No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, APPELLANT

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., AND THE VAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court dismissing the complaint (R. 422) is reported at 233 F. Supp. 475. An earlier opinion of the district court denying the motions of Schenley Industries, Inc., and The Val Corporation for dismissal as to them (R. 27) is reported at 183 F. Supp. 220.

JURISDICTION

The final judgment of the district court was entered on October 13, 1964 (R. 481). The notice of appeal was filed on December 11, 1964, and probable jurisdiction was noted on November 8, 1965 (382 U.S. 900; R. 484). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.,* 378 U.S. 441.

QUESTION PRESENTED

The ultimate question presented is whether the government's evidence established *prima facie* that the acquisition of Blatz Brewing Company by Pabst Brewing Company violated Section 7 of the Clayton Act, as amended. An important subsidiary question is whether the district court erred in holding that the government had failed to establish *prima facie* that the State of Wisconsin was an appropriate section of the country or geographic market in which to test the acquisition.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

On July 30, 1958, Pabst Brewing Company ("Pabst") acquired from Schenley Industries, Inc., the assets and business of Blatz Brewing Company ("Blatz"), a wholly owned subsidiary of Schenley (Fdg. 3, R. 456).[1] On October 1, 1959, the government filed a complaint (R. 22–27) charging that the acquisition violated Section 7 of the Clayton Act, as amended, because its effect might be substantially to lessen competition or tend to create a monopoly in the production and sale of beer in the continental United States and in two geographic submarkets—Wisconsin, and the contiguous three-State area of Wisconsin, Michigan, and Illinois. At the close of the government's case, the district court granted Pabst's motion to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure on the ground that upon the facts and the law the government had shown no right to relief.[2]

1. THE FACTS

(a) *Concentration*

Nationally. Since the end of prohibition, the domestic production and consumption of beer has doubled (Fdg. 44, R. 471–472). At the same time,

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[1] After the acquisition the name of the subsidiary was changed to Val Corporation (Fdg. 2, R. 456); Val and Schenley were joined and retained in the action as defendants for purposes of relief (R. 27). The consideration paid Schenley for the assets and business of Blatz consisted of $11 million in cash and $3.5 million in debentures, as well as shares, and purchase warrants for shares, of Pabst common stock (Fdg. 3, R. 456).

[2] Pabst in its answer raised a "failing company" defense, alleging that it had acquired Blatz in order to avoid the consequences of its own declining sales and increasing losses (R. 36–37). In dismissing at the close of the government's case, the district court did not reach or decide the validity of this defense.

the number of brewers has declined. There were 708 in 1934, 206 in 1957, and only 162 in 1961 (Fdg. 47, R. 476–477; GXS. 216–236 (unprinted). According to the *New York Times,* February 13, 1966, Section 3, pp. F1, 43, by 1965 the number of brewers was down to 134.

Paralleling the decline in the number of beer producers has been an increase in the concentration of sales of beer in the larger firms. The 10 leading brewers accounted for 33 percent of total domestic beer sales in 1948, for 45 percent in 1957, and for 53 percent in 1961 (GX 211, R. 346). In 1961, the four largest brewers had an aggregate share of 27.62 percent of all beer sales (Fdg. 45, R. 472–475).

Wisconsin. Since the repeal of prohibition, the State of Wisconsin has been a major area of beer production; since 1947, it has consistently ranked first or second among the States, producing 13 percent of the nation's total production in 1957 (Fdg. 18, R. 462–463). Wisconsin breweries consistently produce more beer than is consumed within the State. Indeed, the major portion of its production is sold elsewhere (Fdgs. 18–19, R. 462–464). It is, however, a leading beer-consuming State as well; it has ranked either eighth, ninth, or tenth among the States in beer consumption for each of the years 1934–1961 (Fdg. 19, R. 463), and is by far the leading State in per capita consumption (GX 214, R. 349).

Production and consumption of beer has increased in Wisconsin as well as nationally, but—again conforming to the national picture—the number of brewers selling in the State has declined sharply, from 77 to 54 between 1955 and 1961 alone (Fdg. 22, R. 464). Sales concentration is much higher in Wisconsin than it is nationally. In 1957, the top four sellers accounted for almost 48 percent of all beer sales in the State (GX 186, R. 321)—twice the national average (see p. 4, *supra*). Paralleling the rise in concentration in the industry as a whole, this figure increased to 59 percent by 1961 (GX 190, R. 325). Sales shares of the principal sellers in Wisconsin have tended to remain very stable (see App. B, *infra*, pp. 50–51 [3]).

(*b*) *Distribution and Marketing*

In general, the distribution of beer is localized. In Wisconsin, for example, only one-third of the nation's brewers made any sales in 1957 (Fdg. 22, R. 464; Fdg. 47, R. 475), and almost 80 percent of all the beer consumed in that State was produced by brewers having breweries there (see JX 19, R. 157; JX 66, R. 204; GX 257, R. 403). More than half of the balance came

[3] Appendix B is a table showing the rank and sales share by year for brewers doing business in Wisconsin for the period 1955–1961. The only firms excluded are those which had less than one percent of total beer sales in the State; firms included accounted for more than 80 percent of such sales. The table is based on JX 60–78, R. 198–216.

The government also introduced evidence with respect to the three-State area of Wisconsin, Illinois, and Michigan, a major area of both beer production and consumption, where 16.5 percent of the nation's beer was consumed in 1957 (JX 91–92, R. 229–230). Despite increasing demand in the area (JX 92–100, R. 230–238), the number of brewers selling there declined from 104 in 1957 to 86 in 1961 (GX 208, R. 343). Simultaneously, concentration increased. In 1957, the four leading brewers accounted for 37 percent of the area's total beer sales and the eight leading for 59 percent (GX 204, R. 339); by 1961 these figures were 44 and 68 percent respectively (GX 208, R. 343).

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from the Hamm Brewing Company (R. 198, 201, 204), which has a brewery in St. Paul, Minnesota, just across the State line from Wisconsin (GX 257, R. 403). Of the 20 leading sellers in Wisconsin, 17 operated breweries there, 2 (including Hamm) had breweries in neighboring States, and the brewery of the third was in St. Louis, Missouri. Brewers having breweries in the three-State area of Wisconsin, Michigan, and Illinois accounted for 77 percent of the area's total sales in 1957; another 22 percent was sold by brewers with breweries in adjacent States (see JX 91-92, R. 229-230; GX 257, R. 403).[4] Brewers find it advantageous to have a brewery in each important market area (see GX 109, R. 249; GX 145, R. 296).

Marketing techniques in the beer industry emphasize reliance upon wholesale distributors, advertising and consumer promotions (see R. 130; GX 137, R. 276, 279-280; GX 140, R. 284-285; GX 145, R. 292; GX 152-153, 155-156, R. 303-319). This is because the "real sales struggle is the struggle between brands of beer" and it is "getting the consumer acceptance that counts" (R. 130, 131 (depositions of Pabst's Chairman and its Vice President)). In 1957, for example, Pabst spent on advertising and promoting its "Pabst" brand alone more than \$8.5 million, equal to between \$3 and \$3.50 per each barrel sold (see JX 55 and GX 133, R. 193, 272). And Pabst sold many brands (GX 107, R. 244-245), for each of which it designated a different manager to assure effective promotion of that brand (R. 291, 304).

Marketing and distribution are organized and con-

[4] The close correlation between brewery location and sales area is further shown by the pattern of sales of Pabst and Blatz (*infra*, pp. 7-9).

ducted on a State-by-State basis (GX 137, R. 276–280; GX 140, R. 283–285; GX 141, R. 287; GX 142, R. 289; GX 145, R. 294; GX 153, R. 203–310; GX 156, R. 316) in part because of the varying legal restrictions imposed by the States on the marketing of beer (GX 142, 144, R. 289–291; GX 147, 148, 150, R. 298–302). For example, Pabst planned marketing strategy for Washington, D.C., separately, analyzing the distinctive characteristics of this area: the size, income level, and purchasing habits of its population, the number of package liquor stores, and other relevant factors (GX 153, R. 305–310).

The prices charged distributors by the brewers tend also to be set on a State-by-State basis (GX 115, 124, R. 253–259, 261–271), though prices tend to be uniform within the same State. These variations obtain even as between neighboring States.

