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The Honorable Michael S. Lee, Chairman
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 "A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU."[1] For over two decades, the Electronic Privacy Information Center (EPIC) has focused public attention on emerging privacy issues, including the growing concentration of the Internet industry. 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.

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

EPIC has long urged federal agencies to protect American consumers in merger reviews.[2] In 2007, EPIC filed a complaint with the FTC in 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.[3] EPIC correctly warned that this acquisition would accelerate Google's dominance of the

[1] *A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU*, U.S. Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights (Dec. 19, 2018), https://www.judiciary.senate.gov/meetings/a-comparative-look-at-competition-law-approaches-to-monopoly-and-abuse-of-dominance-in-the-us-and-eu.

[2] 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 consideration in merger review, particularly among tech firms.

[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.

online advertising industry and destroy competition. The FTC ultimately allowed the merger to go forward over the compelling dissent of Commissioner Pamela Jones Harbour.[4]

We also explained to the FTC that other mergers posed substantial risks for consumer privacy and competition.[5] 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 86% of the search market in the United States[7] and 93% of the search market in Europe.[8] And as Tim Wu explained in his new 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]

EU Action and FTC Inaction Against Google Market Abuses

Google's acquisition of YouTube was also problematic. Several years ago, EPIC provided the videos among the top-ranked search results on YouTube for a search on "privacy." At the time, YouTube's search results were organized by the objective criteria of "hits" and "viewer rankings." Both objective criteria are easy to verify. However, after Google acquired YouTube, EPIC's search rankings fell. Google had substituted its own subjective, "relevance" ranking in place of objective search criteria. Google's ranking algorithm was opaque and proprietary. Google's subjective algorithm gave preference to Google's video content on YouTube about "privacy" over that of EPIC and others. The Google videos rose in the rankings while others fell.

EPIC prepared a detailed report for the FTC when it undertook its investigation of anti-competitive behavior of Internet companies, based on EPIC's specific experience with Google's decision to change the search algorithm on YouTube to favor its own content.[10] The FTC took no action on EPIC's complaint. But last year, after a seven-year investigation, the European Commission found that Google had abused its dominance as a search engine by rigging its search results to prefer its own shopping service.[11] The Commission required Google to change its algorithm to rank its own shopping comparison as it ranks its competitors.

This early experience with internet mergers helps explain the need for greater transparency today about the determination of search rankings.

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[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] *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.

[6] 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.

[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] Letter from EPIC to Commissioners of the Federal Trade Commission (Sept. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

[11] Press Release, European Commission, Antitrust: Commission fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison-Shopping Service (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

Facebook's Acquisition of WhatsApp: EU Takes Action, FTC Does Not

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.[12] Yet the FTC let the deal go forward without any qualifications.[13]

Most notably, in 2014, Facebook purchased WhatsApp, a text-messaging service that attracted users specifically because of strong commitments to privacy.[14] 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."[15] EPIC and the Center for Digital Democracy urged the Commission to block the deal.[16]

The FTC ultimately approved the merger after Facebook and WhatsApp promised not to make any changes to WhatsApp users' privacy settings.[17] 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.[18] Following this, EPIC and CDD filed another complaint with the FTC in 2016, but the Commission has taken no further action.[19] 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.[20]

Inaction by the FTC has spurred more disregard for the privacy interests of WhatsApp users. Facebook said recently it would WhatsApp users with ads, despite earlier statements to the contrary and opposition from WhatsApp's founders.[21] The disclosure is particularly troubling following

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[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] 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.
[14] EPIC, *In re: WhatsApp*, https://epic.org/privacy/internet/ftc/whatsapp/.
[15] WhatsApp, *Why We Don't Sell Ads* (June 18, 2012), https://blog.whatsapp.com/245/Why-we-dont-sell-ads.
[16] 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.
[17] *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).
[18] WhatsApp, *Looking Ahead for WhatsApp* (Aug. 25, 2016), https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp.
[19] 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.
[20] 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.
[21] 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.

recent reporting that Facebook relies on users' phone numbers for targeting.[22] As we explained for *Techonomy*, 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.[23]

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.[24] But the FTC has repeatedly failed to even consider consumer privacy and data security in its merger review process.[25] 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."[26]

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."[27] 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.[28] The Commission had the power to stop the scandal, simply by enforcing its previous orders in a way that protected consumer privacy.[29]

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[22] 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.
[23] 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.
[24] *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.
[25] 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.
[26] 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.
[27] 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.
[28] 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.
[29] 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

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 platforms."[30] 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] 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. We note also the recent statement from the TransAtlantic Consumer Dialogue, almost twenty years since the original statement on the AOL-Time Warner merger review, which again stresses the importance of privacy protection in competition review: "the lack of privacy protection in the US has contributed to the decline in competition among technology firms."[32]

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.[33] Consumers face a "black box" of automated scoring systems that impact every aspect of their lives.[34] 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.[35] Companies should not be allowed to merge large sets of consumer data without oversight, accountability, and transparency. The Universal Guidelines for AI provide the basis for legislation on this important issue.[36]

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enforced the Facebook consent order, Cambridge Analytica could not have accomplished its unprecedented data harvest.").

[30] 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.

[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] TACD, *Resolution on Competition, Privacy and Consumer Welfare* (Dec. 10, 2018), http://tacd.org/wp-content/uploads/2018/12/TACD-Resolution_Comp_Dec2018_final.pdf. *See generally*, TACD, *TACD publishes resolution on competition, privacy and consumer welfare* (Dec. 10, 2018), http://tacd.org/tacd-publishes-resolution-on-competition-privacy-and-consumer-welfare/.

[33] 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.

[34] *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).

[35] *Id*.

[36] The Public Voice, *The Universal Guidelines for Artificial Intelligence,* https://thepublicvoice.org/ai-universal-guidelines/.

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*
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EPIC Legislative Fellow

/s/ *Christine Bannan*
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