities would regularly have to be excluded from acting as Trusted Flaggers.

In practice, there would be uncertainty as to which types of orders against illegal content could actually be considered to compete with a Trusted Flagger notice. Authorities typically have powers to prohibit illegal activities by providers, including activities conducted online. In some cases, authorities even have powers to impose website blockings, i.e. measures restricting access to illegal content. However, since the effective enforcement of national administrative orders is generally only possible domestically, it is often not possible to hold either the illegal content provider itself or the platform effectively accountable. Blocking measures typically operate as DNS blockings directed at national telecommunications providers, not against the content provider itself and not against the platforms. They are complex instruments and procedures that require time and resources. By contrast, a Trusted Flagger notice constitutes a particularly fast means of prompting an online platform to take action. However, it lacks direct enforceability and is generally directed against content facilitating the promotion and dissemination of an illegal offer. Depending on the specific procedure, both instruments may be effective in different ways. Authorities are obliged to always choose the necessary and appropriate measure.

It is therefore not apparent to us why the activity as a Trusted Flagger and measures such as blocking orders could not complement each other. Current practice rather shows that there are too few effective instruments capable of addressing the growing volume of illegal content in the field of financial services.

We don't consider the possible confusion raised by the Commission between legally binding orders and DSA notices as a relevant risk. Platforms establish dedicated reporting channels for DSA notices, and authorities always specify the legal basis for their action — in this case Articles 16 and 22 DSA. Legally binding orders, all the more so, must indicate their legal basis and comply with specific formal and service requirements. Platforms can reasonably be expected to distinguish a mere notice from a legally binding order and, in case of uncertainty, to contact the authority concerned.

We therefore propose deleting Point 31 without replacement. Should Point 31 nevertheless be retained, it would at the very least be desirable to clarify that it refers exclusively to **legally enforceable orders directed against platforms.**

The contribution has also been submitted via the ECAS EU Survey Tool using the link on the page <https://ec.europa.eu/eusurvey/runner/a1739b0c-df96-c65f-c0a5-77fd0a68aa22> for easier processing.

We kindly ask you to take our contribution into consideration.




Financial Market Authority
On behalf of the Executive Board

Christoph Seggermann

Fabian Aubrunner

signed electronically

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