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Labor-Economy Data Informs Antitrust Law But Needs Work

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Labor market concentration and its potential effects on workers is a topic increasingly debated among antitrust practitioners and academics.

The potential link between labor market concentration and lower wages has led to questions of whether and how labor issues should inform merger review and — more broadly — antitrust investigations.

COVID-19 has strained some industries, such as airlines, and may result in consolidation of some employers, further raising labor market concentration concerns.

This article describes some of the current research regarding labor concentration and its impact on workers, how labor concentration issues are being raised in the courts and how economic analysis can inform antitrust inquiry moving forward.

The Need for a Rigorous Economic Framework

Parallel to the monopolist, a single seller with many buyers, the term monopsonist describes a single buyer with many sellers.

The classic example is that of a company town in which there is a single employer, or buyer of labor, and many workers — or sellers of labor.

As monopolists may exercise monopoly power through product price markups, monopsonists may exercise monopsony power by paying workers lower wages.

Both monopolists and monopsonists illustrate the market power that can arise in markets with few competitors.

There are a number of ways that a labor market may be concentrated, leading to some degree of monopsony power, including a small number of regional employers, restrictive labor contracts and other frictions. These other frictions can include high relocation, licensing or training costs.

At present, academics and practitioners have not reached a consensus as to the level of concentration in

U.S. labor markets.

Although academics recognize many labor markets are not perfectly competitive,[1] it is difficult to empirically establish the relationship, if any, between labor market concentration and its effect on wages in any given labor market.[2]

Further, labor markets are often times different from product markets in that restraints on trade that might appear to be anti-competitive generate clear pro-competitive benefits that need to be accounted for when analyzing the overall effect on competition.

A classic example are noncompete clauses where academic research indicates that such clauses can be associated with more on-the-job training and higher compensation when negotiated directly with workers.[3]

It is our view that without identifying a set of analytical methods and/or rigorous standards for when a certain level of market concentration or a certain contractual arrangement generates incremental market power of antitrust concern, increased antitrust scrutiny in labor markets may miss the mark.

Indeed, academics note that it is hard to determine whether lower wages stem from the exercise of monopsony power or simply from lower labor demand, greater productivity, or market frictions.[4]

Further, even in labor markets where academics find evidence of monopsony power, a central question is how can courts and regulators ascertain whether the alleged monopsony power is based on structural features, or frictions, of the labor market that exist independent of any conduct by an employer, or set of employers, that might be anti-competitive.

In the remainder of this article, we consider two scenarios where these issues are playing out.

Labor Market Concentration and Antitrust Merger Review

There is increased interest in accounting for labor markets in merger review. For example, the U.S. Department of Justice hosted a public workshop in September 2019 focused on labor monopsony issues that addressed this topic, and the Federal Trade Commission held a 2018 hearing that included the issue of antitrust in labor markets.[5]

Additionally, several recent cases have considered monopsony issues as part of the antitrust review. For example, in the 2014 Tyson Foods Inc. acquisition of Hillshire Brands Co., the DOJ required a divesture to avoid monopsony in the sow purchasing market.[6]

In 2017, the U.S. Court of Appeals for the D.C. Circuit voiced concerns about monopsony power in negotiations between hospitals and doctors from the failed merger of Anthem Inc. and Cigna Corp.[7] In 2018, the FTC resolved monopsony concerns about Grifols SA's acquisition of Biotest, a U.S. subsidiary of Biotech AG, by requiring Grifols to divest certain assets.[8]

If labor market concerns continue arising in merger matters, a critical issue is how to best weigh labor market considerations relative to other pro- and anti-competitive effects.

Traditionally, merger analysis focuses on consumer welfare, which may not be directly impacted by labor market conditions.

Researchers and practitioners have proposed several frameworks to expand analysis beyond consumer welfare. Some proposals apply comparable product market analyses to the labor market, which includes evaluating measures of market concentration.[9]

Others suggest broadening analysis to consider the welfare of merging firms' trading partners or total welfare in order to encompass the consumer welfare standard, as well as an impact on labor markets.[10]

If regulators want to more rigorously pursue potential competitive effects of mergers on labor markets, the analytical framework should include at least the following three elements:

- Rigorously link the analytics to the economic theory.
- Holistically assess all potentially impacted parties.
- Consistently apply across affected markets.

