Thinking Through Anticompetitive Effects of Mergers on Workers

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Recent years have seen an explosion of interest in labor market monopsony and its potential intersection with antitrust policy among academic economists, antitrust practitioners, and policy analysts. This note focuses on the implications of labor market monopsony in the merger context to make four points. First, “monopsony” often is used in labor market contexts to mean something quite different from the classical notion of market power associated with employer concentration, that is, too few employers competing for a given pool of workers. Most of these usages are not associated with actionable antitrust harm, nor, and are not further considered in this note. Second, antitrust law has both the ability and responsibility to reach anticompetitive actions by employers, whether through mergers (Clayton Act Section 7), collusion (Sherman Act Section 1), or attempted monopsonization (Sherman Act Section 2). Third, the burgeoning economics literature on the negative correlation of employer concentration and wages raises questions that merit further exploration, but the current literature may provide little evidence on causal impacts of labor market concentration on wage levels, nor does it provide a guide on merger thresholds. Finally, while it may be premature to require an analysis of potential labor market harm in all merger investigations, one can develop guidance for where enforcement agencies might most productively deploy resources to investigate these potential harms.

Antitrust is not an appropriate or available solution for many labor market monopsony problems.

The first usage of “monopsony” generally is attributed to Joan Robinson, who wrote in 1932 that it “is necessary to find a name for the individual buyer which will correspond to the name monopolist for the individual seller. In the following pages an individual buyer is referred to as a monopsonist.”¹ But, “monopsony,” as it is frequently used among labor economists, is not the mirror image of monopoly (or oligopoly). The monopsony label often is applied to many deviations from a perfectly competitive outcome that are unrelated to the number or concentration of employers competing to hire from a pool of workers.² These include outcomes arising from a wide range of frictions in labor markets, such as information failures, transactions and search costs, idiosyncratic match quality, unwillingness of workers to relocate, and more.³ These frictions typically do not arise from a reduction in competition among firms, either through merger or

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² See, for example, the characterization of monopsony as a firm-level labor supply elasticity that is less than infinity in Orley C. Ashenfelter, Henry Farber and Michael R Ransom, “Modern Models of Monopsony in Labor Markets: Tests and Estimates,” Journal of Labor Economics, 28 (2, April 2010), 203-210; and “dynamic monopsony” models proposed by Alan Manning, Alan, Monopsony in Motion, Princeton, NJ: Princeton University Press, 2003.

coordinated conduct. Nor is there a suggestion in most of this literature that they are created by unilateral conduct by firms to exclude or disadvantage rival employers. Antitrust enforcement generally is not an effective or appropriate tool to address frictions such as these.4

Even where there are too few employers bidding for a set of potential workers to ensure competitive wage-setting—classical monopsony—that situation may not arise from actions of those employers actionable under the antitrust laws. A coal company may have labor market power because it is a dominant employer in a rural county, but if that position is not due to acquisition of rival employers or exclusionary behavior, antitrust likely has little to contribute. This is the labor market analog of the Court’s opinion in U.S. Steel (1920) that “the law does not make mere size an offense.”5 By the same symmetry, however, antitrust law condemns the acquisition of market power through anticompetitive actions such as mergers, collusion, or exclusionary behavior, whether those actions are targeted at downstream purchasers or upstream suppliers, such as workers.

Antitrust enforcement has both the ability and responsibility to reach anticompetitive actions by employers

Antitrust law condemns anticompetitive behavior in pursuit of market power, whether those actions harm downstream purchasers of a firm’s products or upstream suppliers of inputs, including labor. Myriad cases support this conclusion in both the conduct realm and mergers.6 The economic and legal arguments that underpin this conclusion for mergers that reduce competition upstream are laid out in Hemphill and Rose (2018).7 That article demonstrates “how economic reasoning and case law support the conclusion that lost upstream competition is an actionable harm to the competitive process,” argues against the narrow view of “consumer welfare” as suggesting that “demonstrated harm to the merging firms’ downstream purchasers or final consumers constitutes an essential element of any antitrust claim.”8 Nor can reductions in wages resulting from a loss of competition be maintained as a legitimate efficiency defense, as noted in the concurring opinion in United States v. Anthem (D.C. Cir. 2017): “there is no dispute that, to have

