This is a joint submission from ARTICLE 19 and the Electronic Frontier Foundation (EFF) in response to a consultation process by the European Commission ('the Commission') for input to their *"Guidelines for Providers of Very Large Online Platforms and Very Large Online Search Engines on the Mitigation of Systemic Risks for Electoral Processes"* pursuant to Article 35(3) of the Digital Services Act (DSA) which provides that the Commission may issue guidelines on risk mitigation measures providers of very large online platforms (VLOPs) and very large online search engines (VLOSEs) are required to adopt in relation to specific risks.

The observations made here pertain solely to those areas in the Guidelines where we have relevant technical and legal expertise.

Introduction

We welcome the opportunity to contribute to this consultation. Both of our organisations have been closely involved in the negotiations of the 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.

Providers of VLOPs have significant responsibility when it comes to elections given their unique power to influence outcomes, stemming from their dominance over the information space. In addition to the incentives that drive platforms, the design of their systems may in themselves constitute risks. For example, platform features like engagement-driven recommender systems may prioritise and amplify disinformation, divisive content, and incitement to violence. That effect, combined with a significant lack of transparency and targeting techniques, can too easily undermine free, fair, and well-informed electoral processes.

The Commission Guidelines

Under the DSA, providers of VLOPs and of VLOSEs must assess the systemic risks linked to their services and take appropriate mitigating measures in observance of fundamental rights. In this respect, Article 34(1) of the DSA lists numerous risks that should be tackled, including negative effects on civic discourse and electoral processes. However, the practical application of these categories of risks remains uncertain under the DSA, leaving the role of civil society unclear.

We therefore support the initiative by the EU Commission to present best practices and recommend possible measures rather than directing platforms towards specific actions through legal interpretation. We believe the Guidelines raise several important points. These include the following:

- Foremost, online platforms should be properly prepared for elections and should address foreseeable negative effects on election integrity. We agree with the Guidelines that a proper understanding of local context is crucial in this effort.
- Online platforms should dedicate sufficient resources and create dedicated teams to prepare for elections, proportionate to the level of risk.
- Finally, we are pleased to see the recommendation that fundamental rights impact assessments are made available to civil society organisations as soon as they are completed.

Key recommendations

- Focus on Processes on Platforms

The DSA preserves important principles under the e-Commerce Directive that helped to support online expression, such as allowing liability exemptions for the speech of others and the ban of mandated user monitoring, including through upload filters. By and large, lawmakers focused on how processes should work on online platforms: reporting problematic content, structuring terms of use, and responding to erroneous content removals. We believe that this is the [right approach to platform governance regulation](#).

By the same token, ARTICLE 19 and EFF recommend that the EU Commission Guidelines should also focus on systems and processes on platforms.

However, we observe that, in their current form, the Guidelines overly emphasise the risks associated with certain types of user-generated content and the activity of malicious actors on online platforms. Instead, the Guidelines should address certain steps VLOPs may undertake to mitigate risks stemming from their own systems and processes, such as their recommender systems, content moderation practices, ad libraries, monetary incentives, or design choices which may contribute to human rights risks during elections.

- Following a Human-Rights Based Approach

In line with Paragraph 21 of the Guidelines, risk mitigation measures should have due regard for any actual or foreseeable negative effects on fundamental rights, in particular freedom of expression. We recommend strengthening the language around fundamental rights protection to better reflect the wording of Article 35 of the DSA, which requires that *particular consideration* be given to the impacts of mitigation measures on fundamental rights. Indeed, we believe that the Guidelines should prioritise fundamental rights by clearly explaining 1) the context of the Charter of Fundamental Rights and other international standards for the protection of human rights, and 2) the objective of safeguarding human rights, especially the right to freedom of expression and the right to free and fair elections, by promoting a healthy information ecosystem (that is, [“a balanced and resilient system of information creation, exchange, flow, and utilisation”](#)).

We believe that this also reflects the spirit of the DSA, which requires assessing and mitigating systemic risks not only to "civic discourse and electoral processes", but also to "the exercise of fundamental rights". These fundamental objectives of the DSA should

be considered complementary, and any mitigation measures suggested should be in line with international human rights standards.

Paragraph 29 of the Guidelines further states that VLOPs should "consider" the impact their policies and measures on generative AI may have on fundamental rights. We suggest highlighting that the DSA does not provide for a definition of "generative AI" and generally requires a case-by-case analysis to determine which elements of the DSA apply to generative AI features. In this respect, the Guidelines should also highlight that any legal mandates that require restrictions of any content including generative AI must be in line with fundamental rights standards, including freedom of expression.

-    Watermarking Not a Suitable Risk Mitigation Measure

We are sceptical about the suggestion, in Paragraph 27, that VLOPs and VLOSEs should use watermarking as a risk mitigation measure. There is evidence suggesting that watermarking will not curb disinformation and while online platforms are free to use different measures to increase transparency, we are concerned about any mandate for platforms to use watermarking for legal compliance purposes. Watermarking also presents a risk to fundamental rights, such as privacy and freedom of expression.

