



ARTICLE 19 submission to the second UNESCO consultation on a “model regulatory framework for the digital content platforms to secure information as a public good”

December 2022

Introductory remarks

ARTICLE 19 welcomes the opportunity to participate in the second UNESCO consultation on a “model regulatory framework for the digital content platforms to secure information as a public good” (the Framework).

ARTICLE 19 is an international human rights organisation which works around the world to protect and promote the right to freedom of expression and information (freedom of expression). With an international office in London and regional offices in Mexico, Brazil, Bangladesh, Tunisia, Senegal, Kenya and the Netherlands, and other national offices, ARTICLE 19 monitors threats to freedom of expression in different regions of the world, develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression nationally and globally. ARTICLE 19 has extensive expertise in the area of platform regulations. For example, we issued a number of policies on the topic,¹ analysed the German Law on Enforcement of Illegal Content Online (so called NetzDG),² the French Law on Fake News,³ the UK Online Safety Bill,⁴ the Bangladesh Online Security Act⁵ or the EU Code of Conduct on Countering Illegal Hate Speech Online,⁶ all of which deal with platforms regulation. We also took an active part in the new legislation in the EU on the subject.⁷

At the outset, ARTICLE 19 notes that the Internet ecosystem has significantly evolved since intermediary liability laws were first adopted in the late 1990s - early 2000. Major social media companies such as Facebook, YouTube or Twitter have become fundamental to how people communicate and hold exceptional influence over individuals' exercise of their right to freedom of expression online. Importantly, the roles played by these companies have evolved in recent years and now range from hosting (a role characterised by the absence of editorial intervention on content) to actively promoting selected content (making selected content more visible through human or algorithmic means) or even actively producing content. However, the power of some of these companies in our society and their dominance in several markets raise legitimate concerns about their accountability to the wider public. This is an important debate to be had and states have a role to play in redressing the power imbalance between tech giants, in particular some social media platforms, and other actors, including users, developers and other smaller competitors.

ARTICLE 19 believes that these developments require a careful examination of the requirements of freedom of expression when it comes to digital platforms. To this end, States must identify what is the necessary and least restrictive method to achieve effective protection

of each of the objectives traditionally assigned to regulation (such as pluralism and diversity of freedom of expression), taking into account the evolution and roles of digital platforms in promoting and protecting human rights, including freedom of expression online.

At the same time, ARTICLE 19 has long argued that access to accurate and reliable information, user literacy and platform transparency are essential elements to protect freedom of expression. We appreciate collaboration with the UNESCO in this respect. We also acknowledge that more efforts are needed in many jurisdictions to support these objectives and recognise the importance of fostering a global understanding regarding what a human-rights based approach to platform regulation should look like.

In this submission, ARTICLE 19 does, however, need to raise serious concerns in relation to the Framework, its recommendations and overall scope. Although the UNESCO's efforts in this area may be filled with good intentions, ARTICLE 19 has significant concerns with the way in which the Framework is conceived as well as its scope. We believe that many aspects of the proposal could pose a significant threat to freedom of expression and it is also highly unclear that the proposed solutions would ultimately be effective. Given our concerns with the proposal, we outline five key issues rather than responding to specific questions posed to stakeholders. We believe that answering specific questions would be preliminary, in the light of our overall reservations regarding the proposal.

Instead, we urge UNESCO to pause its work on the Framework and to address the serious concerns outlined in this submission.

We also note that one of the goals UNESCO seeks to achieve with the Framework is to create a multi-stakeholder shared space for debates on regulation, co-regulation and self-regulation of digital platforms and to create an international community that can exchange good practices on how to approach regulation of digital platforms. ARTICLE 19 suggests that a platform enabling such exchange may indeed be valuable and could be pursued in cooperation with other relevant UN departments such as the Office of the United Nations High Commissioner for Human Rights (OHCHR).

