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RECHT BERATUNG WEITERBILDUNG

Introduction to US business law Business Regulations

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Repetition last time (1)

US Antitrust Law

- > Federal law
- > US „invention“ (Sherman Act 1890)
- > Reasons, why in the US?
- > 3 main acts
 - > **Sherman Act** (1890)
 - > Agreements (cartels) and Monopolization
 - > **Clayton Act** (1914)
 - > Merger
 - > **Federal Trade Commission Act** (1914)
 - > Unfair Competition

Repetition last time (2)

- > Clear wording
 - > Rule of reason
- > Enforcement
 - > Private/administrative
 - > 2 Agencies
 - > But: Courts decide!
 - > Enforcement waves
 - > Differences USA/EU
- > Extraterritorial application
- > New technology?

today

US Business Regulations

Overview

- > USA represent the model of a free market economy like no other country
- > However, also in the US massiv interventions and regulations of the business world happen
- > USA as the economically leading nation in the world
- > But dominance has been shrinking
- > A lot has to do with China
- > But also with deficites in infrastructure, immigration, row materials, unemployment, education
- > USA as the most productive country in the world (ILO)
- > USA as dominant country in the international financial architecture

Governmental intervention in times of crises

- > 1928 – black thursday
- > Enron
- > During the financial crises in 2007/2008 massiv intervention by the Federal Governement
- > But only in specific areas
- > In general reluctance to intervienne
 - > Interstate commerce clause
- > State quota in the economy in the US rather low (ca. 40%)
- > Different waves of enforcement depening on „the White House“

Common view in the USA

- > Each person is responsible for his/her economic success – not the Government
- > Government shall not intervene in business but rather protect citizens in the rights and open options
- > Success possible for everybody (American dream)
- > Risk vs. Security
- > Failure not decisive – a new start is always possible
- > People move easily from one place to another

Most important players

- > White House Office (Trade Representative,
- > Department of the Treasury
- > Departement of Commerce
- > Departement of Agriculture
- > Independant Governmental agencies
- > Div. Committees of Congress
- > Federal Reserve System (12 cooperating central banks)

Most important federal regulations (1)

- > Interstate Commerce Act (1887) – railroads
- > Sherman Act (1890) – Clayton Act/Federal Trade Commission Act (1914)
- > Federal Reserve Act (1913)
- > Social Security Act (1935)/NEW DEAL
- > Glass Steagall Act (1933) – business and investment banks
- > Social Security Act II (1965) – Medicare/Medicaid for poorer people
- > Ronald Reagan – Deregulation (f.e. airline industry)
- > Bill Clinton – investment in infrastructure, communication and education
- > 1999 – end of Glass Steagall Act
- > 2008 – Government takes over Fannie Mae/Freddie Mac (real estate loans)
- > 2008 – Troubled Asset Relief Program (assistance to banks)

Most important federal regulations (2)

- > 2009 – Obama – readiness for more state interventions
- > 2009 – American Recovery and Reinvestment Act
- > 2010 – Dodd Frank Act – strengthening financial supervision
- > 2010 – Affordable Care Act (Obama Care)
- > Since Trump – move towards protectionism
- > Importance of lobbying
- > Tax regulations
- > Committee on Foreign Investment in the United States (CFIUS)
- > Intellectual Property Rights
- > Trade Sanctions
- > Criminal Law – esp. FCPA
- > Money Laundering

1. US Business Organizations (lobbies) (1)

- > Long history
- > Generally understood as the rise of paid advocacy by special interests seeking favor in lawmaking bodies
- > it has been around since the early days of the Republic, and affects every level of government from local municipal authorities to the federal government in Washington.
- > In the nineteenth century, lobbying was mostly conducted at the state level, but in the twentieth century, there has been a marked rise in activity, particularly at the federal level in the past thirty years.
- > While lobbying has generally been marked by controversy, there have been numerous court rulings protecting lobbying as free speech.
- > Washington today is the biggest lobby concentration in the world
 - > Revolving door

1. US Business Organizations (lobbies) (2)

- > Many thousands of special interest groups
- > Billions of Dollars
- > Domestic and foreign
- > Obligation to be transparent
- > Among the most important:
 - > US Chamber of Commerce
 - > Business Roundtable
 - > National Federation of Independent Business
 - > Organization for International Investment
 - > Japan Business Federation
 - > Intellectual Property Owners Assn,
 - > Swiss American Chamber of Commerce (AMCHAM) etc.

