Criminal Monopolization Prosecutions: DOJ's Recent Policy Change, Past Cases, and Potential Obstacles

By Tiffany Rider, James Hunsberger, and John O'Toole[1]

Introduction

On March 2, 2022, while speaking on a panel at the American Bar Association's White Collar Crime Conference in San Francisco, the Antitrust Division's Deputy Assistant Attorney General (DAAG) for Criminal Enforcement, Richard Powers, indicated that the Department of Justice (DOJ) is prepared to bring criminal charges against individual executives or companies for alleged monopolization offenses under Section 2 of the Sherman Act.[2] At the same conference, Doha Mekki, the Principal DAAG of the Antitrust Division, made similar remarks. In various public remarks since then, Jonathan Kanter, Assistant Attorney General (AAG) of the Antitrust Division, and his Deputies have doubled down on the DOJ's new commitment to criminal enforcement of Section 2 when, in their view, "the facts and the law" support it.

As discussed below, the DOJ's recent statements represent a radical departure from its criminal enforcement policy over the last several decades and raise serious questions about the types of cases the DOJ views as warranting criminal prosecution. While it remains to be seen what criminal Section 2 cases the DOJ might bring, below we preview some of the potentially significant obstacles the DOJ may face in any such cases.

Recent DOJ Statements on Criminal Enforcement of Section 2

During his March remarks, Powers reiterated AAG Kanter's statement that the DOJ would utilize "every tool available"[3] 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."[4] Powers also noted, "Historically the division did not

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[1] The authors are attorneys at Axinn, Veltrop & Harkrider LLP in Washington, DC. This article builds on a client alert published by Axinn on March 15, 2022, available at https://www.axinn.com/media-articles-Axinn_Antitrust_Insight_DOJ_Officials_Raise_Specter_Criminal_Monopolization_Prosecutions.html. The authors thank their Axinn colleagues for the helpful comments and thoughts that contributed to the development of this article. The views expressed in this article, however, do not necessarily represent the views of Axinn or its clients.

[2] Section 2 covers monopolization, attempted monopolization, and conspiracies to monopolize. 15 U.S.C. § 2.

[3] Dep't of Justice, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

[4] MLex, "U.S. DOJ stands ready to bring criminal charges in Section 2 monopolization cases, Powers says" (Mar. 2, 2022), *available at* https://content.mlex.com/#/content/1363181.

shy away from bringing criminal monopolization charges, and frequently alongside Section 1 charges, when companies and executives committed flagrant offenses intended to monopolize markets."[5] Powers also 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."[6]

During opening remarks at the Spring Enforcers Summit on April 4, 2022, about a month after Powers' initial remarks, AAG Kanter emphasized that the DOJ "will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers and businesses harmed by unlawful collusion and monopolization."[7] Kanter reiterated the DOJ's justification for its position based on the language of the Sherman Act:

> [W]hen Congress passed the Sherman Act in 1890, it made Section 2 a crime as it did with Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes. So if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law.[8]

During the 2022 ABA Antitrust Law Spring Meeting, multiple DOJ officials commented on the potential for criminal prosecution under Section 2—again pointing to the language of the statute—but none of the officials provided further clarity on the DOJ's policy in this area. During the Enforcers Roundtable on April 8, when prompted on whether there would be further guidance in this area, Kanter responded that "my guidance is to read the cases," noting that "there is over a century of case law relating to criminal antitrust enforcement of Section 1 and Section 2." Kanter concluded his remarks on this point by repeating that the DOJ "will pursue criminal violations when the facts and law suggest that it is appropriate and consistent with the Principles of Federal Prosecution." Similarly, during another Spring Meeting panel, Powers noted there is a "long arc" of criminal Section 2 cases and advised practitioners to "take a look at what's on the books." Neither Kanter nor Powers cited any particular cases or provided any further guidance to the business community.