ARTICLE 19 stands ready to elaborate in more detail on any of these concerns and to engage further with UNESCO on developing human-rights based strategies to further our common goal to protect freedom of expression and the right to information in the digital space.

Our concerns regarding the proposed Framework

The potentially far-reaching impact of the Framework means that its legitimacy is essential. This can only be achieved through a clear mandate for its adoption as well as extensive and diverse consultations of all relevant stakeholders and a high level of transparency throughout the process.

ARTICLE 19 questions whether UNESCO has a mandate to establish the Framework. We submit that the elaboration of a model regulatory framework requires a decision by the General Conference in line with UNESCO's rules of procedure and that the general reference to UNESCO's global mandate to promote the free flow of ideas by word and image does not constitute a sufficient basis to create a mandate for this proposal. Given the centrality of human rights to any framework regulating social media platforms, we further believe that UNESCO should cooperate with the OHCHR in any efforts to establish a global framework of the sort envisaged under the Framework.

ARTICLE 19 is also concerned about the lack of transparency as to the evidence and reasoning that have resulted in this Framework. For example, the section on the “overall logic of the regulatory framework” states that “some approaches to regulation have (inadvertently or deliberately) led to undue restrictions to freedom of expression (and privacy) or have simply proved ineffective in dealing with damaging content”. There is, however, no reference anywhere in the document to any concrete examples of regulatory approaches that are considered either ineffective or overly restrictive of freedom of expression. ARTICLE 19 believes that the elaboration of a framework of the kind envisaged by UNESCO requires extensive empirical analysis, as well as a public and transparent consultation process, allowing for participation of a wide variety of representative stakeholders.

According to UNESCO’s roadmap, a conference to discuss the Framework will take place in February 2023 and the Framework’s launch is planned for the first semester of 2023. In ARTICLE 19’s view, this timeframe is too ambitious and entirely unrealistic. By way of comparison, it has taken the European Union almost three years of negotiations to adopt its Digital Services Act⁸ (DSA), a detailed 300-pages regulation which covers similar issues to those addressed in the Framework in the European Union’s 27 Member States, and an accompanying Digital Markets Act (DMA).⁹ We would also note in this context that we believe it unlikely that the Member States of the European Union are willing to endorse the Framework (despite the EU being listed as one of its core supporters)¹⁰ if its approach departs significantly from that adopted by the Digital Services Act.

In addition, we believe that considering the approach by the European Union when it comes to regulating digital platforms would be a good starting point for any global framework. While ARTICLE 19 believes that the DSA and DMA could have been more ambitious in many ways, we do welcome many aspects, for example that – unlike the Framework - it does not seek to prescribe what type of content platforms should restrict but instead focuses on processes, transparency, on procedural rights for users. The DSA further establishes the protection of fundamental rights as one of its main objectives. We also believe the EU was correct in including competition policies in its approach to platform regulation and negotiating the DSA together with the DMA, which aims to open up digital markets currently under the control of so-called gatekeepers – like Meta or Google - and to establish the conditions for fair relationships between gatekeepers, business users and consumers.¹¹

ARTICLE 19 acknowledges that the new EU regulations (DSA and the DMA) form part of a very complex and specific regulatory environment so many of its provisions are not transferrable into a modal framework that intends to apply across jurisdictions. At the same time, we believe that certain aspects of the DSA and the DMA, such as the procedural rights for users or the requirements regarding transparency, due diligence or interoperability could well be applied globally. We do therefore recommend that any elaboration of a global framework build on the achievements made in the DSA and the DMA but be more ambitious in protecting user rights online.

Key concerns regarding the proposals in the Framework

Beyond the structural concerns outlined, ARTICLE 19 contends that many of the proposals in the Framework are deeply problematic from a freedom of expression perspective. ARTICLE 19 is worried that if launched in its current form, the Framework could be **used by a number of States to justify repressive internet regulations** with reference to a UNESCO framework.

