Derechos Digitales' comments to the UNESCO's "Guidelines for a multistakeholder approach in the context of regulating digital platforms",
Draft 3.0[1]

27 June, 2023

Derechos Digitales[2] is an independent, not-for-profit organisation with a Latin American scope, founded in 2005, whose main objective is the development, defence and promotion of human rights in the digital environment. The mission of Derechos Digitales is to ensure the full exercise of human rights in the digital environment in Latin America, through the study, awareness-raising and advocacy regarding public policy and private practice, promoting social justice, respect and dignity of all people.

In this document we comment and provide feedback on the Draft 3.0 of the "Safeguarding freedom of expression and access to information: guidelines for a multistakeholder approach in the context of regulating digital platforms"[3], from the form available on the UNESCO website[4]. Earlier, we provided comments on the 1.0[5], 1.1[6] and 2.0[7] drafts, participated of the UNESCO Global Conference: "Internet for Trust"[8] and other consultations and meetings, in addition to publishing our opinion about the process[9]. In general, we remain cautious about the effort undertaken by UNESCO, and maintain our expectation that the whole process is revised before arriving to specific outcomes that might not reflect consensus on the subject.

---

[1] Drafted by J. Carlos Lara, based on prior work by María Paz Canales, J. Carlos Lara & Michel Roberto de Souza. Please direct comments to info@derechosdigitales.org.

[2] More information: https://www.derechosdigitales.org/.

[3] Available at: https://unesdoc.unesco.org/ark:/48223/pf0000384031.locale=en

[4] Available at: https://forms.office.com/e/ZGHMwq416G

[5] Available at: https://www.derechosdigitales.org/wp-content/uploads/UNESCO-Regulacion-de-plataformas-digitales-Comentarios-DD.pdf

[6] Available at: https://www.derechosdigitales.org/wp-content/uploads/Derechos-Digitales-Comments-on-UNESCO-platform-guidelines-Draft-1.1.pdf

[7] Available at: https://www.derechosdigitales.org/wp-content/uploads/DD-comments-to-the-UNESCO-Guidelines-for-regulating-digital-platforms-Draft-2.0.pdf

[8] Available at: https://www.derechosdigitales.org/20148/derechos-digitales-participa-de-conferencia-de-la-unesco-por-una-internet-confiable/

[9] Maria Paz Canales and Michel Roberto de Souza. "UNESCO: An opaque process and problematic recommendations for regulating digital platforms". Derechos Digitales, 20 January 2023, available at: https://www.derechosdigitales.org/19974/

Questions:

QUESTION 1. Should we look to a principle-based document or a document that also offers detailed regulatory guidance for digital platforms?

18. Should we look to a principle-based document or a document that guides the review and implementation of regulatory processes?
- *Perspective 1 - The level of detail that the Guidelines provide in most of the sections is necessary, which includes principles and regulatory guidance.*
- ***Perspective 2*** *- The Guidelines should be a principle-based document.*
- *Perspective 3 - There should be a balance between a principle - based document and should add some level of detail in relevant sections.*

19. Please explain why you believe this is the best approach.

Perspective 2. This should be a principle-based document as the starting point, developing in further detail only where there is consensus, but leaving open the possibility of further discussion and implementation guidelines to be drafted and updated separately. There is plenty of work done by UN experts, academics, civil society, coalitions of different stakeholders and more that set out different principles that can be taken as a basis and taken further in order not to replicate existing work. At the same time, platform regulation is still shifting and there are still many areas where there will continue to be debate, as well as some contextual considerations that make it difficult to advise for detailed guidelines. Similarly, principles should be very precise in preventing the usage of these guidelines in any way that provides either states or private companies with outsized power over speech.

As it has been highlighted by several stakeholders, including many from the Global Majority, in public statements and in UNESCO events, there is a risk that the sole existence of these guidelines serve as encouragement or validation of repressive or restrictive attempts at regulating expression, or otherwise as the basis for arbitrary decision making at company level. At Derechos Digitales, we note that draft 3.0 has continued to present the Guidelines as both a reference document for all stakeholders, but then specifically target regulatory processes (see p. 10). Even understanding that UNESCO membership is composed of states, this focus demonstrates that it is difficult to present unified guidance to a broad array of stakeholders, many of whom conduct self-regulatory efforts by virtue of operating in the digital environment.

