

# The FTC fuses competition, privacy, and consumer protection concerns to open a new front against Big Tech

Blog post by Associate Sonia Vasconcellos, 6 October 2022

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The US Federal Trade Commission (FTC) is shifting its traditional approach to competition policy by going beyond the question of whether a transaction violates antitrust law to consider whether consumer privacy has been a casualty of Big Tech's rise. However, the FTC's push to expand its remit and the boundaries of traditional antitrust law will almost certainly be challenged in court, where a conservative majority is likely to push back on the agency's aggressive agenda.

Traditionally, the FTC has primarily investigated companies violating antitrust law by looking at consolidated market power and/or price increases for consumers - notably omitting privacy considerations. However, recently FTC enforcement has shifted its focus to how companies collect and use personal data, especially those that have significant market power across industries.

The FTC has enforcement authority for consumer protection when "unfair or deceptive acts or practices" occur. In recent FTC cases related to data privacy, the agency focuses on the "deception" part of its enforcement authority, claiming companies have made a concrete step or practice that could mislead a consumer. In addition to this theory, Biden-appointed FTC Chair Lina Khan argues that privacy can be considered as a type of product quality when discussing competition. Khan and her staff further argue the diminishment of privacy itself is a form of harm to consumers.

The FTC's recent investigations into Amazon's proposed acquisitions of iRobot and One Medical emphasize the agency's argument that companies are amassing data through unfair methods of collection and manipulating that data at the expense of consumers. In the iRobot case, the FTC is investigating whether the data stored in iRobot's automated vacuum products on the layout of consumers' homes could give Amazon an advantage over other retailers - like suggesting personalized furniture products to certain customers based on the size of their rooms.

Similarly, in the case of One Medical - a network of in-person primary medical care centres - the FTC is asking questions about the data to which Amazon would gain access, including relevant insurance companies and medical patient data. In particular, the FTC's concerns centre around how Amazon would separate retail consumer data and patient data post-acquisition. For example, Amazon could use a diagnosis for high blood pressure to send targeted advertisements for related medication, giving them an edge over their competitors.

The Amazon investigations are part of a broader interest by the FTC in the intersection of competition and privacy. In August, the FTC launched an Advanced Notice of Proposed Rulemaking (ANPR) - a process by which a federal agency can outline ideas and gather feedback in advance of a formal rulemaking - to investigate whether new regulations are required to protect consumers from

the commercial collection and monetization of their data. While the ANPR stops short of suggesting specific rules, it makes it clear that the agency is focused on concrete harms caused by data collection - whether that is through data breaches, ad targeting, or algorithm discrimination.

However, the FTC's rulemaking process is lengthy, and any sort of data privacy rule would almost certainly face legal challenges centred around regulatory overreach. In fact, a recent US Supreme Court ruling in *West Virginia vs. EPA* may be a limiting factor, setting a precedent that requires agencies to have clear statutory authority from Congress to impose regulations on "major" issues. Industry-friendly stakeholders have also already pushed back on the FTC's ambitions to regulate data privacy, claiming that the issue is outside the agency's jurisdiction. As a result, the FTC is leaning on enforcement and investigations of Big Tech companies like Amazon and Meta as a way to define data privacy as a part of antitrust considerations.

The agency's recent investigations of Amazon's proposed acquisitions of iRobot and One Medical are important test cases. If the investigations turn out in the FTC's favour, it will serve as a lesson to the industry that data privacy concerns will be increasingly important in antitrust policy going forward. Even as congressional action on data privacy lags, a new Democratic majority at the FTC will give chairwoman Lina Khan a chance to advance her aggressive agenda to rein in Big Tech's growing power.