

Comments of the
ELECTRONIC PRIVACY INFORMATION CENTER
INFORMATION COMMISSIONER'S OFFICE
Consultation on ICO Draft Regulatory Action Policy
June 28, 2018

By notice published on May 4, 2018, the UK Information Commissioner's Office ("ICO") requests public comments on "ICO and Stakeholder Consultation on Draft Regulatory Action Policy."¹ Specifically, ICO consults on how the agency should use its increased regulatory powers under the General Data Protection Regulation ("GDPR") and the reformed UK Data Protection Act 2018.

Pursuant to this notice, the Electronic Privacy Information Center ("EPIC") submits the following comments to (1) promote transparency in enforcement actions and consumer complaints, (2) increase scrutiny of mergers that consolidate user data, and (3) encourage cooperation with the U.S. Federal Trade Commission ("FTC") for international regulatory actions on data privacy.

EPIC is a public interest research center established in Washington, DC in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC has long worked to promote transparency and accountability for information technology. For years, EPIC has advised the FTC to use its enforcement authority to protect consumers and promote competition.³ EPIC submitted extensive comments on the FTC's Draft Strategic Plan 2018-2022 and set out a series of steps to protect the privacy interests of American consumers.⁴ We also participated in ICO's consultation on the Data Protection Impact Assessment Guidance under the GDPR.⁵

¹ ICO and Stakeholder Consultations, *ICO consults on how it will use increased powers under upcoming data protection reform* (May 4, 2018), <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/05/ico-consults-on-how-it-will-use-increased-powers-under-upcoming-data-protection-reform/>.

² About EPIC, *EPIC*, <https://epic.org/epic/about.html>.

³ See, e.g., *EPIC v. FTC*, No. 12-206 (D.D.C. Feb. 24, 2012); *EPIC, EPIC v. FTC (Enforcement of the Google Consent Order)*, <https://epic.org/privacy/ftc/google/consent-order.html>; Comments of EPIC, *In the Matter of Snapchat, Inc.*, FTC File No. 132 3078, Jun. 9, 2014, <https://epic.org/apa/comments/FTC-Snapchat-Cmts.pdf>; Comments of EPIC, *In the Matter of Myspace LLC*, FTC Docket No. 102 3058, Jun. 8, 2012, <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of EPIC, *In the Matter of Facebook, Inc.* FTC Docket No. 092 3184, Dec. 27, 2011, <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the EPIC, *In the Matter of Google*, FTC Docket No. 102 3136, May 2, 2011, https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

⁴ Comments of EPIC, *FTC Draft Strategic Plan for Fiscal Years 2018 to 2022*, Dec. 5, 2017, <https://www.epic.org/privacy/ftc/EPIC-Comments-FTC-Draft-Strategic-Plan-12-05-17.pdf>,

⁵ Comments of EPIC, *ICO Consultation on Data Protection Impact Assessments (DPIAs) Guidance*, Apr.

(1) ICO Should Promote Transparency

ICO's Regulatory Action Policy should reflect a commitment to transparency in how the agency handles complaints received from organizations and individuals representing consumers' interests. The draft guidance states that ICO will publish details about the volume and types of cases pursued and the outcomes achieved, and report on "corrective measures, sanctions, fines or civil monetary penalties, enforcement notices or orders, fixed penalty notices and prosecutions."⁶

However, the guidance critically fails to address how ICO will ensure transparency and accountability in consumer complaints about an organization's information practices. The ICO has a duty to investigate complaints from members of the public and take direct enforcement action when an organization has breached the law in data protection and freedom of information act requests.⁷ To discharge this responsibility with transparency and opportunities for public engagement, the ICO should promptly confirm receipt of such complaints and notify the complainants in a timely fashion if it decides not to bring formal action and provide the reasons for that decision.

Furthermore, ICO should commit to greater transparency by publicly releasing the documents obtained from organizations through an information or assessment notice. EPIC has previously called for ICO to make privacy audits publicly available to the greatest extent possible.⁸ In our comments to the ICO on the consultation on Data Protection Impact Assessments ("DPIAs"), we said⁹:

The ICO Guidance does not require publication of DPIAs. Nor are the DPIA guidelines supported by a reporting mechanism to the ICO.¹⁰ Leading DPIA scholars Paul de Hert and David Wright have noted the value of publishing the assessments to demonstrate accountability.¹¹

EPIC believes that mandatory publication is necessary. Under the current Guidance, it is virtually impossible to oversee whether the data controllers

12, 2018, <https://epic.org/algorithmic-transparency/EPIC-ICO-Comment-GDPR-DPIA.pdf>

⁶ Information Commissioner's Office, *Draft Regulatory Action Policy* (May 4, 2018), <https://ico.org.uk/media/about-the-ico/consultations/2258810/ico-draft-regulatory-action-policy.pdf> at 13.