-    Addressing 'disinformation' without censorship

It is essential that the DSA does not result in undue restrictions on ill-defined categories of user-generated content. The concepts as identified in paragraph 3 with respect to election integrity, and used repeatedly throughout the Guidelines, in particular "hate speech", "FIMI" or "disinformation" are not clearly defined under international human rights law. As such they are not well suited to serve as a basis upon which freedom of expression may be restricted and we therefore recommend that the Guidelines should be mindful of the fundamental right to freedom of expression, freedom of information and privacy when suggesting any targeted actions. For example, Paragraph 51 of the Guidelines suggests "targeted reporting on the measures put in place to reduce the spread of disinformation" and, additionally, without providing a definition, to reduce "information manipulation". However, the section entirely omits references to fundamental rights, including the right to freedom of expression, and fails to address the issue of government-directed disinformation campaigns.

In this context, we note that the mere falsity of information is not a legitimate basis for restricting such information. Any mandated content restrictions must serve a legitimate aim and be compatible with international law and the right of EU individuals to receive such content or information. In this respect, the 2022 Code of Practice on Disinformation notes that "a delicate balance must be struck between protecting fundamental rights and taking effective action to limit the spread and impact of otherwise lawful content."

It is also problematic for a regulator to recommend that private actors determine the truthfulness of content and to monitor and assess the accuracy of user-generated content. They lack the capacity or authority to do so. The Guidelines should concentrate on offering best practices for VLOPs to implement effective, necessary, and proportionate measures. They should also facilitate an interpretation of the DSA that

aligns with human rights protections, prominently highlighted in Article 1 as one of its main objectives.

We would also like to highlight that the criteria for determining whether a risk associated with disinformation, FIMI or similar is considered "systemic" remains unclear. This question is particularly crucial when systemic risks are believed to originate from content. A lack of clarity could lead to enforcement overreach by authorities and trigger unjustified risk mitigation measures in situations where the occurrence of specific types of content do not amount to a "systemic" risk. This is not merely a hypothetical issue. After the Hamas attacks of 7 October 2023, we and other civil society organisations raised our concerns about Commissioner Breton's reference to "indications" that platforms were used to disseminate illegal content and disinformation in the EU and effectively requested platforms to remove such content.

In particular, mitigation measures should not focus on restriction of content simply deemed *problematic*. Facilitating user access to pluralistic and diverse views about elections and political candidates is more effective in tackling threats to election integrity. We therefore suggest that the Guidelines should focus on promoting access to diverse sources and viewpoints. While we appreciate the Guidelines reference to the importance of the "availability of trustworthy information from pluralistic sources [..] for well-functioning electoral processes" in Paragraph 24, we believe that fostering such environments should be at the heart of any measures required of platforms in the electoral context.

Finally, we note that while the document title refers to "mitigation of systemic risks for electoral processes" it essentially focuses only on heightened risks to "election integrity". Although the Guidelines contain some brief references to hate speech, issues relating to attacks against minority groups or online harassment and abuse of female candidates, further silencing those parts of the population who are already often denied a voice, should be addressed in more detail.

- Cooperation with national authorities must be rights-respecting and transparent

We caution against the Guidelines' broadly phrased recommendation in Paragraph 31 that "in the design and implementation of risk mitigation measures related to electoral processes [...] providers of VLOPs and VLOSEs regularly exchange information with and have contact points for responsible national authorities and other local actors to facilitate the escalation of problems and deliberation of solutions."

It should be clearly stated that the Guidelines refer to electoral authorities, not law enforcement, when mentioning "national authorities". Furthermore, we believe that VLOPs should conduct due diligence prior to engaging with electoral authorities to understand their level of independence and assess the human rights risks associated with engaging with those electoral authorities, and to tailor the mode of engagement accordingly.

We are also concerned about the recommendation in Paragraph 34 to "establish efficient and timely communication with the authorities with swift, efficient and

appropriate follow-up mechanisms to issues flagged". While we do not oppose engagement that seeks to facilitate voter access to official information about elections or promoting media and digital literacy, we are wary of opaque interactions between national authorities and platforms. Such engagement might influence mitigation measures related to content in ways that prioritise speed over careful assessments of their implications for human rights online.

In this respect, we recommend that the Guidelines acknowledge the potential of abuse of the trusted flagger provision in the DSA. As pointed out in previous comments and publications, the DSA lacks general safeguards for users, opening the door to potential notice, action, and human rights misuse. Any guidance should therefore stress that trusted flaggers must have the collective interests of the public and the protection of fundamental rights in mind. This is particularly true for authorities that have been awarded the status of a trusted flagger. Issues with government involvement in content moderation were addressed in the newly revised Santa Clara Principles 2.0 where EFF, ARTICLE 19 and other organisations called on social media companies to "recognize the particular risks to users' rights that result from state involvement in content moderation processes."

Points of contact:

Christoph Schmon, PhD, International Policy Director, Electronic Frontier Foundation (EFF), christoph@eff.org

Chantal Joris, Senior Legal Officer, ARTICLE 19, chantaljoris@article19.org

Mark Dempsey (Brussels), Senior EU Advocacy officer, ARTICLE 19, markdempsey@article19.org