

August 4, 2020

The Honorable Roger Wicker, Chairman
The Honorable Maria Cantwell, Ranking Member
U.S. Senate Committee on Commerce, Science, and Transportation
512 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Wicker and Ranking Member Cantwell:

We write to you in advance of the hearing “Oversight of the Federal Trade Commission.” We appreciate your interest in the role of the FTC and consumer protection. For more than two decades, EPIC has worked to support the FTC in its efforts to safeguard the privacy of American consumers.¹ But it is our view today that the FTC does not function as an effective privacy agency and that Congress should establish an independent Data Protection Agency in the United States.² The Committee should schedule a hearing on S. 3300, which would create a Data Protection Agency, and give it a favorable report without delay.

From EPIC’s perspective, the FTC has not done enough to address the growing threats to consumer privacy. Our federal laws do not create adequate data protection standards. Meanwhile the collection, aggregation, and monetization of personal data is expanding at a rapid pace as Americans continue to face unprecedented risks of identity theft, financial fraud, and data breaches. And because so many U.S. companies offer global services that involve the collection of personal data online, including from European consumers, the failure to implement a comprehensive federal privacy regime threatens economic interests as well. Just last month, the European Court of Justice issued a decision³ in *Irish Data Protection Commissioner v. Facebook & Schrems*, a case concerning transfers of personal data by Facebook between the EU and the United States.⁴ The court invalidated the EU-U.S. Privacy Shield agreement, citing a lack of privacy safeguards and overbroad U.S. surveillance laws.

¹ Letter from EPIC to FTC Comm’r Christine Varney (Dec. 14, 1995), http://epic.org/privacy/internet/ftc/ftc_letter.html; See also EPIC, *In the Matter of DoubleClick, Complaint and Request for Injunction, Request for Investigation and for Other Relief*, before the Federal Trade Comm’n (Feb. 10, 2000), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; EPIC, *In the Matter of Microsoft Corp., Complaint and Request for Injunction, Request for Investigation and for Other Relief*, before the Federal Trade Comm’n (July 26, 2001), http://epic.org/privacy/consumer/MS_complaint.pdf; EPIC, *In re Facebook, (Complaint, Request for Investigation, Injunction, and for Other Relief)*, Dec. 17, 2009, <https://epic.org/privacy/inrefacebook/>.

² EPIC, *The U.S. Urgently Needs a Data Protection Agency*, <https://epic.org/dpa>.

³ Case C-311/18, *Irish Data Protection Comm’r v. Facebook & Schrems*, available at <http://curia.europa.eu/juris/liste.jsf?num=C-311/18#>.

⁴ See *Data Protection Comm’r v. Facebook & Max Schrems (CJEU)*, EPIC, <https://epic.org/privacy/intl/dpc-v-facebook/cjeu/>

Many of the privacy bills before this Committee propose an expansion of the FTC's authority.⁵ But before giving more authority to the FTC, the Senate Commerce Committee should consider whether the Commission is actually capable of establishing and enforcing rigorous data protection standards. The Committee should consider the Commission's prior representations about enforcement and merger review. During their confirmation hearings, many Commissioners have said there would be vigorous enforcement. That simply has not happened.

Below, EPIC raises three critical points for committee consideration: First, the FTC has failed to stop mergers that threaten consumer privacy; second, the FTC has failed to establish data protection standards because it can't even enforce its own consent orders; and third, the United States needs a data protection agency.

Why Has the FTC Failed to Stop Mergers that Threaten Consumer Privacy?

The FTC has failed address the serious threats to consumer privacy posed by increasing consolidation among the dominant technology firms in the United States. Facebook's strategic acquisitions of Instagram and WhatsApp, and their use of consumer data from both acquisitions, provide two examples. The FTC's failure to take these threats into account in its merger review process is one of the main reasons that consumer privacy has diminished and the secretive tracking and profiling of consumers has proliferated.