⁷ See, Information Commissioner's Office, *What happens when someone complains?*, <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/complaints/>

⁸ Comments of EPIC, *ICO Consultation on Data Protection Impact Assessments (DPIAs) Guidance*, Apr. 12, 2018, <https://epic.org/algorithmic-transparency/EPIC-ICO-Comment-GDPR-DPIA.pdf>

⁹ *Id.*

¹⁰ David Wright, Paul de Hert, Kush Wadhwa & Dariusz Kloza, *A Privacy Impact Assessment Framework for Data Protection and Privacy Rights* (September 21, 2011), Prepared for the European Commission Directorate General Justice, JLS/2009-2010/DAP/AG, <http://www.vub.ac.be/LSTS/pub/Dehert/507.pdf>

¹¹ David Wright & Paul de Hert, *Privacy Impact Assessment* (2012), Springer, Law, Governance and Technology Series, Vol. 6. at 27.

engaged in high risk processing are complying with GDPR Articles 35 – 36, or the best practice guidelines promulgated by the ICO. Publication of DPIAs would certify that data controllers have met the requirements of the GDPR by conducting a critical privacy analysis, and ensuring compliance to the legal, regulatory, and policy requirements of individual privacy rights.

After finalizing an enforcement action, it is important for the public to have access to the submissions of the organization pursuant to an information or assessment notice. In particular, privacy assessments are a critical part of assessing the level of intrusiveness new technologies could have on individual rights and freedoms. EPIC believes in the publication of DPIAs to provide transparency to the public and increase accountability for both commercial and governmental processing of personal data.

The experience of the international community provides evidence of the feasibility of such transparency. For example, in 2011 the Irish Data Protection Commissioner’s investigation into Facebook produced a 150-page report and 77 pages of “technical analysis” that were made publicly available.¹² The Data Protection Commissioner also released a report of their re-audit of Facebook the following year.¹³ ICO should commit to transparency in its complaint and settlement enforcement procedures.

(2) ICO Should Scrutinize Mergers that Consolidate User Data and Threaten Consumer Privacy

The risks to consumer privacy and data security posed by mergers and acquisitions cannot be overstated. When companies merge, they combine not only their products, services, and finances, but also their vast troves of personal data. This increases the risk of cyberattacks and data breaches, and also increases the invasiveness of data collection. ICO should cooperate closely with the Competition and Markets Authority (“CMA”) to scrutinize proposed mergers that override users’ privacy settings and change commercial data practices without adequate consumer safeguards. It is not enough to simply publicize how the merger or acquisition will affect the business functions of an entity relating to personal data.¹⁴ If the merger drastically changes the purposes and scope of the data collected, this is an unfair consumer issue that must

¹² See Data Protection Comm’r, Report of Audit (2011), <http://dataprotection.ie/documents/facebook%20report/report.pdf/report.pdf>.

¹³ See Data Protection Comm’r, Report of Re-Audit (2012), https://www.dataprotection.ie/documents/press/Facebook_Ireland_Audit_Review_Report_21_Sept_2012.pdf.

¹⁴ Information Commissioner’s Office, *Data Sharing Code of Practice, Mergers and Takeovers*, https://ico.org.uk/media/for-organisations/documents/1068/data_sharing_code_of_practice.pdf (“When it becomes clear that the takeover or merger is going ahead you should consider when and how you will make individuals aware of what is happening. In some cases publicising the change will be sufficient, for example by taking out an advert in a local newspaper. In other situations it will be appropriate for an organisation to contact individuals directly to let them know what is happening.”)

be reviewed and enjoined by regulatory agencies.

In the United States, EPIC has routinely underscored the consumer privacy risks of high-profile mergers and has urged the FTC to oppose such mergers. Nearly two decades ago, EPIC and a coalition of consumer organizations warned the FTC of the privacy implications of the Time Warner/AOL merger.¹⁵ That merger produced what were, at the time, likely “the most detailed records on consumers ever assembled.”¹⁶ Despite both companies’ records of non-compliance with privacy laws, the FTC approved the merger without addressing any of the consumer privacy or data security risks.¹⁷ In 2007, EPIC filed a complaint with the FTC contending that Google’s proposed acquisition of DoubleClick would enable Google to collect the personal information of billions of users and track their browsing activities across the web to deliver targeted advertisements.¹⁸ EPIC correctly warned that this acquisition would accelerate Google’s dominance of the online advertising industry. The FTC ultimately allowed the merger to go forward over the compelling dissent of Commissioner Pamela Jones Harbor.¹⁹

