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RECHT BERATUNG WEITERBILDUNG

Introduction to US business law

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Repetition last time – company law

- State law – common law (federal legislation)
- Harmonization
- Delaware - why?
- Race to the bottom?
- Basic questions: tax and liability
- 6 form of doing business
  - Sole Proprietorship
  - General Partnership (GP)
  - Limited Partnership (LP)
  - Corporation (Company)
  - Closed Corporation
  - Limited Liability Company (LLC)
  - Limited Liability Partnership (LLP)

Antitrust law

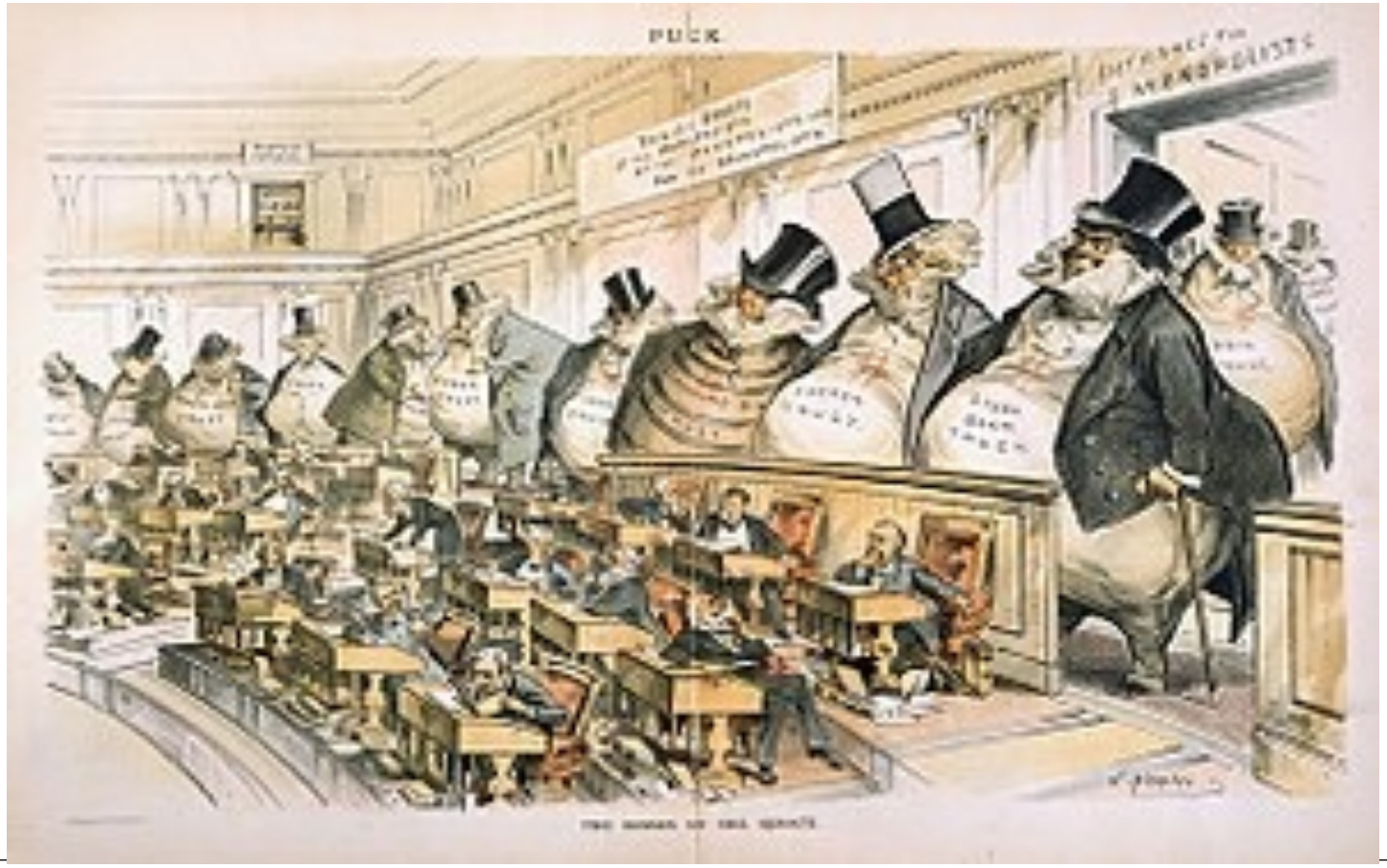
History

- In the USA first competition law (antitrust) 1890
  - Why?
- Freedom and equality
- After civil war dominant firms
  - Trusts (Standard Oil – Rockefeller)
- Influence on politics
- Democratic control of powerfull but private enterprises
  - No monopolies
  - Protection of middle class