What is more, while the Framework may operate on the assumption that independent regulators, will be enforcing any regulation adopted on the basis of the Framework, often this is not the reality. Any aspects of the Framework should therefore be specific enough and contain sufficient safeguards to limit the possibility of abuse. However, the Framework lacks clarity rendering itself open to problematic interpretations.

ARTICLE 19 will at this stage not detail each issue we identified but instead highlight five key concerns. We hope this will trigger a fundamental change in the approach adopted by the Framework.

We invite UNESCO to refer to our recent detailed policies dealing with platform regulation and content moderation, namely our policies on content moderation and digital markets;¹² and to further refer to the *Manila Principles on Intermediary Liability*¹³, the *Santa Clara Principles on Transparency and Accountability in Content Moderation*¹⁴ and the recently adopted *Declaration of principles for content and platform governance in times of crisis*.¹⁵

1. The Framework lacks clarity

The main problem with the Framework is that almost all of its provisions lack clarity. Indeed, the Framework in its current form is too broad and superficial and, thus, may result in unintended consequences that could be dangerous for freedom of expression and the right to information.

For example, the Framework's position on intermediary liability is not specifically addressed – and some provisions in the Framework lend themselves to problematic interpretations in that respect - although it is widely recognized that immunity from liability for intermediaries is the most effective way of protecting freedom of expression online. It is further unclear how “platforms” are defined and it is left up to the individual jurisdictions to define the platforms “in scope” of the regulatory system – the Framework even appears to suggest that larger platforms which “moderate all content before it is uploaded” may be “less in scope” than smaller platforms who do not moderate proactively. Any incentive for platforms to monitor all its user-generated content, has, however, consistently been opposed by ARTICLE 19 and other human rights organisations for its incompatibility with international freedom of expression and privacy standards.

The description of the enforcement powers of the regulator also seriously lacks detail and clarity. For example, there is a broad reference to the regulator's power to commission an “independent third party” to conduct a “special investigation or review” in case of serious concerns about the operations or approach of a platform. However, the Framework does not detail what the exact requirements should be for such investigation; who would be given the power to perform such investigation; the nature of it's the specific investigatory power given to the independent third party; or its cooperation with the regulator as well as any specific enforcement measures.

A further cause of concern is the Framework's repeated reference to types of speech that ought to be limited, such as “harassment”, “conspiracy theories”, “misinformation”, “disinformation”, “hate speech”, “content that is threatening or intimidating”- all of which are not defined in the Framework and all of which lack an international definition. Such open concepts will have to be interpreted by regulators around the world without any guarantee that they will do so in a manner compatible with international freedom of expression standards, which will

likely lead to censorship and surveillance of what people share in their digital spaces. Indeed, ARTICLE 19 notes that these concepts are routinely abused by power-holders, including governments, as a means to discredit media outlets, and journalists as well as to suppress critical thinking and dissenting voices.

The above constitutes a mere illustrative list. We could name many more provisions in the Framework that would have to be specified to avoid arbitrary application or that should be abandoned altogether.

2. The Framework fails to adopt a human-rights based approach

While ARTICLE 19 appreciates and supports UNESCO's objective to secure information as a public good, we believe that it should not serve as the main concept underpinning any regulation in this area. Instead, we have urged States and regional organisations to adopt a human-rights based approach to platform regulation.

The Framework does make repeated reference to human rights, freedom of expression and privacy. However, many of the provision in the Framework do not comply with Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which requires that any restriction to freedom of expression needs to be strictly in line with the tripartite test of legality, legitimacy, necessity and proportionality.

On a broader level, the Framework states that its goal is "to safeguard freedom of expression, particularly in relation to matters of public interest." This diverges from the approach to be adopted under international human rights law which does not classify expression according to content or quality but requires that any sort of expression may only be restricted in line with the tripartite test. Similarly, the Framework states that "in order to protect and promote the free flow of ideas in the digital content platforms, there is not only the need to protect the right to speak (impart), but also the need to protect the right to seek and receive information in a balanced way". This appears to create a false dichotomy between freedom of expression and the right to information. However, under international human rights law, these rights are not understood as competing but as being complementary and mutually reinforcing each other.

