

Grand International Committee  
on Disinformation and Fake News

Statement of Marc Rotenberg, President  
Electronic Privacy Information Center (EPIC)  
Washington, DCEPIC

Oireachtas Joint Committee  
Dublin, Ireland  
7 November 2019

Members of the Committee, fellow panelists, distinguished guests, thank you for the opportunity to speak with you today. My name is Marc Rotenberg. I am President of the Electronic Privacy Information Center in Washington, DC. EPIC was established in 1994 to focus public attention on emerging privacy issues. Beginning more than a decade ago, EPIC brought several cases concerning Facebook to the US Federal Trade Commission, we testified in the U.S. Congress about Facebook's growing threats to the privacy of Internet users, and we ran campaigns on the Internet. This spring we organized the "#EnforceTheOrder" campaign and stood in front of the Trade Commission, urging the U.S. agency to take action against Facebook.

In my statement today, I will briefly summarize this history. My recommendation to you after more than a decade dealing with this company is direct: you must act before it is too late. The longer enforcement action is delayed the more dire the consequences.

History: Victory (2009), Setback (2009), Victory (2011), Setback (2012), Imagined Victory (2019)

Approximately ten years ago, EPIC obtained from Facebook an agreement to establish democratic procedures for the management of the social network company. The procedures required formal process for changes in Facebook's terms and conditions and the opportunity for users to express their views.

This followed a successful campaign organized online by a Facebook user group of 150,000 named "Facebook Users Against the New Terms of Service." At the time, Facebook's commitment to democratic control of the social platform was widely reported by news organizations in the United States and viewed as a great success. Facebook announced that users would be able to cast votes on proposed changes to the Facebook Principles and to the Statement of Rights and Responsibilities.

But Facebook failed to keep its commitments, and within months the company shut down the user groups that had allowed individuals to organize online and hold the company accountable. This was a chilling moment in the history of the Internet.

EPIC and other consumer privacy organizations then turned to the Federal Trade Commission after Facebook brazenly changed the privacy settings of users so that it could extract more commercial value. EPIC filed a detailed complaint with the FTC, with evidence, legal analysis, the opinions of experts, and proposed remedies. Based on earlier cases EPIC brought to the FTC against Microsoft and the databroker Choicepoint, we provided a blueprint for how the FTC could hold the company accountable. And we said clearly in the 2009 complaint, “Facebook transfers users’ data to third-party application developers without the knowledge or consent of the user.”

Over the next two years, we continued to provide evidence to the FTC. As Facebook’s advertising model evolved, we uncovered new threats to privacy. We found that the company was preferencing its own services as against others, that it discouraged stronger privacy and security measures, and that it deceptively acquired the personal contact lists stored on user cellphones. We testified in Congress about the need for the Commission to act against Facebook. And finally, in 2011, the Commission announced a sweeping legal judgement against Facebook. [Attached]

We were thrilled. Although the company broke its commitments to democratic governance and privacy safeguards, the Federal Trade Commission had stepped in to hold the firm accountable. At that moment, we believed that an effective legal structure had been put in place. The FTC ordered changes in the company’s business practices; Facebook was required to provide detailed independent audits to the Commission. The Chairman of the FTC stated proudly, “Facebook is obligated to keep the promises about privacy that it makes to its hundreds of millions of users. Facebook’s innovation does not have to come at the expense of consumer privacy. The FTC action will ensure it will not.”

And in the years that followed FTC Commissioners would come before the US Congress and lawmakers in Europe and hold out the settlement with Facebook as evidence that the United States had effective means to protect privacy. The FTC cited the Facebook settlement in discussions about safeguards for the data of Europeans gathered by Internet firms in the U.S., and in the review of Privacy Shield.

But for us, almost immediately, a problem emerged. In a related case that EPIC brought to the FTC concerning Google, we became aware that the Federal Trade Commission was unwilling to use its enforcement authority even when a company clearly violated a settlement with the FTC. We urged the Commission to act in the Google matter and when it failed to do so, we sued the agency in federal court. The judge was sympathetic but ruled that she lacked the authority to require an independent agency to enforce its own order.

EPIC has spent the last eight years urging the FTC to enforce the legal judgment against Facebook. Each year we remind the agency of the consent order. We even asked the FTC to at least make public the reasoning for its decision not to act. It has declined to do so.

And as the company's business practices have changed, EPIC and other consumer privacy organizations brought new complaints to the FTC, concerning the misuse of children's data, the tracking of people across the Internet, the use of facial recognition, and the gathering of medical data. As the FTC stood by silently, Facebook's power grew, and independent journalism diminished.