(c) *The Merging Companies*

In 1957, the last complete year before the acquisition, Pabst was the nation's tenth largest brewer. Its sales of more than 2.5 million barrels amounted to 3.02 percent of the nation's total sales of domestic beer (Fdg. 45, R. 472–475). It operated four breweries (located in Milwaukee, Wisconsin, Los Angeles, California, Peoria, Illinois, and Newark, New Jersey), from which it sold in all the States (Fdgs. 13–14, R. 460–461). However, its sales were concentrated in the areas in which it had breweries. Thus, about 50 percent of its total sales were derived from the three States where its breweries were located—California, Illinois, and Wisconsin—plus New York, which is just across the Hudson River from Pabst's Newark brewery (JX 47–55, R. 185–193). Wisconsin alone accounted for more than 13 percent of Pabst's total sales in 1957 (see JX 55, R. 193), and almost 100 percent of the Pabst beer sold in that State was produced by Pabst's Milwaukee brewery.[5] That year, Pabst was the fourth largest seller of beer in Wisconsin, with 11.14 percent of total sales (GX 186, R. 321), and seventh in the three-State area with 5.48 percent (GX 204, R. 339).

Blatz was the nation's eighteenth largest brewer at the time of the acquisition; its production of 1.25 million barrels in 1957 gave it 1.47 percent of all domestic beer sold in this country (Fdg. 45, R. 472–475). Although Blatz sold beer in 40 States before the acquisition, its sales were heavily concentrated in Wisconsin, where its single brewery was located (in Milwaukee) (Fdgs. 13–14, R. 460–461). Between 31 percent and 46 percent of its sales were consistently made in that State (see JX 47–55, R. 185–193, 465), and between 55 and 73 percent in the three-State area. Blatz was the leading seller of beer in Wisconsin, with 12.81 percent of total sales there (GX 186, R. 321),

[5] According to Pabst, "Nearly 69% of the 1958 production of Pabst beer in Milwaukee was shipped beyond the state boundary for consumption." Brief in the District Court of Defendant Pabst Brewing Company in Support of its Motion to Dismiss, pp. 19–20. (A copy of this brief has been lodged with the Clerk of this Court.) The remaining 31 percent was therefore sold in Wisconsin. Since 31 percent of 1,054,314—the total amount produced in Wisconsin (GX 110, R. 251)—is 326,837 barrels, and Pabst sold 333,244 barrels in Wisconsin (JX 56, R. 194), almost 100 percent of the beer it sold in Wisconsin was supplied by its Milwaukee plant.

and the sixth largest in the three-State area, with 5.84 percent (GX 204, R. 339).

(*d*) *The Effects of the Merger*

By acquiring Blatz, Pabst became the nation's fifth largest brewer, with 4.49 percent of the industry's total sales on the basis of 1957 figures (Fdg. 45, R. 472–475). By 1961, it had increased its rank to third and its sales share to 5.83 percent. The shares of the two largest brewers that year were 9.55 percent and 6.49 percent respectively, and the aggregate share of the four largest (including Pabst) was 27.62 percent—up from 24.22 percent in 1957 (Fdg. 45, R. 472–475). In the three-State area, the acquisition made Pabst number 2, with more than 11 percent of total beer sales in the area (GX 204, R. 339), and by 1961 Pabst was first with 15 percent and the four leading brewers had 44 percent (GX 208, R. 343). In Wisconsin, the acquisition made Pabst number one with 23.95 percent of total beer sales in that State (GX 186, R. 321). By 1961, Pabst's share had increased to 27.41 percent and that of the four leading suppliers from 48 percent (before the acquisition) to 59 percent (GX 190, R. 325). In the following table, based on GX 186, R. 321, we show the impact on sales concentration in Wisconsin produced by the merger:

	Rank in sales—		Percentage
	Before merger	After merger	
Total of Pabst and Blatz		1	23.95
Blatz	1		12.81
Hamm's	2	2	12.15
Schlitz	3	3	11.64
Pabst	4		11.14
Miller	5	4	5.81
Kingsbury	6	5	4.36
Heileman	7	6	4.00
Anheuser-Busch	8	7	3.14

2. THE DECISION OF THE DISTRICT COURT

In dismissing the complaint on defendants' motion at the close of the government's case, the district court held, first, that neither Wisconsin nor the three-State area could be considered a "section of the country" or relevant geographic market within the meaning of Section 7 of the Clayton Act for purposes of appraising the competitive effects of the challenged acquisition. In holding that Wisconsin was not a relevant market (R. 428–439), the court stated, *inter alia,* that the amount of beer consumed in that State—3.66 percent of the nation's total—was not large enough to make it a commercially significant market; that the high degree of success attained by the merging companies in Wisconsin did not necessarily reflect "the intensity of competition between them"; that beer was freely imported into and exported out of Wisconsin; that there "is no evidence * * * that competition in the beer industry is in any manner localized * * * or affected by the location of a brewery" (Fdg. 30, R. 467); and, in general, that there was no factor which set

Wisconsin apart from other States and justified treating it as a distinct geographic submarket. The district court followed the same analysis in holding that the three-State area was not "a section of the country" either (R. 439–441).

The court then turned to the effects of the merger in the only area it considered relevant—the continental United States—and ruled that the government had not proved that the merger was likely to lessen competition substantially (R. 452). After stating that Pabst's share of that market after the acquisition was not large enough *per se* to permit the inference of probable anticompetitive effects, the court held that it could give no weight to the evidence of a trend toward concentration in the industry, since there was no showing that this development was the result of prior mergers rather than of natural economic forces (Fdg. 48, R. 476).

ARGUMENT

INTRODUCTION AND SUMMARY

I

Since 1934, when prohibition was repealed, the production and consumption of beer in this country has doubled. During the same period, the number of beer producers has declined steeply and the relative size of a handful of large producers has increased apace. This movement—which appears, if anything, to have gathered momentum in recent years—has raised concentration to high levels in many areas. Thus, in the State of Wisconsin (the State with the greatest per capita consumption of beer), four brewers in 1957 accounted for almost 48 percent of all beer sales.

It was against this background that the government in 1959 filed a complaint under the Antimerger Act[6] against the Pabst Brewing Company, the nation's tenth largest brewer, challenging Pabst's acquisition in 1958 of the Blatz Brewing Company. At the time of the merger, Blatz was the leading seller of beer in Wisconsin and Pabst ranked number four; the merger gave Pabst 24 percent of all beer sales in the State and substantially increased the share of the larger sellers as a group. Concentration was also substantially increased in a three-State area (Wisconsin, Michigan, and Illinois) and nationally.

At the close of the government's case, the district court ordered the complaint dismissed. The court held that the government had failed to make a *prima facie* showing that the merger would probably lessen competition substantially—the statutory standard—because (1) it had not proved that either Wisconsin or the three-State area was a relevant market; and (2) treating the nation as the market, the industry trend toward concentration relied on by the government was irrelevant because it was not shown to have been caused by mergers. We think the district court erred, and we urge this Court to reverse the judgment dismissing the complaint. Since the sole question before the Court is whether the government adduced enough evidence of the anticompetitive consequences of the merger to shift the burden of presenting evi-

[6] The Celler-Kefauver Act, 64 Stat. 1125 (1950), amending Section 7 of the Clayton Act, 15 U.S.C. 18.

dence to the defendants, if the Court agrees with the government the case will go back to the district court to hear defendants' evidence.

The issues of this case, in its present posture, are primarily ones of standards rather than of fact. The most important issue involves the proper standard for determining when a lesser territorial area than the entire country is a proper market in which to appraise a merger's competitive impact. In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, this Court established the principle that the interest in manageable and effective enforcement of Section 7 justifies relying heavily on percentage shares of a relevant market for the decision of horizontal-merger cases. Under this principle, correct determination of the relevant market under rational and workable standards becomes essential to sound administration. We therefore devote a major portion of our brief to the exploration of the issue of standards for market definition. We then show that applying proper standards—as the court below did not—it is clear that Wisconsin is *prima facie* a relevant market in which to test the competitive effects of the challenged merger.[7]

II

Section 7 proscribes mergers likely to injure competition substantially in any "section of the country." While it is clear that the sale of beer in Wisconsin

[7] In the interest of simplifying analysis, we concentrate primarily on the Wisconsin market, while pointing out that the district court also erred in its rulings on the other issues. See p. 22, n. 13, and p. 45, n. 34, *infra.*

has sufficient commercial importance to render a merger that creates a probable substantial lessening of competition in such trade illegal, it must also be shown that the State is a proper market for appraising the merger's competitive effects. If Wisconsin is such a market, a finding of *prima facie* illegality follows directly from the standard of *United States* v. *Philadelphia National Bank, supra,* since the merger produced a firm with an nndue percentage share of the market and substantially raised the preexisting level of concentration. While the percentage share of the resulting firm in this case was slightly smaller than in *Philadelphia Bank,* the difference—given the purposes of the Act and the rationale of the Court's opinion—is immaterial. In any event, there are additional factors which make this an *a fortiori* case for applying the *Philadelphia Bank* standard.

