

Comments of
THE ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)

to

THE FEDERAL TRADE COMMISSION

In re: Remedy Study

“Assessment of the FTC’s Prior Actions on
Merger Review and Consumer Privacy”

FTC File No. P143100

March 17, 2015

By notice published on January 16, 2015, the Federal Trade Commission (“FTC”) has requested public comments on a proposed study “to update and expand on the divestiture study it conducted in the mid-1990s to assess the effectiveness of the Commission’s policies and practices regarding remedial orders where the Commission has permitted a merger but required a divestiture or other remedy.”¹ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to ensure that the study evaluates certain FTC’s merger decisions concerning consumer privacy where the Commission recognized important competitive concerns but failed to impose a remedy.

Over the last 15 years, there has been growing recognition among consumer privacy organizations and competition experts that data aggregation practices play a significant role in antitrust analysis. EPIC first raised this issue in 1999 when the Internet advertising firm Doubleclick proposed to acquire the catalog database firm Abacus. EPIC pointed to the specific

¹ FTC, *Agency Information Collection Activities; Proposed Collection; Comment Request*, File No. P143100, 80 Fed. Reg. 2423 (Jan. 16, 2015), available at https://www.ftc.gov/system/files/documents/federal_register_notices/2015/01/1501hsrdivestiturefrn1.pdf.

risks to consumer privacy that would result from the merger. EPIC and a coalition of consumer organizations also brought this issue to the Commission's attention in 2000, in a letter for the TransAtlantic Consumer Dialog ("TACD") on the proposed merger of Time Warner and AOL.² And we subsequently warned about the loss of consumer privacy when Google acquired Doubleclick.³ Most recently, we pointed to the very clear consumer harm that would result from Facebook's acquisition of WhatsApp.⁴ In 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. The failure of the Federal Trade Commission to take this into account during merger review is one of the main reasons consumer privacy in the United States has diminished significantly over the last 15 years.

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.⁵ EPIC's 2010 complaint concerning Google Buzz provided the basis for the Commission's investigation and October 24, 2011 subsequent settlement concerning

² TACD, Statement on AOL-Time Warner Merger (Feb. 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

³ In the Matter of DoubleClick Inc. (2000) (EPIC Complaint, Request for Injunction, Investigation and Other Relief), https://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; In the Matter of Google, Inc. and DoubleClick, Inc. (2007) (EPIC Complaint, Request for Injunction, Investigation and Other Relief), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

⁴ In the Matter of WhatsApp, Inc. (2014) (EPIC and Center for Digital Democracy Complaint, Request for Injunction, Investigation and Other Relief), <https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf>.

⁵ See, e.g., Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm'r Christine Varney (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), http://epic.org/privacy/internet/ftc/ftc_letter.html; DoubleClick, Inc., *FTC* File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; Microsoft Corporation, *FTC* File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; Choicepoint, Inc., *FTC* File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/feraltr12.16.04.html>.

the social networking service.⁶ In that case, the Commission found that Google “used deceptive tactics and violated its own privacy promises to consumers when it launched [Buzz].”⁷ The Commission’s settlement with Facebook also followed from a Complaint filed by EPIC and a coalition of privacy and civil liberties organization in December 2009 and a Supplemental Complaint filed by EPIC in February 2010.⁸ EPIC has also alerted the Commission to proposed mergers that would result in an anticompetitive market for online services. Most recently, EPIC alerted the Commission to the competition risks inherent in Google’s acquisition of Nest, a company that makes internet-connected, machine-learning thermostats.⁹

EPIC’s previous efforts to alert the Commission of the need to assess the impact on consumer privacy during the course of merger review are described in more detail below.

II. Doubleclick/Abacus Merger

In 1999 EPIC objected to DoubleClick’s proposed acquisition of Abacus precisely because of the risk to consumer privacy. In 1999, Doubleclick was the Internet’s largest advertising firm and Abacus Direct was the country’s largest catalog database firm.¹⁰

DoubleClick’s business partners included more than 1,000 Internet-based companies that

⁶ Press Release, Federal Trade Comm’n, FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google’s data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

⁷ *Id.*

⁸ In the Matter of Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf> [hereinafter EPIC 2009 Facebook Complaint]; In the Matter of Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief), https://epic.org/privacy/inrefacebook/EPIC_Facebook_Supp.pdf [hereinafter EPIC 2009 Facebook Supplement]; In the Matter of Facebook, Inc., (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf [hereinafter EPIC 2010 Facebook Complaint].

⁹ In the Matter of WhatsApp, Inc., (2014) (EPIC Supplemental Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/internet/ftc/whatsapp/WhatsApp-Nest-Supp.pdf>.

¹⁰ See U.S. Senate, Committee on Commerce, Science, and Transportation, *Online Profiling and Privacy*, Hearing, June 13, 2000 (S. Hrg. 106-1117). Washington: Government Printing Office, 2003. *Available at* <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg82146/html/CHRG-106shrg82146.htm>.

displayed DoubleClick advertising on the websites they operated and to enabled the placement of advertising cookies on the computers of Internet users who visited those websites. In December 1998, the company received over 5.3 billion requests for the delivery of ads generated by approximately 6,400 Web sites. DoubleClick estimated that more than 48 million users worldwide visited Web sites within the DoubleClick Network during December 1998.¹¹ During the fourth quarter of 1998, DoubleClick placed approximately 18,000 Internet advertisements for over 2,300 advertisers.¹² In calendar year 1998, DoubleClick's DART technology delivered approximately 34 billion advertising impressions worldwide.¹³ By the year 2000, DoubleClick reportedly had compiled approximately 100 million Internet user profiles.¹⁴

DoubleClick's advertising model was critical for the protection of privacy. The company had made a commitment not to collect personally identifiable information from Internet users and users relied on that representation when they visited web sites that displayed advertising from DoubleClick. Prior to the acquisition, DoubleClick stated on its Privacy Policy page:

All users who receive an ad targeted by DoubleClick's technology remain completely anonymous. We do not sell or rent any information to third parties. Because of our efforts to keep users anonymous, the information DoubleClick has is useful only across sites using the DoubleClick technology and only in the context of ad selection.¹⁵

At the end of 1998, the Abacus database contained over 88 million detailed buyer profiles compiled from records of over 2 billion catalog purchasing transactions. Abacus included over 75% of the largest consumer merchandise catalogs in the United States.¹⁶ The database was continually expanded as Abacus Alliance members contributed sales transaction information data

¹¹ DoubleClick Inc. Form 10-K/A (Amendment No. 2) for Calendar Year Ended December 31, 1998.

