

November 12, 2019

The Honorable David Cicilline, Chair
The Honorable F. James Sensenbrenner, Ranking Member
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

We write to you regarding the hearing on “Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies.”¹ For over two decades, the EPIC has focused public attention on emerging privacy issues, including the growing concentration of the Internet industry.² We write to you today to ensure that the Department of Justice and Federal Trade Commission fulfill their responsibility to the American public, and ensure competition, innovation, and the protection of consumer privacy, particularly for Internet-based services.

There are two questions you should ask Chairman Simons: (1) why has the FTC failed to act against the growing consolidation of market power in the Internet industry? (2) why has the FTC disregarded the obvious cost to personal privacy that industry consolidation has produced?

The failure of the FTC to act in these two domains has come at enormous cost, not simply to consumer privacy, but also to competition and innovation in U.S. markets.

The FTC Has Failed to Promote Competition or Consider Data Collection in Merger Review

EPIC was among the first organizations that urged enforcement agencies to consider data protection in merger reviews.³ More than a decade ago, EPIC filed a complaint with the FTC in

¹ *Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies*, 116th Cong. (2019), H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law, <https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-4-perspectives-antitrust-agencies> (Nov. 13, 2019).

² See *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 110th Cong. (2007) (statement of Marc Rotenberg, Exec. Dir., EPIC), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

³ In 2000, EPIC joined with our colleagues in the TransAtlantic Consumer Dialogue to urge anti-trust authorities reviewing the AOL-Time Warner deal to “condition approval of the proposed merger on the adoption of enforceable Fair Information Practices that would guarantee consumer privacy safeguards at least equal to those that would be provided under the EU Data Directive” TACD, *Merger of American Online and Time Warner an Privacy Protection* (Feb. 2000), <http://test.tacd.org/wp-content/uploads/2013/09/TACD-ECOM-17-00-Merger-of-America-Online-and-Time-Warner-and-Privacy-Protection.pdf>. Consumer groups anticipated almost two decades that the collection of personal data would become an increasingly important

which we urged the Commission to block Google’s proposed acquisition of DoubleClick. EPIC 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.⁴ EPIC correctly warned that this acquisition would accelerate Google’s dominance of the online advertising industry and diminish competition. The FTC ultimately allowed the merger to go forward over the compelling dissent of Commissioner Pamela Jones Harbour.⁵

EPIC also explained to the FTC that other mergers also posed substantial risks for consumer privacy and competition. 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.⁶ Today Google occupies 88% of the search market in the United States⁷ and 94% of the search market in Europe.⁸ And as Tim Wu explained in his recent book, “Google wants to organize the world’s information, but to do so they need to get their hands on all the information in the world.”⁹

Google’s Acquisition of Nest, and 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’ and urged the FTC to block the deal.¹⁰ Yet the FTC let the deal go forward without any qualifications.¹¹

Most notably, in 2014, Facebook purchased WhatsApp, a text-messaging service that attracted users precisely because of strong commitments to privacy.¹² WhatsApp’s founder stated in

consideration in merger review, particularly among tech firms. *See also*, EPIC Complaint to FTC regarding DoubleClick’s proposed acquisition of Abacus Direct (Feb. 10, 2000) (“Not only did DoubleClick deceive consumers by claiming in multiple earlier privacy policies that information collected would remain anonymous, the company also unfairly collects and links information about Internet users without their knowledge or control.”)

⁴ 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.

⁵ 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.

⁶ Letter from EPIC to the Fed. Trade Comm’n (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

⁷ *Search Engine Market Share United States of America*, Statcounter, <http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america>.

⁸ *Search Engine Market Share Europe*, Statcounter, <http://gs.statcounter.com/search-engine-market-share/all/europe>.

⁹ Tim Wu, *The Curse of Bigness* 126 (2018).

¹⁰ EPIC, *Google Plans Advertising on Appliances, Including Nest Thermostat* (May 22, 2014), <https://epic.org/2014/05/google-plans-advertising-on-ap.html>.

¹¹ Fed. Trade Comm’n, Early Termination Notice: 20140457: Google Inc.; Nest Labs, Inc. (Feb. 4, 2014), <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20140457>.

¹² EPIC, *In re: WhatsApp*, <https://epic.org/privacy/internet/ftc/whatsapp/>.