The difficult question, therefore, is whether Wisconsin is a proper Section 7 market. The purpose of defining a market is to enable intelligent appraisal of the competitive significance of a transaction's effects. Where the complaint is against a merger of direct competitors, the chief function of market delineation is to identify an area within which sales percentages can be relied upon for substantial guidance in measuring the impact of the merger. While it is clear that Section 7—which proscribes any merger whose effect "in *any* section of the country" [8] may be substantially anti-competitive—contemplates that a State, a group of States, a metropolitan area, or a series of such areas may define an appropriate locus in which to ap-

[8] Emphasis added.

praise competitive effects, sales percentages in a particular such area may, in two respects, overstate a merger's impact. The merging firms may not actually be competitors: one may sell exclusively to purchasers located in one part of the area and the other to completely different purchasers located in another part, in which event the merger will not directly alter the structure of competition in the area[9] even though it increases the acquiring firm's percentage share of sales in the area as a whole considerably. Even if the merging firms are actual competitors in an area, figures showing their sales as a percentage of the area's total sales may have no competitive significance if there are no economic barriers (for example, in the form of transportation costs) impeding the entry of other sellers of the same product. The fact that a few sellers have a large share of the sales in an area is significant only if those sellers enjoy some competitive advantage over those not selling there which enables them, within a range at least, to ignore the others in setting prices.

These considerations demonstrate the need for market definition in a horizontal-merger case and point the way toward a proper legal standard to guide such definition. We submit that where the government relies on sales percentages as a basis for arguing that a horizontal merger adversely changed the structure of competition in a section of the country, it need show only (1) that both the acquired and acquiring firm made substantial sales to customers located in that

[9] It may, however, eliminate a significant potential competitor. See pp. 27–28, n. 17, *infra*.

section, and (2) that there is reason to believe that sellers whose sales were not included in the market suffer from some disadvantage in competing with those whose sales were included. Such a showing was made here and establishes the *prima facie* validity of the government's selection of Wisconsin as a proper geographic market.

First, both Pabst and Blatz made substantial sales to customers located in the State at the time of the merger. Second, there are persuasive if not conclusive indications that the sellers actually selling in the State had a significant competitive edge over other beer producers who might have wanted to sell there. We base the second conclusion on, among other things, evidence that the effective distribution of beer requires the creation of brand allegiance which in turn requires intensive advertising and promotional efforts and the enlistment of distributors who will be vigorous and effective in creating a market for the brand in the State or local area where penetration is desired. A firm whose brands are unknown in an area cannot readily sell there. This is attested by the large and stable market shares that a few brewers have persistently enjoyed in Wisconsin, and by their ability to charge different prices in that State from those they charge elsewhere. The obstacles that confront prospective sellers in Wisconsin—however well entrenched such sellers may be elsewhere—*prima facie* justify excluding them from, and treating the sale of beer in Wisconsin as, a relevant market for appraising the competitive effects of this acquisition.

The order of our argument is thus as follows: (1) Assuming Wisconsin is a proper market for purposes of Section 7, a *prima facie* case of illegality has been established; we put this issue first because it is by far the simpler and can be disposed of briefly and because it helps lay the groundwork for our general discussion of the market problem. (2) Judged by proper standards, the government established that Wisconsin is, at least *prima facie,* an appropriate market for testing the legality of the challenged acquisition.

1. ASSUMING THAT WISCONSIN IS A PROPER GEOGRAPHIC MARKET FOR PURPOSES OF THIS CASE, THE GOVERNMENT'S EVIDENCE ESTABLISHES *PRIMA FACIE* THAT THE EFFECT OF PABST'S ACQUISITION OF BLATZ MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN THE SALE OF BEER IN THAT STATE, IN VIOLATION OF SECTION 7

A. THE SALES PERCENTAGES OF THE LEADING SELLERS OF BEER IN WISCONSIN MEET THE STANDARD OF PRESUMPTIVE ILLEGALITY OF *UNITED STATES* V. *PHILADELPHIA NATIONAL BANK*

The framers of the Antimerger Act expressed particular concern with what economists call "oligopoly," the condition in which most of the business of a market is controlled by a few firms.[10] Theory and experience teach that when a market becomes highly concentrated or oligopolistic in structure, the intensity and effectiveness of competition—and in particular price competition—are likely to diminish. Each of the major sellers bulks so large in the market that a price cut by one cannot be ignored by the

[10] See, *e.g.*, S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5; *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363.

others, but must immediately be matched. Price cutting therefore does not pay, and tends to be avoided; "parallel policies of mutual advantage, not competition * * * emerge." *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 280.

In the perspective of the Antimerger Act—a statute whose dominant purpose is to prevent the creation or aggravation of oligopolistic conditions—the most harmful kind of merger, obviously, is one that by uniting firms which are already among the leading sellers in the market appreciably increases the danger of domination by the few. This, coupled with the pressing need in the merger area for clear and workable standards, led this Court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, to rule that a merger is presumptively illegal when it (1) produces a firm that has "an undue percentage share"—in the range characteristic of oligopoly—of the relevant market, and (2) results in "a significant increase" in the level of concentration in the market. 374 U.S., p. 363. The resulting firm in that case had a 30 percent market share, and the merger increased the aggregate share of the two leading firms one-third. The Court held that these facts brought the merger within its standard. *Id.,* pp. 364–365.

On the assumption that Wisconsin is an appropriate market, we think the standard of *Philadelphia Bank* has been met here. In 1957,[11] Blatz accounted for almost 13 percent of all beer sales in Wisconsin, which made it the leading seller there. Pabst was number four with more than 11 percent. The four

[11] The last complete year before the merger.

largest sellers had almost 48 percent, the eight largest 65 percent, and no other seller more than 2.78 percent. The merger produced a firm having a 24 percent market share, and it increased the aggregate share of the two largest firms from 25 to 36.6 percent, the share of the three largest from 36.5 to 48 percent, and that of the four largest from 48 to 58.6 percent. These facts place the merger within the standard.

First, in terms of the increase in concentration produced by the merger, this is an *a fortiori* case for applying the presumption of illegality. The challenged acquisition increased the aggregate market share in Wisconsin of the two largest firms by more than 40 percent; the corresponding figure in the bank case was only 33 percent.

Second, although Pabst's market share after the merger (24 percent) was slightly smaller than that of the merging companies in the bank case (30 percent), we think it was still "undue" under the standard of *Philadelphia Bank*. The standard is qualitative. The Court emphasized that the particular percentages at bar did not establish the standard's outer boundaries; indeed it intimated (374 U.S., p. 364, n. 41, and 366), and later decisions have made unmistakably clear (see, *e.g.*, *United States* v. *Continental Can Co.*, 378 U.S. 441, 461), that a market share as large as that which Pabst enjoyed as a result of acquiring Blatz would bring an acquisition within the zone of presumptive illegality. If Congress' concern with the competitive dangers of oligopoly requires that in the absence of a clear showing of justification any merger that palpably increases concentration in a market to a level plainly oligopolistic is, without more, to be deemed illegal—the teaching of *Philadelphia Bank*—then a merger that creates a market structure in which one firm has almost one-quarter of all sales (almost twice what any firm previously had) and three firms almost one-half (also a steep rise over their pre-merger share) is unlawful. For a market so concentrated is unlikely to display vigorous competition.[12]

B. ADDITIONAL FACTORS, SUCH AS THE STRONG TREND TOWARD CONCENTRATION IN WISCONSIN AND NATIONALLY, MAKE THIS AN *A FORTIORI* CASE

1. Under the standard of *Philadelphia Bank,* the plaintiff is not required to adduce evidence that concentration in the market affected by the challenged merger was on the rise, a factor this Court has deemed highly probative of a merger's anti-competitive impact. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 322. Nevertheless such evidence was introduced here, and shows, for example, that between 1955 and 1961 alone, the number of beer producers in Wisconsin declined by 30 percent (see Statement, *supra,* p. 4). The trend toward concentration is not an isolated characteristic of the Wisconsin market; it is national in scope. In 1948 the 10 largest brewers accounted for 33 percent of all beer sales in the United States; by 1957, this figure was 45 percent and by 1961, 53

[12] Professor Bain would classify the market structure in Wisconsin produced by the acquisition as an oligopoly of "'high-moderate' concentration," where concentration is "certainly enough to produce a substantial degree of oligopolistic interdependence among the few largest firms." Bain, *Industrial Organization* (1959), pp. 128–129.

percent (GX 211, R. 346). In 1957 the four largest brewers accounted for about 24 percent of all beer sales and the eight largest for 39 percent; by 1964 these figures were 32 and 51 percent respectively (JX 32, R. 170; *Brewing Industry Survey—24th Edition* (Research Co. of America, 1965), p. 106).