Despite the clear lessons from the aftermath of the Google-DoubleClick merger in 2014, the FTC failed to impose privacy safeguards for Facebook's acquisition of WhatsApp, a text-messaging service that attracted users specifically because of its strong privacy protections.⁶ The FTC allowed the merger based on assurances by both companies that they would honor WhatsApp users' privacy.⁷ But in 2016, WhatsApp announced that it would begin disclosing its users' personal information to Facebook.⁸ The UK Information Commissioner's Office blocked WhatsApp's transfer of data to Facebook,⁹ and the European Commission fined Facebook \$122 million for misleading European authorities about the data transfer.¹⁰ And in June, 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. The Court held that Facebook's terms of use were abusive because they did not allow users to access the platform without also consenting to Facebook's collection of their data from other sites. The decision emphasized Facebook's dominant

⁵ See e.g. S. 1214, 116th Cong. (2019); S. 584, 116th Cong. (2019); S. 189, 116th Cong. (2019).

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

⁷ See, See Letter from Jessica L. Rich, Director, 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).

⁸ WHATSAPP, *Looking Ahead for WhatsApp*, WhatsApp Blog, (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

⁹ Information Comm'r Office, *WhatsApp, Inc.* (Mar. 12, 2018), <https://ico.org.uk/media/action-weve-taken/undertakings/2258376/whatsapp-undertaking-20180312.pdf>.

¹⁰ Press Release, European Comm'n, *Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover* (May 18, 2017), http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

market position in Germany and recognized that Facebook thus had a special responsibility towards maintaining market competition.

Meanwhile 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.¹¹ And, last year, Mark Zuckerberg confirmed Facebook's plans to merge WhatsApp, Facebook Messenger, and Instagram into a single messaging platform.¹² 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.

Chairman Joseph Simons said in his nomination hearing that "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."¹³ More pointedly, Congress must ensure that the Commission uses its current authorities to the fullest extent possible. As EPIC has argued, the FTC could "unwind" the Facebook-WhatsApp deal because of Facebook's failure to uphold its commitments to users.¹⁴ Even WhatsApp's founders have acknowledged that Facebook broke its commitments. How can it be that the FTC does not act in such circumstances?

The Committee should ask the FTC Chairman and the Commissioners:

- ***How does the FTC evaluate the privacy and data protection implications of a merger?***
- ***Has the FTC ever blocked an acquisition on data protection or privacy grounds?***

Why Does the FTC Fail to Enforce Its Own Consent Orders?

The FTC has failed time and time again to be a privacy enforcer. In 2011, the FTC entered into a Consent Order with Facebook, following an extensive investigation and complaint pursued by EPIC and several U.S. consumer privacy organizations. The Consent Order specifically prohibited Facebook from transferring personal data to third parties without user consent.¹⁵ The transfer of personal data on 87 million Facebook users to Cambridge Analytica could have been prevented had the FTC enforced its 2011 Consent Order against Facebook.¹⁶ ***The obvious question is "why did the FTC fail to act?"***

¹¹ 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>.

¹² 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>.

¹³ *Nomination Hearing Before the S. Comm. on Sci., Commerce and Trans.*, 115th Cong. (2018) (testimony of Joseph Simons, Nominee to be Chairman, Fed. Trade Comm'n.).

¹⁴ 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/>.

¹⁵ Fed. Trade Comm'n., *In re Facebook*, Decision and Order, FTC File No. 092 3184 (July 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

¹⁶ See, Letter from EPIC to S. Comm. on the Judiciary and S. Comm on Commerce, Sci. and Trans. (Apr. 9, 2018), <https://epic.org/testimony/congress/EPIC-SJC-Facebook-Apr2018.pdf>.

In 2011, EPIC also obtained a significant judgment at the FTC against Google after the disastrous roll-out of Google “Buzz.”¹⁷ In that case, the FTC established a consent order after Google tried to enroll Gmail users into a social networking service without obtaining meaningful consent.¹⁸ But a problem we did not anticipate became apparent almost immediately: *the FTC was unwilling to enforce its own consent orders*. Almost immediately after the settlements, both Facebook and Google began to test the Commission’s willingness to stand behind its judgments: Dramatic changes in the two companies’ advertising models led to more invasive tracking of Internet users, user behaviors both online and offline were tracked and merged, and Facebook used facial recognition tools on Internet users who were not even using their platform. Still the FTC did nothing.

