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The wait is over: DOJ resurrects Section 2 criminal charges

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US antitrust lawyers will remember Halloween 2022 as the day that criminal enforcement of Section 2 of the Sherman Act was resurrected. Norton Rose Fulbright partner ***Carsten Reichel*** *describes how the Department of Justice Division secured a "near-perfect storm" of facts in its first criminal monopolisation case in nearly a half-century and explores the obstacles the agency faces if it cannot secure a guilty plea.*

On 19 September, the Antitrust Division filed both a criminal information and plea agreement in ***United States v Zito***, charging and resolving a criminal violation of Section 2 of the Sherman Act for the first time in 45 years. The district court adopted in full the findings of a magistrate to accept the plea and adjudge the defendant guilty on 31 October, meaning the division has also secured its first conviction under Section 2 in nearly as long. Sentencing is set for 24 February.

While *Zito* appears to involve a relatively small amount of commerce – $2.7 million – and may not lead to significant penalties based on indications about the applicable sentencing guidelines in the plea agreement, it carries outsized importance as the first indication of how the division views and will approach its resurrected Section 2 criminal enforcement efforts. The case also provides important insights into what evidence the DOJ considers key to pursuing these cases.

The story begins like a straightforward geographic market allocation case – typically a criminal violation of Section 1 – to eliminate competition between the two companies across four states. According to court documents, the defendant was the owner and president of a paving and asphalt contractor that primarily filled cracks in asphalt and pavement, known as crack-sealing services, for publicly-funded highway projects in Montana, Wyoming and neighbouring states.

These markets are characterised in case filings as consolidated, with the two companies involved in the case frequently the only bidders for certain projects. In early 2020, Zito called his primary competitor and proposed a "strategic partnership", under which the two companies would allocate crack-sealing projects by state: the defendant's company would get Montana and Wyoming, while his competitor would get South Dakota and Nebraska plus an additional $100,000 payment.

But in an early twist, rather than agreeing to the proposal, Zito's would-be co-conspirator **reported** the call to the Federal Highway Administration, leading to an investigation by the Department of Transportation's Inspector General. Working with the cooperating informant, federal agents recorded additional calls between Zito and the cooperator between March and October of 2022. In these calls, Zito "stated his intention to eliminate [the other company] as a competitor" and told his competitor that "if they agreed not to compete, their companies' revenue streams would be more stable and their margins would be higher". Zito further proposed a written contract that would memorialize the agreement but obscure its true intent, such as by including pretextual language about a potential acquisition of the competitor and selling a piece of equipment with a greatly inflated value.

Turning heads

Section 2 violations have been crimes since the Sherman Act's enactment in 1890. Along with Section 1 offences, Section 2 violations became felonies with the passage of the **Antitrust Procedures and Penalties Act of 1974**. The plain language of the statute encompasses three possible offences: monopolisation, attempted monopolisation and conspiracy to monopolise.

Despite this law, decades-long practice and policy limited the division's criminal enforcement efforts to Section 1 violations – the so-called "hardcore", *per se* offences: price-fixing, bid-rigging and market allocations. The Antitrust Division therefore turned heads when its leadership **announced** in March 2022 an intent to *criminally* investigate and prosecute Section 2 offences, breaking with its longstanding restraint regarding criminal enforcement of the statute.

Making things more interesting, the then-deputy assistant attorney general for criminal enforcement **advised** members of the defence bar and business community in June not to expect additional guidance on this new enforcement direction like the division promulgated in 2016 when it announced that it would investigate and prosecute criminally antitrust violations in labour markets. The division's advice to those seeking further guidance on Section 2 prosecutions was, in essence, "read the cases".

The "cases", however, all date back to a period when criminal Sherman Act violations were misdemeanours. One of the most recent Section 2 criminal prosecutions was based on conduct occurring between 1971 and 1973, and it included both Section 1 and Section 2 counts. That case ended without a trial when the two defendant airlines entered pleas – one guilty and one *nolo contendere*. Both those pleas resulted in $100,000 fines – at that point the statutory maximum for the **charged offence**.

Because the Sherman Act has developed through the common law, the lack of developed case law around criminal enforcement of Section 2 led to questions about not only *whether* and *when* the Antitrust Division would follow through on its commitment to prosecute Section 2 criminally but, if so, *what* a criminal Section 2 case would look like and *how* the division would pursue the conduct.