¹² *Id.*

¹³ *Id.*

¹⁴ See In the Matter of DoubleClick Inc., *supra* at note 3.

¹⁵ *Id.*

¹⁶ *Online Profiling and Privacy, supra* at note 34.

and as additional companies joined the Abacus Alliance. Since at least 1998, the Abacus database contained information identifying and tracking the activities of Internet users. Abacus also formed a strategic alliance with Catalog City, Inc., an on-line catalog Web site offering on-line shopping services to catalog shoppers, to jointly promote each others services and exchange user information, including consumer e-mail addresses and phone numbers, online transactions and “click data.”¹⁷

Although EPIC and others objected to the merger of an online non-PII advertising firm with an offline PII catalog firm, the Commission did not impose conditions on the proposed acquisition, and the merger was allowed to continue. DoubleClick completed its acquisition of Abacus in November of 1999. At that time, DoubleClick changed its privacy policy for the first time, stating that "personally-identifiable information" (including "the user's name, address, retail, catalog and online purchase history, and demographic data") would be combined with "non-personally-identifiable information collected by DoubleClick from Web sites on the DoubleClick Network." This was a reversal of DoubleClick’s pre-merger representation that any information it collected about Internet users and their online activities was, and would remain, “anonymous.”¹⁸

In response to the policy change, EPIC filed a complaint with the Commission about the privacy impact of the Abacus/DoubleClick merger. EPIC drew attention to the practical consequences of combining anonymous online browsing information with offline, identified purchase information. EPIC also pointed to the representation that Doubleclick had made to

¹⁷ *Id.*

¹⁸ *Id.*

Internet users that it would not gather user-identified data. It was the first time that the FTC had been asked to use its Section 5 authority to investigate a privacy complaint. EPIC wrote:

DoubleClick's collection of information about Internet users, through the placement of cookies on users' computers and the linkage of cookie-generated data with information contained in the Abacus database, is performed without the knowledge or consent of the great majority of Internet users who receive DoubleClick cookies. Users who receive DoubleClick cookies on their computers do not knowingly access the DoubleClick Web site. Many of DoubleClick's partners, who operate the Web sites which generate DoubleClick cookies, provide either no information or inaccurate information about the placement of such cookies and the manner in which data about users will be collected or used. As a result, the great majority of users who receive DoubleClick cookies neither know that their activities are being monitored, nor are aware of any "opt-out" procedures that might be available.¹⁹

The Commission (as well as two states) launched an investigation into DoubleClick's business practices following EPIC's complaint, and ultimately DoubleClick announced its intention not to combine databases with Abacus.²⁰ The CEO of Doubleclick said that company made a "mistake by planning to merge names with anonymous user activity across Web sites in the absence of government and industry privacy standards."²¹ The Commission, in response to EPIC's complaint, required Doubleclick to adopt privacy standards for online advertising and also required Doubleclick to create an "opt-out" cookie that would note users who did not want to receive Doubleclick advertising.²²

In 1999 EPIC and others successfully worked to stop the consolidation of two data sets that would have resulted from the Doubleclick and Abacus merger, but in the years that have followed the Commission has been reluctant to block similar mergers or to impose privacy

¹⁹ In the Matter of DoubleClick Inc., *supra* at note 3.

²⁰ Press Release, Doubleclick Inc., Statement From Kevin O'Connor, CEO of Doubleclick (Mar. 2, 2000). *See also In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 505-06 (S.D.N.Y. 2001).

²¹ Statement From Kevin O'Connor, *supra* at note 45.

²² Letter from Joel Winston, Acting Assoc. Dir., Div. of Fin. Practices, Fed. Trade Comm'n, Letter to Christine Varney, Esq. (Jan. 22, 2001), *available at* <http://www.ftc.gov/os/closings/staff/doubleclick.pdf>.

conditions where the risks to consumer privacy are clear. Not only is critical for the Commission to review these proposed acquisitions more closely, where the Commission does permit such mergers to go forward it is vitally important to ensure that whatever conditions are established to safeguard consumer privacy are rigorously enforced. The proposed “opt-out” cookie that resulted from the FTC’s investigation of the Doubleclick Abacus review was an ineffective and counterintuitive technique that did little to safeguard consumers from online tracking.

III. AOL/Time Warner Merger

In 2000, AOL and Time Warner announced their intent to merge into a combined multimedia company, offering customers cable TV and broadband Internet service.²³ The proposed merger would combine “the world’s largest ISP with the world’s largest media company.”²⁴ AOL’s instant messaging service had over 20 million Internet subscribers by the year 2000.²⁵ This level of market penetration allowed AOL to amass a wealth of data about its subscribers. The Wall Street Journal reported, “AOL already has the names, addresses, and credit card numbers of its 22 million members. It also has tons of tidbits on ages, interests, and musical tastes of the people who fill out member profile pages or register with AOL’s ICQ chat or its Spinner online radio divisions.”²⁶ Furthermore, the company recorded and collected the browser history of its users.²⁷

As AOL was the frontrunner in the new Internet economy, Time Warner was the entertainment giant of the old media economy. Time Warner owned film, music, TV, and

²³ Nick Wingfield & Glenn R. Simpson, *With So Much Subscriber Information, AOL Walks a Cautious Line on Privacy*, Wall Street Journal (Mar. 15, 2000), <http://www.wsj.com/articles/SB953070781153369510>.