7 See ibid. For labor market specific discussions see also Ioana Marinescu & Herbert J. Hovenkamp, Anticompetitive Mergers in Labor Markets, Indiana Law Journal (forthcoming 2018), https://scholarship.law.upenn.edu/faculty_scholarship/1965/ [https://perma.cc/A23X-ZM4T]; Suresh Naidu, Eric A. Posner, and E. Glen Weyl, “Antitrust Remedies for Labor Market Power,” Harvard Law Review, Vol. 132(2, December 2018): 536-601, with the caveat that some arguments in the latter appear speculative or superficial (e.g., “agencies have never, to our knowledge, employed an economist whose primary expertise is in labor markets” (at 542) may be factual as to their knowledge but is far from correct, as a quick perusal of FTC Economist biographies or a simple Google search of “FTC economist labor” would reveal).
any legal relevance, a proffered efficiency cannot arise from anticompetitive effects.”

Rather than duplicate these arguments here, interested readers are referred to Hemphill and Rose (2018).

**Empirical correlations of wages and employer concentration should be interpreted with caution.**

A growing empirical literature in economics correlates aggregate measures of employer concentration with wages, and generally concludes that occupations or industries in areas with fewer (more concentrated) employers are associated with lower wage levels. The authors of these studies generally acknowledge that the “labor markets” they define may not align with proper “antitrust labor markets,” instead being based on a variety of heuristics to facilitate regression analysis across many sectors and geographies. For example, the geographic bounds of a “market” typically are assumed to be a county or commuting zone in the U.S.; the labor market may be all workers in a particular industry (across all occupations) or workers in a 6-digit Standard Occupational Code (SOC) job (e.g., 43-6011, Executive secretaries and administrative assistants); concentration measures may be developed from employment across firms in that industry-county in a given year or vacancies posted by firms in a given occupation-commuting zone in a given quarter. Each of these choices may raise as many questions as it answers.

While a negative correlation between wages and measures of employer concentration appears to be quite robust, it may shed little light on the underlying reasons wages appear inversely related to employer concentration even if one takes those correlations at face value. There are several reasons for this, many analogous to concerns raised about the statistical studies of price (or mark-ups or profits) and concentration in product markets; see for example Steven Berry's 2017 FTC Microeconomics Keynote address "Markups and Concentration, Redux" and his testimony in the FTC 2018 Competition hearings.

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To understand one fundamental problem, it might be useful to look at a graph of supply and demand in a labor market, as above. Suppose that the labor supply curve for this particular labor market is upward sloping, as shown by the red line marked Labor Supply. At the market level, this is quite plausible: higher wages most likely will induce existing workers to offer more hours of work or draw new workers into the market. In competitive markets, wages are set by where the labor supply curve intersects with labor demand in the market—an example would be the point marked “Competitive,” where the red Low Labor Demand curve intersects the red Labor Supply curve, leading to an outcome of Wage_0 and Employment_0.

Now consider what might lead labor demand in a market to change. Perhaps a new employer moves into an area, shifting out aggregate labor demand: wages rise, and employer concentration, coincidentally, falls. Or firm shuts down a factory: Aggregate labor demand and wages fall, employer concentration rises. But we can’t tell from those facts whether each employer is moving along a competitive labor supply curve or along a monopsony marginal labor cost curve, nor can we tell from wage movements or concentration whether there is more or less monopsony power. Without econometrically identifying the location of these curves, merely observing wages and employment does not tell us whether wages are set monopsonistically or competitively. Wages increase with higher labor demand, whether the market is competitive or a monopsony, but I need more information to tell whether that is movement along a labor supply curve (red, competitive) or a marginal labor cost curve (blue, monopsony).