Legal basis

- Federal Constitution
  - Interstate commerce clause
- Previous some state antitrust legislation
- Today antitrust in the US is federal law

„The Bosses of the Senate“
Steel, copper, oil, iron, sugar, tin, coal, etc.



US antitrust legislation - overview

- Sherman Act 1890
  - Cartels (101 EU)
  - Monopoly (abuse of dominant position, 102 EU)
- Clayton Act (1914)
  - Merger Control (merger regulation EU)
  - Private law suits
- Federal Trade Commission Act (1914)
  - Second enforcement authority
  - Unfair competition

Early enforcement

- President T. Roosevelt sued 45 companies under Sherman
  - 1902 Roosevelt stopped formation of Northern Securities Company which treatened to monopolize transporation in Nordwest
- President Taft sued almost 90 companies
  - 1911 Standart Oil (Rockefeller/Flegler)
    - USS broke Monopoly into three dozen separate companies (Exxon, Amoco, Mobil, Chevron, etc.)
    - Rule of reason (not all bis companies and not all monopolies are evil
    - Courts make decision, not executive

Split-up of Standart Oil

1.Anglo-American Oil Company → Exxon → ExxonMobil
2.Atlantic Refining → Atlantic Richfield Company → BP
3.Buckeye Pipe Line Company → Buckeye Partners
4.Borne-Scrymser Company → Borne Chemical Company → 1980 Insolvenz
5.Cheseborough Manufacturing Company → Chesebrough-Ponds → Unilever
6.Colonial Oil Company → Colonial
7.Continental Oil Company → Conoco → ConocoPhillips
8.Crescent Pipe Line Company
9.Cumberland Pipe Line Company → Ashland Oil
10.Eureka Pipe Line Company → Pennzoil → Shell
11.Galena-Signal Oil Company → Valvoline → Ashland Oil
12.Indiana Pipe Line Company → Buckeye Pipe Line Company
13.National Transit Company
14.New York Transit Company
15.Northern Pipe Line Company
16.Ohio Oil Company → Marathon Oil Corporation
17.Prairie Oil & Gas Company → Sinclair Oil → Atlantic Richfield Company → BP
18.Solar Refining Company
1.Southern Pipe Line Company → Ashland Oil
2.South Penn Oil Company → Pennzoil → Shell
3.Southwest Pennsylvania Pipe Lines Company
4.Standard Oil Company of New York → Socony → Socony-Vacuum Oil → Mobil Oil → ExxonMobil
5.Standard Oil of California → Chevron → ChevronTexaco → Chevron (wieder seit 2005)
6.Standard Oil of Nebraska → AMOCO → BP
7.Standard Oil of New Jersey → Exxon → ExxonMobil
8.Standard Oil of Ohio → BP
9.Standard Oil of Kentucky → Chevron
10.Standard Oil of Indiana → AMOCO → BP
11.Standard Oil Company of Louisiana → Exxon → ExxonMobil
12.Standard Oil of Kansas → AMOCO → BP
13.Swan & Finch Company → Motul
14.Union Tank Lines → Marmon Group → Berkshire Hathaway
15.Vacuum Oil Company → Socony-Vacuum Oil → Mobil Oil → ExxonMobil
16.Waters-Pierce → Sinclair Oil → Atlantic Richfield Company → BP

US antitrust laws as an export product

- USA 1890
- EU/D 1952
- CH 1962
- Russia 1990
- China 2005

Extraterritorial application

- Foreign Trade Antitrust Improvements Act (1982)
- Extraterritorial application
- Affecting competition in the US
  - Considerable
  - Reasonable
  - US foreign trade or US markets
- Antitrust Enforcement Guidelines for International Operations (1995)
- F.e. trade with China

Sherman Act

Intent

- Preventing collusion and cartels that act in restraint o trade is an essential task of antitrust law
- It reflects the view that wach business has a duty to act independently on the market
- And to earn its profits solely by providing better priced and quality products than its competitors
- To protect competition, not competitors
- To reduce political influence

Sherman Act (1)

- 1890
- „magna charta of free enterprise“
- Restraint of trade (Sec. 1) = cartels
- Monopolies (Sec. 2)

- Broad wording – courts
  - Rule of reason

Sherman Act Section 1 (2)

„Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court“.

