

Before the

Federal Trade Commission

**Hearings on Competition and Consumer Protection in the 21st Century
Project Number P181201**

**Comment on Topic 6: Evaluating the Competitive Effects of
Corporate Acquisitions and Mergers**

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The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows. EFF represents over 40,000 dues-paying members, including consumers, hobbyists, artists, computer programmers, entrepreneurs, students, teachers, and researchers.

Increasing market concentration and structural barriers to competition for Internet-related businesses threaten the values of free expression, privacy, and the innovation that has made the Internet a powerful force in daily life. It is imperative that policymakers and industry address competition issues actively and thoughtfully, avoiding approaches that will themselves harm the rights and freedoms of Internet users, or impede innovation.

To protect both competition and consumers, merging of rich first-party datasets with *third-party trackers*—systems that use ads and other third-party plugins to track user habits around the web and on mobile devices—must receive

special scrutiny. Such mergers present privacy risks to users and exacerbate existing network effects and make it difficult for companies without comparable datasets to compete.

In 2007, Google purchased Doubleclick, a third-party advertising and tracking company. The merger was reviewed by the Commission at the time, and the majority determined that the competition and privacy concerns were not sufficient to challenge the acquisition. In 2013, Facebook acquired a similar product, Atlas, from Microsoft, which they have since folded into their own brands.

Today, Facebook's and Google's tracking networks are the two largest on the English-speaking Internet by far. Facebook tracking code, including social plugins and its invisible "pixel," is present on nearly 25% of the top one million sites on the Internet. The company's ad network also covers 40% of the top 500 most popular mobile apps. By some metrics, Google's reach is even broader. Rich tracking code for Doubleclick is present on over 20% of the top million sites; including Google Analytics and other services, code from Google is present on approximately three quarters of sites on the web.

In addition to their third-party tracking capabilities, both of these companies have massive first-party data stores. That gives them the ability to link data from their third party trackers with the data that users have provided them voluntarily, including real names, demographic data, contacts, communication, and interests.

We believe these kinds of mergers and acquisitions raise both privacy and competition concerns.

From a privacy perspective, mergers between tracking companies and first-party data stores create risks to users that are not present in their component parts. Normally, third-party tracking companies creates anonymous, ad-hoc profiles for users as they browse the web. They have difficulty linking one user's activity across different devices, and when a user clears cookies or switches to a new browser, the tracking company may have to start building a new profile from scratch. However, when a Facebook user browses the web, their activity can be immediately and permanently linked to their Facebook identity via Facebook's cookies. When a user uploads a photo or comments on a friend's post, they implicitly consent to giving the company their data. But when they leave facebook.com to browse the web, they may not realize that Facebook is *still tracking them*. Even if they do, the company offers no way to opt out of that

collection or to delete the data after the fact. The result is a potent, permanent profile of that user’s digital life, combining data they have chosen to share with data collected surreptitiously while they might have felt anonymous.

From a competition perspective, the mergers exacerbate existing network effects and make it difficult for companies without comparable datasets to compete. They give the companies competitive advantages for both their first-party platforms and third-party advertising products. Facebook touts their ability to advertise to “real people”—that is, to use information from Facebook profiles to target individuals outside of Facebook products. Third-party ad platforms that do not possess a similar first-party dataset cannot hope to do the same. Furthermore, these companies have a privileged view of the landscape of the Internet, and therefore of their competition. This gives some companies “a relative advantage in accessing and analyzing data to discern threats well before others, including the government.”¹

There are some behavioral remedies that we believe could mitigate the harms of these mergers. After acquiring Doubleclick, Google volunteered to keep the data it collected through Doubleclick separate from the rest of its user data. Commissioner Harbour, in her dissenting statement for the investigation, predicted that the company would eventually reverse this policy, and in 2016, it did. Today, it might make sense to enforce a similar policy: require that data from third-party tracking networks must be “siloe” away from first-party data so that anonymous web activity cannot be linked to rich digital identities.

Finally, we believe traditional metrics for assessing these mergers are insufficient, and new means of evaluation are needed in the future. In her dissent, Commissioner Harbour wrote, “Traditional competition analysis of Google’s acquisition of DoubleClick fails to capture the interests of all the relevant parties.” We agree, and we believe that mergers between data collectors should be scrutinized more strictly than they have in the past, and on more comprehensive grounds. We hope to engage in an ongoing conversation about how to assess competitive harms caused by consolidation in the age of big data.

¹ See Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 Geo. L. Tech. Rev. 275, 305 (2018) (available at <https://ssrn.com/abstract=3144045> or <http://dx.doi.org/10.2139/ssrn.3144045>).