A principle-based document is, at the same time, a more feasible compromise between the lofty goals of the effort to produce these guidelines and the difficulty of providing detailed guidance in the short amount of time the discussion has been conducted with so many different stakeholders. It can also help to arrive at consensus on difficult or heavily contested topics.

QUESTION 2. What types of digital platforms should be included in the scope of the Guidelines?

20. What types of digital platforms should be included in the scope of the Guidelines?
- *Perspective 1 - Risk based approach*
- *Perspective 2 - Size and market share*
- *Perspective 3 - Services, only user to user*
- ***Other - Mixture of perspectives***

21. Please explain why you believe this is the best approach.

The digital environment is in constant shift, and current success of certain platforms in certain territories is not an indicator of future performance or popularity, nor an indicator of their availability of resources. Whilst there are relevant factors that would seemingly advise towards one or another of these perspectives, any attempt at providing guidance for regulation needs to address the difficulties of both responding to those very diverse contexts as well as anticipating future changes in the market, and be able to apply in changing conditions. As we have noted in our contribution to version 2.0, "the shape and functionality of platforms is in constant shift, influenced both by user experience and by design decisions of platform controllers, which means that functionality becomes more relevant than initial intent", and the market may yet lead to further change.

Moreover, the complexity in the provision of online services by different providers of different services through different technologies under different ownership, calls for a more granular approach than one broad attempt at providing singular guidance. All the listed approaches provide criteria under which to provide guidance, but none is by itself a categorisation that could by itself represent the aforementioned complexity.

QUESTION 3. How should a multi-stakeholder approach in a regulatory process look?

22. Overall, how should a multi-stakeholder approach in a regulatory process look?
- Perspective 1 - The level of description of multistakeholderism in the Guidelines is sufficient and does not require further detail.
- **Perspective 2 -** It would be useful to describe the role of the different stakeholders in a more detailed manner.

23. Please explain why you believe this is the best approach.

Perspective 2. It would be useful to provide descriptions of the types of roles that stakeholders can fulfil, as well as the principles guiding those roles, and the expectations that should be set with regards to their involvement. It is somewhat disheartening that some of the less concrete mentions about stakeholders have been kept mostly unchanged in version 3.0 (paragraphs 34.39) from version 2.0, maintaining vague mentions of "a critical role", "an important role" or "a role" to play for different stakeholders, with some mention to part of their areas of interest. It is crucial that more fleshed out roles are reflected and that the guidelines provide

options and examples without limiting, restricting, excluding or narrowing down the different capacities that these different stakeholders may have. It is also relevant to make this participation a necessary part of any regulatory processes, including company self-regulation, and not just an ideal but optional part of due diligence (see p. 58 and 59).

It is also crucial that the characteristics of their involvement in terms of processes acknowledge the need for mechanisms of inclusivity, diversity and equity. As Derechos Digitales has highlighted, it is ideal that "stakeholder participation is part of the whole policymaking cycle", but that requires a stronger guidance on what that meaningful participation requires. This extends to this very process at UNESCO, where a more detailed approach to what the process of these guidelines will be, and what stakeholder participation will look like, and how that participation will be tracked and accounted for, and how that will include governmental participation will unfold.

24. More specifically, should the Guidelines further address the role of the media and journalism? If yes, how so?

25. More specifically, should the Guidelines provide further information about the role of the Civil Society? If yes, how so?

26. More specifically, should the Guidelines provide further information about the role of the governments? If yes, how so?

