

DOJ Proposes Curb to Antitrust Immunity Under Communications Decency Act of 1996

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Following President Trump's May 28, 2020, executive order claiming that online platforms "selectively" moderate conservative political speech under the auspices of Section 230 of the Communications Decency Act of 1996 (CDA), on June 17, 2020, the Department of Justice (DOJ) announced proposed revisions to "the outdated immunity for online platforms under Section 230 of the [CDA]." While some commentators—like the Trump administration—focus primarily on purported viewpoint discrimination, claiming this renders the online platform unworthy of Section 230 immunity, the potential for antitrust violations—with liability based on harm to competition rather than third-party speech—is a pertinent consideration.

The CDA was originally intended to foster nascent technology companies in their infancy and has provided immunity to online platforms for content generated by third parties, as well as for the platform's "Good Samaritan" removal of such content in certain circumstances. However, the CDA's original focus was on traditional telephone and broadcast media, and, as one jurist suggested, "the Internet was an afterthought, addressed only through floor amendments or in conference." *Force v. Facebook, Inc.*, 934 F.3d 53, 78 (2d Cir. 2019) (Katzman, J., dissenting). The DOJ has now expressed that the rapidly evolving technological landscape vitiates the need for blanket immunity under Section 230, which has resulted in online platforms that are purportedly "unaccountable for a variety of harms flowing from content on their platforms and with virtually unfettered discretion to censor third-party content with little transparency or accountability."

Despite being a potential "afterthought" in 1996, the internet has obviously grown to be vitally important in the modern age. However, according to Attorney General Barr's opening remarks during the DOJ's February 2020 roundtable, "the avenues for sharing information and engaging in discourse have concentrated in the hands of a few key players." For instance, if a particular internet sector derives value from network effects (e.g., additional users of the service attribute more value due to the widespread use of that service), a first mover might leverage its initial customers to attract more customers, which then attracts even more customers in a virtuous cycle until one firm dominates the market entirely. The DOJ reiterated this concern in its Key Takeaways and Recommendations, declaring that these key platforms are now "some of the nation's largest and most valuable companies, and today's online services bear little resemblance to the rudimentary offerings in 1996." Legislators on both sides of the aisle, too, have expressed concerns about potential concentration—particularly in the absence of competitors or substitutes—and questioned whether the CDA provides too broad a shield for dominant platforms, including in the antitrust realm.

The DOJ's new proposal aims to "incentivize[] online platforms to be responsible actors" by balancing the CDA's benefits ("foster[ing] innovation and free speech") with its requirements ("address[ing] illicit material"). To this end, the DOJ identified four high-level recommendations for revisions to Section 230:

- Incentivizing online platforms to address illicit content while preserving immunity for defamation claims.
 - The DOJ suggests doing away with immunity to bad actors who knowingly and purposefully facilitate or solicit content that violates federal criminal law, and specifically carving out content involving child exploitation or sexual abuse, terrorism, and cyber-stalking, thus enabling victims of such egregious conduct to seek civil redress.
- Promoting open discourse and greater transparency by clarifying the original purpose and text of the CDA.
 - The DOJ supports replacing the vague "otherwise objectionable" with "unlawful" and "promotes terrorism" to reinforce the core objective of reducing online content harmful to children while limiting arbitrary content removal simply by deeming it "objectionable."
 - The DOJ also proposes a statutory definition of "good faith," which would limit immunity to content moderation decisions based on the website's "plain and particular terms of service and accompanied by a reasonable explanation unless such notice would impede law enforcement or risk imminent harm to others."
 - The DOJ would clarify that a platform's removal of content, alone, is insufficient to convert the platform into a publisher or speaker for all other content on its service, explicitly overruling the "moderator's dilemma" as set forth in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
- Clarifying that Section 230 does not apply to civil enforcement actions brought by the federal government.
- Promoting competition by clarifying that federal antitrust claims are not covered by Section 230 immunity, in light of the substantial concentration in platforms for both online commerce and speech. In other words, immunity does not attach where liability might arise due to harm to competition rather than third-party speech.

The DOJ contends that these measures will encourage platforms to be more transparent and accountable to their users, including by clarifying that the CDA's "Good Samaritan" filtering provisions should not bar antitrust-related claims. While it remains to be seen the extent to which Congress will act with respect to Section 230 of the CDA, practitioners in the online platform space should be aware of the DOJ's new focus on enforcement against potential antitrust violations based on viewpoint discrimination or conduct designed to exclude or harm competition.

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