We are concerned that the Framework's focus on protecting accurate and reliable information has led to the categorisation of speech and information in "desirable" and "undesirable" or "harmful" throughout the Framework. Should the Framework be adopted, it may lead to regulation that will leave it either up to governments around the globe or private companies to decide which type of information or expression they consider to be desirable or harmful. As will be described further in the next section, both would threaten free speech online.

3. Platforms should not be required to make assessments on the illegal or harmful nature of content

The Framework states that the regulatory system should focus not on individual pieces of content but on "the systems and processes used by the platforms". However, the Framework does not limit itself to provisions that deal with the platforms' systems and processes but instead places a key focus on user-generated content. This is problematic from a freedom of expression perspective.

The Framework states that "it is expected that illegal content – for example child sexual abuse

material (CSAM) – will be reported to the relevant authorities by platforms themselves”. While the enforcement and liability attached to such obligation is not specified, this is a deeply problematic provision. If transposed into regulation by Member States it would likely require platforms to screen all their content and determine whether any of it is illegal. Such determination may be easier when it comes to CSAM content. However, when it comes to illegal content of defamatory or “terrorist” nature, these determinations become highly contextual and complex and therefore may lead to restrictions of content that is not only legal but in the public interest, such as journalistic content. This is particularly true are incentivised by a regulation to err on the side of caution and over-remove content to avoid liability exposure. In addition, decisions on legality of content should be made by independent courts, not private companies.

The Framework further states that the regulatory system should find a means “to reduce the potential harmful content” that may damage democracy and human rights – hatred, incitement to violence; harassment; misinformation; disinformation; and hostility directed at women, racial and other minorities or vulnerable groups”. In addition to the lack of clarity of many of these concepts which may lead to abusive interpretations by authorities, it is concerning that companies may be legally required to take measures against content that may be allowed under the law. To take the examples of misinformation and disinformation – these categories of content are not per se illegal and they cannot be restricted under international human rights law simply on the basis of their false nature.¹⁶ This means that individuals would be allowed to say things on the street that are not permitted on social-media platforms. Moreover, the vast majority of ‘harmful’ content is inherently hard to define, and is therefore likely to lead to the censorship of content that – though offensive to some – ought to stay up.

4. The exclusion of competition and data privacy

The Framework explains that it explicitly does not deal with data privacy, competition, intellectual property as they require different approaches and different legal or regulatory framework and because “attempts to produce legislation dealing with all internet issues inevitably risk being too ambitious or becoming over complicated, which impacts on public understanding”.

We note that any regulation of platforms that does not take into account competition and data protection aspects will prove ineffective in limiting the harmful effects of these platforms’ business model.

ARTICLE 19 has long argued that any attempt to regulate social media companies should include solutions that tackle the market power of the biggest online platforms. Regulatory solutions based on competition law can help enforce terms of service that comply with rights guaranteed by international law and prohibit platforms from using them to exploit people; allow people who want to protect their data, or who want to be in control of the content they see and access on social networks, to find real alternatives in the market; and prevent further concentration in the market, for example by preventing social media platforms from acquiring other players in the same or adjacent markets. More specifically, ARTICLE 19 has suggested that regulators should provide for the unbundling of hosting services from content curation services and strengthen interoperability provisions.¹⁷

Similarly, the business model of many of these platforms is based on the collection of vast amounts of data about their users and their online habits (behavioural data) and its monetisation through online (targeted) advertising. The techniques relied on are highly privacy-

invasive (e.g. online tracking, real-time bidding, and targeting). They also seek to keep users engaged on platform with their recommender systems often fueling the widespread dissemination of clickbait, sensationalist, and 'extremist' content online, without users having a meaningful understanding of why they are seeing a particular type of content or ad on social media.¹⁸

We believe that any regulation in this area should therefore also take account of competition and data privacy aspects and focus on the design and transparency around the platforms' recommender systems. While the Framework states that it seeks to provide guidance for Member States to address curation processes of content, the Framework contains barely any provisions in that regard.

