

DOJ Provides More Specific Guidance About Criminal Enforcement of Section 2

A photograph of a modern building with a curved, glass-and-steel facade, showing multiple floors and windows, set against a light blue sky.

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Since the Antitrust Division's March 2022 announcement that it would once again consider and bring criminal charges for violations of Section 2 of the Sherman Act, DOJ has resisted calls for guidance about what conduct would lead to criminal — rather than civil — enforcement.

Last month DOJ quietly updated [its primer for law enforcement personnel](#) with additional guidance: the starting point when DOJ draws the line between civil and criminal enforcement of Section 2 is whether the conduct otherwise amounts to a crime.

The revised primer also provides more specific guidance for its criminal enforcement of conspiracies to monopolize and unilateral monopolization and attempted monopolization:

- **Conspiracies to Monopolize:** DOJ explains its criminal enforcement of conspiracies to monopolize “often,” “but not always,” falls into two categories:
 - First, violations of Section 1 of the Sherman Act — price fixing, bid rigging, and market allocation — that have the “ultimate goal of monopolization” and therefore may also violate Section 2.

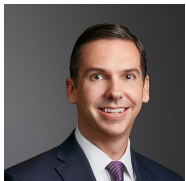
- Second, other crimes beyond Section 1 may also amount to a conspiracy to monopolize. Here, DOJ cites conduct ranging from threatening a rival with violence to the use of bribery, extortion, and fraud “designed to create or keep a chokehold on a market.”
- **Monopolization & Attempted Monopolization:** Here too, DOJ outlines two “usual[]” scenarios where purely unilateral conduct could be pursued criminally:
 - First, as with conspiracies to monopolize, cases involving “other criminal conduct in furtherance of the monopolization scheme.”
 - Second, “unsuccessful attempts or solicitations to enter into agreements to fix prices or allocate markets.”

Whether the conduct is otherwise a crime covers the first three scenarios above and often the fourth as well. Unsuccessful attempts to fix prices, rig bids, or allocate markets do not violate Section 1 (because there is no “agreement”), but have long been considered for other criminal charges such as wire fraud. Now as both the primer and *United States v. Zito* indicate, attempted monopolization is on DOJ’s criminal enforcement menu alongside fraud.

Other “plus factors” can also tilt the scales toward criminal treatment. For example, the Justice Manual explains that civil sanctions may not be sufficient where there is “a serious violation, pattern of wrongdoing, or prior non-criminal sanctions without proper remediation.”

With this additional guidance, corporate compliance efforts should be tailored to mitigate evolving risks under Section 2. Likewise, companies facing antitrust or corporate criminal investigations should be aware of conduct that could generate or expand an existing investigation into criminal violations of Section 2, particularly attempts or solicitations to fix prices or divide markets.

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