All of this was before the Cambridge Analytica data breach.

Earlier this year, the FTC announced a 5 billion dollar fine against Facebook, the largest fine in the agency's history. But as many US lawmakers noted, including Committee Member Cicilline, the FTC's action was too little, too late. There were no meaningful changes in the company's business practices, no attempt to enforce privacy obligations, to undo the damage of the WhatsApp merger, or to limit behavioral advertising.

EPIC has moved to intervene in the case that will decide whether the settlement is approved. In our view, the Federal Trade Commission should do far more than it has proposed. Of particular concern is that the FTC settlement will release the company from more than 29,000 complaints currently pending against Facebook. That means all of the concerns that EPIC and others have raised in detailed filings with the Commission will end up in the shredding machine. Facebook will pay a fine and then be reborn with a clean slate, no longer responsible for any of its transgressions over the past decade. Such an outcome is also without precedent in the U.S. legal system.

This lack of effective action by the U.S. regulators has emboldened the company. Facebook plans to ingest the data of WhatsApp users in violation of explicit representations the company made to the FTC and the European Commission. Facebook seeks to establish its own global currency beyond the reach of regulators. Facebook intends to establish its own court to adjudicate disputes with the users of its services. And Facebook has adopted a view of the free expression with little regard for political debate that seeks to shield its business practices from regulatory scrutiny. At the same time, Facebook is consolidating power as the gatekeeper for global news and information, determining through settings it alone what information is received, by whom, and when. Such a business is not compatible with democratic institutions or the rule of law.

As the integrity of democratic institutions lies at the heart of this Committee's inquiry, it should be said clearly that the protection of personal data is central to the integrity of elections. Our good friend, now passed, European Data Protection Supervisor Giovanni Buttarelli made this point powerfully last year. The solution to the challenge of fake news he said, "is to be found beyond content management and transparency." "What we also need is better enforcement of the rules on data processing, especially sensitive information like on health, political and religious views, and accountability," said Giovanni.

*My central recommendation is that government agencies with legal authority over Facebook take action now.* Delay has only emboldened the company. There is not time to develop fanciful competition theories or to anticipate all of the responses to an enforcement action the company might pursue. Human decision-making operates on a linear time scale but the time sequence for network effects is exponential. The longer enforcement agencies delay, the more powerful the company will become. The longer enforcement agencies delay, the weaker democratic institutions and an independent media will become. A few years from now, it may simply be too late.

- 1) Facebook must be held to account for its failure to comply with the GDPR. Almost 18 months have passed since the GDPR entered into force. History must not repeat itself.

- 2) Facebook must be required to divest WhatsApp and Instagram because of its failure to uphold prior commitments to safeguard user data. This is not a call to break up “Big Tech.” It is the appropriate response when a company has breached a public trust
- 3) Until adequate legal safeguards are established, Facebook must be prohibited from selling political advertising. The company’s recently stated view of political advertising is both reckless and irresponsible. And that advertising revenue should flow back to traditional media and help strengthen independent journalism.

In my view, it was the failure of the Federal Trade Commission to enforce the judgement against Facebook that led directly to the Cambridge Analytica scandal and the Brexit vote, to the coarsening of political dialogue around the world, to the weakening of democratic institutions, and to the near collapse of an independent media.

We live today with the consequences of regulators who failed to protect the public interest when they had the opportunity to do so.

Thank you for your attention. I will be pleased to answer your questions.

## ATTACHMENTS

Federal Trade Commission, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises* (Nov. 29, 2011)

<https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>

Statement from EPIC to U.S. Senate Judiciary Committee Regarding Testimony of Mark Zuckerberg, (Apr. 9, 2018)

<https://epic.org/testimony/congress/EPIC-SJC-Facebook-Apr2018.pdf>

Marc Rotenberg, *After Latest Facebook Fiasco, Focus Falls on Federal Commission, Techonomy* (Dec. 21, 2018)

<https://techonomy.com/2018/12/after-latest-facebook-fiasco-focus-falls-on-federal-commission/>

*EPIC Challenges FTC-Facebook Settlement, Asks Court to Hear from Privacy Groups* (July 26, 2019)

<https://epic.org/2019/07/epic-challenges-ftc-facebook-s.html>

EU Data Authority Pushes For Tighter 'Fake News' Regulation Law360, (Mar. 21, 2018)

<https://www.law360.com/articles/1024246/eu-data-authority-pushes-for-tighter-fake-news-regulation>

Opinion 3/2018 EDPS Opinion on online manipulation and personal data

[https://edps.europa.eu/sites/edp/files/publication/18-03-19\\_online\\_manipulation\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf)