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Task Force 05

INCLUSIVE DIGITAL TRANSFORMATION

A Latin American Perspective on Global Governance for Digital Platform Accountability

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Abstract

This policy brief explores the global interest in digital governance structures and offers a Latin American perspective. It questions the calls to hastily address the need for global regulations in the digital sphere, urging nuance and regard for regional contexts and concerns.

The regulatory dynamics of the Global North have predominant influence in shaping global discussions through regulatory frameworks, such as the Digital Services Act (DSA) in the European Union (EU). These regulations may not align with the diverse needs and realities of Latin America and this is—thus—a major source of concern. Despite the shared concern, normative migration does occur, a point we will demonstrate through the analysis of Latin American bills where the influence of Global North regulations and processes—such as UNESCO's Guidelines for the Governance of Digital Platforms—can be found.

The brief calls to avoid a one-size-fits-all approach to digital governance. Furthermore, it calls to identify principles and recommendations that could contribute to a truly global understanding of the subject. From a Latin American standpoint, a central goal of this brief is to highlight the Inter-American System of Human Rights (IASHR) track record in defending and protecting freedom of expression, including in the digital sphere. This regional perspective should be part of global discussions on digital platform accountability to incite more inclusive and nuanced standards thereby achieving fairness, transparency, and platform accountability that considers the social, cultural, economic, and historical local contexts.

Diagnosis of the Issue

Internet governance is undergoing a process of regulatory globalization, a rich, complex, and dynamic characteristic of late 20th-century capitalism. Norms and rules are born in certain places but they travel and are transplanted to legal systems that are different from those that gave rise to them. This phenomenon essentially has a state-based dimension, but another one goes beyond the formal mechanisms that states have to create norms. Regulatory globalization occurs through many pathways and requires the involvement of different actors (Braithwaite; Drahos, 2000).

Legal migration is particularly relevant in the context of the G20. The forum enables states to reach broad agreements on the future of digital governance and the regulation of digital platforms. These agreements should—however—take stalk of the different social, cultural, economic, and historical contexts where regulations are to be applied. The unidirectional migration of norms and rules is undesirable for a technology that is essentially global. And yet, this phenomenon occurs, as shown, for example, by case studies of Latin American bills influenced by foreign regulations such as the NetzDG, the French Law no. 2018-1202 on the 'fight against the manipulation of information', the EU DSA and other global guidelines, that often adopt standards or laws from the Global North, such as the Guidelines for the Governance of Digital Platforms of UNESCO. We analyzed the main platform regulation bills from Brazil and Costa Rica. These analyses strive to show not only how normative migration occurs, but mainly its challenges.

While the DSA served as a clear inspiration, the controversial Brazilian bill, PL 2630, adopted elements like risk assessments, duty of care, and exemptions to intermediary liability. Despite frequent references to the DSA as a democratic model, the Brazilian proposal differed significantly. Notably, it failed to ensure checks and balances present in

the DSA, raising concerns about potential abuse in the Brazilian context with its unique institutional framework (Sampieri and Alimonti, 2023). Meanwhile, the Costa Rican bill explicitly states that it is inspired by the DSA and, as such, includes obligations similar to those enshrined in European law, such as duties of care (which in some cases are verbatim) and obligations on content moderation, transparency, and sanctions when providers do not comply with them. Nevertheless, it does not mention the economic and human resources required to enforce it.

Furthermore, there are substantial differences between the European regional framework and national frameworks that significantly impact the need for specific regulation and how to enforce it. In the European context, regulatory mechanisms are often subject to the negotiation for consensus among various national authorities and political parties[1], fostering a multi-faceted and balanced approach to governance. In contrast, national frameworks may lack these intricate negotiation processes, resulting in accelerated outcomes that lead to regulatory mechanisms that are more straightforward and potentially less robust in ensuring accountability and preventing abuse.

We identified three main problems, further developed in the following sessions.

1. **The DSA is not a good blueprint for national legislation.**

The reason is that the DSA is a complex regional regulation, very different from common national legislation. It foresees a long implementation process that will require

[1] "Digital Services Act: Council and European Parliament Reach Deal on a Safer Online Space." *Council of the European Union*, April 23, 2022. https://www.consilium.europa.eu/es/press/press-releases/2022/04/23/digital-services-act-council-and-european-parliament-reach-deal-on-a-safer-online-space/.

numerous legislative changes and adaptations at the national level, some degree of regulatory dialogue and negotiations, and several embedded learning processes. Nothing of the sort is available for legislatures passing statutes at the national level. The DSA advances broad principles that demand specification in subordinate norms over time (both regional and national). The rise of the DSA as a regulatory "model" to follow is—at least—premature.