1. US Business Organizations (lobbies) (3)

US Chamber of Commerce (USCC)

- > Founded in 1912 (as a counterbalance to the labor movement)
- > Usually pro Republican
- > Largest lobbying group in the US, spending more money than any other lobbying organization (almost USD 200mio/year)
- > International Network
- > Successful in founding litigation
- > Positions
 - > Agains parts of Sarbanes-Oexley Act
 - > Agains American Clean Energy and Security Act
 - > Against anti-tobacco policies
- > Against Obama Care

1. US Business Organizations (lobbies) (4)

National Rifle Association (NRF)

- > Founded in 1871
- > 5 mio members
- > „rifle lobby“ – securing 2nd Amendment
 - > Right to bear arms/self defence
- > Opposing gun control
- > Shooting training
- > Strong in mobilising voters (Trump)
- > Difficult: amok shootings!
- > Recent tax and leadership problems!

2. Tax Law (1)

- > There are federal, state and local government taxes
- > On income, payroll, property, sales, capital gains, dividends, imports, estates and gifts
- > In 2010 taxes collected in the USA were about 24.8% of GDP
 - > In OECD only Chile and Mexico are taxed less as a share of their GDP
- > Taxes more heavily on labor income than on capital income
- > Income tax by federal, most states and some local governments
 - > Citizens are taxed worldwide wherever they live (=Eritrea)
 - > Federal and states income taxes are self-assessment taxes, taxpayers must declare and pay tax without assessment by taxing authorities
 - > Quarterly payments

2. Tax Law (2)

- > Payroll taxes, social security and medicare imposed on both employers and employees
- > Property taxes are local taxes
- > Sales taxes are imposed by most states and some localities (0%-16%)
- > Tariffs or customs duties on imports (federal)
 - > China!
 - > Europe!
 - > Cotton!
- > Estate and gift taxes by federal and some state governments on worldwide property of citizens and residents

2. Tax Law (3)

- > IRS (Internal Revenue Service)
 - > Federal tax authority
 - > All federal taxes except custom duties and alcohol and tobacco
- > Tax evasion
 - > About 18-19% of reportable income was/is not properly reported to the IRS
 - > Issue with Switzerland!! (Bankgeheimniss)

3. Securities Regulations (1)

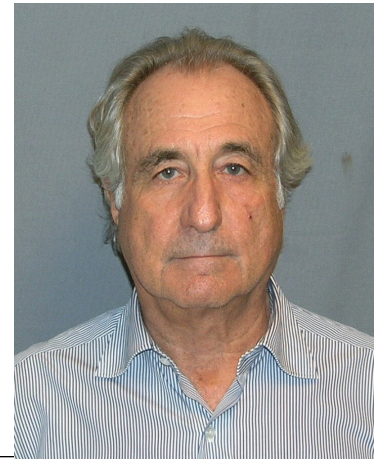
> **Securities Act of 1933**

- > Investors receiving financial information concerning securities being offered for public sale
- > Prohibits misrepresentation or fraud in the sale of securities
- > Disclosure obligations = investors can make informed decisions
- > Therefore, securities sold in the US must be registered (incl. prospectus)
- > Case

3. Securities Regulations (2)

SEC v. National Securities Inc (393 U.S. 453)

- > Berny Madoff, former market maker, investment advisor did run the largest ponzi scheme in world history and the largest financial fraud in US history.
- > Fraud worht USD64.8 billion
- > Is serving federal prison sentence for life (150 years)
- > Among others violation of Securitites Act
- > Enforced by SEC



3. Securities Regulations (3)

> **Securities Exchange Act of 1934**

- > Contrasted with the Securities Act of 1933, which regulates these original issues, the Securities Exchange Act of 1934 regulates the secondary trading
- > Creates SEC with broad authority over all aspects of the securities industry
 - > Power to register, regulate, oversee all securities exchanges like NY Stock, NASDAQ, Chicago, etc.
- > Periodic reporting obligations for big companies
- > Disclosure obligations for tender offers > 5% of a company's securities
- > Insider trading (nonpublic information)
- > Disciplinary powers
- > Major amendements:

3. Securities Regulations

two major amendments

- > **Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)**
 - > President Obama
 - > Dodd-Frank reorganized the financial regulatory system, assigning new responsibilities to existing agencies
- > **Economic Growth, Regulatory Relief and Consumer Protection Act (2018)**
 - > President Trump
 - > Bill eases regulations imposed by Dodd-Frank by raising the threshold to \$250 billion from \$50 billion under which banks are deemed too important to the financial system to fail.
 - > Bill also eliminated the Volcker Rule for small banks with less than \$10 billion in assets (restriction for commercial banks from certain speculative investments which do not benefit customers).