Against this background of rapidly rising concentration, the probable anticompetitive effects of the challenged acquisition take on an added dimension. For there can be no hope that the merger's adverse impact upon the structure of competition will be counteracted by natural economic forces pressing toward the decentralization and dispersion of economic power; the prospect is quite the contrary. The forces that independently of mergers are pushing the market steadily in the direction of excessive concentration compound the harmful effects of this merger.

The court below held that evidence of a trend toward undue concentration is relevant only when the trend is shown to have resulted from prior mergers, rather than from normal competitive forces with which Congress had no wish to interfere. This confuses two wholly different points. It is true that the Antimerger Act was not intended to interfere with normal competitive forces or to bar increases in concentration not attributable to mergers or other corporate acquisitions. But here a merger *is* involved—a merger that artificially accentuated a persistent trend (both in Wisconsin and in the industry as a whole) in the direction of domination by a handful of large producers. This merger should be judged against the background of the actual economic conditions in the industry, and not as if they did not exist. The district court's view would mean that the legal consequences of a merger are the same whether it occurs in an industry or market characterized by a large and constant or growing number of firms or in one where there is a marked trend toward oligopoly. Such a rule would not only be artificial and unrealistic but would disregard the policy of Section 7. The disappearance of numerous small, local companies, whether it be through acquisitions or through inability to compete effectively with their large regional and national rivals, underscores the public importance of barring combinations which eliminate as independent competitors such strong and viable companies—like Blatz—as remain.[13]

2. The error of the district court's ruling on this question is highlighted by another highly probative circumstance: whatever the prior history of this industry, Pabst's acquisition of Blatz, it is now evident, was the first of a series of acquisitions involving substantial beer producers.[14] Not only have these ac-

[13] The district court's holding that the government's evidence of an industry-wide trend toward concentration was irrelevant formed the principal basis for the court's dismissal of the complaint with respect to the national market. The error of this holding vitiates, we submit, its ultimate conclusion that the government had failed *prima facie* to establish that the merger's effect in the national market (which defendants conceded to be a proper market) brought it within the prohibition of the statute.

[14] Some of these acquisitions have already been challenged by the government:

(1) *United States* v. *Falstaff Brewing Corp.* (and Narragansett Co), Civ. No. 3523 (D. R.I.), filed July 13, 1965, 5 Trade

quisitions further accelerated the national trend toward concentration; they have removed as independent competitive factors some of the firms most capable of possible eventual expansion into highly concentrated local markets. By eliminating potential competition of this character, such acquisitions have

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Reg. Rep., ¶45,065. Falstaff, which entered into an agreement for the acquisition of Narragansett, was the fourth largest brewing company in the nation in 1964, with almost six percent of all sales. Narragansett ranks twenty-first nationally with 1.29 percent of beer sales in the country. It concentrates its efforts principally in New England, where it has its plant and where it is the leading seller, with 21 percent of sales. Falstaff, which sold in 32 States, was not yet active in the New England area.

(2) *United States* v. *Rheingold Corp., Jacob Ruppert, et al.*, Civ. No. 65, Civ. 3372 (S.D.N.Y.), filed November 9, 1965, 5 Trade Reg. Rep., ¶45,065. Rheingold ranked 11th on a national basis in 1964, with 3.1 percent of sales. It markets its beer in New England and the States of New York, New Jersey, Delaware and Pennsylvania; the two breweries it operates are in New York and New Jersey. It is the largest seller in the New York metropolitan area, with 16 percent of sales, and the seventh largest in New England, with 6 percent of that section's sales. Ruppert, the firm Rheingold proposes to acquire, ranks 20th on a national basis with 1.6 pereent of sales, but markets half its beer in New England and the remaining half principally in New York and New Jersey. The brewery it operates is located in New York. It is the second largest seller in New England, with 13.4 pereent of sales, and in the New York metropolitan area it accounted for more than 5 percent of sales in 1964.

(3) *United States* v. *Pittsburgh Brewing Co., et al.*, Civ. No. 65-1406, (W.D. Pa.), filed December 28, 1965, 5 Trade Reg. Rep., ¶45,065. This case involves the proposed purchase by Pittsburgh Brewing of a controlling interest in Duquesne Brewing. Both of these firms have their plants in Pittsburgh and concentrate their sales in Pennsylvania, Ohio, West Virginia, Virginia, Maryland, New Jersey and New York. On a national

made it even less likely that natural forces of competition in the beer industry may reverse the strong trend toward concentration that has taken hold in Wisconsin (as it has throughout the country) and was materially accelerated by the challenged acquisition. They may also have removed a significant restraining effect upon oligopolistic behavior in local beer markets.[15]

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basis, both are among the 30 leading brewers, and in Pittsburgh and the surrounding area ranked first and second in 1964, accounting together for about half of all beer sold in the area. In the Upper Ohio Valley, they ranked second and third, accounting together for 25 percent of all sales.

(4) *United States* v. *Jos. Schlitz Brewing Company, et al.*, Civil Action No. 42127 (N.D. Calif.), filed February 19, 1964, 5 Trade Reg. Rep., ¶45,064. This complaint challenges the acquisition by Schlitz of Burgermeister Brewing Corporation and Schlitz' proposed indirect acquisition of a controlling interest in General Brewing Company, formerly The Lucky Lager Brewing Co. of California. Schlitz, which had plants located in Wisconsin, New York, Florida, Missouri, California and Hawaii, is the second largest brewer in the country, with about 6.5 percent of sales. In 1961, it acquired Burgermeister, which with less than one percent of sales on a national basis ranks among the thirty leading sellers (JX 44, R. 182). Most of its sales were made in California, where it had its plant and ranked fifth, with about 8.5 percent of sales. As of 1961, Lucky Lager was the twelfth leading seller in the United States, with 2.51 percent of national sales. More than 60 percent of its total sales were made in California, where it was the top seller with over 18 percent of all California sales and where it operated two of its four breweries. Its other two plants were in Utah and in Washington.

[15] Cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 173–174; *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶17,244 (FTC); Hines, *Effectiveness of "Entry" by Already Established Firms*, 71 Q.J. of Econ. 132 (1957); and see pp. 27–28, n. 17, *infra*.

II. SALES OF BEER IN WISCONSIN DEFINE A PROPER MARKET IN WHICH TO TEST THE CHALLENGED ACQUISITION

Having argued that the increase caused by the Pabst-Blatz merger in the already large share of total beer sales in Wisconsin enjoyed by a small number of producers demonstrates *prima facie* the illegality of the merger, we now turn to the assumed premise of this argument—that sales percentages in Wisconsin are meaningfully related to the statute's concern; that Wisconsin, in other words, is an appropriate "market." [16]

A. MARKET DEFINITION IN A HORIZONTAL MERGER CASE PROVIDES A FRAMEWORK FOR APPRAISING THE COMPETITIVE SIGNIFICANCE OF CONCENTRATION STATISTICS

This Court has on several occasions been asked to infer adverse competitive effects from the fact that a