QUESTION 4. During the second open consultation of the Guidelines, the content management section received a significant amount of comments. In those, there was agreement about:

- ***The necessity to ensure that the Guidelines aim to safeguard freedom of expression and information in the context of any digital platform regulatory process, regardless of the regulatory goal.***
- ***The importance of focusing the Guidelines on the structures and processes to moderate and curate content - and not in individual pieces of content.***
- ***The importance to refer to legitimate restrictions of content as stated in international instruments of human rights.***

27. During the second open consultation of the Guidelines, the content management section received a significant amount of comments. Does version 3.0 suitably incorporate these points? Are we missing something else about content management?
- *Perspective 1 - These 3 issues have been suitably incorporated in the new version of the Guidelines.*
- ***Perspective 2*** *- The guide requires fine-tuning some details related to this section.*

28. Please explain why you believe this is the best approach.

Derechos Digitales acknowledges the advancements of version 3.0 with regards to content management guidance. We also acknowledge that there are improvements regarding not just state regulation but also company behaviour. However, this is one area where incremental improvements reveal the underlying weaknesses of the approach by UNESCO. There should be fine-tuning and harmonisation in the language that sets clear expectations for states and companies. For example, in paragraph 30.a, "Platforms conduct human rights due diligence" is not a principle, but conducting human rights impact assessments constitutes the implementation of a principle of due diligence. "Platforms *should* adhere to International human rights standards […]" should be changed to "*must*".

Further refinements should be made to make sure that there is clarity regarding obligations for states in general and regulatory processes and systems in particular, when both devising regulation as well as revising it and enforcing it. In the case of private companies, given that their duties might be differently developed than those of states, as shown in the UN Guiding Principles, there must be more specific guidance about the meaning of different principles, as is attempted when discussing meaningful transparency. For example, paragraph 77 contrasts state obligations to restrict content under the ICCPR, and what companies are doing to comply with terms of service, an entirely different subject, but then goes back to application of permissible restrictions under international human rights law in paragraph 78. Separately, organisations such as Derechos Digitales provided further feedback to version 2.0 that is not reflected in version 3.0, calling into question the type of processing given to inputs. Given the volume and depth of the content throughout the paragraphs devoted to content management, it is necessary to conduct much wider consultation and be open to deeper revisions in these sections.

QUESTION 5. Future Proofing. How can we ensure that the guidelines are flexible enough to adapt to new and emerging technologies?
- *Perspective 1 - The Guidelines should have a mandatory revision in X number of months*. *This is an example of a written comment that may explain further this question: "The guidelines should be a living document with a mandatory process of revision every 18 months when new significant technology developments arise and require and require an specific assessment."*
- *Perspective 2 - The Guidelines do not require further revision.*
- *Perspective 3. Other.*

29. How can we ensure that the guidelines are flexible enough to adapt to new and emerging technologies?
- *Perspective 1. The Guidelines should have a mandatory revision in X number of months.*
- *Perspective 2. The Guidelines do not require further revision.*
- ***Other***

30. Please explain why you believe this is the best approach.

There is no point in getting ahead of the guidelines by either mandating or excluding revision.

One of the pitfalls of attempting regulatory efforts concerning digital technologies is that not only do they change and evolve, but so does society, so do governments, and so do the markets where they operate. This is why a principles-based document is more convenient, without ruling out both the possibility of updated implementation guidance and the possibility of revision of the guidelines themselves.

Separately, because attempting a specific but inflexible regulatory effort might petrify current thinking and specific positions around very contested issues that manifest differently in different contexts, the adaptability of the guidelines can be better suited by wider consultations and by assessing how the responses to the process itself and to the contents of the guidelines has been and will be. There have been myriad calls to revise the process of development of the guidelines, and acknowledging UNESCO's commendable efforts to open up the process, it cannot be a foregone conclusion that the outcome documentation will be what is now under discussion without profoundly reviewing the process itself. That revision can and should include not only feedback for the current state or the future versions of the guidelines, but also to any outcome document and its likely impact.

Finally, Derechos Digitales joins other civil society and academic organisations and coalitions in calling for a human rights impact assessment of the guidelines themselves, as well as an assessment of the process of development itself, taking into account regional human rights systems and standards. Regional human rights law standards, such as those from the Inter-American human rights system, have been tested through time and are well established enough to be a basis to assess new efforts at providing regulatory guidance.

QUESTION 6. Groups have been consulted to introduce a gender and intersectional approach in the Guidelines. Are there specific elements that should be considered to ensure the guidelines are sensitive to gender and intersectionality?

The gender perspective looks at the impact of gender on people's opportunities, social roles and interactions.
An intersectional approach shows the way that people's social identities can overlap, creating compounding experiences of discrimination.

