Mind-Blowing Merger Control Ep1

Dear readers,

Welcome to the first brain gymnastics regarding horizontal mergers. I hope you enjoy…

Stipulation: The market definition is literally that one block + the merger has to be reviewed regardless of its actual value (conceding that *arguendo* or else this thing doesn't actually work)

Fact Pattern

So imagine a hot dog stand that merges with another hot dog stand. Collectively, the hot dog stands before the merger each accounted for 50% of the market. And once they merge, they account for 100% of the market. A literal monopoly.

HHI (To measure market concentration, so basically it is Company A's market share^2+Company B's^2)

$50^2+50^2= 5000$ (pre-merger)

$100^2= 10000$ (post-merger)

So essentially, pursuant to the DOJ Horizontal Merger Guidelines, it is highly concentrated. In fact, it is way above the prescribed threshold under 1.51 of that guideline.[1]

Prima Facie Case?

Hence, there appears to be a *prima facie* case under §7 of the Clayton Act.

Where Problems Arise

Well, obviously, there are various obvious problems with this. For starters, attacking the market definition. The market definition may be overly narrow, as one may simply say, "Can't you just go to another block to get a hot dog?"

Indeed, one may push back against that counterargument, claiming that people don't usually want to go to another block simply to get a hot dog, so there is enough search friction posed by the existing circumstances that it warrants defining an extremely localized market. In fact, the SCOTUS wrote in *United States v. Philadelphia National Bank* that, "...in most service industries, convenience of location is essential to effective competition."[2]

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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.51 (Apr. 2, 1992, rev. Apr. 8, 1997), https://www.justice.gov/atr/horizontal-merger-guidelines-0#15.

[2] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 358 (1963).

However, it is still important to stress that even if we concede that the market definition is completely fine, the barrier to entry, an important hurdle that needs to be cleared as the DC Circuit has ruled in *US v Baker Hughes*,[3] is still hard to establish. Under the circumstances stated in the fact pattern, one may easily say, “What is there to stop a third guy from starting a hot dog stand next Monday?”

Conclusion

And for that reason, while the original argument looks compelling and especially doctrinally innovative, it remains, as it should, some jiggery pokery dressed in pure applesauce, that is going to be inevitably unpersuasive before a judge.

[3] U.S. v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990) (“It is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case. These factors include, but are not limited to, the absence of significant entry barriers in the relevant market.”)