Most notably, EPIC opposed the merger of Facebook and WhatsApp.²⁰ WhatsApp attracted users specifically for its privacy commitments, but after it was purchased by Facebook in 2014, WhatsApp began disclosing the personal information of its users to Facebook, including their phone numbers, contradicting its previous promises to honor user privacy.²¹ EPIC filed a complaint with the FTC urging the Commission to mandate privacy safeguards for WhatsApp user data before approving the sale.²²

The merger of Facebook and WhatsApp has prompted countries in Europe to update their competition laws.²³ It is thus timely and important for the ICO to become engaged in merger review processes by cooperation with the CMA, and to advise on consumer privacy and data

¹⁵ TACD, Statement on AOL-Time Warner Merger (Feb. 2000), <https://ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

¹⁶ *Id.*

¹⁷ Press Release, FTC Approves AOL/Time Warner Merger with Conditions, Federal Trade Commission (Dec. 14, 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

¹⁸ In the Matter of Google Inc. and DoubleClick Inc., (EPIC Complaint, Request for Injunction, Investigation, and Other Relief), (Apr. 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

¹⁹ In the Matter of Google/DoubleClick, FTC File No. 070-0170 (2007) (Harbor, C., dissenting), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

²⁰ 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>. (“WhatsApp Complaint”).

²¹ WHATSAPP, Looking Ahead for WhatsApp, WhatsApp Blog, (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

²² WhatsApp Complaint

²³ Fuel of the Future: Data is Giving Rise to A New Economy, *The Economist*, May 6, 2017, <http://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy>.

security issues through a competition lens. The practical consequence of privacy-invasive mergers is that consumers will be exposed to enhanced tracking and profiling without meaningful controls over their data. The failure to take this into account during merger reviews would be detrimental to the standard of data protection in Europe and worldwide. ICO should therefore explore the privacy implications of mergers and advise the CMA to block those proposals that lack sufficient privacy and data security safeguards.

(3) ICO Should Cooperate with the FTC for International Regulatory Actions on Data Privacy

ICO's Draft Regulatory Action Policy highlights the importance of international cooperation due to the extent of international data flows and the extraterritorial nature of the GDPR. ICO has significant international standing as a leading data protection authority. EPIC believes that it would bring substantial public benefit to data protection standards worldwide if ICO would increase cooperation with the FTC to enforce compliance with the GDPR.

ICO and the FTC are already parties to a Memorandum of Understanding, which aims to facilitate research and education related to the protection of personal information, and to increase investigative assistance and mutual aid to promote better enforcement of privacy laws in their respective legal capacities.²⁴

A key aim of GDPR is to protect the personal data of individuals and to strengthen individuals' control and rights over their data. Many companies have recently pledged to extend GDPR-level protections to individuals in the U.S., yet failed to change their business practices to uphold these promises. EPIC and a coalition of consumer groups recently sent a letter²⁵ to the FTC highlighting the misleading and manipulative tactics of dominant digital platforms which steer users to 'consent' to privacy-invasive default settings. We urged the FTC to investigate Facebook and Google for these "deceptive by design"²⁶ practices, and called to question whether these companies are upholding their promises to comply with the GDPR; and whether these tactics constitute unfair and deceptive trade practices under Section 5 of the FTC Act.

We believe that this is a significant and systemic issue that warrants the ICO and FTC to coordinate enforcement and investigative activities to provide mutual aid, exchange expertise on the GDPR, and secure appropriate regulatory outcomes for consumer privacy. The ICO

²⁴ Fed. Trade Comm'n, *FTC Signs Memorandum of Understanding with UK Privacy Enforcement Agency* (Mar. 6, 2014), <https://www.ftc.gov/news-events/press-releases/2014/03/ftc-signs-memorandum-understanding-uk-privacy-enforcement-agency>

²⁵ EPIC, Letter to the Federal Trade Comm'n and Chairman Simons, *How tech companies nudge users to choose less privacy-friendly options* (Jun. 27, 2018), <http://thepublicvoice.org/wp-content/uploads/2018/06/FTC-letter-Deceived-by-Design.pdf>

²⁶ Norwegian Consumer Council, *Deceived by Design* (June 27, 2018), <https://www.forbrukerradet.no/undersokelse/no-undersokelsekategori/deceived-by-design>

Regulatory Action Policy should endeavor to increase international coordination with relevant supervisory authorities in the U.S. to ensure strong cooperation on privacy and data protection.

Conclusion

EPIC appreciates the opportunity to comment on the ICO's Draft Regulatory Action Policy. ICO should use its enhanced powers under the GDPR and Data Protection Act 2018 to (1) strengthen transparency and accountability in enforcement procedures, (2) cooperate with competition law authorities to block mergers that threaten consumer privacy, and (3) enhance international cooperation with the FTC to promote higher data privacy standards and GDPR compliance. We urge the ICO to apply its greater regulatory authority to protect individuals' rights and freedoms in privacy.

Respectfully Submitted,

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