Sherman Act Section 1 (3)

- Section 1 has 3 elements
  - An agreement
  - Which unreasonably restrains competition
  - And which affects interstate commerce

Vertical and horizontal agreements

- Horizontal and vertical agreements can both eliminate competition
- But horizontal are generally seen as more dangerous
  - Among those who are supposed to compete
- Vertical agreements can have advantages
  - Quality
  - Customer treatment
  - Price fixing between competitors almost always illegal but:
  - Per se illegality still alive?
    - Om 2007 USS held that a vertical price restraint agreement is not per se illegal (Leegin Creative Leather Products, Inc. V. PSKS)

Sherman Act Section 2 (4)

„Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court“.

Sherman Act Section 2 (5)

- Section 2 has 2 elements:
  - The possession of monopoly power in the relevant market and
  - The willful acqusition or maintenance of that power as distinguished from growth or development as a consequence of a superior product

Standard Oil Co. V. New Jersey

- 221 US 1 (1911)
- First leading case on antitrust law
- Over years, Standard Oil had bought up virtually all oil refining companies
- Standard Oil used its size to undercut competitors (underprizing)
- Standard Oil was found guilty of monopolizing the petroleum industry
- Court endorsed rule of reason – only unduly restrictions of trade
- Division of Standard Oil into several competing firms

Sherman Act (6)

„The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself“ (USC, Spectrum)

Rule of reason/per se

- Rule of reason v. per se violations
  - Broad wording
  - If claim does not fall within per se illegal category plaintiff must show the conduct causes harm in «restraint of trade».
  - Per se categories are always illegal
- Per se = severe restrictions
  - Horizonal (vertical) price fixing
  - Geografic divisons of markets
  - Predatory pricing (Verdrängung)
  - Boycott – collective refusals to deal
  - Tying arrangements

Northern Pacific Ry v. US (1)

- 356 US 1, 4 (1958)
- 1864 Government granted NPR land to facilitate railroad constructions
- By 1949 NPR had soled most of that land but with „preferential routing clauses“
  - Using NPR as long as rates were equal to competing carriers
  - Most of interstate trade went with NPR
- Government filed lawsuit (Sherman Act)
  - Preferential routing agreements unlawful

Northern Pacific Ry v. US (2)

- USC in favour of Government
- Tying arrangements are per se unreasonable and unlawful whenever seller has sufficient economic power
  - Here substiantial economic power is given
  - Prove of unreasonable restrictions
  - However, some agreements because of their negative effects on competition, are presumed to be unreasonable

Chicago Board of Trade v. US

- 223 F.2d 348 (1955)
  - USC applied rule of reason to internal trading rules of commodity market
  - CBOT is commodity market (sales of grain)
  - New internal rules that after last call (2 pm) price is set and all board members have to accept
  - DOJ accused CBOT of price-fixing
  - Evidence that rule had no unlawful purpose but rather against pre-existing problems and abuses
  - USC came to conclusion that new rule was ultimately procompetitive – hepled to create public market for grain
  - Justification of restrictions of trade (reasonable)

Clayton Act (1)

- Sherman left a gap
  - instead cartel businesses could simply merge into one entity
  - 1914 Clayton Act
- „If competition might be substantially resctricted“
- Exclusive dealing and tying contracts
- Merger control (preemptive)
- Interlocking directorates (same persons in boards)
- Private law suits
- Robinson Pattman Act 1936
  - Price discrimination
- Celler-Kefauver Antimerger Act 1950

Clayton Act (2)

- Horizontal mergers
- Vertical mergers
- Conglomerate mergers

Clayton Act (2)

- Merger Guidelines
  - First 1968, 1997
  - Set of internal rules promulgated by Antitrust Department of DOJ
  - Rules under which the 2 bodies will challange mergers
  - To improve predictability of Agency‘s merger enforcement policy
  - Market definition focuses solely on demand substitution factors
  - definitions

Clayton Act (3)

- General Electrics/Honeywell
  - Honeywell Fortune 500 company
  - Consumer goods and engineering services
  - In 2000 GE announced intention to acquire Honeywell (2.1 billion $)
  - American authorities cleared merger but it was blocked by EC
  - GE‘s dominance of the small jet engine market and Honeywell‘s portfolio of regional jet engines
  - Problems?