²⁴ Jim Hu, *FTC Approves AOL Time Warner Merger*, CNet (Dec. 14, 2000) http://news.cnet.com/FTC-approves-AOL-Time-Warner-merger/2100-1023_3-249897.html

²⁵ Andrea Petersen & Matthew Rose, *Database of a Merged AOL Brings Cheers and Chills*, Wall Street Journal (Jan. 14, 2000), <http://www.wsj.com/articles/SB947807131223295584>.

²⁶ *Id.*

²⁷ *Id.*

magazine properties, including HBO, CNN, People Magazine and Time.²⁸ Time Warner, for its part, collected the names, addresses, and credit card numbers of its customer base as well as its customers' music, magazine and movie preferences and consumption habits.²⁹ Its cable division, Time Warner Cable, had 13 million cable subscribers. Including magazine subscriptions, Time Warner's customer base extended to more than 65 million households. Each company had its own database of consumers' personal information.

At the time of the proposed merger, consumer protection experts and lawmakers expressed concerns about the impact the merger would have on consumer privacy. With the combination of AOL and Time Warner's databases, the companies would have access to an unprecedented amount of consumers' personal information.³⁰ The Trans Atlantic Consumer Dialogue (TACD) in conjunction with 64 consumer organizations, including EPIC, urged the FTC to consider the consumer privacy risks of the merger.³¹ TACD recommended that the FTC not approve the merger unless enforceable practices to safeguard consumer privacy were adopted.³² TACD stated:

In the absence of effective means to enforce privacy protection in the merged AOL-Time Warner entity, particularly the right of data subjects to access and inspect all personal information collected from them, consumers will face an unprecedented threat to personal privacy. Matters of religion, politics, health, and personal finance will be accumulated and used for marketing purposes. Moreover, companies other than AOL-Time Warner who seek to operate under a higher privacy standard will be at a competitive disadvantage as they will be unable to compete against a larger entity that is able to make unrestricted use of the personal information it obtains.³³

²⁸ Wingfield, *supra*, note 23.

²⁹ TACD, Statement on AOL-Time Warner Merger (Feb. 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

³⁰ Wingfield, *supra*, note 23.

³¹ *Id.*

³² *Id.*

³³ *Id.*

TACD further wrote, “The combined databases of the two firms would likely produce the most detailed records on consumers ever assembled, from favorite television programs, to book purchases, to associations with religious organizations, and even political preferences.”³⁴

In hearings before Congress regarding the proposed merger, many Senators also voiced privacy as one of two chief concerns.³⁵ In response, AOL and Time Warner offered assurances that privacy was and would remain an important company value.³⁶ Notably, AOL’s chief executive officer testified that, “[AOL has] a lot of information, to be sure, but may have less than you might think, because our policy actually does not result in us tracking individual navigational data, things like that. We do not believe that is an appropriate thing to do, so there is some information, but we perhaps have less than people might fear that is being tracked.”³⁷

However, as TACD described in its letter to the Commission, AOL and Time Warner both had a history of noncompliance with privacy laws.³⁸ At the time of the FTC’s merger review, Time Warner was defending itself in federal court against allegations that it failed to comply with privacy subscriber provisions of the Cable Act of 1984 by “collecting and distributing personally identifiable information about [their subscribers] and also violated its notice provision by failing to adequately inform them of these provisions.”³⁹ And AOL, TACD wrote, “has been the subject of numerous privacy complaints. At one point, AOL sold member profile information to telemarketers until this practice was disclosed to the public. Following protest, AOL discontinued the practice. The most high profile incident concerned records that

³⁴ *Id.*

³⁵ Transcript of hearing before the Committee on Commerce, Science, and Transportation (Mar. 2, 2000), at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg78185/html/CHRG-106shrg78185.htm>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ TACD, *supra* note 29.

³⁹ *Id.*

were disclosed about a naval investigator without court authority that led to the improper dismissal of a naval officer. Recently, AOL also took the somewhat extraordinary step of informing its subscribers that it would ‘expire their privacy preferences,’ effectively requiring AOL customers who tried to exercise various privacy options to renew them on an annual basis.⁴⁰

The Commission conditionally approved the proposed AOL/Time Warner merger in December 2000 without addressing the non-price factor of consumer privacy and data security.⁴¹ Although both privacy and open access were overwhelmingly listed by consumer organizations and lawmakers as the two chief concerns regarding the merger, the FTC only addressed open access, imposing remedies in its consent order to ensure the merger did not have an anticompetitive effect on consumers’ ability to log on and access content.⁴²

The warnings of EPIC and TACD proved prophetic. In 2007 AOL changed its business model, transitioning to behavioral advertising and digital media.⁴³ By the end of 2009, after AOL spun off from Time Warner as an independent company, AOL had amassed over 80 content websites, its own search engine, and its own behavioral targeting software company.⁴⁴ Using its online behavioral ad targeting software, AOL now specializes in tracking consumers’ web

⁴⁰ *Id.*

⁴¹ Press Release, *FTC Approves AOL/Time Warner Merger with Conditions*, Federal Trade Commission (Dec. 14, 2000), <https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions>.

⁴² *Id.*

⁴³ Louise Story, *AOL Moving Headquarters to New York*, New York Times (Sept. 17, 2007), http://www.nytimes.com/2007/09/17/technology/17cnd-adco.html?gwh=D509D461E145C79279164C7A7B2E9611&gwt=pay&_r=0.