The *Zito* case charges attempted monopolisation, the second of the Section 2 violations. Most speculation since the DOJ's March announcement, however, had focused on the possibility that Section 2 enforcement would centre on conspiracies to monopolise for several reasons. This is due to the agency's own signals, including an April 2022 update to its **primer** for law enforcement personnel that addressed only the Section 2 conspiracy offence and noted that "[h]istorically, the Antitrust Division has prosecuted Section 2 violations where monopolization was carried out by means of other predicate crimes. Where there is an agreement to act in a per se anticompetitive manner under Section 1 – for example, a market allocation – there may also be evidence of a conspiracy to monopolize that is prohibited under Section 2".

Further, the Antitrust Division has more favourable law on its side under the conspiracy offence of Section 2. Specifically, the Supreme Court has **noted** that conspiracy offences are distinct from the crimes underlying them and that a Section 2 conspiracy can be found without proving market power.

The DOJ is also more familiar with investigating and prosecuting conspiracies, which have been the focus of its Section 1 enforcement for decades. Antitrust Division prosecutors have experience with the core tools of conspiracy investigations, including the development and use of cooperator testimony and the use of circumstantial evidence to prove agreements.

Zito's attempted monopolisation charge, therefore, starts the division's renewed Section 2 criminal enforcement efforts in a somewhat unexpected place by not charging a conspiracy to monopolise. But the facts of the case show itis "conspiracy to monopolize-adjacent". If not for his would-be co-conspirator going to government investigators, Zito's case was headed in a direction that may have resulted in the Section 2 conspiracy charge paired with a Section 1 market allocation charge, which would have hewed closer to the dominant trend from the government's past criminal Section 2 cases.

For both the attempted monopolisation and conspiracy to monopolise offence, Antitrust Division prosecutors **bear the burden** of proving a defendant's specific intent to acquire or maintain a monopoly. There is little indication from the existing case law of what this specific intent looks like in a criminal case Section 2 case, and the challenge of proving this element projects to be a novel issue for the Division's prosecutors.

A new era

The *Zito* case is an important first step to understanding the Antitrust Division's approach to and views of its criminal Section 2 enforcement.

The first and most obvious takeaway from the case is that division leaders were serious when they committed to investigate and prosecute Section 2 criminally. To the extent that questions remained about whether and when the division's criminal Section 2 enforcement commitments would turn to action, we have an answer.

We also now know that the agency will begin this era of resurrected criminal Section 2 enforcement with a win. Unlike its first **wage-fixing** and **no-poach** cases – both of which resulted in acquittals on the antitrust charges following April 2022 trials – the Antitrust Division's first criminal Section 2 case in decades will end with a conviction and a court's factual findings and rulings that may have utility in subsequent prosecutions.

Unrelated to its Section 2 criminal enforcement priority, *Zito* also serves as a win for the Antitrust Division's criminal programme on other fronts. The case, which deals with federally funded highway repairs, appears to have connections to the DOJ's **Procurement Collusion Strike Force** initiative. The investigation also involved a whistleblower, whose cooperation with investigators allowed for an effective, months-long covert investigation of the defendant. While the case filings do not indicate what motivated the cooperation, the mere fact that someone came forward and cooperated with the government reinforces an oft-repeated deterrent message of the Antitrust Division, consistent with its goal of destabilising cartels: conspire at your own risk, you never know when you're being recorded.

The case also provides important insights into how the Antitrust Division might approach Section 2 moving forward and what evidence it considers key to pursuing these cases.

First, while the standalone attempted monopoly charge is a surprise, the unique facts of the case suggest that it was one individual's decision not to conspire with a competitor and instead to become an informant and cooperate with investigators that led to the specific charge here. Had the proposed allocation agreement been consummated, a Section 2 conspiracy count paired with a Section 1 *per se* offence might have followed. As noted, this charging structure would have been consistent with the historical trend from previous criminal Section 2 cases and played to the Antitrust Division's strengths in investigating and prosecuting Section 1 conspiracies.

Second, the conduct at issue occurred in a highly consolidated market, in which the two companies involved often were the only bidders for projects. This market structure not only allowed the Antitrust Division to establish the "dangerous probability of success" that Zito's company would have achieved monopoly power, which is a requirement for the attempted offence, but it also supported the specific intent that prosecutors had to prove. With even a few more potential bidders in the market, for instance, Zito's intent to monopolise markets would have been less clear – simply because, with more competitors, his odds of success would have been lower.

