

October 3, 2018

The Honorable Michael S. Lee
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition
Policy and Consumer Rights
Dirksen Senate Office Building 224
Washington, DC 20510

The Honorable Amy Klobuchar
Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition
Policy and Consumer Rights
Dirksen Senate Office Building 224
Washington, DC 20510

Dear Chairman Lee and Ranking Member Klobuchar:

We write to you regarding the hearing on “Oversight of the Enforcement of the Antitrust Laws.”¹ The Electronic Privacy Information Center (EPIC) writes to you today to ensure that the Department of Justice and Federal Trade Commission unwind ill-conceived mergers and make Americans’ privacy rights a primary consideration in antitrust review going forward. Founded in 1994, EPIC has long been a leading voice in privacy advocacy. In that role, EPIC has consistently urged this Committee—along with the antitrust agencies—to ensure that consumers’ private information is protected.²

The Federal Trade Commission Has Failed to Promote Competition and Has Failed to Consider the Significance of Data Collection in Merger Review

In 2007, EPIC filed a complaint with the FTC in which we urged the Commission to block Google’s proposed acquisition of DoubleClick. We said at the time that the acquisition would enable Google to collect the personal information of billions of users and track their browsing activities across the web.³ EPIC correctly warned that this acquisition would accelerate Google’s dominance of the online advertising industry and destroy competition. The FTC ultimately allowed the merger

¹ *Oversight of the Enforcement of the Antitrust Laws*, U.S. Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2018), <https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws>.

² See e.g., Letter from EPIC to Senate Committee on the Judiciary (May 9, 2017), <https://epic.org/testimony/congress/EPIC-SJC-DOJ-Antitrust-Nominee-May2017.pdf>; EPIC et al., Complaint and Request for Investigation, Injunction, and Other Relief In the Matter of Genesis Toys and Nuance Communications (Dec. 6, 2016), <https://epic.org/privacy/kids/EPIC-IPR-FTC-Genesis-Complaint.pdf>; EPIC, Complaint, Request for Investigation, Injunction, and Other Relief In the Matter of Samsung Electronics Co., Ltd. (Feb. 24, 2015), <https://epic.org/privacy/internet/ftc/Samsung/EPIC-FTC-Samsung.pdf>; EPIC, Complaint, Request for Investigation, Injunction, and Other Relief, In the Matter of Uber Technologies, Inc. (June 22, 2015), <https://epic.org/privacy/internet/ftc/uber/Complaint.pdf>.

³ EPIC, Complaint and Request for Injunction, Request for Investigation and for Other Relief In the Matter of Google, Inc. and DoubleClick, Inc. (Apr. 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

to go forward over the compelling dissent of Commissioner Pamela Jones Harbour.⁴ Today Google occupies 31% of the advertising market and uses its advertising dominance to control the Internet economy.⁵

EPIC testified before the Senate Judiciary Committee on this particular issue in 2007 and warned about other mergers that posed substantial risks for consumer privacy and competition.⁶ In 2011, EPIC warned the FTC that Google's dominance in the search algorithm marketplace was allowing it to preference its own content in search results.⁷ Today Google occupies 86% of the search market in the United States⁸ and 93% of the search market in Europe.⁹

Google's Acquisition of YouTube Skewed Search Results to Favor Google

Google's acquisition of YouTube was also problematic. Prior to the acquisition, YouTube used objective metrics, such as user hits and ratings, for search rankings. After the acquisition, Google substituted its own proprietary technique, "relevance," for rankings.¹⁰ As a consequence, Google sites on YouTube rose in the search rankings while others fell. This early experience with internet mergers helps explain the need for greater transparency today about the determination of search rankings.

The need for transparency is further evident from a simple examination of the internet market: As Google acquires market power, it has motive and opportunity to block innovative competitors. As it acquires consumer data, it gains the means to do so. As George Soros explained, "as Facebook and Google have grown into ever more powerful monopolies, they have become obstacles to innovation, and they have caused a variety of problems of which we are only now beginning to become aware."¹¹ Antitrust enforcers must recognize that consumer data and privacy protections play a key role in this relationship.

⁴ Dissenting Statement of Commissioner Pamela Jones Harbour, *In re Google/DoubleClick*, FTC File No. 070-0170 (Dec. 20, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

⁵ Emily Cegielski and Tim Brinkhof, *For Google's 20th Birthday, a Complete Timeline of Its Path to World Domination* Observer (Sept. 27, 2018), <https://observer.com/2018/09/google-20-birthday-major-milestones>.

⁶ *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marc Rotenberg, Exec. Dir., EPIC), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

⁷ Letter from EPIC to the Federal Trade Commission on Google's search preferences in YouTube (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

⁸ *Search Engine Market Share United States of America*, Statcounter, <http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america>.