[16] This Court has treated as a threshold question in determining the relevant geographic market in a Section 7 case whether the area in question is substantial enough to warrant concern with the effects on competition of a challenged merger. Since the statute proscribes any merger that may substantially lessen competition in "any section of the country," a merger is forbidden even if its effects are felt primarily in an area smaller than the entire nation. On the other hand, the plaintiff is not free to choose an area so commercially insignificant that any adverse effect the merger might have would be *de minimis*. See S. Rep. No. 1775, 81st Cong., 2d Sess., p. 2; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 and n. 35; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 359, n. 36. Wisconsin in this case clearly meets this threshold test. Beer is a major commodity in that State. Since 1948, Wisconsin has consistently ranked ninth among the States in total consumption of beer, annually accounting for about 3 million barrels. The federal excise tax alone on 3 million barrels of beer is $27 million (Fdg. 18, R. 462). The commercial and economic im-

merger results in a substantial increase in the share that a few firms enjoy of the sales of a particular product in a particular geographical area. Always, however, this Court has insisted, as a precondition to attaching any weight to such statistics, that the following be shown: (1) The product sold by each firm whose sales are included is in fact competitive with that sold by the others (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 326; *United States* v. *Continental Can Co.,* 378 U.S. 441, 457); (2) there are no perfect substitutes for the product (*Brown Shoe Co.* v. *United States, supra,* pp. 325–326; *United States* v. *Aluminum Co. of America,* 377 U.S. 271); (3) the merging firms compete in the territory in question (*e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357); and (4) no sellers of the product, other than those whose sales are included in measuring concentration in the area, provide a fully comparable alternative source of supply for the purchasers located there (*id.,* p. 359; *Brown Shoe Co.* v. *United States, supra,* p. 339; cf. *Tampa Elec. Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327; *Standard Oil Co.* v. *United States,* 337

portance of the sale of beer in Wisconsin is therefore plain, and the decisions of this Court establish the propriety of regarding States—or even single metropolitan areas—as appropriate sections of the country for Section 7 purposes. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657; *United States* v. *Philadelphia National Bank*, *supra*, p. 359, n. 36; *Brown Shoe Co.* v. *United States*, *supra*, pp. 336–337; *Maryland & Va. Milk Producers Assn.* v. *United States*, 362 U.S. 458, 469. There is a substantial interest in protecting Wisconsin's consumers against substantial impairment of competition in the marketing of beer, and a merger that had such an effect could not reasonably be thought too trivial in its consequences to warrant scrutiny under Section 7.

U.S. 293, 299–300, n. 5). These conditions together define an economically meaningful market. If they are met, sales percentages can provide a rational index to the effect of the merger upon the structure of competition.

There is no contention in this case that inferences are being drawn from sales percentages as to a "product" when that "product" has perfect substitutes the sales of which are ignored. Similarly, there is no issue of relying on sales percentages to predict the probable consequences of a merger when the product is so broadly defined that it includes commodities which do not actually compete. Such problems are not raised by this case, where all are agreed that the relevant product is beer.

It is, however, necessary here to consider closely the geographical dimension of the market concept. Just as two sellers of the same product may not actually be competitors if the product is too broadly defined, so two sellers of the same product may not actually be competitors if the area in which the merger's effects are considered is too broadly drawn. *A* and *B* may sell the same product; but if *A* is located in California and *B* in New York, and high freight costs make it impracticable to ship the product long distances, the acquisition of *B* by *A* will not remove a direct competitive restraint upon the behavior of *A* and of the other sellers of the product who do business in the same area as *A*.[17]

[17] The elimination of a seller who is only a potential competitor in the territory served by another may, to be sure, remove an important restraining effect upon oligopolistic behavior and

On the other hand, simply establishing that the merging firms were direct competitors in an area does not suffice to prove that the area is a relevant market, and its sales percentages market shares upon which predictions of competitive conditions can be based with reasonable confidence. There must be good reason to believe that those selling there are the only sellers who provide significant direct competitive restraints upon the behavior in the area of the firm resulting from the merger. If other firms are able to compete in the area on equal terms with the present sellers, they, too, are direct competitive restraints upon the resulting firm. Market share figures which exclude them will therefore overstate the likelihood that the merger will produce or aggravate oligopolistic conditions.

Two contrasting examples will illustrate. Suppose that 100 firms produce and sell a product, but only two sell it in the State of Ohio. If, due to cost of transportation or other factors, these are the only sellers of the product who can practicably sell in the State, the merger will result in a monopoly, in a prac-

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support a finding of illegality under Section 7. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244 (FTC); cf. *Ekco Products Co.* v. *Federal Trade Commission*, 347 F. 2d 745 (C.A. 7); *Proctor & Gamble Co.*, Trade Reg. Rep. (Transfer Binder 1963–1965), ¶ 16,673 (FTC). Or it may remove a likely potential entrant and thus significantly decrease the probable intensity of competition in the future. But the elimination of an actual competitor—a seller of the same product in the same geographic market—clearly has a more direct and immediate effect upon the structure of competition and the likelihood that oligopolistic conditions will emerge.

tical economic sense, in that area. For, so long as the resulting firm does not raise its price to a level so high that other sellers can overcome their cost handicap and sell competitively there, it need take no account of the other members of the industry; they are not a competitive restraint. Ohio thus is a meaningful market.

But suppose instead that any producer of the product in question can sell in Ohio as cheaply as any other, and it is pure happenstance that only two are at the moment active there. If so, the merger of these two firms will not create a monopoly in any meaningful sense, since, if the resulting firm raised its price even slightly over the level prevailing elsewhere in the country, its customers would immediately switch to other members of the industry—who, by hypothesis, are perfectly able to sell in Ohio at the same price at which they sell elsewhere.

In short, the fact that one or a few firms has all the sales of a particular product in a particular area does not establish monopoly or oligopoly in an antitrust sense; it does not define a condition of competition. It has competitive significance only if the sale of the product in the area constitutes a market because the purchasers there cannot readily turn to other sellers of the same product or of perfect substitutes for it. "Substantiality" in testing a merger's impact under Section 7 "can be determined only in terms of the market affected." *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593.

While the market as an analytic concept plays a necessary role in appraising the competitive significance of the most commonly used indicia of competitive structure—percentages of sales on an area basis—there are pitfalls in treating the concept too literally, or pushing it to unwarranted extremes. For example, suppose the cost of transporting electrical fixtures is such that no producer who does not have a plant in Oregon can profitably sell in Portland—with one exception, a producer in Kansas who, because of unusually low production costs, encounters no difficulty in shipping to and selling in Portland. Plainly he is part of the market for Portland buyers of such fixtures. Cf. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 597–599 (S.D.N.Y.). But that does not mean the market should be expanded to include not only Oregon but also Kansas and all the States in between, on the theory that distant sellers can practicably compete in Portland. That would be unrealistic, when only one such seller is capable. The law's concern in defining an "area of effective competition" (*Standard Oil Co.* v. *United States*, 337 U.S. 293, 299–300, n. 5) is to identify all those producers of a product who can, without appreciable difficulty, compete in the section of the country in which the merger is alleged to harm the structure of competition.

The critical point, in any event, is that the definition of markets cannot be an exact science. Here, too, "the relevant economic data are both complex and elusive" and the question is not "susceptible of a ready and precise answer in most cases." *United States* v.

Philadelphia National Bank, 374 U.S. 321, 362. "The 'market', as most concepts in law or economics, cannot be measured by metes and bounds" (*Times-Picayune* v. *United States,* 345 U.S. 594, 611–612); "[i]ndustrial activities cannot be confined to trim categories" (*United States* v. *E. I. duPont de Nemours & Co.,* 351 U.S. 377, 395). Accordingly, this Court has candidly recognized that "fuzziness would seem inherent in any attempt to delineate the relevant geographical market," and that "some artificiality" may be unavoidable. *United States* v. *Philadelphia National Bank, supra,* p. 360, n. 37; cf. *United States* v. *Continental Can Co.,* 378 U.S. 441.

Within a particular area, there are bound to be a few customers who (perhaps because they are located near the periphery) have greater purchasing alternatives—a wider market—for a particular product than most. And among the sellers of that product who have not sold in the area, there are likely to be some—though precisely who and how many may be difficult to determine—for whom the economic barriers which establish the market are lower than for other outside sellers and perhaps nonexistent. Nor will it be possible, ordinarily, to estimate, except in the roughest fashion, just how great is the freedom from competition which the market confers upon those sellers who compose it as against sellers outside the market. Such uncertainties must be borne in mind in defining the legal standard for market delineation in merger cases—a question to which we now turn.

B. THE PLAINTIFF'S BURDEN OF PRODUCING EVIDENCE TO SHOW THAT AN AREA'S SALES PERCENTAGES ADEQUATELY REFLECT THE STRUCTURE OF COMPETITION IS SATISFIED BY PROOF THAT (1) THE PARTIES TO THE MERGER WERE IN DIRECT COMPETITION IN THE AREA AND (2) THOSE SELLERS OF THE PRODUCT IN QUESTION WHO DID NOT SELL THERE PROBABLY COULD NOT DO SO ON EQUAL TERMS WITH THE EXISTING SELLERS

The general propositions of market definition discussed above must be translated into a practical legal standard to define the quantum of proof that the plaintiff in a horizontal-merger case must present in order to establish that sales shares constitute shares in an economically meaningful market, and hence afford a rational basis for inferring probable competitive effects. We lay stress upon the careful formulation of a standard of market definition for two reasons. First, the Court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, laid down a simplified test for application to merger cases like the present. The test is based upon sales percentages, and, as we have explained, such percentages do not provide a rational basis for predicting a merger's effects unless they are derived from a reasonably meaningful market.