Enforcement

- Administrative vs. private enforcement
- Department of Justice
- Federal Trade Commission
- Federal Courts!

Enforcement (2)

- Federal courts
  - Not agencies but federal courts decide!
  - Private lawsuits – most important
  - Of central importance
    - „broad wording“
  - treble damages
  - Class actions – misuse?
  - Per se - Rule of reason
  - Criminal sanctions!

Federal Trade Commission Act (1)

> 1914

> Second enforcement agency

> General prohibition for „unfair competition“

Federal Trade Commission Act (2)

- Section 5
  - Section 5 prohibits entities from enganging in unfair or deceptive acts or practices in interstate commerce
  - Deceptive = acts that is likely to mislead consumers acting reasonably
  - Advertisement: if it includes material information that is false or that is likely to mislead consumers
  - FTC can seek injunctive relief

Difficult issues

- Relevant market?
  - Interchangeability
  - Cross-elasticity of demand

- Exemptions for
  - Sport
  - media

Waves of enforcement

> Waves of enforcement

- > Broad wording
- > Interpretation by courts
- > Depending on judges
- > Strict v. relaxed interpretation
- > Criminal enforcement
- > Leniency program

Anticompetitive practices

Anticompetitive practices in the United States can take various forms, and they are typically implemented by businesses or individuals to gain an unfair advantage in the marketplace, stifle competition, and potentially monopolize or dominate a specific industry.

It's important to note that these practices are illegal under U.S. antitrust laws. Here are some common examples of anticompetitive practices.

Anticompetitive practices
Price Fixing

> It occurs when competitors agree to set prices at a certain level, eliminating price competition. This can involve direct collusion among companies or indirect communication through a trade association.

> Competitors may meet secretly to discuss and agree on pricing strategies, or they may use code words, signals, or online forums to coordinate and maintain fixed prices.

Anticompetitive practices
Market Allocation

> Companies or individuals divide markets or customers among themselves to avoid competing with each other in certain geographic areas or for specific customers.

> Competitors may engage in agreements that allocate customers, territories, or product lines. For example, two rival companies might agree not to sell their products in each other's territories.

Anticompetitive practices
Predatory Pricing

> Occurs when a company intentionally lowers prices to a level that is unsustainable in the short term, with the goal of driving competitors out of the market.

> Companies may temporarily lower prices to a level that is below their costs to produce or provide a product or service. This can make it difficult for competitors to survive and ultimately lead to market dominance.

Anticompetitive practices
Monopolization

> Involves a company acquiring or maintaining monopoly power in a market through anticompetitive conduct, such as exclusionary practices or abusing its dominant position.

> Monopolization can occur through practices like predatory pricing, exclusive dealing, tying and bundling, or acquisitions that substantially lessen competition.

Anticompetitive practices

> Illegal under U.S. antitrust laws, including the Sherman Act and Clayton Act.

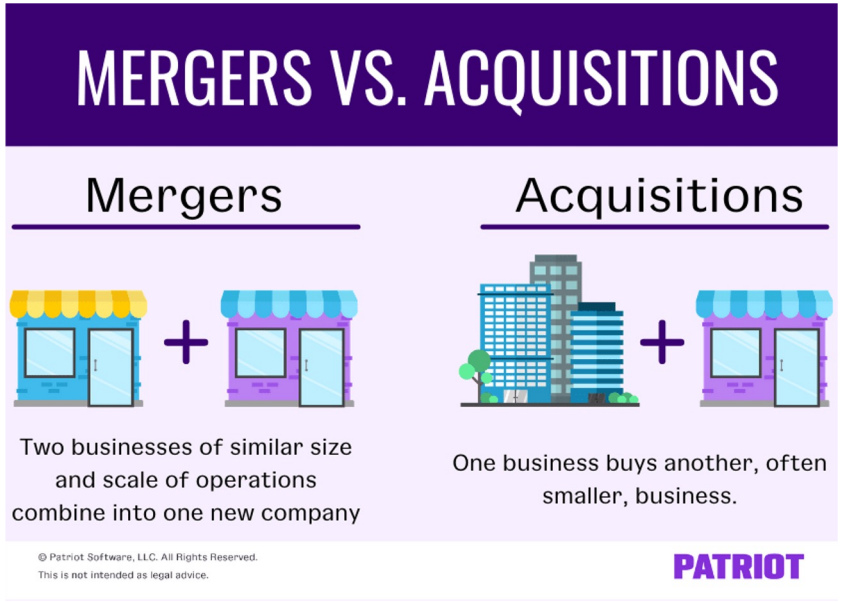
> Violators can face significant fines, civil lawsuits, criminal charges, and court-ordered remedies.