2. **The UNESCO Guidelines need to be wary of the context in which they could be used**.

Indeed, our analysis highlights the most problematic points of incentivizing regulatory change that does not take into consideration the contextual, historical, and economic realities of specific countries or regions. With a focus on Latin America, we highlight lessons learned from the region's regulatory past regarding some of the structural conditions that complex regulation needs to succeed. Furthermore, many countries have their own regulatory frameworks —some legislative, some created by courts—that should be considered when assessing the development of new regulations.

3. **The IASHR offers the necessary background for building its own platform regulation models**.

The IASHR has developed standards that seek to make the new challenges presented by technological changes compatible with the standards of freedom of expression and human rights that are derived from the American Convention on Human Rights (ACHR).

In thematic reports[2], documents and various statements by the Special Rapporteur for Freedom of Expression (RELE) of the Organization of American States (OAS) has laid the foundations for the protection of human rights. Our policy brief shows that on some issues DSA's and UNESCO's Guidelines' provisions can be incompatible with IASHR standards. This reveals an underlying conflict that any legislators in the region who want to imitate European regulation should consider it as a necessary prior step.

Recommendations

While the international community increasingly focuses on global structures to govern the digital world, effectively regulating digital platforms requires a more nuanced approach. In regions like Latin America, a strong regional framework grounded in human rights is crucial to ensure fairness, transparency, and accountability.

The primary recommendation of this brief is to strengthen the efforts to empower regional institutions as primary spaces of (regional) normative creation and consolidation. Supporting and promoting the work of the IACHR and its RELE is a central tenet of this approach. By facilitating the creation of a legal framework or guidelines that consider the specific needs and contexts of Latin America, these entities can play a vital role in shaping a more just and equitable digital space in the region. Our research on normative migration is based on comparing the EU DSA, the Brazilian Fake News Bill and the Costa Rican Electronic Commerce Bill.

[2] IACHR, "Libertad de expresión e Internet". Comisión Interamericana de Derechos Humanos, Washington, DC. (2013), "Estándares para una Internet libre, abierta e incluyente". D.C. No. INF.17/17. (2017).

Both the Brazilian and Costa Rica bills include DSA-like provisions regarding risk evaluation and mitigation obligations, transparency, the very large online platforms approach, and sanctions (among other issues). Should these laws be enacted, would these countries have the institutional infrastructure necessary to implement risk-based approaches that are foreign to their institutional and legal traditions? We believe they would not for at least three reasons.

First, the DSA is a regional piece of legislation built upon an infrastructure that presupposes an ongoing regulatory dialogue between the European Commission and nation-states. This dialogue is permitted by and derived from the institutional infrastructure of the EU. Latin America lacks this robust institutional framework as a region and also at the individual country-level where these bills would be applied (Ventura, 2005)

As assessed by the OECD, while Brazil and Costa Rica have made commendable efforts to enhance their regulatory processes, significant opportunities for improvement remain in several areas: conducting effective and transparent public consultations, implementing consistent practices for Regulatory Impact Assessments and ex-post evaluations, and expanding the scope of good regulatory policy (Querbach and Arndt, 2017). This context aids in evaluating the potential risk of provisions similar to those in the DSA being misused in environments that are not as institutionally robust as the EU.

Finally, the risk-based approach of the DSA, outlined in Article 34, is a true regulatory innovation, that—to an extent—replaces previous approaches based on clearly defined obligations, sanctions, and punishment as a means of coercion. The mechanism behind the risk-based approach is different and it is at least not certain that peripheral countries with a lack of adequate resources will be able to cope with a mechanism designed for

better-funded -and still with limited resources- bureaucracies[3]. Furthermore, it is at least questionable that a risk-based approach should have prominence over a human rights-based approach, provided the latter are non-negotiable and must be respected regardless of a risk level associated with external factors.

While developing new institutions and procedures is not impossible, it is challenging. Those proposing to copy-cat foreign legislation should be aware of difficulties that may render their legislation harmful or, at least, ineffective.

The standards on permissible hate speech also vary deeply from region to region. The right to free speech has never been as broadly conceived in the EU as in the US (and—we would add—in Latin America) (Bradford, 2020). Hence, in the EU speech that is validly banned is both one that incites violence and hatred as such. This standard of hate speech is different from the one enshrined in the US and in the IASHR. In both cases the incitement to violence is a necessary element because hatred alone does not comply with the threshold established in the US First Amendment or in article 13 of the ACHR.