⁴⁴ Press Release, *AOL Celebrates Day One as an Independent Company*, AOL (Dec. 10, 2009), <http://corp.aol.com/2009/12/10/aol-celebrates-day-one-as-an-independent-company/>.

browser history.⁴⁵ This is the very practice that AOL’s CEO called “inappropriate” in 2001 and testified that AOL would protect consumer privacy by not pursuing such a practice.⁴⁶

In the 2000 merger review of AOL and Time Warner, the FTC failed to consider the consumer privacy impact of the companies’ roles as data aggregators. Additionally, the Commission failed to conduct a post-merger review of such practices. In the absence of any imposed privacy safeguards, AOL/Time Warner was free to create a massive database of personal data and detailed consumer profiles, the extent of which remains unknown 15 years later.

IV. Google/DoubleClick Merger

In April 2007, a little over seven years after EPIC filed the Abacus/DoubleClick complaint, Google announced its acquisition of DoubleClick.⁴⁷ At the time of the proposed acquisition, Google not only dominated the search market in Europe and the United States, it also tracked its users’ search activity in connection with their IP addresses and stored users’ search activity indefinitely. Thus, in 2007, Google maintained permanent records of over 1.1 billion internet users’ web activity.⁴⁸

In 2007, DoubleClick was still a leading provider of Internet-based advertising, with clients that included Time Warner’s AOL and Viacom’s MTV Networks. DoubleClick’s advertisements reached about 80% of Internet users. By 2007, DoubleClick tracked the individual Internet users who received ads served through DoubleClick. When a user was first “served” an ad, DoubleClick assigned the user a unique identifying number, which was stored in

⁴⁵ *Id.*

⁴⁶ In the Matter of DoubleClick Inc., *supra* at note 3.

⁴⁷ Google, *Google to Acquire DoubleClick*, Google News (Apr. 13, 2007), http://googlepress.blogspot.com/2007/04/google-to-acquire-doubleclick_13.html.

⁴⁸ Internet World Statistics, *Internet Growth Statistics*, <http://www.internetworldstats.com/stats.htm>.

a cookie on the user's computer. As that user visited other websites on which DoubleClick served ads, the user was identified and recorded as having viewed the ad. DoubleClick then used this data on consumer web browsing behavior to focus targeted advertisements.

Immediately after Google announced the proposed merger, consumer protection experts expressed significant concern over how Google's acquisition of DoubleClick customer and user data would produce anti-competitive effects. EPIC, together with the Center for Digital Democracy and U.S. PIRG, filed a complaint urging the FTC to block or impose conditions on the merger pursuant to the FTC's authority under Section 5 of the FTC Act. EPIC wrote:

Google's proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy of the personal data that it collects. At this time, there is simply no consumer privacy issue more pressing for the Commission to consider than Google's plan to combine the search histories and web site visit records of Internet users.⁴⁹

European consumer organizations, including BEUC the leading European consumer association, echoed the warnings of US consumer organizations. In an open letter to the European Commission, the BEUC wrote:

The monopoly power that Google will acquire through this acquisition will further weaken its incentives to compete on the non-price aspects of its services, including such quality factors as the privacy protections it offers consumers. Indeed, Google's own stated ambitions are to establish integrated on-line profiles of internet users, to enable it to provide customized content, highly targeted advertising, and individualized recommendations for new services and content. This will vastly diminish a user's ability to selectively limit their consent to use certain pieces of

⁴⁹ EPIC, *Complaint and Request for Injunction, Request for Investigation and for Other Relief*, In the Matter of Google, Inc., and DoubleClick, Inc., ¶ 54 (Apr. 20, 2007), available at https://epic.org/privacy/ftc/google/epic_complaint.pdf.

personal information to specific purposes or at least control access to this information.⁵⁰

It was becoming increasingly clear that privacy plays a critical role in merger analysis Senator Herb Kohl, then-Chairman of the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights, stated in a hearing on the merger:

Some commentators believe that antitrust policymakers should not be concerned with these fundamental issues of privacy, and merely be content to limit their review to traditional questions of effects on advertising rates. We disagree. The antitrust laws were written more than a century ago out of a concern with the effects of undue concentrations of economic power for our society as a whole, and not just merely their effects on consumers' pocketbooks. No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy.⁵¹

The New York State Consumer Protection Board likewise warned about the competitive and privacy risks posed by the merger. The Chairperson and Executive Director of the Board wrote in a letter to the FTC:

The combination of DoubleClick's Internet surfing history generated through consumers' pattern of clicking on specific advertisements, coupled with Google's database of consumers' past searches, will result in the creation of 'super-profiles,' which will make up the world's single largest repository of both personally and non-personally identifiable information. . . . In the best interest of consumers, we call for a halt to the merger until the Federal Trade Commission has fully investigated Google's planned use of the data post-merger.⁵²

In response to these concerns, Google made numerous commitments as to how it would conduct its business post-merger, including with respect to DoubleClick data. For example,

⁵⁰ Letter from BEUC and Others to Commissioner Neelie Kroes on Proposed Acquisition of DoubleClick by Google (June 27, 2007).

⁵¹ *Opening Statement of Sen. Herb Kohl at a hearing on An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What Are the Risks for Competition and Privacy?*, (Sept. 27, 2007), available at https://epic.org/privacy/ftc/google/kohl_092707.pdf.

⁵² Letter from Mindy Bockstein, Chairperson and Executive Director, New York State Consumer Protection Board, to Chairperson Deborah Platt Majoras, Federal Trade Commission (May 1, 2007), available at <https://epic.org/privacy/ftc/google/cpb.pdf>.