> Antitrust enforcement agencies, such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC), actively investigate and prosecute cases involving anticompetitive behavior to protect competition and consumers in the United States.

Mergers and acquisitions

> Mergers and acquisitions (M&A) in the United States are subject to antitrust scrutiny to ensure they do not harm competition and consumers.

> The federal antitrust agencies responsible for reviewing and regulating M&A transactions are the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC).



Mergers and acquisitions
Pre-Transaction Review under U.S. antitrust law

> **Notification Requirement:** Parties to certain M&A transactions are required to notify the antitrust agencies in advance. This requirement is triggered when the size of the transaction meets certain thresholds, which are adjusted annually. Parties must file a notification under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act.

> **Waiting Period:** After filing an HSR notification, there is typically a waiting period during which the antitrust agencies review the proposed transaction. This waiting period allows the agencies to assess whether the merger or acquisition raises any antitrust concerns.

Mergers and acquisitions
Antitrust Review under U.S. antitrust law

> **Competitive Analysis:** The reviewing agency (either the DOJ or the FTC) conducts a thorough analysis to assess the potential impact of the transaction on competition. They examine factors such as market concentration, market shares, barriers to entry, and potential anticompetitive effects.

> **Market Definition:** One critical aspect of the review process is defining the relevant product and geographic markets to determine the potential competitive impact accurately.

> **Competitive Effects:** If the agencies find that the M&A transaction would substantially lessen competition in a relevant market, they may take action to block the transaction, negotiate remedies with the parties, or challenge it in court.

Mergers and acquisitions
Antitrust Review under U.S. antitrust law

> **Negotiated Remedies:** In some cases, the reviewing agency may negotiate with the parties to develop remedies that address the antitrust concerns raised by the transaction. Remedies could include divestitures of certain assets or businesses to preserve competition in affected markets.

> **Litigation:** If the agency believes that the transaction would harm competition and negotiated remedies are insufficient, it can seek a court-issued injunction to block the merger or acquisition.

Mergers and acquisitions
Post-Transaction Review and Enforcement

> **Ongoing Monitoring:** In certain cases, antitrust agencies may require post-transaction monitoring to ensure that any agreed-upon remedies are implemented and effective in maintaining competition.

> **Enforcement Actions:** If the parties fail to comply with remedies or engage in deceptive practices during the review process, they may face enforcement actions, including fines and penalties.

Mergers and acquisitions

> Goal of the antitrust review process for M&A transactions in the United States is to prevent mergers and acquisitions that would substantially lessen competition or create anticompetitive market conditions.

> It helps maintain a competitive marketplace, promotes innovation, and protects the interests of consumers and competitors alike.

USA vs. Europe? Microsoft case

- 2001—The DOJ brought a Sherman Act case against Microsoft. After a trial, judgment, appeal, and remand, United States v. Microsoft Corp., 253 F.3d 34 (D.C.Cir.2001) (en banc), a negotiated consent decree was approved by the court in 2002.
- United States v. Microsoft Corp., 231 F.Supp.2d 144 (D.D.C. 2002). The company was accused of unfairly restricting the market for competing web browsers when it bundled the Windows operating system with Internet Explorer and then sold bundles to computer manufacturers for use by consumers. In what was criticized as a “slap on the wrist,” Microsoft agreed to share programming interfaces with third party companies, as well as appoint a three-person panel to ensure compliance with antitrust laws.
- EU
  - European Commission
  - Fine Euro 561 million for abuse of dominant position
- USA
  - www.youtube.com/watch?v=ZohSfvCQGC8

Thank you

Next time: business regulation in the United States