⁹ *Search Engine Market Share Europe*, Statcounter, <http://gs.statcounter.com/search-engine-market-share/all/europe>.

¹⁰ Letter from EPIC to Fed. Trade Comm'n (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

¹¹ Ralph Nader and Marc Rotenberg, *Consumer Voices Needed in US Privacy Debate*, Nader.org (Sept. 24, 2018), <https://nader.org/2018/09/24/consumer-voices-needed-in-us-privacy-debate>.

Facebook's Acquisition of WhatsApp Broke Privacy Commitments

Companies that protect user privacy are being absorbed by companies that do not protect privacy. In 2014, EPIC warned the FTC about the privacy risks of Google's acquisition of Nest Labs, a maker of "smart thermostats," stressing that "Google regularly collapses the privacy policies of companies it acquires."¹² Most notably, in 2014, Facebook purchased WhatsApp, a text-messaging service that attracted users specifically because of strong commitments to privacy.¹³ WhatsApp's founder stated in 2012 that, "[w]e have not, we do not and we will not ever sell your personal information to anyone."¹⁴

The FTC, after a complaint filed by EPIC and the Center for Digital Democracy,¹⁵ ultimately approved the merger after Facebook and WhatsApp promised not to make any changes to WhatsApp users' privacy settings.¹⁶ Despite this promise, WhatsApp announced in 2016 that it would begin disclosing the personal information of its users, including phone numbers, to Facebook, directly contradicting their previous promises to honor user privacy.¹⁷ Following this, EPIC and CDD filed another complaint with the FTC in 2016, but the Commission has taken no further action.¹⁸

Inaction from the Commission has spurred further confidence by Facebook: it recently announced it would begin placing advertisements on WhatsApp, despite opposition from WhatsApp's founders.¹⁹ The disclosure is particularly troubling following recent reporting that Facebook relies on users' phone numbers to target them with advertisements.²⁰ This targeting harms competition as well as consumers. As EPIC President Marc Rotenberg recently wrote:

If the FTC had stood behind its commitment to protect the data of WhatsApp users, there might still be an excellent messaging service, with end-to-end encryption, no advertising and minimal cost, widely loved by internet users around the world. But

¹² EPIC, *Google Plans Advertising on Appliances, Including Nest Thermostat* (May 22, 2014), <https://epic.org/2014/05/google-plans-advertising-on-ap.html>.

¹³ EPIC, *In re: WhatsApp*, <https://epic.org/privacy/internet/ftc/whatsapp/>.

¹⁴ WhatsApp, *Why We Don't Sell Ads* (June 18, 2012), <https://blog.whatsapp.com/245/Why-we-dont-sell-ads>.

¹⁵ EPIC and Center for Digital Democracy, *Complaint, Request for Investigation, Injunction, and Other Relief In the Matter of WhatsApp, Inc.*, (Mar. 6, 2014), <https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf>.

¹⁶ See, Letter from Jessica L. Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, to Facebook and WhatsApp (Apr. 10, 2014), <https://epic.org/privacy/internet/ftc/whatsapp/FTC-facebook-whatsapp-ltr.pdf> (concerning the companies' pledge to honor WhatsApp's privacy promises).

¹⁷ WhatsApp, *Looking Ahead for WhatsApp* (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

¹⁸ EPIC and Center for Digital Democracy, *Complaint, Request for Investigation, Injunction, and Other Relief In the Matter of WhatsApp, Inc.* (Aug. 29, 2016), <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf>.

¹⁹ Anthony Cuthbertson, *WhatsApp to Start Filling Up with Ads Just Like Facebook*, Independent (Oct. 1, 2018), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-update-targeted-ads-status-facebook-brian-acton-a8563091.html>.

²⁰ Liam Tung, *Facebook Is Using Your 2FA Phone Number to Target Ads at You*, ZDNet (Oct. 1, 2018), <https://www.zdnet.com/article/facebook-is-using-your-2fa-phone-number-to-target-ads-at-you>.

the FTC failed to act and one of the great internet innovations has essentially disappeared.²¹

Instead, consumers are left with fewer options, Facebook has less competition, and the increased amount of data available to Facebook will make it even easier to crush the next competitor.

Merger Review Should Consider Data Protection

The United States stands alone in its unwillingness to address privacy as a competition issue. The merger of Facebook and WhatsApp has prompted countries in Europe to scrutinize the deal and issue fines.²² But the FTC has repeatedly failed to even consider consumer privacy and data security in its merger review process.²³ EPIC emphasized the consequences of this failure in comments to the FTC in 2015, stating, “[i]n every instance, it was clear that the practical consequence of the merger would be to reduce the privacy protections for consumers and expose individuals to enhanced tracking and profiling.”²⁴

EPIC further underscored the dangers of lax enforcement in recent comments to the Commission, noting that Google and Facebook’s access to consumer data “is at the very heart of why the digital platforms have been able to entrench their dominance.”²⁵ But as Facebook and Google have developed increasingly invasive tracking of their users, the FTC failed to act. Despite an active consent decree against Facebook, the FTC allowed the company to disclose the personal information of 50 million Americans.²⁶ The Commission had the power to stop the scandal, simply by enforcing its previous orders in a way that protected consumer privacy.²⁷

Antitrust enforcers must ensure that consumer privacy and data is treated as the competitive harm that it so clearly is. In written responses to the Senate Judiciary Committee, Assistant Attorney General Delrahim stated that he would “vigorously enforce the antitrust laws with respect to online

²¹ Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation*, Techonomy (May 4, 2018), <https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation>.

²² *Fuel of the Future: Data is Giving Rise to A New Economy*, Economist (May 6, 2017),

<http://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy>.

²³ Nathan Newman, *15 Years of FTC Failure to Factor Privacy into Merger Reviews*, Huffington Post, (Mar. 19, 2015), https://www.huffingtonpost.com/nathan-newman/15-years-of-ftc-failure-t_b_6901670.html.

²⁴ EPIC, Comments of the Electronic Privacy Information Center: Assessing the FTC’s Prior Actions on Merger Review and Consumer Privacy, FTC File No. P143100, (Mar. 17, 2015), <https://epic.org/privacy/internet/ftc/Merger-Remedy-3-17.pdf>.

²⁵ EPIC et al., Comments on Competition and Consumer Protection in the 21st Century Hearings at 19 (Aug. 20, 2018), <https://epic.org/apa/comments/EPIC-FTC-CompetitionHearings-August2018.pdf>.

²⁶ Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. Times (March 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

²⁷ Marc Rotenberg, *How the FTC Could Have Prevented the Facebook Mess*, Techonomy (Mar. 22, 2018), <https://techonomy.com/2018/03/how-the-ftc-could-have-avoided-the-facebook-mess> (“If the FTC had enforced the Facebook consent order, Cambridge Analytica could not have accomplished its unprecedented data harvest.”).

platforms.”²⁸ Chairman Simons said in his nomination hearing “the FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that is the case, the agency needs to determine the reason for such failure and to fix it.”²⁹ Clearly, there have been considerable shortcomings in merger enforcement. This Committee must ensure those are remedied.

The consolidation of user private data into the hands of a small group of firms shows that enforcement agencies cannot ignore the economic impacts of privacy on proposed merger. EPIC has continued to insist that privacy and users’ data be considered in the analysis of competitive harms, and we urge the Subcommittee to press its witnesses to ensure that competition *and* consumers are protected in merger reviews.

Finally, EPIC urges the Committee to make “algorithmic transparency” a priority for merger review. When companies combine vast amounts of consumer data, it not only increases the risk of data breach, but allows companies to use that data in increasingly opaque ways.³⁰ Consumers face a “black box” of automated scoring systems that impact every aspect of their lives.³¹ Consumers have no control over which companies have access their personal data and how those companies use that data. Algorithms often make determinations about consumers based on inaccurate, outdated or incomplete information, and these determinations can serve as the basis for denying a consumer a job, a home loan, or a scholarship.³² Companies should not be allowed to merge large sets of consumer data without oversight, accountability, and transparency.

Thank you for your timely attention to this pressing issue. EPIC looks forward to working with the Subcommittee to ensure that consumers are protected during merger reviews. We ask that this statement be entered in the hearing record.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Jeff Gary

Jeff Gary
EPIC Legislative Fellow

²⁸ Questions for the Record, Makan Delrahim, Nominee to be Assistant Attorney General of the Antitrust Division at 6, <https://www.judiciary.senate.gov/imo/media/doc/Delrahim%20Responses%20to%20QFRs.pdf>.

²⁹ *Nomination Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 115th Cong. (2018) (statement of Joseph Simons, Chairman, Fed. Trade Comm’n. at 59:40), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>.

³⁰ For instance, Facebook’s massive breach last week was particularly damaging because the 50 million affected accounts were used by Facebook in myriad ways users did not understand. See Mike Isaac and Sheera Frenkel, *Facebook Security Breach Exposes Accounts of 50 Million Users*, N.Y. Times (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/technology/facebook-hack-data-breach.html>.

³¹ See Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014); Frank Pasquale, *The Black Box Society* 8 (2015).

³² *Citron & Pasquale, supra* note 31.