Contextual reasons caution against embracing the DSA as a model. On one hand, what concerns European lawmakers (such as foreign information manipulations and interference (FIMI) practices) is not a primary concern for their Latin American peers. To what extent portions of the DSA are thinking of FIMI when regulating disinformation?

On the other hand, the risk-based approach of the DSA may be contrary to IASHR standards or other legal instruments. For instance, article 35 of the DSA enshrines

[3] Eliška Pírková (Access Now); Marlena Wisniak and Karolina Iwańska (ECNL). 2023. "Towards Meaningful Fundamental Rights Impact Assessments under the DSA". https://www.accessnow.org/wp-content/uploads/2023/09/DSA-FRIA-joint-policy-paper-September-2023.pdf.

mitigation obligations that require platforms to expeditiously remove or disable access to illegal hate speech. Should the European standard be applied in the Americas, speech permissible under the IASHR could be censored by private parties. Particularly, in the case of Costa Rica's bill, article 44 copies article 16 of the DSA. It incorporates the liability for intermediaries when they fail to remove potential illegal content they host after they receive a private notice. Regulations should avoid conflating platform accountability with empowering digital platforms to control users' online expression and actions. This is a dangerous path, given the immense power already wielded by big platforms and the growing influence of digital technologies in all aspects of our lives (IACHR, 2023)

Finally, the lack of contextual adequation of the imported regulation may create a trap for regulators that may not be up for the task.

In the last few years there has been a tendency to regulate "harmful but legal" content. This content category clashes with the categorical distinctions used for decades by the IASHR. The Advisory Opinion OC 5/85 of the Inter-American Court of Human Rights (IACtHR), for instance, flatly rules out the feasibility of state regulation tending (IACtHR, 1985) to limit the circulation of legal but potentially harmful information or ideas.

These arguments call for caution when dealing with processes of legal migration. While this conclusion should be considered by legislators looking for inspiration elsewhere, the G20 should take it as a point of departure for thinking about global principles. A thoughtful concern for different institutional infrastructures, contexts, and histories would provide a sounder basis for multi-stakeholder processes.

For the aforementioned reasons and in order to instrumentalize this concern, the G20 should:

- **Identify points of agreement and disagreement on Internet governance among member states through engagement group policy briefs.** This can be conducted at a high level of abstraction, focusing primarily on structural principles applicable to all G20 states. This endeavor should also provide evidence of how these principles are applied in specific regional or national regulations within member states.
- **Consider different contexts and increase international cooperatio***n* to ensure accountability in cases where freedom of expression and human rights online are not upheld. While the G20 typically operates at high levels of abstraction, it's crucial to acknowledge regional and national nuances.
- **Establish a framework of funding principles** calling for comprehensive transparency reports, ensuring uniformity, consistency, and incorporating both quantitative and qualitative analysis to assess the social impact of digital platforms. The G20 could propose a toolkit or set of indexes that could ensure that the reports are indeed qualitatively comparable and quantifiable.
- **Promote human-rights-centered approaches to deal with new technological challenges**, including the development of AI - even if companies may adopt risk-based approaches to foster their interests. Hence, regulation should strive to ensure that the evaluation of risks carefully considers the stakes involved from the point of view of human rights.

Scenario of Outcomes

If these recommendations were adopted, the G20 could promote and foster the exchange between different stakeholders regarding platform governance taking into account the local contexts of each country.

Accordingly, decision-makers representatives from Latin American countries of the G20 should:

- Develop policies and agreements that reflect broad consensus and acknowledge regional differences. The IASHR developments on freedom of expression online and internet governance mechanisms could serve as a benchmark for discussing and constructing public policy among relevant stakeholders within the G20. Governance mechanisms may range, as identified by Marsden, Meyer, and Brown, from controlled self-regulation, formalized self-regulation, to co-regulation (Marsden; Meyer; Brown, 2020)
- Foster multi stakeholder dialogues both nationally and regionally to inquire if global governance mechanisms for platforms are desirable and, if so, what at the minimum core principles they should abide by. The trade-off implied in this approach is that it would likely push G20-based consensus down the line. It is, however, necessary if the nuanced approach here proposed is to be effective.
- Refrain from focusing on global regulations, and instead support those regions with a strong background on the topic as the IASHR. While there is a growing concern regarding disinformation, especially when it may affect democratic electoral processes, the answer to this issue is not creating categories of prohibited

content. Errors should be answered with corrections; and the main way of fighting false information is with true information (Del Campo; Ugarte, 2021). States should thoroughly discuss and analyze with a multistakeholder approach which mechanisms—other than prohibition—may help to maintain the integrity of information ecosystems while protecting freedom of expression and taking into account the nuances provided by the specific context where such information is circulating.

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