Moreover, while there may be a correlation between wages and concentration, it is not necessarily causal. As Berry points out, both concentration and wages (prices) are equilibrium outcomes determined by other factors in the market. Most of the aggregate studies of wages on employment HHI face this problem. Industrial Organization (IO) economists confronted this challenge in the late 1970s, when the field began to recognize the fundamental causal identification problem in these types of analyses. Now our colleagues in other applied microeconomics fields have rediscovered this problem, as Steve Berry explained at the first FTC hearing in September. As tantalizing as it may be to wring a causal story from these correlations, we have to resist.

But I think there is more at work, as well. In particular, the desire to draw general conclusions across a large swath of the economy leads to analysis that is far from what an antitrust investigation would need to prove. Consider the “labor markets” used in some of the recent work. In one study, it might be county employment within a 4-digit SIC code industry. But we know most workers, apart from the most specialized, likely do not look for work only within a 4-digit SIC code industry boundary. Others use occupation codes and look across all employers in a commuting zone. But here again, this likely does not reflect patterns of substitution for workers. Low skilled workers may shift across occupations with similar low skill requirements. Young workers may be fluid across occupations early in their career; more experienced workers look within narrower bounds. For example, recent employee searches that I was engaged involved five different 6 digit SOCs: Senior Administrative Assistant, Research Support Associate, HR Personnel Coordinator, Graduate Administrator, and IT Systems Engineer. Yet we had some top applicants who applied to at least two of these, with pairwise applications ultimately linking all 5 of these searches. Only one
of the top four resumes in a recent search came from someone outside the Boston commuting zone—Florida. But for faculty searches, applicants are drawn from an international pool. And the construction crew vehicles around MIT sport MA, NH, and Maine license plates. The challenges posed for academic research are considerable, for analysis that would stand up to litigation challenges, are immense.

How should enforcement agencies evaluate labor market impacts of mergers?

The challenges for broad empirical analysis in this setting do not suggest that enforcement agencies ignore anticompetitive behavior in labor markets. Nor have they, as attested to by the history of enforcement activity described in Hemphill and Rose (supra note 6), the agencies’ 2016 Antitrust Guidance for Human Resources Professionals, recent no-poach cases, and more. But it is also true that merger-related reductions in labor market competition have not featured in many challenges. Should this change? Should agencies go as far as suggested by FTC Chair Joe Simon’s October 3, 2018 testimony before the Senate that he has directed staff to examine the labor market impact in every merger investigation?

In the merger context, a working paper by Elena Prager and Matt Schmitt on hospital mergers exemplifies a fruitful direction for scholars exploring the evidentiary foundation for employment based upstream challenges, and perhaps provides some guidance for enforcers. Their work suggests that hospital mergers that substantially increase concentration are associated with wage effects on the order of 1 – 1.5% lower wage growth per year for some classes of workers—primarily specialized health care workers (pharmacists and nurses) and skilled non-health workers (think hospital administration). Low-skilled and unskilled workers did not appear to be affected. This is an important finding in a well-focused and carefully executed study. Mergers may matter, and may matter for workers.

However, its results also suggest that failure to focus on labor market effects, in this context, was unlikely to have led to underenforcement. Why? First, it is not yet certain that the impact occurs from a reduction in labor market competition, as opposed to a decrease in labor demand — which could result from output restrictions due to greater product market power by the merged hospital or from more efficient operations post-merger. These have very different implications for policy and antitrust enforcement. But more importantly, because this study's wage effects appear to be significant only for the most concentration-increasing mergers—ΔHHI of 3000 or more — which are wildly beyond the HMG thresholds. Under the Horizontal Merger Guidelines, we would expect those mergers to be challenged on product market grounds. Given that, how did these mergers go through? Many of the mergers in their sample appear to have occurred in relatively small communities, suggesting they may have been below the HSR reporting thresholds, and took place during the period in which the FTC was regrouping after a string of trial losses in hospital merger challenges. Perhaps the courts should give greater deference to FTC hospital merger challenges, and state AGs should challenge more hospital mergers. But it seems unlikely from these results that there were many hospital mergers that looked competitively benign on the product market side and yet had significant anticompetitive wage effects. This is important, as enforcement resources are limited. If agencies add extensive labor market analysis to all merger investigations, we should

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expect them to investigate and challenge fewer mergers overall. That tradeoff is not an obvious improvement for consumers, workers, or our overall society.

