

May 9, 2017

The Honorable Chuck Grassley, Chairman
The Honorable Dianne Feinstein, Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you regarding the nomination of Makan Delrahim to be an Assistant Attorney General at the Antitrust Division of the Department of Justice.¹ EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. As a leading advocate for consumer privacy, EPIC has become increasingly aware of the growing significance of data collection in merger review.² While we take no position for or against the nominee, we urge you to explore this topic, as well as data breaches and “algorithmic transparency,” with the nominee.

Control of personal data has become increasingly important in our modern economy. As companies merge they will combine not only products, services, and finances, but they will also bring together vast amounts of personal information. We urge the committee to press the nominee on his views of the role that data protection should play in merger reviews.

In 2007 EPIC urged the Federal Trade Commission to review carefully Google’s proposed acquisition of DoubleClick, an Internet advertising technology firm.³ EPIC correctly warned that the acquisition would accelerate Google’s dominance of the Internet and the advertising industry in particular.⁴ The FTC ultimately allowed the merger to go forward over

¹ *Nominations*, 115th Cong. (2017), S. Comm. on Judiciary, May 10, 2017, <https://www.judiciary.senate.gov/meetings/05/10/2017/nominations>.

² EPIC et al., *In the Matter of Genesis Toys and Nuance Communications, Complaint* EPIC, *In the Matter of Samsung Electronics Co. Ltd: Complaint and Request for Investigation, Injunction, and Other Relief before the Federal Trade Commission*, Dec. 6, 2016, <https://epic.org/privacy/kids/EPIC-IPR-FTC-Genesis-Complaint.pdf>, *Request for Investigation, Injunction, and Other Relief, before the Federal Trade Commission*, February 24, 2015, <https://epic.org/privacy/internet/ftc/Samsung/EPIC-FTC-Samsung.pdf>; EPIC, *In the Matter of Uber Technologies Inc.: Complaint, Request for Investigation, Injunction, and Other Relief, before the Federal Trade Commission*, Jun. 22, 2015, <https://epic.org/privacy/internet/ftc/uber/Complaint.pdf>.

³ EPIC et al., *In the Matter of Google Inc. and DoubleClick Inc., Complaint and Request for Injunction, Request for Investigation and for Other Relief*, Apr. 20, 2007, https://epic.org/privacy/ftc/google/epic_complaint.pdf.

⁴ Business Insider, *Facebook and Google completely dominate the digital ad industry* (Apr. 26, 2017), <http://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4>

the compelling dissent of Commissioner Pamela Jones Harbor.⁵ [CITE] EPIC testified on this merger before this Committee in 2007 and warned about other mergers that posed substantial risks for consumer privacy and competition.⁶

EPIC raised similar objections in 2014 about Facebook's proposed acquisition of WhatsApp, a popular text messaging application often praised for its privacy safeguards.⁷ The FTC allowed the merger to go forward but said it would require the companies to honor their privacy policies. However, in August 2016, WhatsApp announced it would revise its privacy policy and disclose personal data, most notably the phone numbers of WhatsApp users, to "Facebook and the Facebook family of companies."⁸ EPIC again filed a complaint with the FTC on August 31, 2016.⁹ No further action has been taken by the FTC.

A recent commentary in *The Economist* pointed to the challenges that merger reviews of companies such as Facebook and WhatsApp:

At a minimum, trustbusters have to sharpen their tools for the digital age. The European Commission did not block the merger of Facebook and WhatsApp. It argued that although these were operating the two largest text-messaging services, there were plenty of others around and that the deal would also not add to Facebook's data hoard because WhatsApp did not collect much information about its users. But Facebook was buying a firm that it feared might evolve into a serious rival. It had built an alternative "social graph", the network of connections between friends, which is Facebook's most valuable asset. During the approval process of the merger Facebook had pledged that it would not merge the two user-bases, but started doing so last year, which has led the commission to threaten it with fines.

The frustration with Facebook helps explain why some countries in Europe have already started to upgrade competition laws. In Germany legislation is winding through parliament which would allow the Federal Cartel Office to intervene in cases in which network effects and data assets play a role. The agency has already taken a special interest in the data economy. It has launched an investigation into

⁵ *In the Matter of Google/DoubleClick*, F.T.C. 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.

⁶ Testimony of Marc Rotenberg, EPIC President, *Hearing on "An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What are the Risks for Competition and Privacy?"* before the S. Comm. on Antitrust, Competition Policy and Consumer Rights, Sept. 27, 2007, https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

⁷ EPIC & Center for Digital Democracy, *In the Matter of WhatsApp Inc.: Complaint, Request or Investigation, Injunction, and Other Relief*, Aug. 29, 2016, <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf> (hereafter "WhatsApp Complaint"); See generally EPIC In re WhatsApp, <https://epic.org/privacy/internet/ftc/whatsapp/>

⁸ *I Have Questions About the Updated Terms of Service and Privacy*, WhatsApp, <https://www.whatsapp.com/faq/en/general/28030012>.

⁹ WhatsApp Complaint.

whether Facebook is abusing its dominant position to impose certain privacy policies.”¹⁰

The importance of the issue cannot be understated. Search engines are now a major source of advertising, social media is a primary method of communication and sharing for many individuals, and ride sharing companies appear poised to take over traditional taxi services. These industries build “platform monopolies” through the collection of personal data. We urge the Committee to question the nominee on how he believes antitrust analysis and review should change considering the changing economy.

Mergers not only have substantial implications for consumer privacy, but for security as well. The unregulated collection of personal data has led to staggering increases in identity theft, security breaches, and financial fraud in the United States.¹¹ This trend can only be expected to continue and should be a focus of merger reviews. The same way safeguards are put in place to ensure competition in the marketplace, similar requirements and safeguards must be implemented to protect consumer data.

Finally, we urge the Committee to explore “algorithmic transparency” as a new consideration for merger review. In both financial services and the Internet economy there is growing concern that many industries have simply become “black boxes.” Even CEO’s are not certain how outputs are produced.¹² The Department of Justice needs be aware of this issue, particularly given the recent practices of VW and Uber.¹³

We ask that this Statement from EPIC be entered in the hearing record. EPIC looks forward to working with the Committee on these and other issues impacting the privacy and security of American consumers.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ Kim Miller
Kim Miller
EPIC Policy Fellow

¹⁰ *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>.

¹¹ See, e.g., Robert McMillian et al., *Yahoo Discloses New Breach of 1 Billion User Accounts*, Wall Street Journal, Dec.15, 2016, <https://www.wsj.com/articles/yahoo-discloses-new-breach-of-1-billion-user-accounts-1481753131>.

¹² Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information*, 2015.

¹³ Fortune, *Uber is Under Investigation by the Justice Department* (May 4, 2017), <http://fortune.com/2017/05/04/uber-federal-criminal-investigation/>