Secondly, this Court's expressed concern with the need to develop clear and definite standards for merger cases is no less applicable in deciding what the proper market is for appraising a particular merger than in deciding the ultimate issue of what changes in the structure of the market render illegal a merger that produces them. Businessmen and their counsel can derive little concrete guidance from the principle that a merger is illegal when it produces a firm with an undue percentage share of the relevant market and substantially increases the existing level of concentration in that market (*Philadelphia Bank*) if the standards for delineation of the market are vague—or if the lack of standards in defining the market results in allowing in the limitless range of economic evidence that the simplifying substantive principle was designed to exclude. The dangers of overbroad and undirected market determinations are especially acute in view of the inherent uncertainties in market definition mentioned earlier, which make it futile to ~~except that~~ expect in all but a few cases, that an attempt at an exhaustive inquiry into the market question will produce anything more useful than a more limited inquiry.

We think there are two elements that the plaintiff in a horizontal merger case must prove to confirm that the sales percentages in a section of the country may be treated as shares of a market. The first is that sellers whose sales are included were in fact in competition with each other. If not, clearly they belong to different markets and a direct impact upon the structure of competition in the area cannot be inferred from percentage shares derived from an amalgamation of the two.

The second element is some proof that sellers who were not doing business in the area at the time of the acquisition (albeit they sold the same product elsewhere in the country) were properly excluded in figuring market shares because they faced cost or other disadvantages preventing them from competing on equal terms with the existing sellers. The plaintiff must, in other words, present evidence indicating that the existing pattern of sales in the area was not merely fortuitous; he must present proof not only that other sellers did not sell there, but that there were economic barriers—for example, high freight costs, lack of adequate distribution facilities, settled preference for existing brands (see pp. 38–44, *infra*)—which made it difficult for them to do so.

Under this test, the plaintiff is not required to prove conclusively the existence of barriers to other sellers. Such a burden could not be met without a prohibitively time-consuming and complex inquiry into the particular costs and competitive capabilities of all the members of an industry and would ill accord with the statute's emphasis on "probabilities, not certainties." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323. Nor is it part of the plaintiff's burden to establish that the economic barriers relied on to define the market are of a particular height or uniformly effective in preventing entry. Be they high or even relatively low, such barriers give the sellers shielded behind them a spectrum within which they are free from effective competition. So long as a group of sellers enjoy *some* leeway to price without regard for the actions of other sellers outside the barrier, they constitute, in a practical economic sense, a market.[18]

Once the plaintiff establishes a market, the burden shifts to the defendant to show, if it can, that any adverse competitive effects of the challenged merger that the plaintiff seeks to infer from percentages of

[18] See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 425–426 (C.A. 2); *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 976 (S.D.N.Y.).

sales in that market should be discounted because the market barriers are so low as to pose no appreciable obstacle to some, at least, of the sellers who have been placed outside it. In the *Philadelphia Bank* case, this Court partially discounted the percentages relied upon by the government to prove market shares, pointing out that the record did not reveal the exaet dimensions or effectiveness of the economic barriers relied on to define the geographical market. 374 U.S., p. 364, n. 40. We think that is the proper procedure—rather than insistence upon rigorous, and unattainable, precision in market definition.

C. TESTED BY THE PROPER STANDARD, IT IS APPARENT THAT SALES OF BEER IN WISCONSIN *PRIMA FACIE* CONSTITUTE AN APPROPRIATE MARKET IN WHICH TO APPRAISE THE IMPACT OF THE MERGER OF PABST AND BLATZ

There is no disagreement with the proposition that Pabst and Blatz were direct competitors in Wisconsin at the time of the merger, where each sold a substantial amount of the beer it produced. This aspect of the market question is not in issue here. As now we show, the government also discharged its burden of a *prima facie* showing that the existing sellers have an advantage over other producers of beer in selling to Wisconsin beer consumers.[19]

1. We begin by noting four factors which, taken together, suggest persuasively that there are in fact barriers to effective competition in the sale of beer in Wisconsin by brewers not at present selling there, albeit these factors alone do not explain the nature

[19] Should the government prevail on this appeal, appellees will have an opportunity on remand to introduce their own evidence on the market as well as the other issues of the case.

and reasons for such barriers—a question we consider in the next section. The first factor is that not all members of the beer industry—indeed, not even most—sold in Wisconsin at the time of the acquisition. If there were no obstacles preventing members of the industry from competing freely in Wisconsin, one might expect that more than one-third [20] would be selling in this very important [21] beer market.

The second is that the identity of the brewers selling to Wisconsin consumers changed little over the seven-year period covered by the record in this case.[22] If the fact that not all members of the industry sell in Wisconsin were purely fortuitous, the identity of those selling there would not remain stable. Pabst and Blatz might have a substantial share of total beer sales in the State one year, but, if the market for beer were truly national, the next year—or the next—their places would probably be taken. Moreover, in a na-

[20] In 1961, 54 of the nation's 162 brewers sold in Wisconsin (Fdg. 22, R. 464).

[21] In 1961, Wisconsin ranked ninth among the States in the sale of beer and first in per capita consumption. Statement, *supra*, p. 4.

[22] In App. B, *infra*, pp. 50–51, we present in tabular form the rank and sales share by year for brewers doing business in Wisconsin for the period 1955–1961. As explained in n. 3, p. 5, *supra*, the table (based on JX 60–78, R. 198–216) excludes only those brewers that had less than one percent of total beer sales in the State; those that are included accounted in the aggregate for more than 80 percent of such sales. The table indicates no significant shifts (save those attributable to merger) in rank or market share among these sellers, and no exit or entry. The identity of these sellers—constituting a fair cross-section of beer competition in the State—showed no change in the seven-year period.

tional market (like that for locomotives, prescription drugs, or commercial aircraft) one would not expect a small group of sellers persistently to account for a much larger share of sales within a particular State than they enjoyed nationally. They could not keep this area as their private preserve, since all other members of the industry could, by hypothesis, sell there with equal facility. Hence their shares would fluctuate. Yet in Wisconsin, year after year, the same few firms, including Pabst and Blatz, have managed consistently to maintain much larger sales percentages than their national average,[23] and these substantial shares have remained generally stable (App. B, *infra*, pp. 50–51).

Third, this pattern of local concentration, rather than being limited to Wisconsin, appears to be typical of the structure of competition throughout the beer industry. Firms strong in some areas may be very weak in others and do no business at all in still others.[24] The picture that emerges is one highlighted by local or regional competition. The patronage of the beer consumers of a particular State is typically

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[23] Nationally the four largest brewers accounted for about 28 percent of total beer sales in 1961, and the eight largest for 46 percent; Pabst's share was 5.83 percent. In Wisconsin, in contrast, the four largest sellers of beer in 1961 had 58.6 percent of all sales, the eight largest 76.8, and Pabst-Blatz 27.4 (Statement, *supra*, pp. 4–5, 9).

[24] For example, Blatz prior to its acquisition by Pabst sold in forty States, and between one-third and one-half of its sales were in Wisconsin and between one-half and three-fourths in Wisconsin, Illinois, and Michigan. Pabst sold in every State, but one-half of its sales were made in just four. Statement, *supra*, pp. 7–8. See, also, pp. 22–24, n. 14 *supra*.

contested by relatively few of the nation's brewers. The prevalence of this condition throughout the industry suggests that it is likely to be related to economic factors limiting the selling areas of the industry's members.

Fourth, the record of this case indicates that a beer producer often charges substantially different prices (exclusive of freight) to its distributors, depending on their location, and that such disparities are persistent; often, prices vary as between neighboring States (GX 115, 124, R. 253-259, 261-271).[25] This phenomenon, too, implies that the market for beer is not a national one. If it were, a producer could not consistently command a higher price for his brand in one area than in another; the pressure of competition would be the same everywhere he sold. Charging different prices for the same brand rarely makes business sense unless the intensity of competition varies from area to area due to economic barriers that prevent particular producers from competing with equal ease in every part of the country.

2. Confirmation that competition in the beer industry is local rather than national in structure may be found in the manner in which beer is marketed. Beer—unlike, say, paper clips or gravel—is not a

[25] For example, on January 1, 1956, Blatz was selling its "Blatz Pilsner" brand beer in 24-12 oz. returnable bottles to its distributors net (excluding freight, taxes, allowances, etc.) for $2.33 in Michigan's Upper Peninsula and $2.46 in the Lower Peninsula; for $2.16 in the neighboring State of Illinois; for as little as $1.45 in parts of Pennsylvania; and for $2.06 in Virginia. The price in Wisconsin was $2.32742. Pabst's comparable price ranged from $2.085 in St. Louis to $2.75 in parts of New Jersey.

fungible commodity in which price is the only important consideration to the buyer. Nuances of taste, and other intangible differences, figure prominently in the beer drinker's choice. Brewers therefore strive to differentiate their brands in the public's mind. Each seeks to create a distinctive and desirable image that will induce consumers to prefer his brand (or brands).[26] This requires intensive and costly advertising and promotional campaigns directed at the consumer, and the development of networks of wholesale distributors who will vigorously cultivate the market and ensure the widespread availability of the particular brand.[27]

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[26] The Chairman of Pabst stated in a deposition (R. 130):

> Well, you can only increase sales by winning more consumers to your brand. The real sales struggle is the struggle between brands of beer and everything that goes with reaching the consumer plays a part in increasing sales. You have got to secure distribution in retail outlets, in the maximum number of retail outlets. This is point No. 1. You have got to get your beer where people can buy it. Then you have got to present it through advertising of one kind and another, whether it be media advertising or whether it be what we call point-of-sale or point-of-customer advertising to call attention of the customer to the brand. You have to do all of these things. It is a many-sided process.

[27] Most sales of Blatz and Pabst are through wholesale distributors (R. 130; see, also, GX 137, R. 276, 279–280), and the record clearly documents the importance of good distributors to the successful marketing of beer and the difficulty of enlisting them (*e.g.*, GX 140, R. 284–285, GX 145, R. 292). The critical importance which the industry attaches to brand advertising and promotions is also clearly demonstrated (GX 152–153, 155–156, R. 303–319.) The record shows, for example, that in 1959 and 1960 Pabst spent about $2 per barrel for the advertising and promotion of its beer sold in Wisconsin (computed from JX 57, 58, R. 195–196; GX 134, 136, R. 273, 275).

As a result of the industry's emphasis upon brand differentiation as a marketing tool, it seems clear that a seller who is established in a particular area has an inherent advantage over one who has not previously sold there, though their roles may be reversed in another area. An example will illustrate. Suppose *A* is a major brewer, but he has confined his selling efforts to the eastern seaboard. He has blanketed the area with advertising, promotions, and a network of distributors, and his brand is popular and widely sold. But in the midwest, his brand is unknown. He has never advertised, does not attempt to sell, and has no distributors there. Should he, nevertheless, be deemed an actual competitor [28] in the midwest, and his sales volume included in computing the market shares of those producers who do sell in the midwest? Surely not. He is not part of the midwest market, for he could not begin to compete effectively against the strongly entrenched firms there without undertaking elaborate, costly, and time-consuming measures to establish brand acceptance in that area.[29] Cf. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 797.

Such is the situation in Wisconsin. Those who sell beer there are able to do so by virtue of having culti-

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[28] As mentioned earlier (pp. 27–28, n. 17, *supra*), such a firm might, under some circumstance, be an important potential competitor, the threat of whose entry could exercise some restraining influence on the prices of the sellers in the market—albeit less than that of a firm actually in the market.

[29] A leading student of the subject has concluded that brand allegiance is probably "the most important barrier to entry" into markets. Bain, *Barriers to New Competition* (1956), p. 216.

vated a consumer desire for their brands in preference to others through years of advertising and promotions, and through the efforts of their distributors. The high degree of consumer acceptance they enjoy is graphically attested by Pabst's action in charging a higher price for Blatz brand beer after the acquisition than it charged for this brand in any other State (R. 431). Pabst's ability to do so indicates that Blatz, and no doubt the other market leaders in Wisconsin as well, enjoyed a protected market position by reason of their great popularity with the Wisconsin consumer. A producer of beer who sold no beer in Wisconsin and whose brand consequently was unknown in the State could not compete on equal terms with the existing sellers (even if transportation costs were not a factor, a question we consider next), due to the absence of any consumer demand for his brand. This would seem the most likely explanation why the sale of beer in Wisconsin has been persistently dominated by a few firms having stable sales shares. They are the firms whose brands are well known in the State, and who for that reason enjoy a competitive advantage that has discouraged entry by other brewers.

In so arguing, we assume of course that the barrier of brand differentiation runs—allowing for some unavoidable peripheral fuzziness—along the boundaries of the State of Wisconsin, so that a brewer who is well entrenched in a neighboring State could not readily shift his sales to Wisconsin. The record supports this assumption. Advertising and promotional campaigns are planned and conducted, and distributional networks organized, largely on a State or local basis (GX 137, R. 276–280; GX 140, R. 283–285; GX 141, R. 287; GX 142, R. 289; GX 145, R. 294; GX 153, R. 305–310; GX 156, R. 316).[30] A brand well known in one State might, therefore, be little known in an adjacent State; an excellent system of wholesale and retail distribution in one State might be of no help at all in achieving wide distribution and promotion of the brand in any other State. This is corroborated by the stable market shares in Wisconsin, and by the fact that brands normally were sold at the same price throughout each State but at different prices even as between neighboring States. It is therefore a valid inference that those who are established in Wisconsin enjoy an advantage over any other brewers, even those who might be doing business in the surrounding areas.

In addition to the barriers created by brand differentiation, sellers who do not supply the Wisconsin area in many cases almost certainly face substantial barriers in the form of transportation costs. Cf. *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 259 F. 2d 524, 529 (C.A. 2). It is true that the record in this case contains no direct evidence of such costs,[31] but since beer is a heavy, rela-

[30] One reason for this is that the States elaborately regulate the marketing of beer. A promotional or advertising campaign legal in some States might be illegal in others. This pattern of regulation tends to compel brewers to plan and operate such campaigns on a State-by-State basis (GX 142, 144, R. 289–291; GX 147, 148, 150, R. 298–302).

[31] However, we note that in *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 297, the Federal Trade Commission in 1957 found that

tively low-priced commodity, frequently shipped in bottles, freight costs must be an important element in total cost and they would of course increase in proportion to the distance between the brewery and the point of sale. That they in fact impose a barrier to the sale of beer in distant markets is strongly suggested by the fact—well documented in this record (Statement, *supra*, pp. 5–8)—that most beer sales by producers are made within the immediate areas of their breweries. Ninety percent of all beer sold in Wisconsin comes either from breweries actually located within the State or from Hamm's brewery just across the border in Minnesota, and this pattern holds across the nation.[32]

"[i]n the beer industry there is a wide dispersal of manufacturing facilities due mainly to high shipping costs relative to unit value. Thus, there is found throughout the country many beers of local or regional geographic distribution." See, also, 54 F.T.C. at 279 (examiner's findings). The Commission's order was eventually vacated on judicial review, 289 F. 2d 835 (C.A. 7), but this particular finding was not disturbed. See 289 F. 2d at 838.

[32] It is true that freight cost is presumably not an obstacle to competition by those firms that have breweries in Wisconsin but sell the bulk of their production elsewhere, Wisconsin being a surplus beer-producing State. But even if such production was included in delimiting the market, Pabst's and Blatz' market shares would not be substantially changed, since they, too, were substantial surplus producers in Wisconsin. Moreover, a producer located in Wisconsin but having his market elsewhere would still find it difficult to sell in Wisconsin in view of the barriers created by brand allegiance—our primary ground for arguing that the existing sellers in Wisconsin constitute a meaningful economic market. In delimiting the relevant market here, we have of course included all brewers who sold in Wisconsin regardless of whether they had a brewery there. As we

Moreover, there is evidence that brewers consider it important for effective distribution that they have breweries proximate to their important markets (GX 109, R. 249; GX 145, R. 296).

We think the foregoing facts suffice to establish *prima facie* that the group of sellers who at the time of the acquisition were actually selling in Wisconsin constitute a proper market for purposes of this case, and that their relative sales volumes in the State furnish a reliable index to the structure of competition in this economically important area of beer consumption.[33] The pattern of selling that holds throughout the industry, and the economics of beer marketing, indicate persuasively that these sellers had advantages

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have just noted, a brewer's market (where his customers are located) may not be the same as his place of production.

[33] If so, then for the reasons stated in part I of our argument it is apparent that the challenged acquisition is *prima facie* illegal.