4. Intellectual Property Rights (IPR) (1)

- > In the USA there are several types of IPR, which include
 - > **Patents**
 - > Protection of innovation
 - > File application with the US Patent and Trademark Office
 - > 20 years protection

 - > **Trade marks**
 - > Source of origin
 - > To distinguish the source of a good from others
 - > Obtaining a federal trade mark by filing with the US Patent Office
 - > Lasts as long as trade mark is used

4. Intellectual Property Rights (IPR) (2)

- > **Copyrights**

- > Who can reproduce or distribute business information
- > To protect original works of authorship
- > To apply with the US Copyright Office (not required)
- > As long as life of the author plus 70 years

- > **Trade secrets**

- > To protect confidential business information
- > Needs reasonable steps to be taken to protect

4. Intellectual Property Rights (IPR) (3)

- > **Enforcement of IP Rights**
 - > US law provides for civil, criminal and border enforcement
 - > IP rights-holder is responsible for civil enforcement

5. Committee on Foreign Investment in the US (CFIUS) (1)

- > CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.
- > Since 1975
- > **THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018 (FIRRMA)**
 - > signed in 2018;
 - > to strengthen and modernize CFIUS to address national security concerns more effectively, including by broadening the authorities of the President and CFIUS to review and to take action to address any national security concerns arising from certain non-controlling investments and real estate transactions involving foreign persons.

5. Committee on Foreign Investment in the US (CFIUS) (2)

- > If CFIUS determines that there are national security risks arising as a result of the covered transaction then CFIUS will advise the President to forbid the planned transaction.
- > Decision by President is final.
- > Between 2014 – 2018 CFIUS checked 627 transactions, three of them were forbidden by President.
- > In 2018 only, President Trump has interviened 2 times, both with Chinese companies involved (Xcerra und Qualcomm).
- > CFIUS makes foreign investments in the USA less predictable. Difficult specifically for certain countries!

6. Trade Sanctions

- > Trade sanctions a common instrument for US international policies
- > Increase in active US sanctions since 2017 with more than one sanctions action per week in 2017 and 2018
- > Blacklisted entities for sanctions are now being added and removed at an unprecedented pace
- > Long list of sanctions!
- > Expl
 - > China Iran
 - > EU Iraq
 - > Russia North Korea
 - > Venezuela etc
 - > Cuba,

7. Foreign Corruption Practicing Act (FCPA) (1)

- > 1977
- > Federal law that prohibits U.S. citizens and entities from bribing foreign government officials to benefit their business interests
- > The FCPA is applicable worldwide and extends specifically to public traded companies and their personnel, including officers, directors, employees, shareholders, and agents.
- > Following amendments made in 1998, the Act also applies to foreign firms and persons who, either directly or through intermediaries, help facilitate or carry out corrupt payments in U.S. territory.
- > Pursuant to its anti-bribery purpose, the FCPA amends the Securities Exchange Act of 1934 to require all companies with securities listed in the U.S. to meet certain accounting provisions, such as ensuring accurate and transparent financial records and maintaining internal accounting controls

7. Foreign Corruption Practicing Act (FCPA) (2)

- > The FCPA is jointly enforced by the DOJ and the SEC, which apply criminal and civil penalties, respectively
- > In the case of foreign natural and legal persons, the Act covers their deeds if they are in the U.S. at the time of the corrupt conduct.
- > In 2008, Siemens AG (Germany) paid \$450 million in criminal fines to the DOJ and \$350 million to the SEC for violating the FCPA. This is one of the largest penalties ever collected for an FCPA case.
 - > Siemens AG pleaded guilty to violating the internal controls and books and records provisions of the FCPA, reaching settlements with the U.S.D.OJ and the SEC.
 - > The U.S. dispositions required appointment of a compliance monitor for four years!

7. Foreign Corruption Practicing Act (FCPA) (3)

- > US authorities have a powerful toolkit at their disposal in regulating the activities not only of US companies but also multinational corporations and foreign individuals.
 - > Foreign multinational corp. are subject when they (only) issue stocks or bonds on US stock markets or if they have «minimal contact with the US financial institutions»
 - > In 2018 USD8.1 billion in US criminal enforcement actions
 - > Actions against foreign companies seem to be on the rise
 - > Potential for international discrimination for US companies (old days!)
- > Later on the US initiated initiatives within the **OECD** to make member states to enact similar legislations (not to discriminate US national companies!)



8. Money Laundering (1)



8. Money Laundering (2)

- > USA are criticizing Switzerland a lot
 - > F.e. CS
- > USA issues
 - > Bahamas, Cayman, Vergin-Island
 - > Delaware (ananonymous companies, 1/3 same address in Wilmington!)
 - > No FATCA application inside USA
 - > South Dakota
- > New: National Defense Authorization Act
 - > Beneficial owner
 - > Expl. Rotenberg brothers (Putin) bought Renoir through Corp.

Next time

US-Swiss trade relations