Google’s European Privacy Counsel, Peter Fleisher, committed in testimony to the European Parliament that Google would not merge data acquired by Google with data acquired by DoubleClick—in Mr. Fleisher’s words, the acquisition “will not involve merging the two companies’ databases.”⁵³ Since making this commitment, however, Google has integrated DoubleClick deeply into its other advertising services and consolidated user privacy policies across its various services, which indicates that Google has failed to honor this commitment.⁵⁴

Google spokesperson Julia Holtz, in an effort to secure European regulatory approval for the DoubleClick acquisition, stated that, “In response to third-party concerns, Google has committed to the European Commission that we will keep certain DoubleClick practices unchanged.”⁵⁵ Once the acquisition was approved, however, Google refused to identify which practices it would leave unchanged or how it was honoring this commitment.⁵⁶

Google Senior Vice President David Drummond testified before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights that the DoubleClick “data is owned by the customers – publishers and advertisers – and DoubleClick or Google can’t do anything with it.”⁵⁷ Many were skeptical of this claim; as Commissioner Harbour noted at the time, “DoubleClick appears to have access to a wealth of aggregated data

⁵³ *Google Seeks to Allay Privacy Fears Over DoubleClick Merger*, EurActive (Jan. 22, 2008), at <http://www.euractiv.com/infosociety/google-seeks-allay-privacy-fears-news-219232>.

⁵⁴ See Mark Milian, *Google to Merge User Data Across its Services*, CNN (Jan. 25, 2012), <http://www.cnn.com/2012/01/24/tech/web/google-privacy-policy/> (“Google plans to start combining information the company collects about each user of its various websites and services into a single profile”).

⁵⁵ Matthew Newman, *Google Offers Remedies to Win EU DoubleClick Backing (Update3)*, Bloomberg (Oct. 22, 2007) (emphasis added), at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aifqdybmAWa0>.

⁵⁶ Google, “Privacy and Terms: Advertising,” (last modified Feb. 25, 2015), <http://www.google.com/intl/en/policies/technologies/ads/>.

⁵⁷ David Drummond, *Testimony Before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights* (Sept. 27, 2007) (emphasis added), at http://judiciary.senate.gov/hearings/testimony.cfm?id=2955&wit_id=6685.

about user preferences and Internet behavior, based on its cookie-enabled tracking of users as they travel among websites, and would seem to have a strong incentive to use it.”⁵⁸

In a supplement to the initial complaint to the Commission, EPIC added:

Unless the FTC uses its authority to modify or block this merger, Google/DoubleClick, based on the detailed personal information of Internet users, will expand its market position to drive out competing advertising and search firms, will control the process of monetizing web content, will exploit the detailed profiles of Internet users for private commercial gain, and will fail to develop the privacy safeguards that would protect consumers and lead to the development of better and more innovative business practices in a competitive marketplace.⁵⁹

EPIC also proposed several possible remedies, based on past FTC actions. For example, EPIC suggested that the Commission could require the merged companies to license a set of data to a commission-approved buyer, which would then act as an independent competitor.⁶⁰ EPIC also suggested that the Commission require the acquiring company to divest a division that threatened to block competition in the market,⁶¹ create an information security and reporting program,⁶² or grant the FTC access to its databases for post-merger audits.⁶³

However, the Commission did not adopt any of these recommendations, and instead approved the merger without conditions. The sole dissenter was Commissioner Harbour, who articulated numerous data- and privacy-related concerns arising from the merger. Noting that the combination of Google’s and DoubleClick’s vast troves of data could lead to network effects that might “tip” the market irrevocably in Google’s favor, Commissioner Harbour noted, “I remain

⁵⁸ *Dissenting Statement of Commissioner Pamela Jones Harbour in the Matter of Google/DoubleClick*, at 6-7 n. 20, FTC File No. 071-0170, Available at http://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

⁵⁹ EPIC, CDD, U.S. PIRG, Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission (June 6, 2007), available at http://www.epic.org/privacy/ftc/google/supp_060607.pdf.

⁶⁰ See Fed. Trade Comm’n, *Decision and Order, In Re Softsearch Holdings, Inc.*, FTC Docket No. C-3759 (Aug. 1997).

⁶¹ See Fed. Trade Comm’n, *Agreement Containing Consent Orders, In Re VNU N.V.*, FTC Docket No. C-3900, File No. 991-0319 (Oct. 22, 1999), available at <http://www.ftc.gov/os/1999/10/vnunconsent.pdf>.

⁶² See generally, Fed. Trade Comm’n, *Agreement, In Re Microsoft Corporation*, FTC Docket No. C-4069 (Aug. 8, 2002).

⁶³ See Fed. Trade Comm’n, *Decision and Order, In Re Automatic Data Processing, Inc.*, FTC Docket No. 9282 (Oct. 20, 1997), available at <http://www.ftc.gov/os/1997/10/autoinfo.htm>.

concerned that the Commission's antitrust investigation relied on the parties' representations about what they intend to do with their combined data troves, even though their choices about data integration are as relevant to the antitrust analysis as they are to the consumer protection review."⁶⁴ She explained further, "One could argue, for example, that if network effects lead to a reduction in the number of search competitors, consumers will suffer from a diversity of choice among search engines, which will reduce the incentives of search firms to compete based on privacy protections or related non-price dimensions."⁶⁵ In her conclusion, Harbour stated:

I do not doubt that this merger has the potential to create some efficiencies, especially from the perspective of advertisers and publishers. But it has greater potential to harm competition, and it also threatens privacy. By closing its investigation without imposing any conditions or other safeguards, the Commission is asking consumers to bear too much of the risk of both types of harm.⁶⁶

In the years since acquiring DoubleClick without conditions, Google has continued to expand the tracking and profiling Internet users, often ignoring prior commitments it had made to protect the privacy of these same users. For example, in 2011, Google attempted to launch Buzz, a social networking service linked to Gmail, Google's email service.⁶⁷ Google Buzz was an online service that compiled and made public a Gmail user's social networking list based on address book and Gchat list contacts.⁶⁸ In response, EPIC filed a complaint with the FTC, highlighting several aspects of the Google Buzz service that threatened Gmail users' privacy.⁶⁹ The complaint alleged that Google engaged in unfair and deceptive trade practices by

⁶⁴ *Dissenting Statement of Commissioner Pamela Jones Harbour*, *supra* n. 65, at 9.

⁶⁵ *Id.* at 10 n.25.

⁶⁶ *Id.* at 12.

