

Antitrust In Retail: Why FTC Is Studying 'Surveillance Pricing'

By **David Kully, Rachel Marmor and Caitlin Saladrigas** (October 4, 2024)

This article is part of a quarterly column that explores recent antitrust developments in the retail industry and their potential impacts on competition. In this installment, we discuss the Federal Trade Commission's recent surveillance pricing study.

On July 23, the Federal Trade Commission announced the initiation of a study into what it referred to as "surveillance pricing," a practice it described as the use by companies of "advanced algorithms, artificial intelligence and other technologies, along with personal information about consumers — such as their location, demographics, credit history, and browsing or shopping history — to categorize individuals and set a targeted price for a product or service."^[1]

The FTC has, for some good reason, been criticized for a lack of clarity into the nature of the conduct it is studying and, more importantly, whether so-called surveillance pricing practices might violate any existing laws.^[2]

The FTC initiated the study based on its asserted authority under Section 6(b) of the FTC Act to conduct wide-ranging studies that do not have any specific law enforcement purpose,^[3] and it might well be the case that the practices it is studying are simply not illegal under any established interpretations of the antitrust laws.

But there might be independent data privacy-related concerns the FTC could pursue under its consumer protection mandate.

It is worth considering whether surveillance pricing, as described by the FTC, might raise legitimate antitrust issues.

Although inflated prices can be an anticompetitive effect of practices found to be illegal under the antitrust laws, U.S. antitrust law as a general matter^[4] does not intrude on unilateral pricing practices or prohibit a company from charging any price for its products that it believes market conditions will allow.^[5]

The ability to charge high prices is even recognized to be the reward companies receive for their investments in innovations.^[6]

To the extent that surveillance pricing tools are adopted as part of a company's unilateral pricing policies, the broad discretion even monopolists have to establish their own prices and pricing policies should help insulate those policies from liability.

The FTC's reference to "advanced algorithms, artificial intelligence, and other technologies" suggests a possible connection to widespread litigation concerning alleged use by competitors of common pricing software facilitating so-called collusion by algorithm.

The Antitrust Division of the U.S. Department of Justice, for instance, on Aug. 23 commenced the U.S. v. RealPage case in the U.S. District Court for the Northern District



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of North Carolina.[7]

RealPage provides pricing tools for use by multifamily apartment owners and managers, and private plaintiffs have initiated similar class action cases against providers and users of similar software in a variety of different industries.

One essential feature of these cases, however, is the alleged use of the software by competitors to share competitively sensitive information and inflate prices.[8]

While it remains unclear precisely what specific practices the FTC might view to constitute the surveillance pricing it is studying, it appears more likely to reach unilateral pricing practices and not coordinated conduct allegedly at issue in the collusion-by-algorithm cases.

The FTC's description of surveillance pricing appears to focus on information about its customers that a company possesses or obtains from noncompetitors, and not on companies using sensitive information from competitors to inform their own pricing decisions.

On the other hand, the FTC's study expressly targets firms that "harvest American's personal data" with an apparently particular focus on the data aggregation industry or data brokers more specifically, which the FTC refers to as the "shadowy ecosystem of pricing middlemen." [9]

While many technology devices collect information from consumers seemingly here, there and everywhere, that data is typically sold for use in targeted advertising and likely of little utility to retailers and other organizations in setting prices.

Privacy considerations associated with the surreptitious collection and aggregation of data has prompted litigation related to the collection and sharing of driver data between car manufacturers, vehicle security software companies, data brokers and ultimately auto insurers.[10]

The same consumer privacy concerns might have prompted the FTC to commission the study to learn, as FTC Commissioner Melissa Holyoak said in a concurring statement, "more about the behind-the-scenes work of data brokers and other data intermediaries." [11]

The most reasonable interpretation of the conduct the FTC regards to be surveillance pricing is that companies are using technology tools and information they possess or have access to about consumers to price discriminate — increasing prices to consumers who data suggests will be willing to pay higher prices.

At a Sept. 18 Aspen Institute conference on cybersecurity, FTC Chair Lina Khan referred to families with kids with nut allergies being charged more for granola bars without nuts, or a person facing higher airline ticket prices based on personal information revealing that he or she just had a death in the family and would need to fly to a funeral.[12]

Price discrimination, when it harms competition between competing purchasers of goods of like grade and quality, can violate the Robinson-Patman Act.[13]

Although the antitrust agencies largely abandoned enforcement of the Robinson-Patman Act in the 1980s, FTC commissioners in recent years have stated their intention to reinvigorate Robinson-Patman enforcement,[14] but without any enforcement activities to date.

