

July 28, 2020

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 “Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google.” For over 25 years, the EPIC has focused public attention on emerging privacy issues, including the growing concentration of the Internet industry.<sup>1</sup> We write to you today to highlight the damage market consolidation in online platforms has done to consumer privacy, the need to consider data protection in merger review, and encourage the creation of a U.S. Data Protection Agency and a hearing on H.R. 4978, the Online Privacy Act.

### **Market Consolidation in Online Platforms Threatens Consumer Privacy**

Data collection is at the core of most online platforms’ business models. For this reason, mergers and acquisitions in the Internet industry pose acute risks to consumer privacy. That is why EPIC was among the first organizations to urge enforcement agencies to consider data protection in the context of merger reviews.<sup>2</sup> More than a decade ago, EPIC urged the FTC to block Google’s proposed acquisition of DoubleClick. EPIC said that the acquisition would enable Google to collect the personal information of billions of users and track their browsing activities across the web.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> See *An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: Hearing Before 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](https://epic.org/privacy/ftc/google/epic_test_092707.pdf).

<sup>2</sup> In 2000, EPIC and the TransAtlantic Consumer Dialogue urged 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>; See also, EPIC Complaint to FTC regarding DoubleClick’s proposed acquisition of Abacus Direct (Feb. 10, 2000).

<sup>3</sup> 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](https://epic.org/privacy/ftc/google/epic_complaint.pdf).

<sup>4</sup> 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](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf).

EPIC has since repeatedly warned FTC that other mergers posed similar risks to 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.<sup>5</sup> Today Google occupies 91% of the search market worldwide.<sup>6</sup>

*Google’s Acquisition of Nest, and Facebook’s Acquisition of WhatsApp Broke Privacy Commitments*

Over the last decade, we have witnessed another trend in corporate consolidation that threatens consumer privacy: companies that have promised to protect user privacy are being taken over by companies that have repeatedly failed to protect user 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.<sup>7</sup> Yet the FTC let the deal go forward without any qualifications.<sup>8</sup> There have been multiple privacy issues with Nest since, including the inclusion of “secret microphones” in Nest home-security devices.<sup>9</sup>

Most notably, in 2014, Facebook purchased WhatsApp, a text-messaging service that attracted users precisely because of strong commitments to privacy.<sup>10</sup> 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.”<sup>11</sup> EPIC and the Center for Digital Democracy urged the FTC to block the deal.<sup>12</sup>

The FTC ultimately approved the merger after Facebook and WhatsApp promised not to make any changes to WhatsApp users’ privacy settings.<sup>13</sup> 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.<sup>14</sup> Following this, EPIC and CDD filed another complaint with the FTC in 2016, but the Commission has taken no further

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<sup>5</sup> 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](https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf).

<sup>6</sup> *Search Engine Market Share Europe*, Statcounter, <http://gs.statcounter.com/search-engine-market-share/all/europe>.

<sup>7</sup> EPIC, *Google Plans Advertising on Appliances, Including Nest Thermostat* (May 22, 2014), <https://epic.org/2014/05/google-plans-advertising-on-ap.html>.

<sup>8</sup> 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>.

<sup>9</sup> Jon Porter, *Google claims built-in Nest mic was ‘never intended to be a secret’*, The Verge (Feb. 20, 2019), <https://www.theverge.com/circuitbreaker/2019/2/20/18232960/google-nest-secure-microphone-google-assistant-built-in-security-privacy>.

<sup>10</sup> EPIC, *In re: WhatsApp*, <https://epic.org/privacy/internet/ftc/whatsapp/>.

<sup>11</sup> WhatsApp, *Why We Don’t Sell Ads* (June 18, 2012), <https://blog.whatsapp.com/245/Why-we-dont-sell-ads>.

<sup>12</sup> 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>.

<sup>13</sup> 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).

<sup>14</sup> WhatsApp, *Looking Ahead for WhatsApp* (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

action.<sup>15</sup> 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.<sup>16</sup> And last month, Germany's Federal Court of Justice sided with antitrust regulators in a case challenging Facebook's practice of combining user data across different sources, including WhatsApp and Instagram.<sup>17</sup> The Court held that Facebook's terms of use were abusive because they did not allow users to use the platform without also consenting to Facebook's collection of their data from other sites. The decision emphasized Facebook's dominant market position in Germany and recognized that Facebook thus had a special responsibility towards maintaining market competition.

Inaction by the FTC has empowered Facebook to disregard 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.<sup>18</sup> And last year, Mark Zuckerberg confirmed Facebook's plans to merge WhatsApp, Facebook Messenger, and Instagram into a single messaging platform.<sup>19</sup> If the FTC had stood behind its commitment to protect the data of WhatsApp users, this would not be possible. But the FTC failed to act. Now consumers have 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.