Although it is possible to bring a rigorous labor analysis into merger review, there are challenges.

There is a deep academic literature invested in measuring empirical relationships between market features and labor market outcomes, such as wages, as well as a younger, structural modeling literature modeling workers' labor market preferences.[11]

However, these models either tend to be simpler than those currently used to evaluate product markets or are more complicated but are not as commonly used.

Further, merger reviews inclusive of labor market impacts introduce additional complications compared to those focused purely on product markets. In particular:

- A measured impact to labor markets would need to be systematically weighed against the other factors relevant to the review.
- A proposed labor market may not overlap with a proposed product market, and defining it may require a different approach.
- A proposed labor market may, in fact, consist of several labor markets that incur more or less harm.

Without a rigorous approach that leverages the tools of labor economics to expand beyond the consumer welfare standard, it seems unlikely that labor issues will become a central piece of merger analysis. Simply appending a labor analysis to the consumer welfare standard may relegate labor issues to the sidelines, as efficiency currently is,[12] with various ad hoc approaches to measuring it and demonstrating its impact.

Labor Market Contract Restrictions

Beyond mergers, another area of antitrust interest where rigorous economic analysis is critical is contract restrictions, such as no-poach agreements among employers and noncompete clauses between employers and employees.[13] These clauses exist in many types of employment, skilled and unskilled alike.[14]

Recent waves of litigation have alleged that such contract restrictions may harm competition in labor markets.[15] Economic analysis is critical to assessing these types of allegations because the contract restrictions may stem from pro-competitive motivations, such as protecting firms' trade secrets, intellectual property, and client lists,[16] as well as encouraging firms' investment in employee training.[17]

Indeed, the DOJ has issued guidance in recent years to help clarify the types of contractual arrangements that it views as the biggest antitrust concern. In 2016, the DOJ and FTC issued human resource guidelines noting that naked horizontal agreements between competitors to fix wages or not hire one another's employees that are not ancillary to a broader pro-competitive purpose are contractual provisions that most likely harm competition.[18]

The DOJ, however, has taken a different stance on contractual provisions that are vertical in nature. For example, a number of private class action lawsuits have targeted franchise agreements that limit franchisees' ability to solicit and/or hire employees already working in the franchise network. Because franchise agreements are inherently vertical in nature, and franchisees are invested in the brand as a whole, these types of intrabrand restraints raise more complex economic issues relative to naked horizontal restraints that are interbrand in nature.

In 2019, the DOJ weighed in, clarifying that most no-poach agreements between franchisors and franchisees are a form of vertical restraint that, consistent with the economics of vertical restraints, are better evaluated under the rule of reason.[19] When these cases are litigated under the rule of reason, affiliate economic analyses are critical, including a well-defined relevant antitrust market, analysis of market power in that market, analysis of incentives, and assessment of antitrust impact and damages.

In December, the DOJ brought its first criminal no-poach case, which should help clarify which factors elevate a no-poach agreement to per se. The case was brought against a health care staffing company that had an explicit agreement among the co-conspirators to pay lower wages for "certain physical therapists and physical therapist assistants."[20]

We note several key structural features of the market at issue — the firms were direct horizontal competitors, they competed in a very well-defined local labor market, and the communications to fix wages were clearly not ancillary to any other joint economic enterprise.

Such structural features differ substantially from, for example, a franchise no-poach matter or a non-compete matter involving vertical restraints and the potential for clear pro-competitive benefits. It is our view that more cases like the foregoing will further clarify when and how contractual labor market restraints can cause anti-competitive harm.

Conclusion

As courts continue to wrestle with how to incorporate labor market monopsony in their considerations, the path forward will require engagement with the many complex economic issues that distinguish labor market antitrust analysis from traditional product market antitrust analysis.

Given the importance of balancing potential pro-competitive and anti-competitive effects of labor market restraints, the complexities of defining relevant labor markets and the difficulty in drawing clear linkages between concentration and wage levels, economic analysis will play a key role in many ongoing matters and may ultimately influence standards as case law continues to develop.

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[1] José A. Azar et al., "Concentration in US Labor Markets: Evidence from Online Vacancy Data," NBER Working Paper Series, 2019; Orley C. Ashenfelter, Henry Farber, and Michael R. Ransom, "Labor Market Monopsony," Journal of Labor Economics 28, no. 2 (2010).