But consumers potentially subject to surveillance pricing practices — like two purchasers of peanut-free granola bars — are not in competition with one another and retailer discrimination in pricing of granola bars would not implicate Robinson-Patman concerns.

But "put[ting] peoples privacy and risk" and the potential exploitation of consumer information are consumer protection issues on which the FTC also focuses significant attention.[15]

The FTC regards pricing surveillance through the use of algorithms, artificial intelligence and other technologies as implicating a multitude of privacy concerns, including a lack of consumer transparency, lack of consumer control of the use of their information, inability to correct bad data, lax data security and potential discriminatory outcomes.[16]

It is likely those concerns, rather than potential Robinson-Patman enforcement, that motivated the FTC's study.

The FTC's study might reveal the existence of data-driven pricing practices that could violate nonantitrust statutes or spur calls for new laws or regulations. But if engaged in by retailers as a unilateral practice, any connection to existing interpretations of the antitrust laws is not currently apparent.

The results of the FTC's study should provide greater clarity into the nature of the data aggregation industry that currently operates only behind the scenes and into how data brokers work.

That clarity will reveal to the FTC whether any basis exists to pursue enforcement under the antitrust laws or whether privacy-related enforcement or regulatory efforts might be appropriate.

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[1] FTC Press Release, FTC Issues Orders to Eight Companies Seeking Information on Surveillance Pricing, July 23, 2024.

[2] See, e.g., Chris Wlach, A Fuzzy Label with Bite: FTC Must Define Surveillance Pricing, Law360, Sept. 17, 2024.

[3] See FTC, A Brief Overview of the [FTC's] Investigative, Law Enforcement, and Rulemaking Authority, May 2021.

[4] Predatory pricing – pricing below cost to eliminate competition with an expectation of later recouping losses – can support a monopolization claim and is a rare instance in which

unilateral pricing practices can present issues under U.S. antitrust law. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993).

[5] See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979) ("A pristine monopolist, we have held, may charge as high a rate as the market will bear."); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means [can] charge any price that it wants . . . , for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute." (citations omitted)); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) ("[E]ven a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices.").

[6] See *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."); *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

[7] Complaint, *United States, et al. v. RealPage, Inc.*, No. 1:24-cv-00710 (M.D.N.C. Aug. 23, 2024)

[8] See, e.g., *Gibson v. Cendyn Group, LLC*, No. 2:23-cv-00140, 2024 WL 2060260, at *4 (D. Nev. May 8, 2024) (dismissing collusion-by-algorithm claims against Las Vegas hotel operators based on absence of allegations that the hotel operators at the "rim" of the alleged hub-and-spoke conspiracy shared competitively sensitive information with one another through the software at the "hub" or that they agreed to charge the prices recommended by the pricing algorithm).

[9] FTC Press Release, *FTC Issues Orders to Eight Companies Seeking Information on Surveillance Pricing*, July 23, 2024.

[10] *In re Consumer Vehicle Driving Data Tracking Collection*, 24-MD-3115 (N.D. Ga.).

[11] See Concurring Statement of Comm'r Melissa Holyoak, *Surveillance Pricing Intermediaries*, FTC Matter No. #P246202, July 23, 2024.

[12] See Madeline Hughes, *US FTC, CFPB looking to use existing laws to combat unfair personalized pricing*, *Khan and Chopra say*, *MLex* (Sept. 18, 2024).

[13] 15 U.S.C. § 13(a); see also *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175-77 (2006).

[14] See, e.g., Alvaro M. Bedoya, "Returning to Fairness," prepared remarks to the Midwest Forum on Fair Markets (Sept. 22, 2022); Matthew Perlman, *FTC Says Retailers Used Pandemic to Boost Profits, Power*, *Law360* (Mar. 24, 2024) (quoting FTC Chair Lina Khan as promising "swift action" if the FTC finds that elevated grocery prices are caused by conduct that might violate the Robinson-Patman Act).

[15] FTC Press Release, *FTC Issues Orders to Eight Companies Seeking Information on*

Surveillance Pricing, July 23, 2024.

[16] See Fact Sheet on the FTC's Commercial Surveillance and Data Security Rulemaking, August 11, 2022.