2012 that, “[w]e have not, we do not and we will not ever sell your personal information to anyone.”¹³ EPIC and the Center for Digital Democracy urged the FTC to block the deal.¹⁴

The FTC ultimately approved the merger after Facebook and WhatsApp promised not to make any changes to WhatsApp users’ privacy settings.¹⁵ However, Facebook announced in 2016 that it would begin acquiring the personal information of WhatsApp users, including phone numbers, directly contradicting their previous promises to honor user privacy.¹⁶ Following this, EPIC and CDD filed another complaint with the FTC in 2016, but the Commission has taken no further action.¹⁷ Meanwhile, antitrust authorities in the EU fined Facebook \$122 million for making deliberately false representations about the company’s ability to integrate the personal data of WhatsApp users.¹⁸

Inaction by the FTC has spurred more disregard for the privacy interests of WhatsApp users. Facebook recently said it would target WhatsApp users with ads, despite earlier statements to the contrary and opposition from WhatsApp’s founders.¹⁹ And earlier this year, Mark Zuckerberg confirmed Facebook’s plans to merge WhatsApp, Facebook Messenger, and Instagram.²⁰ As we explained for *Techonomy*, a leading journal of tech innovation:

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

Instead, consumers have 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.

¹³ WhatsApp, *Why We Don’t Sell Ads* (June 18, 2012), <https://blog.whatsapp.com/245/Why-we-dont-sell-ads>.

¹⁴ 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>.

¹⁵ 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).

¹⁶ WhatsApp, *Looking Ahead for WhatsApp* (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

¹⁷ 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>.

¹⁸ Mark Scott, *E.U. Fines Facebook \$122 Million Over Disclosures in WhatsApp Deal*, N.Y. Times (May 18, 2017), <https://www.nytimes.com/2017/05/18/technology/facebook-european-union-fine-whatsapp.html>.

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 Mike Issac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. Times (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html>.

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>.

In the Commission's recent settlement with Facebook, the FTC chose not to undo the mistaken approval of the WhatsApp acquisition against the advice of consumer groups.²² ***Far from protecting market competition and promoting innovation, the Commission is facilitating industry consolidation.***

Merger Review Should Consider Data Protection

The United States stands virtually 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.²³ But the FTC has repeatedly failed to even consider consumer privacy and data security in its merger review process.²⁴ 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.”²⁵

EPIC further underscored the dangers of lax enforcement in recent comments to the FTC, 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.”²⁶ 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 87 million Americans.²⁷ The Commission had the power to stop the scandal, simply by enforcing its previous orders in a way that protected consumer privacy.²⁸

Antitrust enforcers must treat consumer privacy as the competitive harm it so clearly is. Just last week, Assistant Attorney General Delrahim warned: “it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis.”²⁹ Mr. Delrahim stated further, “Without

²² Letter from EPIC et al. to Joseph Simons, Chairman, Federal Trade Comm'n (Jan. 24, 2019), <https://epic.org/privacy/facebook/2011-consent-order/US-NGOs-to-FTC-re-FB-Jan-2019.pdf>.

²³ *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>.

²⁴ 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.

²⁵ 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>.

²⁶ 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>.

²⁷ 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>.

²⁸ 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.”).

²⁹ Tony Romm, *DOJ issues new warning to big tech: Data and privacy could be competition concerns*, Wash. Post (Nov. 8, 2019), <https://www.washingtonpost.com/technology/2019/11/08/doj-issues-latest-warning-big-tech-data-privacy-could-be-competition-concerns/>.

competition, a dominant firm can more easily reduce quality — such as by decreasing privacy protections — without losing a significant number of users.”³⁰

This is precisely what EPIC has documented in antitrust and privacy complaints to the FTC for more than a decade: each acquisition by a dominant firm has led to a reduction in both competition and privacy protection.

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.”³¹ But Chairman Simons, when he has had the opportunity to revisit poorly conceived mergers, has failed to act. And now before the FTC is Google’s planned acquisition of Fitbit, which is widely opposed by consumer organizations and those who favor market-based competition.

If the FTC approves Google’s acquisition of Fitbit, it will be the 230th firm that Google/Alphabet has acquired with barely a whimper from the Federal Trade Commission.³² This is not antitrust enforcement. This is agency negligence. The Federal Trade Commission’s disregard for privacy protection and lax record of antitrust enforcement are diminishing innovation and competition in the United States economy.

It has become increasingly clear that data protection, competition, and innovation are all on the same side in a healthy Internet economy. The critical challenge now for the Committee is to ensure that the Federal Trade Commission fulfills its mission and safeguards these interests. The current path is not sustainable.

Thank you for your timely attention to this pressing issue. 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

³⁰ *Id.*

³¹ *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>.

³² Wikipedia, *List of Mergers and Acquisitions by Alphabet* (Nov. 10, 2019), https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet#cite_note-303