[2] Federal Trade Commission: Competition and Consumer Protection in the 21st Century, October 16, 2018, transcript p. 49.

[3] Starr, Evan, N. Bishara, and J. J. Prescott. "Noncompete Agreements in the US Labor Force." Journal of Law and Economics (2020) ("Starr, Prescott, Bishara (2020)").

[4] Federal Trade Commission: Competition and Consumer Protection in the 21st Century, October 16, 2018, transcript pp. 51, 54, and 64.

[5] DOJ September 2019 Public Workshop: Competition in Labor Markets, https://www.justice.gov/atr/events/public-workshop-competition-labor-markets; FTC October 2018 hearings: Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.

[6] Department of Justice Press Release, "Justice Department Requires Divestiture in Tyson Foods Inc. Acquisition of the Hillshire Brands Company," August 27, 2014, https://www.justice.gov/opa/pr/justice-department-requires-divestiture-tyson-foods-inc-acquisition-hillshire-brands-company.

[7] U.S. et al. v. Anthem Inc. and Cigna Corp., United States Court of Appeals decision, April 28, 2017, Kavanaugh, Circuit Judge Dissenting, https://www.cadc.uscourts.gov/internet/opinions.nsf/55EC55639C87835E85258110004F41B9/$file/17-5024-1673054.pdf

[8] Federal Trade Commission Press Release, "FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation," August 1, 2018, https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest.

[9] Suresh Naidu, Eric A. Posner, and E. Glen Weyl, "Antitrust Remedies for Labor Market Power," Harvard Law Review 132 (2018).

[10] A standard evaluating the welfare of trading partners examines the potential harm to both the merging firms' upstream trading partners (which could include workers) and downstream trading partners (e.g., consumers). See C. Scott Hemphill and Nancy L. Rose, "Mergers That Harm Sellers," Yale Law Journal 127, no. 7 (2018). Total welfare encapsulates a standard that is meant to measure costs and

benefits that may stem from a merger. See also Herbert Hovenkamp, "Competition Policy for Labour Markets – Note by Herbert Hovenkamp," OECD Roundtable on Competition Issues in Labour Markets, June 5, 2019.

[11] Blundell, Richard, and Andrew Shephard. "Employment, hours of work and the optimal taxation of low-income families." The Review of Economic Studies 79, no. 2 (2012); Boyd, Donald, Hamilton Lankford, Susanna Loeb, and James Wyckoff. "Analyzing the determinants of the matching of public school teachers to jobs: Disentangling the preferences of teachers and employers." Journal of Labor Economics 31, no. 1 (2013); Agarwal, Nikhil. "An empirical model of the medical match." American Economic Review 105, no. 7 (2015).

[12] Suresh Naidu, Eric A. Posner, and E. Glen Weyl, "Antitrust Remedies for Labor Market Power," Harvard Law Review 132 (2018), p. 585.

[13] Evan Starr, "The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements," February 2019 ("Starr (2019)"), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf; Department of Justice Division Update, "No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute 'No-Poach' and Wage-Fixing Agreements," Spring 2018, https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

15 Starr, Prescott, Bishara (2020); Spencer Woodman, "Exclusive: Amazon makes even temporary warehouse workers sign 18-month non-competes," The Verge, March 26, 2015, https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-non-compete-contracts.

[15] Arrington v. Burger King Worldwide Inc. et al., Case No. 1:18-cv-24128 (S.D. Fla.); Ogden v. Little Caesar Enterprises Inc. et al., Case No.2:18-cv-12792 (E.D. Mich.).

[16] Starr, Prescott, Bishara (2020).

[17] Starr (2019).

[18] Department of Justice Antitrust Division and Federal Trade Commission, "Antitrust Guidance for Human Resource Professionals," October 2016, https://www.justice.gov/atr/file/903511/download. See also Statement of Interest of the United States of America, in Seaman v. Duke Univ. et al., No. 1:15-cv-00462 (M.D.N.C. Mar. 7, 2019).

[19] Corrected Statement of Interest of the United States of America in Stigar v. Dough Dough, Inc., et al., March 8, 2019.

[20] "Former Owner of Health Care Staffing Company Indicted for Wage Fixing," U.S. Department of Justice, December 10, 2020, https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.