5. The appropriate regulatory framework

Much of the Framework focuses on content moderation, placing it under the supervision of a State regulator. When it comes to the question of overseeing the content moderation practices of platforms, ARTICLE 19 is not convinced that the case for a regulator has been made, particularly for content that falls into the category of 'harmful' but which may be legal. We therefore invite UNESCO to instead promote other mechanisms. In particular, we believe that independent multi-stakeholder bodies (Social Media Councils) - inspired by the effective self-regulation models created to support and promote journalistic ethics and high standards in print media - could be better suited to oversee social-media companies' compliance with a set of principles derived from human rights standards.

We suggest that the key objectives of such a Social Media Council would be to i) review individual content moderation decisions made by platforms; ii) provide general guidance on content moderation policies; iii) act as a discussion forum for the adoption of recommendations; and iv) encourage a voluntary compliance approach to the content moderation oversight.¹⁹ For a detailed analysis of how such a Social Media Council could operate, we invite UNESCO to refer to our detailed policy *Social Media Councils: One piece in the puzzle of content moderation*.²⁰

Final remarks

As mentioned at the start, this submission only highlights a limited number of key concerns we wished to raise with the Framework. Many other problems could be discussed, including but not limited to the sections on language and accessibility, election integrity, data access or major events. ARTICLE 19 is of course willing to provide more detail on our specific concerns with each aspect of the Framework.

However, rather than attempting to amend the Framework provision by provision to bring it closer in line with international freedom of expression standards, we urge UNESCO to reconsider moving forward with this project and address the concerns around the mandate and process that we have outlined at the start of our submission.

¹ See in particular ARTICLE 19, Internet intermediaries: Dilemma of liability, 2013, available at https://www.article19.org/wp-content/uploads/2018/02/Intermediaries_ENGLISH.pdf; Regulating

content moderation: Who watches the watchmen?, 8 December 2021, available at: <https://www.article19.org/resources/international-regulating-content-moderation-who-watches-the-watchmen/>; and Taming Big Tech: Protecting freedom of expression through the unbundling of services, open markets, competition, and users' empowerment, 8 December 2021, available at: <https://www.article19.org/resources/international-a-new-policy-to-tame-bigtech-and-protect-expression/>

² ARTICLE 19, Germany: Act to Improve Enforcement of the Law on Social Networks undermines free expression, 1 September 2017, available at <https://www.article19.org/resources/germany-act-to-improve-enforcement-of-the-law-on-social-networks-undermines-free-expression/>.

³ ARTICLE 19, France: Proposed law against the manipulation of information violates international standards, 23 July 2018, available at <https://www.article19.org/fr/resources/france-la-proposition-de-loi-contre-la-manipulation-de-linformation-viole-les-standards-internationaux-mise-a-jour/>.

⁴ See e.g. ARTICLE 19, Online Safety Bill is a serious threat to human rights online, April 2022, available at <https://www.article19.org/resources/uk-online-safety-bill-serious-threat-to-human-rights-online/>; ARTICLE 19, UK: Joint civil society briefing for Online Safety Bill's second reading, April 2022, available at <https://www.article19.org/resources/uk-joint-civil-society-briefing-for-online-safety-bill/>; or ARTICLE 19, UK: Draft Online Safety Bill poses serious risk to free expression, July 2021, available at <https://www.article19.org/resources/uk-draft-online-safety-bill-poses-serious-risk-to-free-expression>.