We note here the possible argument that any seller capable of selling in Wisconsin—as manifested by the fact that he does sell there—is capable of selling *all* his output in Wisconsin and that accordingly a proper test of the merger's effect would require a comparison between the total production of Pabst-Blatz and the total production of all 54 brewers who sold in Wisconsin, subject to adjustment for multi-plant brewers, some of whose plants may be too distant to permit shipment into Wisconsin, due to freight costs. The record permits no such comparison; and it is doubtful how useful it would be. For there are surely limits beyond which a seller in Wisconsin could not substantially increase his market share without costly expansion of his distribution methods and substantially increased investment in advertising and promotions, as suggested by the remarkable stability of market shares in Wisconsin over time.

over other sellers of beer which insulated them (albeit not absolutely) from fully effective competition by such outsiders.[34]

[34] The same reasoning we have applied to the Wisconsin market also compels the conclusion that the district court erred in rejecting the three-State area of Wisconsin, Illinois, and Michigan as a relevant market. As this Court has made clear, within a geographic market there may be submarkets that are equally valid for Section 7 purposes. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336. Pabst and Blatz were not only strong contenders for the patronage of beer drinkers in Wisconsin; they were strongly entrenched throughout the three-State area of which Wisconsin is a part. This broader area, too, was one where both firms were in heavy competition at the time of the merger and where—given the nature of beer marketing—brewers who did not sell in the area would have found it difficult to penetrate without major efforts and expense.

There is no inherent reason for focusing inquiry upon a State or group of States, as opposed to a region within a State, or a region that cuts across State boundaries rather than follows them. Nor do we suggest that State boundaries necessarily have intrinsic commercial significance. At least in this case, however, there are strong reasons for centering attention upon States and especially Wisconsin. First, States are areas for which relevant market statistics are most likely to be available—especially in the case of a product, such as beer, which is subject to extensive State taxation and regulation. Second, businesses frequently organize their operations on a State-by-State basis, and the record shows this to be true in this case. This has special relevance here, since advertising and distributional policies—conducted on a State-by-State basis (see pp. 41–42, *supra*)—are at the heart of the most important economic barriers defining relevant markets in the beer industry. Pabst, for example, adopted a separate pricing policy in each State, and while in some cases a uniform price prevailed throughout a multi-State area, it was more common for the price to vary even as between neighboring States (GX 115, R. 253). Significantly, moreover, the State of Wisconsin was singled out for special treatment; as mentioned earlier, We do not suggest that the market we have demarcated is perfect; no market is. The only question is its *prima facie* validity as a basis for application of the legal standard of *Philadelphia Bank*. This much, surely, has been demonstrated. The government's evidence established the strong probability that those who have a market in Wisconsin—brewers who sold there at the time of the acquisition—are not (within limits of course) subject to significant competition in that market from most other brewers. They have an entrenched position giving them an appreciable cost advantage over such outsiders. Since there thus appears to be an area within which prices charged, and other business moves made, by the Wisconsin sellers are free from significant constraint by other members of the industry, the policy of the antitrust laws requires that the conditions of effective competition among the brewers who sell in Wisconsin not be impaired by merger.

Pabst sold its newly acquired Blatz product at a higher price in that State than in any other. Thus, while there may be other submarkets for testing this merger, Wisconsin is a particularly appropriate one.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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MARCH 1966.

APPENDIX A

The exhibits in this case were offered and admitted in evidence at the following pages of the transcript of proceedings in the district court:

Transcript of 1-27-64

Exhibit:	Page
JX 1-100	61
GX 105-110	62-65
GX 115-118	74-75
GX 124-125	76-77
GX 133-136	109-110
GX 137	[1] 110
GX 140-156	116

Transcript of 1-28-64

Exhibit:	Page
GX 157-185	214
GX 186-191	159-163
GX 192A-215	170-186
GX 216-236	187
GX 245-266	143-158
GX 267	200-201

[1] Admitted at p. 214 of the transcript of 1-28-64.

APPENDIX B

State of Wisconsin

Sales of beer (barrels) by companies with 1 percent or more of the volume of sales per annum

Company and location of brewery	Y=in Wisconsin; O=outside Wisconsin	1955		1956		1957		1958		1959		1960		1961	
		Rank	Market share (percent)	Rank	Market share (percent)	Rank	Market share (percent)	Rank	Market share (percent)	Rank	Market share (percent)	Rank	Market share (percent)	Rank	Market share (percent)
Blatz: Milwaukee, Wis	Y	1	14.01	1	12.72	1	12.81	1	12.99	(1)	(1)	(1)	(1)	(1)	(1)
Schlitz: Milwaukee, Wis	Y	2	11.54	2	11.73	3	11.64	3	11.32	3	11.25	3	10.98	3	10.88
Pabst: Milwaukee, Wis	Y	3	10.51	4	10.88	4	11.14	4	10.73	1	24.80	1	26.14	1	27.41
Hamm's: St. Paul, Minn	O	4	8.09	3	11.01	2	12.15	2	12.45	2	12.24	2	12.34	2	11.97
Miller: Milwaukee, Wis	Y	5	7.04	5	6.29	5	5.81	5	5.21	6	4.49	6	4.35	4	[3] 8.36
Heileman: La Crosse, Wis	Y	6	5.65	6	5.08	7	4.00	8	3.82	7	3.96	4	8.28	5	[4] 8.17
Kingsbury: Sheboygan, Wis	Y	7	3.36	7	3.86	6	4.36	6	4.77	5	4.60	(4)	(4)	(4)	(4)
Gettelman: Milwaukee, Wis	Y	8	3.07	8	3.21	9	2.78	9	3.36	8	3.60	7	3.60	(4)	(2)
Anheuser-Busch: St. Louis, Mo	O	9	2.58	9	2.76	8	3.14	7	3.86	4	4.80	5	5.56	6	5.72
Leinenkugel: Chippewa Falls, Wis	Y	10	2.34	10	2.28	10	2.30	10	2.32	9	2.31	8	2.22	7	2.16
Ind.-Milwaukee: Milwaukee, Wis	Y	11	1.85	11	1.89	11	1.92	12	1.88	14	1.82	11	1.70	11	1.52
Weber-Waukesha: Theresa, Wis	Y	12	1.82	12	1.86	15	1.69	15	1.23	(4)	(4)	(4)	(4)	(4)	(3, 4)
Oshkosh: Oshkosh, Wis	Y	13	1.75	13	1.74	13	1.77	13	1.83	12	1.85	12	1.66	10	1.55
Drewry's		14	1.50	14	1.62	12	1.80	11	2.02	11	2.10	9	2.13	8	2.13
Chicago, Ill	O														
South Bend, Ind	O														

Oconto: Oconto, Wis	Y	15	1.43	15	1.56	14	1.70	14	1.82	13	1.85	13	1.65	12	1.29
Stevens Point: Stevens Point, Wis	Y	16	1.27	17	1.32	16	1.28	17	1.21	18	1.14	17	1.10	14	1.07
Walter (Appleton): Appleton, Wis	Y	17	1.25	19	1.15	19	1.15	18	1.19	17	1.22	14	1.21	13	1.16
West Bend: West Bend, Wis	Y	18	1.20	18	1.17	21	1.12	22	1.04	20	1.03	20	.94	20	.84
Peoples (Oshkosh): Oshkosh, Wis	Y	19	1.13	20	1.12	22	1.09	21	1.07	19	1.05	19	1.01	19	.96
Walter (Eau Claire): Eau Claire, Wis	Y	20	1.06	22	1.04	23	1.01	23	1.02	21	1.00	18	1.06	15	1.06
Bohemian		21	1.05	24	1.00	24	.92	24	.90	23	.84	22	.82	[5] 21	[5] .83
Boise, Idaho	O														
Chicago, Ill	O														
Spokane, Wash	O														
Rohr-Green Bay: Green Bay, Wis	Y	22	1.02	21	1.06	20	1.14	19	1.15	15	1.26	15	1.20	17	.98
Fox Head: Waukesha, Wis	Y	24	.89	16	1.35	17	1.24	20	1.14	10	2.12	10	1.94	9	[3] 2.11
Fauerbach: Madison, Wis	Y	23	.95	23	1.02	18	1.16	16	1.22	16	1.23	16	1.16	16	1.04

[1] Acquired by Pabst and included in Pabst share.

[2] Miller acquired Gettelman in January 1961. *The Wall Street Journal* (Midwest edition), January 16, 1961, p. 14.

[3] Heilman acquired Kingsbury in January 1960 and Fox Head in July 1962. *Moody's Industrial Manual*, 1963, p. 767. Weber-Waukesha had previously been acquired by Fox Head. *Modern Brewery Age Blue Book*, March 1961, p. 131.

[4] Not listed.

[5] Bohemian was acquired by Atlantic Brewing Co. *Modern Brewery Age Blue Book*, March 1961, p. 124.

Source: JX 60-78, R. 198-216.

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