The DOJ's Prior Policy Statements on Criminal Antitrust Enforcement

The recent comments from DOJ officials stand in stark contrast with the DOJ's approach to Section 2 enforcement over the past few decades. The DOJ has long had the theoretical ability to criminally prosecute violations of Section 2 because, like Section 1 of the Sherman Act, the text of the statute provides that those who violate the statute "shall be

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[5] *Id*.

[6] *Id*.

[7] Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022) (emphasis added), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[8] *Id.*

deemed guilty of a felony."[9] In recent history, however, 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. Courts have held that classic "hardcore" agreements among competitors, such as those to fix prices, rig bids, or allocate markets, are "unlawful *per se*" under Section 1 and may be condemned without elaborate analysis because they "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit."[10]

Across presidential administrations spanning several decades, the DOJ has made numerous statements outlining its approach of prioritizing criminal prosecution of such per se conduct under Section 1. For example, in 1955, in the Report of the Attorney General's National Committee to Study the Antitrust Laws, the Antitrust Division advised that it would limit criminal prosecution to price-fixing and other violations where there is "proof of a specific intent to restrain trade or to monopolize."[11] The Report also noted, however, that "the use of criminal process . . . was improper" under the antitrust laws where the cases were "wholly without precedent."[12] In 1967, the DOJ reiterated that it would limit criminal prosecution to only "willful" violations of the antitrust laws.[13] Later, in 1995, shortly after the expansion of the Antitrust Division's Criminal Leniency Program, then-AAG Anne Bingaman and Criminal DAAG Gary Spratling specifically highlighted that price-fixing, bid-rigging, and market-allocation schemes were the most important areas of focus for DOJ criminal enforcement.[14] And, in 2003, then-AAG Hewitt Pate said that the DOJ brings criminal charges only against "hard core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior."[15] During the hearings

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[9] 15 U.S.C. § 2.

[10] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[11] Dep't of Justice, Report of the Attorney General's National Committee to Study the Antitrust Laws, at 350 (1955), *available at* https://babel.hathitrust.org/cgi/pt?id=umn.31951d02427803y&view=1up&seq=368&skin=2021.

[12] *Id*. at 351. The Report also concluded that, "All criminal cases, however, should be confined to instances where proof of violation is clear and the law is settled." *Id.*; *see also id.* at 349 ("[I]t may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade.").

[13] The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment, at 109-10 (1967) ("Vagueness in the legal definitions of the prohibited acts might raise problems of fairness, or even constitutionality in proceeding criminally. The Supreme Court has held that the Sherman Act is not unconstitutionally vague. But an indictment in a particular case might unfairly attack conduct not known to the defendants to be unlawful. The solution of the Antitrust Division to this problem of potential unfairness has been to lay down the firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law . . . ."), *available at* https://babel.hathitrust.org/cgi/pt?id=uva.x004110310&view=1up&seq=127&skin=2021.

[14] Dep't of Justice, Criminal Antitrust Enforcement: A Joint Address - AAG Anne K. Bingaman And DAAG Gary R.Spratling (Feb. 23, 1995), *available at* https://www.justice.gov/atr/speech/criminal-antitrust-enforcement-joint-address-aag-anne-k-bingaman-and-daag-gary-rspratling.

[15] R. Hewitt Pate, Ass't Att'y Gen., Antitrust Division, Dep't of Justice, Vigorous and Principled Antitrust Enforcement: Priorities And Goals (Aug. 12, 2003), *available at* https://www.justice.gov/atr/speech/vigorous-and-principled-antitrust-enforcement-priorities-and-goals.

for the Antitrust Modernization Commission, Criminal DAAG Scott Hammond added that the DOJ will not prosecute cases in which "there is some innocent explanation here or some inadvertence, that they crossed the line without meaning to."[16]

In fact, even up until the day before the March remarks from DOJ officials, 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.[17] As of the date of publication of this article, the webpage for the Manual indicates that it is "undergoing revision."[18]

Past Criminal Prosecutions Under Section 2: How to "Read the Cases"

The 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,[19] 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.[20] This 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

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[16] Antitrust Modernization Commission, Criminal Remedies Discussion Memorandum (May 4, 2006), at 9-10, *available at* https://govinfo.library.unt.edu/amc/pdf/meetings/CrimRem_DiscMemo_060504-fin.pdf.