⁶⁷ See generally EPIC, *In re Google Buzz: Concerning the Privacy of Electronic Address Books*, available at <http://epic.org/privacy/ftc/googlebuzz/default.html>.

⁶⁸ *Id.*

⁶⁹ EPIC, *In the Matter of Google, Complaint, Request for Investigation, Injunction, and Other Relief*, before the Federal Trade Commission (Feb. 16, 2010), available at https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

transforming its email service into a social networking service without offering users meaningful control over their information or opt-in consent.⁷⁰ Ultimately, the Commission agreed with EPIC, and required Google to enter into a consent order and subjecting the company to regular privacy audits.⁷¹

Then, in early 2012, Google announced that it would change its terms of service for current users of more than 60 Google services, including Gmail, Google+, Youtube, and the Android mobile operating system.⁷² Rather than keeping personal information about a user of a given Google service separate from information gathered from other Google services, Google consolidated user data from across its services and created a single merged profile for each user.⁷³ Despite the urging of consumer privacy groups to prevent the collapse, warnings from European data protection officials that the collapse violated European Union privacy law, and even misgivings by the Chairman of the FTC, the Commission did not intervene.⁷⁴

Google's privacy policy states, "We will not combine DoubleClick cookie information with personally identifiable information unless we have your opt-in consent."⁷⁵ However, Vincent Toubiana, an information technology expert working for the French data protection authority, explained:

⁷⁰ *Id.*

⁷¹ Press Release, Federal Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> ("Google's data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.").

⁷² *Updating our Privacy Policies and Terms of Service*, The Google Blog (Jan. 24, 2012 1:30 PM), <http://googleblog.blogspot.com/2012/01/updating-our-privacy-policies-and-terms.html>.

⁷³ *Id.*

⁷⁴ Letter from EPIC et. al. to Rep. Mary Bono Mack, Chairman, House Energy and Commerce Committee, Subcommittee on Commerce, Manufacturing and Trade (Feb. 24, 2012), *available at* <https://epic.org/privacy/ftc/google/Privacy-Groups-ltr-to-Bono-Mack.pdf>; Letter from Isabelle Falque-Pierrotin, President of CNIL, to Larry Page, President of Google (Feb. 27, 2012), *available at* <https://epic.org/privacy/ftc/google/Courier-Google-CE121115-27-02-2012.pdf>; C-SPAN, *Newsmakers with Jon Leibowitz* (Feb. 24, 2012), <http://www.c-span.org/video/?304584-1/newsmakers-jon-leibowitz>.

⁷⁵ Google, *Privacy and Terms* (last updated Feb. 25, 2015), <http://www.google.com/intl/en/policies/privacy/>.

[Y]our Double-Click cookie will not be linked to your personally identifiable information. So Google can not put your name in front of the list of interests they inferred from your browsing behavior and will not put your name (or any other PII) in the ads you see. Because your Web Search history is likely to be unique, it identifies you and therefore can not be combined to your DoubleClick profile. But your search profile (i.e. the list of interests inferred from your search history) is unlikely to be unique and therefore does not identify you so Google can combine it with your DoubleClick cookie information.⁷⁶

Similarly, he explained, “your age, gender and interests expressed during Gtalk and Gmail discussions (or any other interest that Google could infer but that you would not be the only one to express) could be associated to your DoubleClick cookie.”⁷⁷

In the years since the DoubleClick acquisition, Google has demonstrated a pattern of collapsing user data profiles. In addition, Google is not necessarily isolating the DoubleClick data from its own databases; through its own definition of PII, Google may be able to combine user data in ways unanticipated by the Commission, or by users themselves. It would be invaluable for the Commission to determine whether Google has kept Google and DoubleClick user data truly separated in the years since the merger was approved.

V. Facebook/WhatsApp Merger

At the end of February 2014, Facebook announced its acquisition of WhatsApp, a mobile messaging application. At the time of the proposed acquisition, WhatsApp processed 50 billion messages per day from 450 million monthly users.⁷⁸ At the time of the proposed acquisition, WhatsApp’s privacy policies and official blog posts reflected a strong commitment to user privacy. For example, WhatsApp’s privacy policy stated, “WhatsApp does not collect names, emails, addresses or other contact information from its users’ mobile address book or contact

⁷⁶ Vincent Toubiana, *Google’s Ad Targeting Under the New Privacy Policy*, Unsearcher, Feb. 24, 2012, <http://unsearcher.org/google-ad-targeting-under-the-new-privacy-policy>.

⁷⁷ *Id.*

⁷⁸ Kristin Burnham, *Facebook’s WhatsApp Buy: 10 Staggering Stats*, InformationWeek (Feb. 21, 2014), <http://www.informationweek.com/software/social/facebooks-whatsapp-buy-10-staggering-stats-/d/d-id/1113927>.

lists” other than mobile phone numbers.⁷⁹ The mobile application’s association of a phone number with a user’s name occurred “dynamically on the mobile device itself and not on WhatsApp’s servers and is not transmitted to WhatsApp.”⁸⁰ The privacy policy further stated that only messages stored on WhatsApp servers were “undelivered” messages whose recipients have not logged into WhatsApp to retrieve messages. These were automatically deleted after 30 days.⁸¹

However, Facebook has regularly collected user data from companies it acquires. For example, when Facebook purchased Instagram in 2012, Instagram users were not subjected to advertisements based on the content they uploaded to the site.⁸² Like WhatsApp, Instagram’s Terms of Service included a provision that in the event of acquisition, users’ “information such as name and email address, User Content and any other information collected through the Service may be among the items sold or transferred.”⁸³ After the acquisition, Facebook did in fact access Instagram users’ data and changed the Instagram Terms of Service to reflect this change.⁸⁴

Immediately after Facebook announced the proposed merger, consumer protection experts again expressed significant concern over how Facebook’s acquisition of WhatsApp customer and user data would produce anti-competitive effects. EPIC and CDD filed a

⁷⁹ WhatsApp Privacy Policy, <http://www.whatsapp.com/legal/#Privacy>

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Craig Timberg, *Instagram outrage reveals a powerful but unaware Web community*, WASH. POST, Dec. 21, 2012, http://www.washingtonpost.com/business/technology/instagram-outrage-reveals-a-powerful-but-unaware-web-community/2012/12/21/b387e828-4b7a-11e2-b709-667035ff9029_story.html.