⁵ ARTICLE 19, Bangladesh: Digital Security Act, November 2019, available at <https://www.article19.org/wp-content/uploads/2019/11/Bangladesh-Cyber-Security-act-2018-analysis-FINAL.pdf>.

⁶ ARTICLE 19, EU: European Commission's Code of Conduct for Countering Illegal Hate Speech Online, available at <https://www.article19.org/resources/eu-european-commissions-code-of-conduct-for-countering-illegal-hate-speech-online-and-the-framework-decision/>.

⁷ See e.g. ARTICLE 19, EU: Commission approach to tackling illegal content online fails to protect free expression, 10 July 2018., available at <https://www.article19.org/resources/eu-commission-approach-to-tackling-illegal-content-online-fails-to-protect-free-expression>; ARTICLE 19 EU: Protect freedom of expression in Digital Services Act, October 2020, available at <https://www.article19.org/resources/eu-protect-freedom-of-expression-in-digital-services-act/>; ARTICLE 19, EU: The draft Digital Services Act and the Digital Markets Act must protect freedom of expression, December 2020, available at <https://www.article19.org/resources/digital-rights>; ARTICLE 19, At a glance: Does the EU Digital Services Act protect freedom of expression?, February 2021, available at <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/>; ARTICLE 19, EU: Will the Digital Services Act hold Big Tech to account?, July 2022, available at <https://www.article19.org/resources/digital-services-act-big-tech-accountable>. See for a general overview of our work in the European Union, ARTICLE 19, Our work in the European Union, available at <https://www.article19.org/our-work-in-the-european-union/>.

⁸ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act).

⁹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

¹⁰ C.f. <https://www.unesco.org/en/internet-conference/supporters>.

¹¹ ARTICLE 19, EU: Will the Digital Services Act hold Big Tech to account?, 5 July 2022, available at: <https://www.article19.org/resources/digital-services-act-big-tech-accountable/>.

¹² ARTICLE 19, Regulating content moderation: Who watches the watchmen?, and Taming Big Tech: Protecting freedom of expression through the unbundling of services, open markets, competition, and users' empowerment, *op.cit.*

¹³ The Manila Principles on Intermediary Liability (the Manila Principles), March 2015, available at: <https://manilaprinciples.org/index.html>.

¹⁴ The Santa Clara Principles On Transparency and Accountability in Content Moderation, 8 December 2021, available at: <https://santaclaraprinciples.org/>.

¹⁵ Declaration of Principles for content and platform governance in times of crisis, 29 November 2022, available at: <https://www.article19.org/resources/platforms-must-protect-human-rights-during-crisis/>.

¹⁶ See also the Inter-American Court of Human Rights' description of the inherent risk in trying to limit concepts such as disinformation or misinformation. It points out that by demanding a high degree of truthfulness as a requirement for the exercise of freedom of expression [it creates] "[a] system of control of the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the

information that society receives [which] can be a source of great abuses and, in essence, violates the right to information that society itself has [...]". See Inter-American Court of Human Rights. Compulsory Membership in an Association of Journalists (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of 13 November 1985, Series A No. 5, para 77. See also Inter-American Commission on Human Rights. Declaration of Principles on Freedom of Expression. Principle 6, para 30. Available at <https://www.cidh.oas.org/basicos/declaracion.htm>.

¹⁷ For more detail see Taming Big Tech: Protecting freedom of expression through the unbundling of services, open markets, competition, and users' empowerment, *op.cit.*

¹⁸ Regulating content moderation: Who watches the watchmen?, *op.cit.*, p. 16.

¹⁹ For more information about ARTICLE 19's social media council, see ARTICLE 19, Self-regulation and 'hate speech' on social media platforms, 2 March 2018, available at <https://www.article19.org/resources/self-regulation-hate-speech-social-media-platforms/> and ARTICLE 19, Social Media Councils, One piece in the puzzle of content moderation, October 2021, available at <https://www.article19.org/resources/social-media-councils-moderation/>.

²⁰ *Ibid.*