[17] The Antitrust Division Manual (Fifth Edition), Chapter III, Section C.1, formerly stated:

> Many investigations conducted by the Division are clearly civil investigations (*e.g.*, merger investigations). Nevertheless, there are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation. In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations. Civil process and, if necessary, civil prosecution is used with respect to other suspected antitrust violations, including those that require analysis under the rule of reason as well as some offenses that historically have been labeled "per se" by the courts. There are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate. These situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.
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> (emphasis added).

[18] Antitrust Division Manual, *available at* https://www.justice.gov/atr/division-manual (noting web page last updated on March 1, 2022).

[19] *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (*en banc*) (*per curiam*).

[20] *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) (per se rule limited to cases where the challenged "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output," as opposed to "one designed to 'increase economic efficiency and render markets more, rather than less, competitive'") (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (per se rule applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

fifty years ago and that, despite the statutory authority to do so, the DOJ has forgone criminal prosecutions of unilateral conduct under Section 2 (as well as certain joint conduct where the competitive effects are often ambiguous).[21]

In the most recent criminal Section 2 cases, which are from the 1970s and predate many modern antitrust precedents, the DOJ had a mixed record of success.[22] Notably, the cases where the DOJ alleged criminal violations of Section 2 also included either a traditional conspiracy claim under Section 1 of the Sherman Act, or egregious criminal conduct of a completely different sort from the type of conduct alleged in more modern Section 2 cases. Moreover, only in one of these 1970s cases, *U.S. v. Dunham Concrete Products*, were individual defendants actually indicted and sentenced to jail time.

The indictments in *General Motors* and *Braniff Airways* each alleged both Section 1 and Section 2 claims,[23] indicating that the Section 2 claims may not have been necessary to bring criminal charges. In *General Motors*, the DOJ alleged that the defendants had engaged in a traditional conspiracy to fix prices, in violation of Section 1 of the Sherman Act, as well as a conspiracy to monopolize the market for automobile fleets in violation of Section 2 of the Sherman Act.[24] The court, however, concluded that the DOJ's allegations were incongruous, observing that typically co-conspirators do not raise prices in order to monopolize a market.[25] The court ultimately entered a judgment of acquittal on the second count of the indictment (conspiracy to monopolize), finding that the DOJ did not allege sufficient facts to demonstrate that the defendants had specific intent to monopolize, a necessary element of a conspiracy to monopolize claim.[26] In *Braniff*, the DOJ also brought a traditional conspiracy claim under Section 1 alongside the Section 2 claim, this time alleging a conspiracy to allocate the market and also to prevent rival Southwest Airlines from growing in the Texas market.[27] The DOJ alleged that Braniff and its co-conspirator exchanged flight schedules, ticket fees, and other competitive information as part of a market allocation scheme, and also to prevent customers from

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[21] Antitrust Modernization Commission, Report and Recommendations, "Chapter III: Civil and Criminal Remedies," at 293-297 (Apr. 2007), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/chapter3.pdf.

[22] *Compare United States v. Braniff Airways, Inc.*, 453 F. Supp. 724 (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 Corp.*, 369 F. Supp. 1306, 1311 (E.D. Mich 1974) (judgment of acquittal on Section 2 claim) 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 claim).

[23] *General Motors*, 369 F. Supp. at 1306; *Braniff*, 453 F. Supp. at 725.

[24] *General Motors*, 369 F. Supp. at 1306, 1311.

