

Public Comment to the Oversight Board - Case 2021-016-FB-FBR

This public comment sheds light on the scope of Facebook's Community Standards concerning sexual abuse and exploitation of minors, and the standards for protecting them from re-victimization in the digital space. Then, it goes on to briefly portray the nuances of balancing public interest and the protection of children's rights, and argue that Meta can improve on how it addresses disputes between these often opposing concerns. Lastly, it suggests a tool to assist the company in identifying when and to what extent public interest may override children's rights and best interests.

As the Board highlighted in its description of the case, Facebook appears to have based the removal of the user's content on the basis that it "shows children in a sexualized context" because it "describes how the attacker viewed the minor in sexually explicit terms." Pursuant to Facebook's policy on Children Sexual Exploitation, Abuse and Nudity, users are precluded from posting "content that threatens, depicts, praises, supports, provides instructions for, makes statements of intent, admits participation in or shares links of the sexual exploitation of children (real or non-real minors, toddlers or babies)."

In light of the description of the post provided by the Board, it seems reasonable to conclude that the content in question falls under the restriction on "depicting" sexual exploitation of minors. **However, the elusiveness of said word - "depicting" -, coupled with the absence of further guidelines, may lead to different interpretations as to the type and depth of information that users are authorized to convey.** This becomes even more critical in cases of publications that report on issues concerning sexual violence against minors, since this type of content speaks to people's public interest concerns.

In analyzing whether Facebook's policies and enforcement practices adequately protect children's rights, the Board may first evaluate whether Facebook's Community Standards provide clear and concrete standards for users to rely on. With regards to the substance of the current policy on Children Sexual Exploitation, Abuse and Nudity, Facebook could interpret its provisions, and especially the term "depicts", in light of the international guidelines for reporting on issues affecting minors. While these standards are primarily targeted at journalists, they can help navigate the complexities and specificities of the protection of children's rights in the digital space.

First and foremost, we highlight that such standards are grounded on the values and provisions enshrined in the Convention on the Rights of the Child, which should inform Facebook's policies and enforcement measures involving minors. Among other rights, said document underscores the importance of always taking into account the best interests of children (article 3). Furthermore, it sets out children's right to privacy (article 16), which encompasses the protection of their honour and reputation, shielding them from all forms of exploitation that are deemed harmful to their welfare (article 36) - especially when they can be identified based on

location data. Interestingly, the Convention also underscores the role of the mass media in helping disseminate information that fosters the promotion of children's well-being and physical and mental health, as well as the need for guidelines that protect children from information and material injuries.

Specifically on the issue of reporting on children-related cases, UNICEF has published, in the past years, relevant principles and guidelines that may serve as guidance for the Board. In a nutshell, these standards urge for a more sensitive and mindful approach to cases involving minors, particularly where these individuals are found in a position of enhanced vulnerability, such as in episodes of sexual abuse and exploitation. Additionally, they outline that children should be viewed as rights' holders, just like adults. Consequently, their particular needs must be given due and careful consideration.

Importantly, UNICEF instructs journalists **not to "further stigmatize any child; [and to] avoid categorizations or descriptions that expose a child to negative reprisals, including additional physical or psychological harm, or to life-long abuse, discrimination or rejection by their local communities."**¹ Unlike the broader terms around Facebook's policy, this guideline seems to provide more objective standards on the scope of the information that could be published based on children's best interests and rights.

In its policy recommendations, the Board may ponder whether the absence of any such standard from Facebook's part leaves children that were subjected to sexual violence open to re-victimization. Then, it could consider whether Facebook should adopt similar guidelines to draw a more clear line and define to what extent the "depiction" of any given case of sexual abuse or exploitation of a minor is, in fact, harmful to the victim.

In its referral to the Board, Meta demonstrated a legitimate concern. While the company stated that it is concerned with making sure that its platforms are not used to re-traumatize victims and cause further harm, Meta also recognized that its platforms - in this case, Facebook - may host relevant advocacy content against crimes and human rights violations, a positive function it would like to see preserved.