⁸³ *Id.*

⁸⁴ Hayley Tsukayama, *Instagram reminds users of privacy policy change*, WASH. POST, Jan. 16, 2013, http://www.washingtonpost.com/business/technology/instagram-reminds-users-of-privacy-policy-change/2013/01/16/124a8712-5fee-11e2-9940-6fc488f3fec3_story.html

Complaint with Commission requesting an injunction and investigation.⁸⁵ As EPIC explained in the Complaint:

WhatsApp built a user base based on its commitment not to collect user data for advertising revenue. Acting in reliance on WhatsApp representations, Internet users provided detailed personal information to the company including private text to close friends. Facebook routinely makes use of user information for advertising purposes and has made clear that it intends to incorporate the data of WhatsApp users into the user profiling business model.⁸⁶

At the same time, Jacob Kohnstamm, the Dutch data protection Commissioner, began an investigation into data protection issues related to Facebook's purchase of WhatsApp.⁸⁷ His investigation focused on the collection of data from WhatsApp users' address books and the potential for misuse of that information.⁸⁸ Thilo Weichert, the data protection commissioner for the German state of Schleswig-Holstein, also began an investigation into the acquisition.⁸⁹ He commented, "The mixing of data is strictly regulated by German law, especially through the Telemedia Act and the Federal Data Protection Act. Both acts rely on the principle of purpose binding, that data stored for one purpose cannot be processed for any other purposes - there are no such restrictions in the U.S."⁹⁰

The Commission, however, did not conduct an antitrust analysis on the potential data collapse of Facebook and WhatsApp. Instead, the Commission approved the merger without conditions. The Commission's only recognition of the threats posed by the Facebook/WhatsApp merger consisted of an open letter to the companies from Jessica Rich of the FTC's Bureau of

⁸⁵ In the Matter of WhatsApp, Inc., (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://www.epic.org/ftc/WhatsApp-Complaint.pdf>.

⁸⁶ In the Matter of WhatsApp, Inc., (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://www.epic.org/ftc/WhatsApp-Complaint.pdf>.

⁸⁷ Samuel Gibbs, *Six Alternatives to WhatsApp Now That Facebook Owns It*, The Guardian, Feb. 20, 2014, <http://www.theguardian.com/technology/2014/feb/20/six-alternatives-whatsapp-facebook>.

⁸⁸ *Id.*

⁸⁹ Jabeen Bhatti and Stephanie Bodoni, *Facebook Purchase of WhatsApp Raises German, Dutch, Art. 29 Privacy Concerns*, BLOOMBERG BNA, Mar. 3, 2014, <http://www.bna.com/facebook-purchase-whatsapp-n17179882555>.

⁹⁰ *Id.*

Consumer Protection. The letter merely reminded the companies of the existence of their privacy obligations and stating that, “[i]f the acquisition is completed and WhatsApp fails to honor these [privacy] promises, both companies could be in violation of Section 5 of the Federal Trade Commission (FTC) Act and, potentially, the FTC's order against Facebook.”⁹¹

Despite continued urging from consumer privacy experts, including a supplemental complaint from EPIC,⁹² the FTC has not conducted a post-merger review to assess the privacy impact of Facebook’s acquisition.

VI. Analysis

Over the course of 15 years, EPIC continued to warn the FTC that non-price factors such as data protection and consumer privacy are far clearer indicators of the state of the data collection market. In 2007, EPIC wrote to the Commission about Google’s manipulation of YouTube search rankings. EPIC warned:

Google has used its dominance in the search algorithm marketplace to preference its own content in search results. This business practice leads to Google's domination in the marketplace of content and ideas, as it gives Google the limitless ability to not only preference its own content but to disfavor the content of others, including groups or individuals that have differing views from Google on such topics as privacy.⁹³

In testimony before the U.S. Senate in 2007, EPIC President Marc Rotenberg alerted the Subcommittee on Antitrust, Consumer Protection, and Consumer Rights to the privacy risks arising from Google’s proposed acquisition of DoubleClick. EPIC noted that DoubleClick’s original business model was not to collect personally identifying information for its delivery of

⁹¹ Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc., at 1 (Apr. 10, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapltr.pdf.

⁹² In the Matter of WhatsApp, Inc., *supra* at 6.

⁹³ Letter from EPIC to the Federal Trade Commission on Google's search preferences in YouTube (Sept. 8, 2011), *available at* https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf.

online advertisements. At the time, EPIC praised the company for its stand on privacy issues and acknowledged its effort to make anonymity work for online commerce. EPIC was surprised and disappointed when DoubleClick proposed to acquire a large consumer database company called Abacus and merge the profiles of anonymous Internet users with the detailed profiles of identified users. EPIC testified, “The company had collected personal information and built relationships of trust based on one set of privacy policies and then decided to change the rules.”⁹⁴ EPIC also noted the inadequacy of the Federal Trade Commission’s remedy measure – an opt-out cookie. The measure “made little sense because it required Internet users who did not want to be tracked by DoubleClick to maintain a DoubleClick cookie on their computer that would tell the company not to target ads at the user. This was a nutty approach since Internet users who did not want to be targeted by DoubleClick would naturally want to remove the DoubleClick cookie.”⁹⁵

Regarding the Google acquisition of Doubleclick, EPIC testified

The merger of the Internet’s largest search company and the Internet’s largest advertising [company] posed a unique and substantial threat to the privacy interests of Internet users around the globe. . . [T]he two companies would be under virtually no legal obligation to protect the privacy and security of the information that they collect and that consumers would have no effective means to safeguard their privacy interests because of the lack of transparency in the companies data practices.⁹⁶

Much of what we described to the Senate in 2007 about the privacy risks of inadequate merger review has come to pass. Legislators and executive agencies around the world understood the significance of non-price factors in assessing data collection markets. For example, Senator

⁹⁴ Marc Rotenberg, “*An Examination of the Google-DoubleClick Merger and the Online Advertising Industry: What are the Risks for Competition and Privacy?*”, Committee on the Judiciary, U.S. Senate (Sept. 27, 2007), https://epic.org/privacy/ftc/google/epic_test_092707.pdf.

