

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
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Week 4: Criminal Price-Fixing Investigations and Prosecutions (Unit 3 continued)

This week we will finish the unit on criminal price-fixing investigations and prosecutions with criminal sentencing and appeals. We will begin Unit 4 on private antitrust actions in Week 5.

We have already seen the maximum sentences that may be imposed under the Sherman Act and the alternative fines provision of 18 U.S.C. §3571(d). But how are the actual sentences—or, in our case, the recommended sentences under a plea agreement—determined? Read slides 54-82 on sentencing and the sentencing guidelines. You may skim the statutory provisions in the required reading (pp. 111-117), but you should be aware that they exist. Section 2R1.1 of the Sentencing Guidelines is the only section that is specific to antitrust criminal offenses and is worth a careful read (pp. 118-121). That said, you will see that the sentencing memoranda draw on many sections of the sentencing guidelines.

So far, I have been able to find only one sentencing memorandum in the *Ready-Mix Concrete* case. It is not especially enlightening, so we will read the *Kayaba Industry*, *AU Optronics*, and *Hitachi* sentencing memoranda and the judgments instead (pp. 122-330). Try to follow the DOJ's reasoning when calculating the sentencing ranges under the Guidelines. We will walk through some of these calculations in class. Keep in mind as you read these materials that *Kayaba Industry* entered a plea agreement¹ while *AU Optronics* was convicted at trial.

I appreciate that the case materials are quite lengthy. If you feel the urge to cut down on the reading, I suggest the following:

Read all of the *Kayaba* materials (pp. 122-38)

In the *AU Optronics* materials, concentrate on pages 1-9 and 23-52 of the DOJ sentencing memorandum (pp. 149-57, 171-200) and the first 20 pages of the hearing transcript (pp. 205-24). The transcript is a great read, and if you have the time, I encourage you to read the whole thing. You can see how Judge Susan Illston decided the dispute in the judgments she entered in the case (pp. 277-286).

Skim the *Hitachi* sentencing materials (pp. 287-330). This is an example of the DOJ's "Penalty Plus" approach. The papers also present an interesting dispute over the role of antitrust compliance programs in sentencing.

The notes do a fair job (I hope) of explaining the sentencing guidelines process. But if you really want to get an understanding of how these guidelines work, you need to go back and read the relevant provisions of the statutes and the sentencing guidelines as they come up in the memoranda. The 2021 edition of the Sentencing Guidelines, which is the most current edition, may be found [here](#) on the United States Sentencing Commission's website.² The web page also links to a pdf of the complete guidelines.

Finally, read the slides on the grounds for appeal of a criminal conviction and the standards of review (slides 82-86).

¹ If you are interested in the plea agreement, you can find it in the supplemental materials on Unit 3 web page.

² Since early 2019, the United States Sentencing Commission has been operating without the quorum of four voting members required by statute to promulgate amendments to the sentencing guidelines, policy statements, and commentary. The operative sentencing guidelines are those promulgated in 2018. The 2021 edition of the Sentencing Guidelines Manual contains the text of the Guidelines Manual incorporating amendments effective on or before November 1, 2018.