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RECHT BERATUNG WEITERBILDUNG

Introduction to US business law 8. Antitrust

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News

- > Gerrymandering – Democrats lost in Louisiana
 - > USC decided end of april
 - > More to come with the permission of the USC
- > Trump says he needs no decision of US Parliament to extend war in Iran beyond 60 days because ceasefire is not war anymore
- > Federal Grand Jury indictds fromer FBI Director Comey for threats to harm President Trump
- > Still no trade deal CH-USA (goal: end of March) – decision by USSC
 - > Claime money back?

Repetition last time – company law

- > State law – common law (federal legislation)
- > Harmonization – interstate commerce clause
- > 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

Why do we care about US antitrust law?

- > US economy has worldwide impact
- > Jurisdiction with longest history of competition law enforcement
- > Earliest sophistication in antitrust economics
- > Vast body of litigated cases
- > Model on private enforcement

I. History

- > In the USA first competition law (antitrust) 1890
 - > Why?
 - > Freedom and equality
 - > Strong growth of the economy after war
 - > dominant players
 - > Trusts (Standard Oil – Rockefeller, Flagler)
 - > Influence on politics
 - > Democratic control of powerful but private enterprises
 - > No monopolies
 - > Protection of middle class
-

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



Early enforcement

- > First antitrust regulation in 1890
- > President T. Roosevelt sued 45 companies under Sherman
 - > 1902 Roosevelt stopped formation of Northern Securities Company which threatened to monopolize transportation in Northwest
- > President Taft sued almost 90 companies
 - > 1911 Standard Oil (Rockefeller)
 - > USS broke Monopoly into three dozens separate companies (Exxon, Amoco, Mobil, Chevron, etc.)
 - > Rule of reason (not all big companies and not all monopolies are evil)
 - > Courts make decision, not executive

Who sets US antitrust policy?

- > US antitrust policy is not monolithic but reflects an array of enforcers and decisionmakers in the US model of federalism
- > State – federal laws
- > President
 - > DOJ
 - > Federal Trade Commission
- > Congress
 - > Appointments
 - > Laws
- > Federal Courts (up to USSC)

II. US Antitrust laws as an export product

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

II. 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
 - > Trump?
-

II. 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
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Intention Sherman Act

- > Preventing collusion and cartels that act in restraint of trade is an essential task of antitrust law
- > It reflects the view that each 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

II. Sherman Act (1)

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

 - > Broad wording – courts
 - > Rule of reason
-

II. 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“.

II. Sherman Act Section 1 (3)

- > Section 1 has 3 elements
 - > An agreement
 - > Which unreasonably restrains competition
 - > And which affects interstate commerce
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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?
 - > In 2007 USC held that a vertical price restraint agreement is not per se illegal (Leegin Creative Leather Products, Inc. V. PSKS)

II. 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“.

II. Sherman Act Section 2 (5)

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

II. 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 (underpricing)
 - > 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
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II. 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)

II. Rule of reason/per se

- > Rule of reason v. per se violations
 - > Broad wording
 - > Rule of reason – pro competitive factors are weighed against anticompetitive effects
 - > 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 – less and less!
 - > Horizontal (vertical) price fixing?
 - > Geographic divisions of markets?
 - > Predatory pricing (Verdrängung)?
 - > Boycott – collective refusals to deal?
 - > Tying arrangements?
-

Per se rule

- > *U.S. Dep't of Justice and Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors from April 2000*
- > In other words, first (besides antitrust injury), a plaintiff is only required to prove that the specific anticompetitive conduct actually took place. The plaintiff does not need to demonstrate the conduct's competitive unreasonableness or negative competitive effects in the relevant product and geographic markets.
- > Under the per se rule, defendants are not entitled to justify their behavior based on any objective competitive justifications.
- > The most serious «per se» offenses are subject to criminal prosecution! (10 years)

II. 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 lawsuite (Sherman Act)
 - > Preferential routing agreements unlawful
-

II. 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 substantial economic power is given
 - > Prove of unreasonable restrictions
 - > However, some agreements because of their negative effects on competition, are presumed to be unreasonable
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II. 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 – helped to create public market for grain
 - > Justification of restrictions of trade (reasonable)
-

Recent monopolization high-profile cases (1)

> Google

- > **Search Monopoly (U.S. v. Google):** In August 2024, a DC District Court found Google acted as a monopolist by paying for default search status on devices, violating the Sherman Act. As of May 2026, this decision is being appealed, while a specialized committee is already tasked with designing remedies to break this control.

