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Is DOJ Looking to Bring Criminal Charges Under Sherman Act's Section 2? 'Yes, Absolutely'

March 9, 2022

On March 2, 2022, Richard Powers, the deputy assistant attorney general of the Antitrust Division of the US Department of Justice, said that the division is prepared – for the first time in decades – to bring criminal charges under Section 2 of the Sherman Act, which prohibits monopolists or attempted monopolists from engaging in certain exclusionary conduct.

Speaking on a panel at the American Bar Association's National Institute on White Collar Crime, Powers was asked whether the DOJ was committed to prosecuting monopolization cases, and whether this meant the Antitrust Division was prepared to bring criminal charges under Section 2 of the Sherman Act. Powers responded that he was not "making any announcements," but that the short answer was "yes, absolutely."

Powers further explained that "Congress made violations of the Sherman Act, both Section 1 and Section 2, a crime … and Section 2 is a felony just like Section 1, and that's been true since the 1970s." He said that Section 2 charges were historically brought alongside Section 1 charges, "when companies and executives committed flagrant offenses intended to monopolize markets." Powers further stressed that "[m]arket concentration and consolidation is not only a civil antitrust issue; consolidated industries tend to harbor price-fixing conspiracies and other forms of collusion or anticompetitive conduct."

Powers' comments came after Assistant Attorney General Jonathan Kanter's **January 2022 remarks** in which he expressed concerns about "a dearth of Section 2 case law addressing modern markets."

Section 2 of the Sherman Act makes it a felony punishable by up to ten years of imprisonment for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations … ."

But even though attempts to monopolize commerce are a felony under the statute, the DOJ has not brought criminal charges against companies or individuals under Section 2 for decades.

What to know

Undoubtedly, Powers' comments came as a surprise – not only because the DOJ has not criminally prosecuted Section 2 violations in more than 40 years, but because Powers did not provide concrete guidance as to how the Antitrust Division intends to implement this significant policy shift. Without further guidance, it is difficult for companies to understand what they should be doing to avoid DOJ scrutiny and how to best stay clear of potential criminal exposure.

Powers noted that criminal prosecutions would be directed to those who have committed the most obvious and "flagrant offenses intended to monopolize the market." But it is unclear how this new approach will work in practice. Being a monopolist is not, in and of itself, unlawful under Section 2 of the Sherman Act. That is because sometimes monopolists or attempted monopolists have gained market power through better products or services, not through illegal means. In an attempt to not penalize companies who have succeeded on their merits, or suppress modernization, the antitrust laws are designed to only punish actors who are gaining monopoly power in an exclusionary way that harms competition. An analysis of what is exclusionary conduct that's actionable under

Section 2 requires an intensive market and economic analysis under the "rule of reason" – which **provides** that "antitrust law needs to be applied only to the unreasonable restraints of trade" – and can be complicated in the new economy, particularly for tech and pharma companies. To criminally prosecute some of these actors may result in overcorrection and a stifling of innovation.

In addition, Powers hinted that criminal Section 2 prosecutions could accompany charges under Section 1 of the Sherman Act, as "consolidated industries tend to harbor price-fixing conspiracies and other forms of collusion or anticompetitive conduct." However, the Antitrust Division already has the ability to criminally prosecute Section 1 agreements, so it is unclear why the DOJ needs this additional tool in its arsenal.

The Antitrust Division declared a similarly drastic policy shift in 2016, announcing that it would be criminally prosecuting certain labor agreements, such as naked no poach or wage-fixing arrangements, which had previously been treated civilly. In that instance, the Antitrust Division and the Federal Trade Commission issued a joint publication titled "**Antitrust Guidance for Human Resource Professionals**," which provided **guidance on the types of conduct that may be a criminal violation**. In the future, the Antitrust Division may issue more concrete guidance on the criminalization of Section 2.

A significant policy shift

In the meantime, companies should be on notice that criminal charges under Section 2 may be on the horizon. This is a significant policy shift and an aggressive expansion of the DOJ's antitrust enforcement efforts, but it very much reflects the Biden administration's strong emphasis on antitrust enforcement. **Last year, in enacting a sweeping executive order focused on antitrust reform**, President Joe Biden said, "[w]e are now 40 years into the experiment of letting giant corporations accumulate more and more power, and what have we gotten from it? Less growth, weakened investment, fewer small businesses. … I believe the experiment failed."

As a result, as a first step, we encourage clients to invest in their antitrust compliance programs. **The Antitrust Division has made clear** that in evaluating charging decisions in criminal antitrust investigations, it will evaluate the effectiveness and robustness of a company's pre-existing antitrust compliance program. This may prove critical in the face of criminal Section 2 charges.

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