US Developments and the DSA

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Presentation for the IMCO committee

1. Intermediary Liability Laws Generally

Define platforms' legal responsibilities for content posted by users

Balance three big policy goals

- Prevent harm (by incentivising platforms to remove bad content)
- Protect user rights (by not incentivising them to remove too much)
- Promote innovation and competition (by avoiding crushing liability for large scale processing of user speech)

US Intermediary Liability Law

Three Major Components

- CDA 230: for most speech torts, immunity for leaving content up *and* for taking it down
- DMCA: highly formal notice and takedown for copyright
- Federal criminal law: no immunity for criminal charges involving e.g. child abuse material, terrorist content

Constitutional/Fundamental Rights Backdrop

- Much debated. US has very little case law compared to EU

CDA 230 Immunity

Intended to correct "moderator's dilemma" and perverse incentives to leave harmful or illegal content up. CDA 230 effectively overruled these 1990s defamation cases

- *Cubby*: No liability for passive platform
- *Stratton Oakmont:* Liability as an editor for platform that tried to moderate content

To do this, CDA 230 makes platforms

1. Immune from suits claiming wrongful takedown ("Good Samaritan")
2. Immune from suits over illegal content even if they are not neutral or passive
3. Immune from suits over illegal content even if they knew about that content

That's a drastic approach. But #2 and #3 solve a contradiction that the DSA does not and maybe cannot resolve. How to encourage platform "diligence" and proactive efforts while simultaneously punishing them with loss of immunity if they are too "active" or gain "knowledge" about illegal content?

Future Changes to CDA 230 Immunity?

Everyone speculates, and no one knows

CDA 230 has become very controversial: both Democrats and Republicans introducing dozens of bills to change it

- Left and Right party goals are hard to reconcile
- Democrats generally want more content taken down
- Republicans generally want less content taken down

My best guess for plausible changes, given the politics

- Laws tackling the very worst content (like the EARN IT Act for CSAM)
- Laws improving takedown process (like the PACT Act)

Meanwhile, an evolving line of court cases seems to be limiting CDA 230 for marketplaces like Amazon

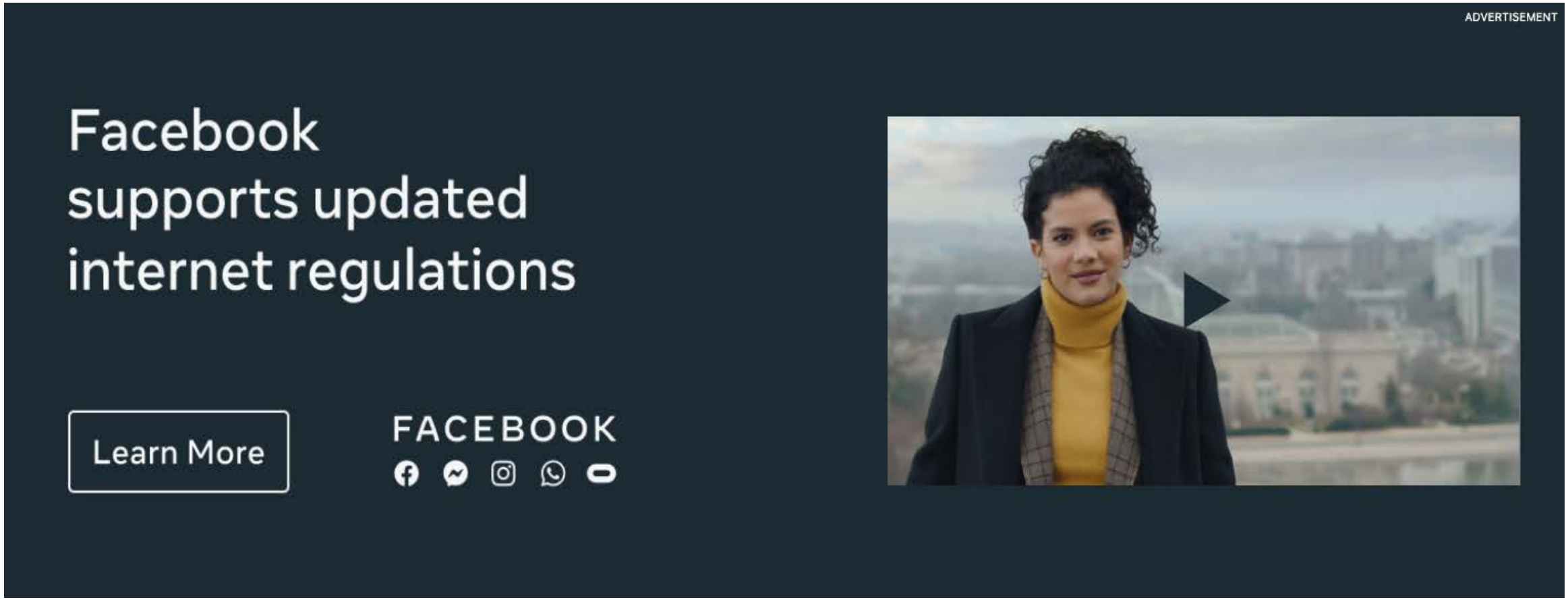
3. DSA Issues: Competition

The DSA's improvements for user rights are great news. But DSA notice-and-action obligations for the smallest platforms should be simplified, to protect competition and consumers. For smaller platforms:

- Simplify notice to users (Art. 15), transparency reporting (Art. 13), and appeals processes (Art. 17)
- Remove or clarify Art. 12.2's ambiguous "diligent" enforcement requirement
- Exempt entirely from Art. 18's novel out-of-court dispute provisions. Apply these only to VLOPs until they can be studied and proven fit for purpose (or improved)

Excessive burdens on smaller platforms will benefit and entrench incumbents

Economic, technical, and content moderation experts should help define size, reach, or risk metrics to define smaller platforms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DSA Issues: Harms to Consumers

The DSA should be clear that it does not weaken protections for encryption and security of commercial and private communications

- Amend Article 7 to make clear that DSA is not implicitly undermining encryption
- Weakening encryption (including through "backdoors") would have huge consequences. It deserves full and clear debate and lawmaking process
- This is as much a consumer protection issue as it is a privacy or data protection issue

The DSA should not weaken platforms' ability to fight "spam"

- All platforms have some version of spam – misleading, high volume, often commercial content
- Services could become unusable or far less safe for consumers if companies could not fight spam effectively
- Notice-and-action provisions should distinguish spam from legitimate user content, and reduce takedown-related burdens for spam

DSA Issues: Transparency

Chance to get the best possible transparency: should get this right, really understand benefits and costs

- Convene civil society, academic, company, and other experts promptly to sort this out
- Figure out what this Art. 15.4 database is
- Require transparency for authorities and high volume notifiers
- Set clear, stable rules for smaller platforms while preserving flexibility in transparency requirements for VLOPs
- Carefully define researcher access and reduce or eliminate perceived GDPR barriers

DSA Issues: Marketplaces and Recommenders

The Marketplace provision at Art. 22 seems broadly sensible

- Setting clear rules and obligations, instead of unclear standards that may lead to uncertainty, litigation, and Member State fragmentation
- (I don't claim huge expertise on marketplaces, though)

The Recommender System provision at Art. 29 is wisely limited

- We are at the very beginning of understanding how to regulate algorithmic recommendations. Detailed rules would be premature
- (I do claim expertise on this one! My article about the complexity of regulating algorithmic ranking and recommendations will be out soon...)

Thank you for your attention!

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