

In Kanter, DOJ Would Get An Aggressive Antitrust Enforcer

By **Bryan Koenig**

Law360 (July 22, 2021, 11:11 PM EDT) -- President Joe Biden's nomination this week of Jonathan Kanter to lead the U.S. Department of Justice Antitrust Division put to rest any lingering doubts about just how aggressively his administration will ramp up antitrust enforcement and crack down on corporate concentration.

Now the nominee for assistant attorney general for the Antitrust Division, Kanter, a founding partner at the Kanter Law Group PLLC and former co-chair of Paul Weiss Rifkind Wharton & Garrison LLP's antitrust practice, has spent almost his entire career at major firms, where he's represented a range of corporate clients including Microsoft and Farelogix, as well as Google critics duking it out with the search giant.

Despite his stints representing corporate interests, Kanter has also made a name for himself as a critic of Google and an advocate for changing the antitrust status quo, placing him in roughly the same intellectual wheelhouse as new Federal Trade Commission Chair Lina Khan, a former academic and Capitol Hill staffer who built her career on calling for antitrust enforcers to drop the hammer on technology platforms, especially Amazon.

"He has a BigLaw background but he's clearly carrying the aggressive enforcement banner," said Stephen Calkins, a former general counsel at the Federal Trade Commission who is now a professor at Wayne State University Law School in Detroit.

Kanter, who started his career as a summer intern at the FTC and went on to spend two years at the agency after graduating in 1998 from the Washington University School of Law (St. Louis), has been carrying that banner for years even as he's spent most of his career at BigLaw firms Fried Frank Harris Shriver & Jacobson LLP, Cadwalader Wickersham & Taft LLP and finally Paul Weiss, which he left last year to start his own antitrust advocacy boutique.

"It's fairly apparent that he really does believe that enforcement has a lot of value in the antitrust world," said Leslie W. Kostyshak, a partner at Hunton Andrews Kurth LLP. "That enforcement effort may largely be focused on Big Tech, given his history."

In 2016, Kanter wrote an op-ed for The New York Times warning that Google had been accused of "troubling practices," such as "biasing its search results, allowing some sites to pay for prominent display in search results and copying the content of others for its own use."

"Google is said to have followed the same playbook for years: introducing a free product into a

competitive space, subsidizing that product with advertising revenue, and then closing off competition through discriminatory and exclusionary practices," Kanter wrote.

Two years later, Kanter broadly argued that much of the thinking around mergers needs updating. On an FTC panel discussing major companies' buying up so-called nascent competitors, held as part of a series of FTC hearings on the state of modern antitrust and consumer protection law, Kanter warned that current thinking needs to evolve past "stale" economic theories and a fear of overenforcement.

At the same time, Kanter acknowledged the difficulty in weighing whether to contest a merger, especially as major corporations buy much smaller companies when they pose only potential competition.

Whether enforcers should continue erring on the side of caution is a part of the reckoning over what critics say has been lax antitrust enforcement.

Even enforcers have been rethinking the growth of dominant tech platforms that occurred under their watch. The DOJ and state attorneys general are suing Google for allegedly monopolistic practices in a range of markets, and the FTC and state enforcers are trying to unwind Facebook's purchases of WhatsApp and Instagram, which cleared commission scrutiny at the time. The Facebook suits were tossed — at least initially — last month.

If confirmed by the Senate, Kanter would inherit that case against Google, along with an ongoing criminal investigation of wage-fixing and agreements among companies to avoid recruiting or hiring each other's employees, cases accusing major pharmaceutical companies of fixing the costs of generic drugs, and a challenge to the proposed merger of two of the "Big Three" global insurance brokers.

Kanter would also have to navigate the larger backlash against Big Tech and corporate concentration more broadly, as lawmakers debate a series of proposed overhauls to U.S. antitrust law and as investigations into other online platforms and tech companies continue.

Kanter has already indicated that he thinks size itself can be a factor in investigations, at least in the nascent-merger space.

"Bigger is more suspicious, and I do not think it is controversial to suggest you are likely to see more problems when you have companies with market power and large market share," Kanter said during the 2018 FTC event.

At that same event, Kanter argued that antitrust enforcers "get tied up in formalistic distinctions, like horizontal and vertical," referring, respectively, to mergers between direct competitors and between companies at different steps in the supply chain.

Historically, antitrust agencies have considered vertical deals less competitively detrimental. But that thinking is beginning to change, with the DOJ unsuccessfully contesting the vertical tie-up between AT&T and Time Warner and the FTC currently opposing Illumina's purchase of Grail.

Kanter warned that it could be problematic for antitrust law to focus too much on economic theory, "anchored in theories that are kind of staid" and don't match the dynamics of modern markets.