According to the Board, the intention behind the portrayal of the perpetrator's view was to criticize the Swedish criminal justice system and argue for the creation of a sex offenders register in the country. **This case, therefore, precisely reflects the tension between the public interest in reporting and raising awareness of topics relating to sexual violence against children, on the one hand, and its impact to children's rights (i.e. privacy, safety and welfare), on the other.**

In its policy on Children Sexual Exploitation, Abuse and Nudity, Facebook does not provide any public interest-related exceptions to the restrictions it imposes upon users. While this

¹ UNICEF Cambodia, *Guidelines for Reporting on Children*, 2017. Available at: https://www.unicef.org/cambodia/media/1426/file/A%20guideline%20for%20journalists%20on%20reporting%20on%20children_Eng.pdf%20.pdf; and UNICEF, *Ethical Reporting Guidelines*. Available at: <https://www.unicef.org/media/reporting-guidelines>

could mean there were no such exceptions, the original decision to leave the content up proves this is not the case. For this reason, the Board could consider whether the lack of a public interest exception in Facebook's policies is an obstacle to striking a better balance between public interest, on the one hand, and children's rights, on the other.

On a related note, a **zero-tolerance policy towards the disclosure of information when there is a public interest involved may disproportionately affect the expression of journalists, academics, artists and civil society organizations, and, in this particular context, prevent the dissemination of key advocacy and reporting work that actually helps safeguard children's rights and well-being.**

This would preclude the public from accessing relevant, factual, educational, and awareness-raising information that may also, under the right circumstances, promote the protection of children's safety. Hence, the Board's interpretation of Facebook's Community Standards should be construed in a manner that allows for the publication of some level of potentially sensitive information, while also safeguarding children's best interests and protecting them from being harmed, re-traumatized or re-victimized.

To better understand how to strike this balance, the Board could also rely on the guidelines and principles put forward for journalists by UNICEF. In its *Ethical reporting guidelines*², the organization - in line with the Convention on the Rights of the Child - states that the best interest of children should be prioritized in detriment to other considerations, "including advocacy for children's issues and the promotion of child rights."

However, UNICEF argues that in case there is a public interest involved and there may be doubts on whether a reporting activity could put a child at risk, journalists should focus on the "general situation of children, rather than on an individual child, no matter how newsworthy the story [is]", thus protecting the privacy of children affected by the situation.³ **These provisions may serve as a compass to set more nuanced and concrete standards for Facebook users and enforcement systems on what to prioritize with regards to children-related content and how to prevent reporting and advocacy from turning against those who they intend to favour, instead of simply imposing a prohibition on content that "depicts" sexual exploitation of children.**

Finally, we take this opportunity to revisit our recent public comment on Facebook's privacy policy,⁴ in which we provided the Board with some considerations on the conflict between privacy and public interest that we believe could be relevant to the analysis of this case. Our submission supported that Facebook should consider a narrow authorization for the

² UNICEF, *Ethical Reporting Guidelines*. Available at: <https://www.unicef.org/media/reporting-guidelines>

³ UNICEF, *Guidelines for journalists reporting on children*. Available at: <https://www.unicef.org/eca/media/ethical-guidelines>

⁴ ITS Rio, *Comentário Público ao Oversight Board no caso da política de privacidade do Facebook*. Available at: <https://itsrio.org/pt/publicacoes/comentario-publico-ao-oversight-board-no-caso-da-politica-de-privacidade-do-facebook/>

publication of third parties' private information on its platform, as long as it serves journalistic or related purposes.

Nonetheless, we argued that this exemption should not stand alone. **Rather, we outlined that Facebook's Community Standards should incorporate a proportionality component that would enable an adequate balancing of conflicting fundamental rights.** We then proceeded to propose that this component be translated into the Community Standards by adding two yardsticks that would facilitate Facebook's analysis of whether an exemption to the prohibition on publishing private information would apply or not. **Firstly, Facebook should consider whether the publication is in the public interest, and, secondly, it should assess the risks (of physical, psychological and reputational harm) involved in said publication.**

As we mentioned in our submission to the Board, there is no one-size-fits-all solution, given that the perspectives on what constitutes public interest vary according to context. When bringing this "two-part test" to the present case, we must call attention to the fact that children-related issues may scoop out some information that would otherwise be rendered within the limits of a more general idea of "public interest".

Given the sharpened vulnerability faced by minors around the globe, policies that regulate content around them must embody greater sensitivity and higher standards for the evaluation of the impact of any publication on them, especially in cases involving sexual abuse and exploitation. Thus, in its policy recommendations, the Board should be mindful of the enhanced level of protection enjoyed by children, and their particular demands, even in face of public interest concerns that could benefit them.