Finally, *Zito* shows the importance of intent evidence to the DOJ's criminal Section 2 enforcement. Before this case, many had noted that Section 2's specific intent requirement would be a focus of the division's cases under Section 2, and *Zito* seems to validate that earlier speculation. Investigators here recorded the defendant's own statements about his intent to control the Montana and Wyoming crack-sealing markets. While this type of evidence is compelling on its own, the information suggests that DOJ prosecutors were prepared to go even further and introduce additional "consciousness of guilt" evidence – prosecutor-speak for "shady behaviour" – regarding Zito's conduct. Specifically, the Information makes note of Zito's efforts to conceal the true nature of the illegal agreement that he proposed by papering it over with a sham contract that included inflating the value of assets and a bogus option for sale that had been expressly disclaimed by the government's cooperator.

While we now have these answers, much uncertainty still exists about the Antitrust Division's criminal Section 2 enforcement.

Critical questions

It remains to be seen what happens when there is no plea agreement. The Antitrust Division has recently and repeatedly **signalled** its willingness to take tough cases to trial, as well as touting the near-record number of criminal cases currently in litigation. If and when the agency litigates its first Section 2 prosecution, it is likely to be one of the toughest cases the division has taken to trial to date.

The plea agreement in the *Zito* case avoids issues that may arise in a litigated case – such as whether the DOJ will pursue a Section 2 violation on a *per se* theory, and if it doesn't, how a criminal case might proceed under a rule of reason theory. Moreover, how will a "void for vagueness" challenge play out, and will the agency have to prove a relevant market as part of its proof?

The DOJ does not allege in *Zito* that the charged offence is a *per se* violation. But in litigation, might the division take that position to try to gain the benefit of *per se* treatment? Proceeding on a *per se* basis in any criminal prosecution has evidentiary significance, as the government only needs to prove the illegal agreement and does not have to address its possible

procompetitive effects or justifications. Defendants in the Antitrust Division's cases now regularly raise challenges to the *per se* designation. The enforcer recently has survived these challenges and garnered favourable appellate court decisions in its **heir location services** and **foreign currency exchange** litigations – but these cases involved Section 1 offences, which the law singles out based on the courts' confidence from **experience** regarding their "predictable and pernicious anticompetitive effect".

Conduct violating Section 2 has never been categorised as a *per se*, however, and the lack of criminal enforcement of the statute also means there is a lack of **court experience**. Would the Antitrust Division seek to push the *per se* boundary to encompass conduct based on Section 2, or would it proceed under the default rule of reason analysis? If the latter, what trial dynamics will emerge when the division cannot benefit from the "evidentiary shortcut through the **rule of reason morass**" that *per se* treatment allows and excludes from trial evidence of procompetitive justifications or reasonableness, as it routinely does in Section 1 cases?

Likewise, "void for vagueness" arguments based on the Fifth Amendment's Due Process clause, which "guarantees that ordinary people have fairness of the conduct a **statute proscribes**", increasingly arise in the Antitrust Division's criminal cases. In denying a recent motion to dismiss a Section 1 count as void for vagueness, for instance, one trial court ultimately followed precedent in ruling that the Sherman Act was not void for vagueness but nonetheless **noted** that "[c]riminal behavior in the antitrust context is effectively defined by federal common law, even though the Constitution forbids common-law crimes".

A Section 2 prosecution that proceeds to trial will not benefit from the body of case law that surrounds Section 1, nor will the DOJ be able to point to any of its own guidance regarding its revived criminal Section 2 enforcement. When the first criminal Section 2 case proceeds to trial, therefore, how this question plays out in litigation will be critical to the future of the Antitrust Division's criminal enforcement of Section 2.

Finally, if the agency ultimately pursues conspiracy to monopolise cases, as many have predicted that it will, it will have to navigate the split **among courts** on whether it needs to prove a relevant market as part of showing the intent to monopolise. While the type of evidence needed to prove a market, including expert analysis, is typical in the division's civil cases, it has not been a feature of criminal prosecutions where the burden of proof is higher and the factfinders are lay jurors. How the Antitrust Division would establish the relevant market remains unknown.

A good first start?

