

Google bid for Kanter recusal in US antitrust case seen as long shot

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(December 7, 2021) - Jonathan Kanter, the Justice Department's competition chief, spent years taking on Alphabet Inc.'s Google as an attorney in private practice and now has the opportunity to put his stamp on major federal antitrust litigation against the company — assuming he's not forced to recuse himself.

Google is seeking a determination from Lee Lofthus, the DOJ's designated ethics official, as to whether Kanter should be recused from the department's enforcement matters against the company based on his past legal work and public statements.

The move reflects a legal strategy by Big Tech to challenge the participation in their cases of some of the administration's top antitrust officials. Amazon.com Inc. and Facebook Inc., which recently renamed itself Meta Platforms Inc., have raised similar concerns about Federal Trade Commission Chair Lina Khan, a vocal critic of both companies before taking her current job.

Several antitrust experts said they don't expect the strategy to work.

"It's not impossible that a person's pre-government zeal could get them kicked off a case, but it's pretty unlikely," said Chris Sagers, an antitrust law professor at Cleveland State University.

Even if Kanter is recused, the overall impact on the DOJ's litigation against Google may be minimal, according to Austin Ownbey, an antitrust attorney at Foley Hoag LLP.

"The Google case was begun prior to his arrival and will proceed regardless of whether it's helmed by him or one of his deputies," he said.

A Khan recusal could be much more significant, given that FTC enforcement actions are subject to approval by a majority of the commission, analysts said.

Facebook is seeking the dismissal of an amended FTC antitrust complaint against the company in part on the basis that Khan should have recused herself from the matter, which would have resulted in a commission deadlock.

In June, a federal district judge dismissed the original case but gave the FTC the opportunity to refile it with new evidence. The amended complaint was filed in August, after it was approved by the commission with a 3-2 partly-line vote.

Amazon has also called for Khan to recuse herself from any FTC antitrust probes of the company.

With the Senate's 68-29 confirmation of Kanter last month, President Joe Biden now has three Big Tech critics steering his administration's antitrust agenda. National Economic Council member Tim Wu previously called for breaking up companies like Facebook. Both he and Khan were progressive antitrust scholars before their appointments.

Kanter founded his own antitrust-focused law firm in 2020 after leaving Paul, Weiss, Rifkind, Wharton, and Garrison LLP. Before that, he worked at Cadwalader, Wickersham & Taft LLP. He has represented clients in complaints against Google and Apple Inc.

As part of his new role, Kanter is responsible for overseeing a DOJ antitrust lawsuit filed against Google near the end of the Trump administration.

The complaint alleges that Google has maintained power as a "monopoly gatekeeper for the internet" through exclusionary agreements that allow its search engine to be set as the default on billions of mobile devices and computers worldwide. It calls on the court to prohibit Google from engaging in any anticompetitive conduct and to provide "structural relief as needed."

"Kanter will have to decide some big issues, including whether to seek a divestiture of assets such as Android," Google's mobile operating system, said Herbert Hovenkamp, a University of Pennsylvania law professor.

The litigation is still in the discovery phase. The DOJ has asked the court to extend the deadline for completing discovery from March 22 to June 22, allowing more time to review and receive additional relevant documents and conduct more effective depositions. The extension shouldn't affect the scheduled trial date, which is nearly two years away, it said.

Further action

DOJ is also reportedly gearing up to slap Google with a second antitrust complaint focused on its advertising technology business.

In a letter last month to Lofthus, Google said Kanter's involvement in any investigations or litigation targeting the company may violate ethics guidelines that prohibit federal employees from participating in matters in which their impartiality could be "reasonably" questioned.

The letter, sent just two days after Kanter was sworn in at the DOJ, noted his long track record of litigating and advocating against Google on behalf of commercial rivals, including Microsoft Corp. and Yelp Inc. It also said Kanter has made statements that prejudged the question of whether Google has violated antitrust laws, including accusing the company of being a monopolist and closing off competition through "discriminatory and exclusionary practices."

"While nominees for office will inevitably come to office with their own general opinions, [Assistant Attorney General] Kanter's past conduct and statements suggest that he has already made up his mind about Google's antitrust culpability," Google said. The company requested both an investigation of the matter and a briefing on it.

DOJ spokesperson Arlen Morales declined to comment.

Prior to his Senate confirmation, Kanter promised to consult with ethics officials at the DOJ if asked by Google to recuse himself from enforcement actions against the company. He addressed the issue as part of his response to a Senate Judiciary Committee questionnaire.

Sarah Miller, executive director of the American Economic Liberties Project, an anti-monopoly group, said Google is trying to equate bias with a commitment for enforcing antitrust law, coupled with a "deep knowledge of the tech industry."

"The president nominated and the Senate overwhelmingly confirmed Jonathan Kanter precisely because of those very qualities," she said. "In my view, there's zero chance that ethics officials will find that he needs to be recused."

Typically, DOJ officials recuse themselves from legal matters either because they have financial ties with a company or a prior attorney-client relationship with it, Miller said, adding that there is no evidence of either problem for Kanter in relation to Google.

Cleveland State's Sagers said he wouldn't rule out the possibility of a recusal by Kanter, though it appears to be unlikely. "There is some history of government officials being forced off of cases because they were seen as being overly zealous," he said.

Two such cases, both several decades old, were cited by Amazon and Facebook over the summer in separate petitions urging Khan's recusal from FTC matters involving them.

In 1966, the 6th Circuit Court of Appeals decided in *American Cyanamid Co. v. FTC* to invalidate an FTC antitrust order in which then-Chairman Paul Rand Dixon participated, because he had previously investigated similar issues as chief counsel and staff director of a Senate subcommittee. This created at least the appearance of unfairness, the court found.

Two years later, in *Cinderella Career and Finishing Schools v. FTC*, the D.C. Circuit invalidated a separate FTC order on the grounds that Dixon had given a speech in which he appeared to forecast his opinion.

The cases weren't cited in Google's letter, and a spokesperson declined to comment on them.

It's unclear how much the Dixon cases would help Google's cause, given differences between DOJ, an executive branch law enforcement agency, and the FTC, an independent body with adjudicatory authority and the ability to issue its own enforcement orders, according to Jeffrey Amato, a partner at Winston & Strawn LLP.

"I think this attempt by Google, at least in the initial stages, probably has a very low chance of success," Amato said. "It's probably something they did as a litigation strategy and a potential feather in their quiver for later down the road in the event of an appeal."

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