[25] *Id*. at 1309-11 ("At this point the court notes a dilemma that has burdened the government throughout the case. In Count I it charged the defendants with a conspiracy to fix prices by *raising* them while in Count II it charged the defendants with a conspiracy to monopolize, that is, to exclude competitors. The government thus put itself into the difficult position of having to prove that the defendants' general intent to conspire to *raise* prices was coupled with a specific intent to *exclude* competitors. This is contrary to common sense and experience. Even in an industry where there are few suppliers, price raising by some is bound to lead to increased sales by the others.").

[26] *Id*.

[27] *Braniff*, 453 F. Supp. at 725, 728-29.

re-booking flights on Southwest in an effort to thwart competition.[28] Unlike in *General Motors*, the court rejected defendants' arguments for dismissal, and the two defendants ultimately pled guilty and no contest, respectively.[29]

In other cases that the DOJ prosecuted criminally under Section 2, there was egregious criminal conduct outside the antitrust context. For example, in *Dunham Concrete Products*, defendants were accused not only of attempting to monopolize certain concrete markets, but also of engaging in other forms of conduct in violation of the Hobbs Act.[30] The indictment charged defendants with engaging in other extreme forms of criminal conduct, such as purposefully obstructing competitors' construction projects and using labor strikes and threats of physical violence as forms of extortion.[31] Notably, the defendants involved in this conduct were affiliated with infamous criminal Jimmy Hoffa,[32] and the conduct occurred before the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) was passed. Similarly, in *Empire Gas*, defendants were accused of intentionally damaging competitors' property as part of an attempt to monopolize the market.[33]

Viewed in this historical context, it is difficult to imagine the DOJ bringing—let alone sustaining—criminal monopolization charges against a company or individuals in the current age without either (a) egregious alleged conduct that is otherwise criminal, or (b) facts sufficient to support a traditional conspiracy claim under Section 1 of the Sherman Act. Given the extreme facts of this dated precedent, and without any further guidance from the DOJ, it remains unclear where the DOJ views the line for conduct to cross into criminal Section 2 territory—particularly in light of the modern rule-of-reason framework for Section 2 monopolization claims.

Potential Obstacles to Criminal Prosecution under Section 2

The recent vague statements by DOJ officials regarding criminal prosecution under Section 2 contrast with the approach that the DOJ took when announcing a change in

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[28] *Id*. at 728-29 ("What is challenged is defendants' seeking, pursuant to a continuing agreement, understanding and concert of action, to impair the ability of Southwest Airlines to commence and maintain operations in competition with them in the tri-city intrastate market of Texas and thereafter to eliminate Southwest from that market. The essence of the indictment, therefore, is that defendants conspired to eliminate Southwest and to thereafter monopolize the intrastate market.").

[29] N.Y. Times, "Braniff Fined In Trust Case" (Dec. 28, 1978), *available at* https://www.nytimes.com/1978/12/28/archives/braniff-fined-in-trust-case.html.

[30] *Dunham*, 475 F.2d at 1242. The Hobbs Act provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a) (emphasis added).

[31] N.Y. Times, "Ex-Teamster is Held Guilty of Extortion" (Feb. 28, 1973), *available at* https://www.nytimes.com/1973/02/28/archives/exteamster-is-held-guilty-of-extortion.html; N.Y. Times, "Witness Against Hoffa Indicted in New Orleans" (June 21, 1969), *available at* https://www.nytimes.com/1969/06/21/archives/witness-against-hoffa-indicted-in-new-orleans-labor-official.html.

[32] *Id*.

[33] *Empire Gas*, 393 F. Supp at 907, 912 (reciting DOJ allegation that defendants "attempted to injure or destroy and threatened to injure or destroy the business or property" of competitors).

policy with respect to so-called "no poach" or "wage-fixing" agreements. There, the DOJ and FTC made a formal policy announcement through the 2016 Guidance for Human Resource Professionals that made clear that going forward the DOJ would be criminally prosecuting no-poach and wage-fixing agreements under Section 1 of the Sherman Act.[34] The DOJ indicated that the Guidance would not apply retroactively and it would not criminally prosecute conduct that had completely terminated before the issuance of the Guidance. Even then, in several of the DOJ's active no-poach cases, defendants have argued (unsuccessfully so far) that the Guidance alone did not provide fair notice to potential defendants, and therefore the DOJ's criminal prosecution of this conduct is unconstitutional.