The fact pattern for *Zito* is, in many ways, a near-perfect storm in favour of the DOJ. It appears the defendant was caught red-handed at the beginning of his efforts to allocate a highly concentrated market, thanks to a cooperating whistleblower and investigators who acted efficiently and effectively to build their case covertly. Layer in the apparently strong evidence of the defendant's specific intent – which he provided in his own words – and it is hard to imagine a better set of circumstances for a Section 2 prosecution.

Other investigations are unlikely to present such advantageous facts for the division. Moreover, the conduct in the case predated by more than a year the agency's announcement that it intended to revive its criminal enforcement of Section 2. It is possible that the fact pattern here was simply too good for the Antitrust Division not to act on, and because the allocation agreement was not consummated, the attempted monopolisation charge was the best vehicle to pursue the conduct.

Based on the magistrate's recommendation in *Zito*, the district court has found the defendant guilty of the Section 2 crime. But how will the Antitrust Division use the outcome in this case in any subsequent Section 2 prosecutions? And how persuasive to those courts will the factual findings and ruling of the *Zito* court be? While this outcome is a good first start for the agency, its precedential value is difficult to predict.

Theories and penalties

Zito ultimately flows from the defendant's attempt to allocate the market for crack-sealing services, which would have been a Section 1 violation had the offence been completed. The division's primer for law enforcement indicates that, in addition to conspiracies to monopolise based on Section 1 offences, it may also proceed based on conspiracies involving "other criminal conduct". What other, non-antitrust crimes might underlie future Section 2 prosecutions remains to be seen. One classic example has been destructive or violent activity – burning down a competitor's warehouse or damaging its delivery trucks to hamper its ability to compete, for instance. But it remains to be seen if Antitrust Division prosecutors will encounter something approaching this fact pattern, and if so, if they determine that a Section 2 count is appropriate and necessary if other charges could result in more significant penalties for the conduct. And what about other offences, such as fraud or bribery, that the division has **charged** in some of its recent procurement cases?

Meanwhile, the plea agreement in *Zito* is pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), which means that at a sentencing hearing the court will consider, but not be bound by, the parties' recommendations as to the potential penalty. Here, the parties agree on some but not all of the sentencing issues. Notably, they agree to recommend a $27,000 fine, but the plea agreement is silent as to a term of imprisonment for the defendant.

The **US Sentencing Guidelines** do not include a Section 2-specific provision, as they do for Section 1 violations, but here the parties agree that the applicable **guideline** is the same as it would be for a Section 1 violation as the "the most analogous offense". Using that methodology, Zito and the Antitrust Division have agreed that the relevant volume of commerce is $2.7 million – although it is unclear, based on the unsuccessful attempt to allocate markets, how the parties arrived at this figure. The DOJ also agrees to recommend reductions in the sentence based on the defendant's acceptance of responsibility.

The parties reserve the right to make other arguments at sentencing. It therefore would be premature to guess what sentence the government will recommend for Zito, or even how hotly contested the sentencing hearing may be. If prosecutors do not seek sentencing enhancements under the guidelines beyond the calculation suggested by the plea agreement, such as for an aggravating role in the offence, Zito's recommended sentence under the plea agreement likely will fall in a range that does not result in imprisonment. There is no indication, however, that this assumption should apply.

The Antitrust Division's sentencing recommendation in *Zito* could be the first and best indication of its views on the penalty for Section 2 criminal offence. Because this is a standalone count, the discussion about the seriousness of the crime, the need for deterrence, and other mandatory sentencing considerations – regular features in Antitrust Division sentencing submissions – will relate exclusively to the Section 2 offence, so both the government's memorandum and the sentence the court imposes in *Zito* may be particularly useful as an opening indication of what penalties prosecutors may seek. Still, the penalties that could attach to criminal Section 2 offences, as well as the leverage that this may give DOJ prosecutors in other Section 2 investigations, are unlikely to be known until there is a contested sentencing following a Section 2 conviction.

Watch this space

Zito is a milestone for the Antitrust Division and an important data point for businesses, compliance professionals and the defence bar. But it is only a single point, from which it is not yet possible to discern a trendline. While we can glean some early lessons from the case, before the true trajectory of the DOJ's criminal Section 2 enforcement can be known, additional points – especially those drawn from litigation – are needed.

Up to now, the Antitrust Division's guidance had been to "read the cases," but companies that want to understand the boundaries and steer clear of potential criminal Section 2 investigations may now be best advised to "watch this space".

Norton Rose Fulbright law clerk Marisa Madaras also contributed to this article