> Microsoft

- > The historic 1998 US government antitrust lawsuit (*United States v. Microsoft Corp.*) accused Microsoft of illegally maintaining a monopoly in the PC operating system market by bundling Internet Explorer with Windows to crush Netscape. While initially ordered to break up in 2000, Microsoft settled in 2001, agreeing to share APIs and alter licensing, avoiding a breakup

Recent monopolization high-profile cases (2)

> **Apple**

- > The U.S. Department of Justice (DOJ) and 16 state/district attorneys general sued Apple in March 2024 for alleged monopolization of the smartphone market, a case that will proceed toward trial following a June 2025 court ruling. The lawsuit contends Apple uses restrictive practices to stifle competition, maintain its “walled garden,” and restrict functionality of third-party apps and devices

Qualcomm

Qualcomm has faced significant, long-term antitrust scrutiny in the United States regarding its business practices in the semiconductor industry, particularly concerning cellular modems for smartphones. While the Federal Trade Commission (FTC) accused the company of using anticompetitive tactics to maintain a monopoly, legal battles have seen mixed outcomes, with a major appellate court reversal in 2020 largely favoring Qualcomm

II. Clayton Act (1)

- > Sherman left a gap
 - > instead cartel businesses could simply merge into one entity
 - > 1914 Clayton Act
 - > Prohibits mergers whose effects «may substantially to lessen competition or tend to create a monopoly
 - > 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

II. Clayton Act (2)

- > Horizontal mergers
- > Vertical mergers
- > Conglomerate mergers

II. 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 challenge mergers
 - > To improve predictability of Agency's merger enforcement policy
 - > Market definition focuses solely on demand substitution factors
 - > definitions
-

II. 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?
-

II. Federal Trade Commission Act (1)

- > 1914
- > Second enforcement agency
- > General prohibition for „unfair competition“



II. Federal Trade Commission Act (2)

- > Section 5
 - > Section 5 prohibits entities from engaging 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
-

III. Difficult issues

- > Relevant market?
 - > Interchangeability
 - > Cross-elasticity of demand
 - > Internet (plattformen)
 - > Per se?
 - > Exemptions for
 - > Sport
 - > media
-

III. Enforcement (1)

- > 2 federal offices
 - > DOJ
 - > Depending on who is in power
 - > FBI
 - > Immunity programs
 - > Federal Trade Commission
 - > Government enforcement agencies cannot act alone
 - > Courts!!
-

III. Enforcement (2)

- > Federal courts
 - > Not agencies but federal courts decide!
 - > Private lawsuits – most important (about 750 a year)
 - > Of central importance
 - > „broad wording“
 - > Automatic treble damages
 - > Class actions – misuse?
 - > Per se - Rule of reason
 - > Criminal sanctions! (subject to abuse)
-

III. Enforcement (3)

- > Waves of enforcement
 - > Broad wording
 - > Interpretation by courts
 - > Depending on judges
 - > Strict v. relaxed interpretation
 - > Criminal act
-

Different countries – different views

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

today

Google: Today the Antitrust Division of the Department of Justice prevailed in its second monopolization case against Google. In *United States et al. v. Google*, the U.S. District Court for the Eastern District of Virginia held that Google violated antitrust law by monopolizing open-web digital advertising markets. According to the Court, Google “harmed Google’s publishing customers, the competitive process, and, ultimately, consumers of information on the open web.” (April 17, 2025)

Managers: A former senior executive of a Michigan asphalt paving company was sentenced today to six months in prison and a \$20,000 fine for his role in a conspiracy to rig bids for asphalt paving services contracts in Michigan. (April 16, 2025)

Merger control: The Justice Department sued to block Hewlett Packard Enterprise Co.’s (HPE) proposed \$14 billion acquisition of rival wireless local area network (WLAN) technology provider Juniper Networks Inc. (Juniper). HPE and Juniper are the second- and third- largest providers, respectively, of enterprise-grade WLAN solutions in the United States. The complaint, filed in the Northern District of California, alleges that the proposed transaction would eliminate fierce head-to-head competition between the companies, raise prices, reduce innovation, and diminish choice for scores of American (January 30, 2025)

Thank you

Next week: Trade Law