Likewise here, potential 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. "To satisfy due process, a penal statute must define the criminal offense . . . with sufficient definiteness that ordinary people can understand what conduct is prohibited."[35] Potential defendants in a Section 2 criminal case are likely to argue that the sudden criminal enforcement of Section 2—after a fifty-year gap of criminal prosecution and after numerous policy statements indicating the DOJ would act to the contrary—violates the Due Process Clause of the Constitution.[36] Potential defendants are also likely to argue that the theoretical ability under the statute for the DOJ to bring criminal charges, absent actual prosecution, is not sufficient fair notice of the criminality of such conduct.

In response, the DOJ will likely argue that, unlike the arguments that defendants have raised in the no-poach cases, there is historical precedent for criminally prosecuting Section 2 violations, as discussed above, and the Sherman Act explicitly makes violations of Section 2 a felony. Therefore, the DOJ will likely argue that the government cannot be accused of creating a new category of criminal antitrust conduct, and defendants cannot say there is *no* precedent for such action either. Further, while doing so would certainly promote transparency and good government, the DOJ may hesitate to issue formal guidance on criminal enforcement of Section 2, as it did with no-poach and wage-fixing, to avoid potential arguments from future defendants that the fact such guidance was necessary means they were not on fair notice. While defendants in the DOJ's recent labor-market cases have been unsuccessful in dismissing criminal charges on constitutional grounds, they have prevailed in defeating the DOJ's Sherman Act claims on the merits—with the jury delivering "not guilty" verdicts in both of the DOJ's recent wage-fixing and no-poach trials.[37]

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[34] Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resources Professionals (Oct. 2016), at 3-4 ("Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."), *available at* https://www.justice.gov/atr/file/903511/download.

[35] *Skilling v. United States*, 561 U.S. 358, 402 (2010) (cleaned up).

[36] *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266-67 (1997) (explaining that "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

[37] *United States v. Jindal*, 20-cr-00358-ALM, Verdict of the Jury, ECF No. 112 (E.D. Tex. Apr. 14, 2022) (not guilty on wage-fixing counts; guilty on obstruction of justice); *United States v. DaVita Inc. and Kent Thiry*, 21-cr-00229-RBJ, Verdict, ECF No. 264 (D. Colo. Apr. 15, 2022) (not guilty on no-poach counts).

In addition to the fair notice issues, it is unclear how the DOJ could prove each of the elements of a monopolization or attempted monopolization claim beyond a reasonable doubt, as would be required to obtain a criminal conviction. With respect to the first element of a monopolization claim—monopoly power[38]—claims under Section 2 often involve intense battles between leading economists and other experts on both sides who opine on the parameters of the relevant markets and resulting market shares, as well as direct evidence (or lack thereof) of monopoly power. With respect to the second element of a monopolization claim—anticompetitive or exclusionary conduct—differentiating anticompetitive from procompetitive conduct is notoriously difficult and presents "one of the most vexing questions in antitrust law."[39] Given the difficulty of proving both elements under even a preponderance standard in civil cases, it is likely the DOJ would encounter significant obstacles trying to prove each of these elements beyond a reasonable doubt in a criminal case.

What To Look For Going Forward

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

It remains to be seen whether the DOJ statements indicate a real policy change at the 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 training 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.

[38] *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (Section 2 claim requires (1) "possession of monopoly power in the relevant market"; and (2) "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

[39] 1-2 Antitrust Law Developments 2C (8th ed. 2016); *see also, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (*en banc*) (*per curiam*) ("Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.").

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