"Those kinds of distinctions, as being the anchors for how we evaluate these kinds of problems, tend to

throw us off and away from the issues that really matter," Kanter said. "And so I think we have to figure out better ways to look at the dynamic nature of competition."

Exactly how Kanter's thinking might translate into policy remains to be seen.

Assuming that he's confirmed, Kanter has a lot of catching up to do. In waiting six months to nominate his chief antitrust enforcer, Biden shattered the previous longest wait in modern presidential history, set when former President George H.W. Bush took a little under four months to name his pick. And Kanter must still be confirmed, a process that at its fastest in recent history took 27 days, a pace unlikely to be met now thanks to the looming August congressional recess.

Craig Y. Lee, a former Antitrust Division official and current Hunton Andrews partner leading the firm's cartel and antitrust investigations practice, said that if Kanter takes the job, he will probably want to take stock of all the investigations and activity on his plate.

"I suspect that there will be a pause in the flurry of cases that have been filed in the last few months," Lee said.

Most of those cases have been criminal labor-side indictments, prosecutions that are likely to get an additional jolt from Biden's recent sweeping executive order aimed at boosting competition across the U.S. economy. Until Kanter's nomination announcement, the order was the latest signal of what Biden wants from his antitrust enforcers and came as the FTC under Khan moves to reshape and reinvigorate its enforcement approach, including a potential move away from the long-standing policy of bringing antitrust challenges based solely on how a merger or competitive behavior affects consumer welfare.

"The Biden administration is taking pretty seriously this notion we need to reinvigorate enforcement and, in particular, enforcement under [Sherman Act] Section 2 for monopolization," said David W. Kesselman, co-managing partner at Kesselman Brantly Stockinger LLP.

As Kanter's nomination moves forward, antitrust professionals will be watching to see how he balances no-poach and Big Tech enforcement with the cartel cases that have traditionally been a major focus for the division, even as cartel fines have declined worldwide over the last several years.

Informing Kanter's efforts will be two decades of BigLaw work, including representing companies battling the DOJ such as Farelogix Inc. in its merger with Sabre Corp., which was eventually blocked by U.K. antitrust authorities.

Steven C. Sunshine, global head of Skadden Arps Slate Meagher & Flom LLP's antitrust practice and a former senior Antitrust Division official, does not expect Kanter's BigLaw experience to inhibit him.

"Jon's experience working both for and against enforcement will serve him well in guiding the antitrust policy," Sunshine told Law360 in an email. "He may have a specific enforcement agenda, but he can only implement it by choosing to bring the right cases. His career working for the 'other side' will only improve his effectiveness."

Kanter's past statements indicate at least some sympathy for parties facing in-depth merger reviews and other investigations. He said during the FTC event in 2018 that he's been "on the receiving end of many

second requests," which he described as "very painful and invasive," even as he maintained that he wasn't criticizing agency staffers.

But he's nevertheless likely to apply a stronger microscope to mergers.

"Merging parties — as well as potentially impacted third parties — should prepare for more expansive requests for information that encompass non-traditional theories of harm," Alexander P. Okuliar, a former deputy assistant attorney general for antitrust and current Morrison & Foerster LLP partner, said in an email. "I would expect that for many deals the process will be slower, more time-consuming and potentially more expensive than it is today."

"Ultimately, we will likely see more matters go to litigation as a result," he added.

Despite Kanter's background and mandate from Biden to push the bounds of antitrust law, there are limits to what an assistant attorney general alone can do. Limited financial resources could make it difficult to add another major case on top of the Google lawsuit, although lawmakers are considering funding increases.

"On the merger front, DOJ can implement policy pretty quickly since most merger matters are decided through the [review] process and very few are litigated," Daniel A. Crane, a professor at the University of Michigan Law School, told Law360 in an email.

But in conduct cases, Crane said, the DOJ's ambitions will be dependent on court responsiveness to novel legal theories and new ways of looking at markets.

"Without new legislation in Congress, Jonathan will have to be careful about not pushing too hard against established precedent," Crane said. "Setbacks in court could fuel the fire for legislative reform, but also demoralize the DOJ and make it timid in future filings. Jonathan needs to get some wins under his belt on conventional antitrust theories before taking more aggressive positions in litigation."

The ultimate question, Crane said, is not whether Kanter himself is up to the job, but "whether the Biden administration's apparent blueprint for an antitrust revolution can realistically be achieved by anyone, given all of the constraints: conservative courts, dysfunctional Congress, lack of clear consensus on replacing the consumer welfare standard, etc."

--Additional reporting by Christopher Cole, Matthew Perlman and J. Edward Moreno. Editing by Karin Roberts and Alanna Weissman.