

Big Tech Probes May Trigger Antitrust Scrutiny On All Sectors

By Anne Cullen

Law360 (February 26, 2020, 2:02 AM EST) -- Major technology platforms' perceived failings in the arenas of consumer privacy, data security and content vetting have prompted antitrust enforcers to look at revamping the rules in ways that will likely reverberate across the entire economy, according to a report released Wednesday by Crowell & Moring LLP.

In the international law firm's sixth annual regulatory forecast — which examines regulatory trends that in-house counsel will likely face in the coming year — Crowell & Moring predicted that industries across the board will be affected by steps U.S. lawmakers and regulators have taken to tackle anti-competitive behavior in the tech industry.

Over the past year, probes into leading tech companies were launched by the U.S.'s top antitrust enforcers — the Federal Trade Commission and the U.S. Department of Justice — as well as the House Judiciary Committee and a bevy of state attorneys general. And last month, the DOJ and the FTC together floated new guidelines covering vertical mergers, and the FTC is planning to roll out additional enforcement guidelines for digital platforms.

This heightened scrutiny may have been sparked by conduct within the tech industry, but it won't stop there, according to Shawn R. Johnson, a Crowell & Moring partner who co-chairs the firm's antitrust group and contributed to Wednesday's report.

"The revisions and debates that are ongoing in antitrust are broader than just the technology platforms and the big tech companies," he told Law360. When tech giants are accused of mismanaging consumer data or failing to safeguard their customers' privacy, regulators looking to police that behavior won't limit the new rules to tech companies, he explained.

The increased flow of consumer data throughout this sector "has raised questions about whether the antitrust laws are being effectively applied and enforced in the tech industry," which Johnson said will "have knock-on effects across numerous other industries."

All sectors are becoming more digital, he said, and data collection practices are growing across the economy.

Aside from fumbles with consumer information, tech giants have also been accused of engaging in so-called killer acquisitions, in which a dominant market player buys up a burgeoning rival in a neighboring

industry to fend off future competition. Many would put Facebook's \$1 billion pickup of Instagram in 2012 under this category, as while the nascent photo-sharing app wasn't offering the same services as Facebook at the time, Instagram had the potential to eventually rival the social media giant.

While these types of mergers had previously flown under the radar, Johnson said regulators are starting to take notice, which will affect merger reviews in other dynamic sectors like manufacturing. "It's these transactions that are now more likely to get a harder look from regulators," he said in the report.

In January, the FTC and DOJ proposed their first new guidelines for vertical mergers in more than three decades. Although many observers felt the retooled rules didn't go far enough — the FTC's Democratic heads abstained from the vote, contending the updated guidelines were too soft — Crowell & Moring attorneys contend the decision to give the regime a face-lift speaks volumes.

"The mere fact that the guidelines were revised reflects closer scrutiny of deals by both state and federal regulators in many areas besides tech," according to the report authors.

In the automotive industry, antitrust enforcers may now spend more time examining possible killer acquisitions in this space, "because today's maker of parts and systems for these vehicles could be tomorrow's major automaker," according to the report.

Health care is another industry that should be on the lookout for a new rulebook, according to Crowell & Moring, as the report's authors said the effort to offer "integrated care" has spawned a bevy of vertical acquisitions within that sector.

"From how we view the role of data privacy to so-called killer acquisitions, these investigations are going to impact a wide range of businesses for years to come," Johnson said in the 2020 forecast.

While antitrust in big tech headlined Crowell & Moring's latest forecast, contributing attorneys also tackled topics such as corporate counsel's engagement with blockchain, advertising on social media platforms in advertising, and using artificial intelligence in insurance.

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