31. Are there specific elements that should be considered to ensure the guidelines are sensitive to gender and intersectionality?

Draft 3.0 includes a section on "Specific measures to counter online gender-based violence" removing from the 2.0 title the language of "gendered disinformation", which can be understood as included as part of gender-based violence. A prefatory paragraph has also been removed. There might be need for further guidance on the meaning and scope of some of the concepts, considering different contexts where discussion on gender topics may vary, for which later implementation guidance can be useful, but at the very least these guidelines should specify that gender considerations extend not just to the interests of women of different ages in a man-woman binary, but to all considerations of social inequalities that involve considerations of gender.

Sensitivity of the guidelines to gender and intersectionality can be presented in two broad ways. The first is as a cross-cutting consideration in all of the text, in each part that needs to account for systemic risks that disparately affect different groups. In that sense, it is key to understand that gender considerations are inextricably tied and interdependent with other forms of inequality (economic, religious, age-related, ethnic, geographic, educational, et cetera) and marginalisation arising from those inequalities. The second is through an explicitly devoted section on discrimination, that includes but is not limited to gender-based discrimination and differentiated impacts on the basis of gender, where systemic and contextual considerations might be the root cause of differentiated effects in digital platforms. We recommend that the section on countering gender-based violence is part of a larger section that acknowledges discrimination in an intersectional manner. We note that intersectionality is acknowledged in this consultation but not in the draft 3.0 of the guidelines.

QUESTION 7. General and specific comments

32. Beyond the previous questions, please add any general or specific comment to the different sections or paragraphs of the guidelines.

Derechos Digitales also wishes to restate the specific comments made to version 2.0 (available at https://www.derechosdigitales.org/wp-content/uploads/DD-comments-to-the-UNESCO-Guidelines-for-regulating-digital-platforms-Draft-2.0.pdf). This extends to the need to restructure the guidelines there where better systematisation can help provide a coherent body of principle-based guidelines for states, companies and other stakeholders, including the need to remove or revise prefatory paragraphs that often obscure and do not help the operationalisation of paragraphs that might as well be removed to streamline the guidelines. This is the case, for example, with the paragraphs that start the highly debated guidelines on the regulatory system.

Additionally, we restate our opinion against basing the development of these guidelines on broadcast regulation. We have mentioned that "Broadcasting regulation is not necessarily a good point to build upon, notwithstanding the lessons from so many decades of broadcast regulation. There are inextricable differences among different means of communication, including those related to scarcity, infrastructure control, state or private monopolies, obligations to carry content, and much more. If narratively this effort is linked to that body of work, it risks being interpreted in a similar fashion, which is risky considering the control that states claim with regards to broadcast media". Because broadcasting is such a specific area of regulation, good experiences notwithstanding, there is not enough basis to approach a different and complex set of issues as what is presented through digital platforms.

Derechos Digitales also wishes to express the need to include explicit mentions to rights of users that have been part of the work of UN experts in the past decade, namely, safeguards for anonymity and for the encryption of private communications, which are necessary for the protection of free expression in digital platforms, especially against attacks and persecution by state actors.

QUESTION 8. Consultation process

33. The consultation process of the Guidelines is available for revision in the UNESCO Internet for Trust webpage (https://www.unesco.org/en/internet-conference). Please provide any comments you would like to give to evaluate this process.

Derechos Digitales once more expresses its appreciation for UNESCO's commendable effort to open up a global discussion on platform regulation and the roles of states, companies and other stakeholders. At the same time, we reiterate our calls to revise the process of development of the guidelines, to account for differences in standpoints and diversities of contexts, including the risk of encouraging regulation that does not comply with human rights standards.

We also restate our alignment with the calls to redesign the process, adjust expectations regarding outcome documents, reduce the scope to remove highly debated subject matters (such as those related to specific areas of content moderation), and conduct impact assessments and monitoring and evaluation mechanisms for the process, including wide consultation with stakeholders as well as active work with experts to restructure and refine the content of the guidelines. This may require moving forward in an altogether different manner, including halting or slowing down current plans for output documents, but that should be an option in order to conduct the most thorough process possible.