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Axinn Antitrust Insight: DOJ Officials Raise Specter of Criminal Monopolization Prosecutions

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PRACTICE AREAS

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In what would be a major expansion in criminal enforcement of the U.S. antitrust laws, senior officials of the DOJ Antitrust Division announced that DOJ will consider bringing criminal charges for monopolization offenses. For decades, criminal prosecutions have been restricted to per se unlawful agreements between competitors, such as price-fixing and bid-rigging. It remains to be seen whether or how DOJ will follow through on this threat.

DOJ's Recent Announcement Regarding Criminal Prosecution Under Section 2

On March 2, 2022, while speaking on a panel at the American Bar Association's White Collar Crime Conference in San Francisco with Axinn Partner Tiffany Rider, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, Richard Powers, indicated that the Department of Justice (DOJ) is prepared to bring criminal charges against individual executives or companies for violations of Section 2 of the Sherman Act. At the same conference, Doha Mekki, the Principal Deputy Assistant Attorney General of the Antitrust Division, made similar remarks. Section 2 of the Sherman Act covers monopolization, attempted monopolization, and conspiracies to monopolize and, like Section 1 of the Sherman Act, provides that those who violate the statute "shall be deemed guilty of a felony." While DOJ has long had the theoretical ability to criminally prosecute violations of Section 2, for the past few decades, the DOJ has only brought criminal charges for "hardcore" violations of Section 1 of the Sherman Act, which prohibits concerted action in restraint of trade, such as price-fixing, bid rigging, market or customer allocation, and, in the last few years, no-poach or wage-fixing conduct. In fact, Ms. Rider noted that bringing a case solely based on violation of Section 2 may raise constitutional due process issues.

During his remarks, Powers reiterated Assistant Attorney General Jonathan Kanter's statement that the DOJ would utilize "all available tools" for antitrust enforcement, including criminal prosecution of Section 2

violations. Powers added 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.” Powers also noted, “Historically the division did not shy away from bringing criminal monopolization charges, and frequently alongside Section 1 charges, when companies and executives committed flagrant offenses intended to monopolize markets.” He indicated that the DOJ may be actively looking to criminally prosecute under Section 2, stating that, “[i]f the facts and the law lead us to the conclusion that a criminal charge based on a Section 2 violation is warranted, then that’s what we’ll do, we’ll charge it.” DOJ has not provided any indications as to what factors would lead DOJ to prosecute an alleged Section 2 violation criminally.

Background on Criminal Prosecution Under Section 2

DOJ has not pursued criminal prosecutions for Section 2 violations for the past few decades, and for good reason. Section 2 cases are governed by the rule of reason which requires a careful weighing of anticompetitive effects and procompetitive justifications, while criminal Section 1 cases are nearly universally governed by the per se standard, which condemns certain categories of conduct as illegal without a need for detailed assessment of competitive effects. In the most recent criminal Section 2 cases, which are from the 1970s and predate many modern antitrust precedents, DOJ had a mixed record of success. *Compare United States v. Braniff Airways, Inc.*, 453 F. Supp. 724, 725 (W.D. Tex. 1978) (one airline defendant pled guilty and the other pled no contest) and *United States v. Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1242 (5th Cir. 1973) (indictment and subsequent conviction of three corporate defendants and their part-owner and manager was upheld) with *United States v. General Motors Corps.*, 369 F. Supp. 1306, 1311 (E.D. Mich 1974) and *United States v. Empire Gas Co.*, 393 F. Supp. 903, 912 (W.D. Mo. 1975) (defendant acquitted at trial, and DOJ dismissed Section 2 allegation). Notably, *Braniff, General Motors*, and *Empire Gas* included conspiracy allegations under Section 1 too.

The rarity of criminal prosecution under Section 2 was addressed in an April 2007 report by the blue-ribbon Antitrust Modernization Commission, noting that the last criminal prosecutions for such conduct occurred almost fifty years ago and that, despite the statutory authority to do so, DOJ has forgone criminal prosecutions of unilateral conduct under Section 2 (as well as certain joint conduct where the competitive effects are often ambiguous).

Up until the day before the DOJ officials' remarks, the publicly available Antitrust Division Manual, which guides the criminal and civil prosecutorial and enforcement decisions of Division attorneys, essentially stated that the Division's policy was to use civil process for violations that are subject to the rule of reason, e.g. Section 2 claims, and that even certain conduct that may appear to be a per se violation would not be appropriate to prosecute criminally. As of the date of publication of this alert, the webpage for the Manual indicates that it is "undergoing revision."

DOJ's statements regarding criminal prosecution under Section 2 contrast with the approach DOJ took when announcing a change in policy with respect to labor-market violations. There, the DOJ and FTC made a formal policy announcement through the 2016 Guidance for Human Resource Professionals that made clear that going forward they would be criminally prosecuting no-poach and wage-fixing agreements under Section 1 of the Sherman Act and provided an 11-page guidance manual. The DOJ indicated that the Guidance would not apply retroactively and they would not criminally prosecute conduct that had completely terminated before the issuance of the Guidance. Even then, in several of DOJ's active no-poach cases, defendants have argued (unsuccessfully so far) that that Guidance alone did not provide fair notice to potential defendants, and therefore DOJ's criminal prosecution of this conduct is unconstitutional. Likewise here, defendants in any future Section 2 criminal prosecutions are likely to raise significant due process objections due to, among other things, lack of fair notice on what conduct constitutes a criminal violation of Section 2.

What to Look for Going Forward

Without guidance from DOJ regarding what conduct crosses the line to warrant criminal prosecution, one might expect DOJ only to criminally prosecute conduct under Section 2 when they have some other basis for criminal prosecution anyway. For example, DOJ may attempt to criminally prosecute a conspiracy among companies to monopolize a relevant market, which DOJ arguably also could charge under Section 1.

It remains to be seen whether the DOJ statements indicate a real policy change at DOJ and an omen of indictments to come, or only an attempt to gain leverage against targets or deter future violations. In any event, it is important to revisit antitrust compliance policies and conduct antitrust trainings for employees to ensure that these issues and others do not result in either criminal or civil enforcement. And it is yet to be seen how

modern courts would respond to a criminal prosecution of Section 2 given significant case law developments since the historic criminal prosecutions under Section 2.