This study is a compelling call not only for further academic research in this spirit—reflecting a granularity of analysis that one might call hand to hand combat, as opposed to aerial strafing. It also suggests greater attention to labor market impacts in select merger investigations, pointing most directly to those with significant specialized occupations that are dependent upon labor market competition between the merging firms. That leads to the important question: What merger challenges have the agencies missed, or would they in the future miss, by neglecting to focus enough attention on anticompetitive effects on employees?

As the Prager and Schmitt work suggests that the answer probably is not hospital mergers. With labor market harm aligned so closely with product market harm, adding additional harmed markets to an investigation or challenge adds costs without obvious benefits. But their work suggests agencies might pay particular attention to labor market impacts when both firms are significant employers of the same type of specialized labor (including senior management talent), but their products may not be sell-side substitutes, or may not overlap enough to hit the guideline concentration thresholds on the product side. These could even be potential competition or complementary product mergers. In the health care setting, this might flag hospital acquisitions of physician practices, rehab facilities, or specialty health care businesses that draw on similar employee pools in a relevant geographic market, for example. Skipping a labor market screen may blind agencies to anticompetitive mergers in these cases.

Another example, on the DOJ side, is suggested by the coincidence of the second most highly concentrated occupation in the Azar, Marinsecu, and Steinbaum paper (supra note 10)—rail car repairers and the April 2018 DOJ no poach action against rail equipment manufacturers Knorr-Bremse and Westinghouse Air Brake (Wabtec) alleging the companies had “for years maintained unlawful agreements not to compete for each other’s employees,” and had “similar ‘no-poach’ agreements with Faiveley Transport before Faiveley was acquired by Wabtec in November 2016.14

Wabtec and Knorr entered into pervasive no-poach agreements that spanned multiple business units and jurisdictions. Senior executives at the companies’ global headquarters and their respective U.S. passenger and freight rail businesses entered into no-poach agreements that involved promises and commitments not to solicit or hire one another’s employees. These no-poach agreements primarily affected recruiting for project management, engineering, sales, and corporate officer roles ...

Just as an agreement to collude on the product market side is strongly suggestive that the firms in the agreement see each other as competitors—else why the need to collude—these labor market agreements suggest competition for a common pool of employees. The breadth of these agreements—spanning “multiple business units and jurisdictions” could imply that the labor market overlap is quite broad in this sector. Yet the DOJ and European Commission (EC) allowed the Wabtec – Faiveley merger in 2016 after the EC ordered divestiture of Faiveley’s sintered friction materials unit, used for various purposes including in manufacture of train brakes, and the DOJ ordered divestiture of Faiveley’s US freight car brakes unit and a freight car brake control valve under development by Faiveley. Those remedies address specific product market concerns, but do not appear to reflect possible labor market impacts that could be broader than the divestiture units.


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This may be a live question. Wabtec announced an acquisition of General Electric’s transportation business, which makes train engines, in May 2018. That merger received second requests from DOJ in July 2018 and the companies have stated they expect to close in early 2019. The history in this sector strongly suggests examining labor market competitive impacts in this investigation.

These may be examples of mergers in which the type of narrow product market overlaps the agencies focus on in typical merger challenges could miss the locus of competitive harm to workers, and therefore in which the enforcement resources needed to do at least a screen for labor market effects might be most usefully deployed. This example also raises the importance of thinking about labor market impact with respect to remedies, not only with respect to what product market divestitures might allay product market competitive concerns, but structuring divestitures also to allay labor market competitive impacts. That suggests designing remedies with attention to the geography of labor markets as well as product markets.