⁹⁵ *Id.*

⁹⁶ *Id.*

Al Franken, writing about the pressure of competitive markets to provide consumers with the product they want, asked, “what if a company is able to establish a dominant market share and insulate itself from that pressure?” He answered:

When a company is able to establish a dominant market position, consumers lose meaningful choices. You might not like that Facebook shares your political opinions with Politico, but are you really going to delete all the photos, all the posts, all the connections - the presence you've spent years establishing on the world's dominant social network? ... When companies become so dominant that they can violate their users' privacy without worrying about market pressure, all that's left is the incentive to get more and more information about you. That's a big problem if you care about privacy, and it's a problem that the antitrust community should be talking about.⁹⁷

International antitrust agencies expressed similar concerns. EU Competition Commissioner Margrethe Vestager drew a direct connection between competition and data, calling data “the new currency of the Internet.” Commissioner Vestager further stated, “Very few people realize that, if you tick the box, your information can be exchanged with others. Actually, you are paying a price, an extra price for the product that you are purchasing. You give away something that was valuable. I think that point is underestimated as a factor as to how competition works.”⁹⁸

Former European Data Protection Supervisor Peter Hustinx has argued, “Power in the digital economy is partly driven by the degree to which a given undertaking can actually, potentially or hypothetically collect and diffuse personal information.” He proposed that

⁹⁷ Al Franken, *How Privacy Has Become an Antitrust Issue*, Huffington Post (Mar. 30, 2012), available at http://www.huffingtonpost.com/al-franken/how-privacy-has-become-an_b_1392580.html. Professor Frank Pasquale has also described this effect, explaining, “as the use and reuse of personal information becomes more deeply rooted in intermediary business practices, the tension between competition and privacy becomes more pronounced. For example, if a user of one social network wants to join another, she will often be reluctant to do so because of “switching costs”; she has already invested some time and effort in creating her existing profile. The chief way of reducing those costs is to require data portability, which would allow users to take their list of contacts, applications, pictures, and other items with them when they want to leave. However, such a rule (or protocol for data storage) can render the rest of the user's social graph vulnerable to unwanted exposure on the network the user migrates to.” Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 153 (2010).

⁹⁸ Lewis Crofts and Robert McLeod, *Interview with Margrethe Vestager*, at 5, MLEX (Jan. 22, 2015).

difficulties in measuring market share and thus “dominance” in industries characterized by the concept of “free” services powered by user data could be partially resolved if competition, consumer protection and data protection authorities collaborated together more closely.⁹⁹ And BEUC explained in a letter to then-Commission Vice President Almunia regarding its concerns in the Commission’s Google investigation:

A key component of Google’s policy in order to maintain its dominance of online search is to increase the scale of data it collects via its different services. Search engines can make their results more effective as their scale - including the volume of user data and search queries - increases. With Google’s ever-increasing breadth of online services, a particular user’s online activities will be traceable on a much more continuous and universal level than ever before. Such unprecedented visibility of consumer behaviour will allow Google to build user profiles which are much more complete. The privacy policy of Google is directly linked to its dominance in the online search and should therefore be considered as an aggravating factor in your analysis.¹⁰⁰

As these experts in antitrust and privacy have made clear, there is growing recognition that mergers among companies built upon the collection of user data have far-reaching consequences for consumer privacy. Thus, when firm merges, consumer privacy suffers.

However, the FTC has chosen to ignore non-price factors in assessing mergers of data aggregators. Further, in spite of this growing consensus, the FTC has failed to conduct a single review of data aggregators post-merger. The examples of the AOL/Time Warner merger, the DoubleClick/Abacus merger, the Google/DoubleClick merger, and the Facebook/WhatsApp merger demonstrate the serious anticompetitive effects of data collection mergers without regulatory oversight. The FTC should investigate proposed mergers of data aggregators with

⁹⁹ See *Preliminary Opinion of the European Data Protection Supervisor on “Privacy and competitiveness in the age of big data”* para. 4.1.2 (March 2014), at: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf.

¹⁰⁰ *Letter from Monique Goyens of BEUC to Vice-President Almunia on Google Antitrust Investigation* (31 Oct. 2012), at <http://www.beuc.eu/publications/2012-00691-01-e.pdf>.

regard to the companies' ability to dominate the search market and pose unchallenged privacy threats to consumers. Following mergers of data aggregators, the FTC should conduct post-merger reviews to assess whether the companies have honored their commitments, whether formal or informal, to protect the privacy of the users of their services from whom they have obtained detailed, personal information.

VII. Conclusion

It is clear, in the absence of action by the Commission, that companies will not honor commitments to uphold the privacy protections that were in place at the time the merger occurred. This occurred, for example, as a consequence of DoubleClick's acquisition of Abacus, and likely contributed to AOL's transition from a search engine to an Internet advertising firm.

The FTC should investigate the impact on consumer privacy of proposed mergers between companies that engage in data collection activities. The Commission should also conduct regular post-merger reviews to ensure that companies honor the commitments they have made. By incorporating non-price factors such as privacy into merger reviews, the FTC can protect the online services market from yielding data collection monopolies. Merger analysis would also benefit from economic research that looks into the competition aspects of information dominance. In the absence of FTC action, corporate mergers will accelerate and consumer privacy will diminish.

Respectfully Submitted,

/s/

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