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.<sup>20</sup> ***Far from protecting market competition and promoting innovation, the Commission is facilitating industry consolidation.***

Now U.S. antitrust regulators are reviewing Google's proposed acquisition of Fitbit, which has been widely opposed by consumer organizations and those who favor market-based competition. If the Google/Fitbit merger goes through, Fitbit will be the 230<sup>th</sup> firm that Google/Alphabet has acquired with little action from U.S. antitrust regulators.<sup>21</sup>

***Google CEO Sundar Pichai should be asked: Last year, the Department of Defense prohibited military personnel from using geolocation features on their fitness devices because of***

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<sup>15</sup> 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>.

<sup>16</sup> 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>.

<sup>17</sup> Adam Satariano, *Facebook Loses Antitrust Decision in Germany Over Data Collection*, N.Y. Times (Jun. 23, 2020), <https://www.nytimes.com/2020/06/23/technology/facebook-antitrust-germany.html>.

<sup>18</sup> 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>.

<sup>19</sup> 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>.

<sup>20</sup> 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>.

<sup>21</sup> 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](https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet#cite_note-303)

***privacy and security concerns. If Google obtains FitBit, will it also obtain the sensitive personal data on millions of Americans that FitBit has collected? If so, how does Google plan to use this personal data?***

***Facebook CEO Mark Zuckerberg should be asked: When Facebook acquired WhatsApp, you pledged that Facebook would not make changes to WhatsApp users' privacy settings. But two years later, Facebook did just that when it said it would begin acquiring the personal information of WhatsApp users. Now, you want to merge WhatsApp, Facebook Messenger, and Instagram. Why should antitrust regulators trust any representations you or Facebook make given this history?***

### **Antitrust Authorities Should Take Data Protection and Security Implications As Part of Their Merger Review Process**

The United States stands virtually alone in its unwillingness to address privacy as an increasingly important dimension of competition in the digital marketplace. The merger of Facebook and WhatsApp has prompted countries in Europe to scrutinize the deal and issue fines.<sup>22</sup> But the FTC has repeatedly failed to consider consumer privacy and data security issues in its merger review process.<sup>23</sup> If the largest Internet firms continue to buy up new market entrants and assimilate their users' data into the existing platforms then there will be no meaningful opportunity for firms to compete with better privacy and data security practices.

EPIC has underscored the dangers posed by 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."<sup>24</sup> 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. The Commission had the power to stop the scandal, simply by enforcing its previous orders in a way that protected consumer privacy.<sup>25</sup>

Antitrust enforcers must treat consumer privacy as the competitive harm it so clearly is. Assistant Attorney General Delrahim recently warned: "it would be a grave mistake to believe that

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<sup>22</sup> *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>.

<sup>23</sup> 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](https://www.huffingtonpost.com/nathan-newman/15-years-of-ftc-failure-t_b_6901670.html); 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>.

<sup>24</sup> 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>.

<sup>25</sup> 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.").

privacy concerns can never play a role in antitrust analysis.”<sup>26</sup> Mr. Delrahim stated further, “Without competition, a dominant firm can more easily reduce quality — such as by decreasing privacy protections — without losing a significant number of users.”<sup>27</sup>

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. ***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 consolidated market power of online platforms today is not healthy. A handful of companies dominate the market. The privacy of Internet users is under assault. The revenue model allowed small businesses to break into the market is broken. The current model is not sustainable. Privacy rules can help level the playing field.

### **Enforcement is critical – Congress must establish an Independent Data Protection Agency**

***The United States urgently needs a Data Protection Agency.*** Virtually every other democratic government has recognized the need for an independent agency to address the challenges of the digital age. Given the enormity of the challenge, the United States should create a dedicated Data Protection Agency, based on a legal framework that requires compliance with baseline data protection obligations.<sup>28</sup> An independent agency could more effectively police the widespread exploitation of consumers’ personal data and would be staffed with personnel who possess the requisite expertise to regulate the field of data security.

The Online Privacy Act, filed by Representatives Eshoo and Lofgren (H.R. 4978), creates an independent data protection agency with strong enforcement powers. The Online Privacy Act also sets out robust rights for internet users and clear obligations on data controllers, and promotes innovation. The Subcommittee should schedule a hearing on this excellent bill and give it a favorable report without delay.

Thank you for your timely attention to this pressing issue. We ask that this statement be entered in the hearing record.

Sincerely,

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald

EPIC Interim Associate Director and Policy Director

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<sup>26</sup> 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/>.

<sup>27</sup> *Id.*

<sup>28</sup> EPIC, *The U.S. Urgently Needs a Data Protection Agency*, <https://epic.org/dpa/>.