In March 2018, after the Cambridge Analytica scandal became public, the FTC announced it would reopen the investigation of Facebook.¹⁹ On July 24, 2019, after a 16 month investigation, the FTC announced a proposed settlement to end its investigation into Facebook. This was the first fine against Facebook since EPIC and a coalition of privacy organizations filed a complaint with the Commission about the company’s businesses practices back in 2009. The FTC fined Facebook \$5 billion, but *required no meaningful changes to the business practices that violate user privacy*.

Despite the clear need for a transformation of Facebook’s practices, the settlement did not change Facebook’s business model or impose restrictions on its collection and use of consumer data. The settlement permits Facebook to continue to make its own determinations about user privacy and data collection if it produces additional records about those choices. It also does not meaningfully change the company’s structure or financial incentives. The large settlement amount, while flashy, constitutes only 7% of Facebook’s projected global ad revenue for 2019 of \$67.37 billion. Given the comparative ease with which Facebook can pay fines of this degree, the company can retain its business model and its profitability under the settlement. Facebook is incentivized to continue to operate as it currently does, merely risking paying future fines out of its revenue.

The Committee should ask the FTC Chairman and the Commissioners: What changes to business practices has the FTC required of companies who violate Consent Orders in order to protect consumer privacy?

The United States Needs a Data Protection Agency

The Federal Trade Commission helps to safeguard consumers and to promote competition, but the FTC is not an effective data protection agency. The FTC lacks authority to enforce basic data protection obligations and has failed to enforce the orders it has established. The Commission also

¹⁷ *In the Matter of Google, Inc.*, EPIC Complaint, Request for Investigation, Injunction, and Other Relief, before the Federal Trade Comm’n, Washington, D.C. (filed Feb. 16, 2010), https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

¹⁸ Press Release, Fed. Trade Comm’n., *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network: Google Agrees to Implement Comprehensive Privacy Program to Protect Consumer Data* (Mar. 30, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz>.

¹⁹ Press Release, Fed. Trade Comm’n., *Statement by the Acting Director of FTC’s Bureau of Consumer Protection Regarding Reported Concerns About Facebook Privacy Practices* (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

lacks the ability, authority and expertise to engage the broad range of challenges we now confront— such as Internet of Things, Artificial Intelligence, connected vehicles, and more.

*The FTC's problems are not lack of budget or staff. The FTC has not even filled the current post for a Chief Technologist. The FTC has simply failed to use its current resources and current authorities to safeguard consumers. **Giving the FTC more authority will not solve that issue.***

Given the enormity of the challenge, the U.S. would be best served to do what other countries have done and create a dedicated data protection agency. An independent agency could more effectively utilize its resources to police the current widespread exploitation of consumers' personal information and would be staffed with personnel who possess the requisite expertise to regulate the field of data security.

The U.S. is one of the few advanced economies in the world without a data protection agency. The consequence is that the U.S consumers experience the highest levels of data breach, financial fraud, and identity theft in the world. And U.S. businesses, with their vast collections of personal data, remain the target of cyber-attack by criminals and foreign adversaries. Meanwhile companies collect vast amounts of personal data about American's without their knowledge and without any meaningful data protection standards. The Cambridge Analytica case is just one illustration of the ways in which that vulnerability threatens not only U.S. citizens, but also our democratic institutions. The longer the U.S. continues on this course, the greater will be the threats to consumer privacy, democratic institutions, and national security.

As the data breach epidemic reaches unprecedented levels and the FTC fails to act again and again, the need for an effective, independent data protection agency has never been greater.

This Committee has a bill before it that would solve this problem. S. 3300, filed by Senator Kirsten Gillibrand, creates an independent Data Protection Agency in the United States to safeguard the personal data of Americans. The Committee should schedule a hearing on S. 3300 and give it a favorable report without delay.

Conclusion

EPIC appreciates the Committee's decision to convene this hearing and respects the FTC's role as the lead consumer protection agency in the United States. But when it comes to data protection, the FTC is not up to the task. It is time to establish an independent federal data protection agency in the United States.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Alan Butler

Alan Butler
EPIC Interim Executive Director
and General Counsel

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Interim Associate Director
and Policy Director