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When the relevant market is your work force: How labor law may inform M&A

Antitrust laws prohibit firms from restricting competition in both product and labor markets. However, government officials have focused most of their attention on analyzing the effects of product market concentration.[1] Recent developments seem to indicate a growing interest on the part of the authorities in the effects of labor market consolidation.

In 2017, Senator Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act,[2] a bill that would require antitrust authorities to include labor market considerations during merger review. In 2018, the Federal Trade Commission (FTC) held hearings to debate the consideration of labor market power during merger review.[3] More recently, new agreements allow several federal agencies to coordinate their efforts to collaborate on unfair labor practice investigations, leaving open the possibility of triggering FTC merger reviews informed by labor law.[4,5] Most importantly, the blocking of the proposed acquisition of Simon & Schuster by Penguin Random House because of its potential anticompetitive effects on writers' compensation seems to confirm the authorities' interest in the effects of consolidations on labor markets.

There is still not much clarity regarding the eventual rules and regulations that will govern future mergers and acquisitions in terms of their impact on labor markets (or even whether proposed transactions will be consistently reviewed based on their effects on labor markets). This article attempts to discuss what areas and metrics the regulators may look at during merger reviews informed by labor law.

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1 Ioana Marinescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets," *Indiana Law Journal*, (2019) Vol. 94: Iss. 3, Article 5, https://www.repository.law.indiana.edu/ilj/vol94/iss3/5.

2 Office of Senator Amy Klobuchar, "Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement," news release, February 4, 2021, https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

3 Federal Trade Commission, "FTC Hearing #3: Competition and Consumer Protection in the 21st Century," 2018, https://www.ftc.gov/enforcement-policy/hearings-competition-consumer-protection.

4 FTC, "Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices," news release, July 19, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers?utm_source=govdelivery.

5 Department of Justice, "Departments of Justice and Labor Strengthen Partnership to Protect Workers," news release, March 10, 2022, https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.

What is labor market power and why does it matter?

The concept of monopoly is familiar to most people. Monopolies occur when one company is the sole producer of a good or service in a given market. Under certain conditions, this privileged position allows the company to charge higher prices for its products or services.

In contrast, a monopsony occurs when a firm is the sole purchaser of a good or service. A firm with monopsonist power can, under certain conditions, purchase inputs at a lower price than it would otherwise pay. Since companies hire workers' services in labor markets—a set of jobs within a given geographic area among which workers can switch relatively easily,[6] labor market power is an example of monopsony and can lead to a reduction in employment and the suppression of wages. The existence of a limited number of companies in a given labor market does not mean that abusive practices exist. Evaluating the existence and consequences of labor market power requires a careful analysis.

Horizontal Merger Guidelines

The DOJ and FTC Horizontal Merger Guidelines provide a framework to screen mergers for potential antitrust violations. However the Merger Guidelines do not differentiate between seller and buyer power, and they do not explicitly refer to labor market power.

In practice, few mergers are challenged based on labor market power because it has been generally thought that labor markets are competitive and they remain unaffected by company consolidation.[7] However, recent evidence suggests both the existence of labor market power and that labor market concentration is different from product market concentration.[8,9,10]

Blocking the Penguin-Simon proposed acquisition of Simon & Schuster highlights DOJ's renewed focus on the impact of mergers on labor markets

On October 31, a federal district court blocked Penguin Random House's proposed acquisition of Simon & Schuster. The DOJ alleged that the proposed combination of the two publishers would be detrimental to a segment of writers (the "workers" in this case). The DOJ's argument for challenging the proposed transaction was that the combined companies would dominate the market for manuscripts and could suppress the advances paid to writers. The last time the DOJ had successfully blocked a merger in court was in 2017.[11,12]

Evaluating the effect of mergers and acquisitions on labor market is not easy

The evaluation of the effects of mergers and acquisitions on labor market power first requires the definition of the relevant labor market. A first approximation might be to define the relevant labor market

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6 Eric A. Posner, Glen Weyl, and Suresh Naidu, "Antitrust Remedies for Labor Market Power," December 10, 2018, *Harvard Law Review*, https://harvardlawreview.org/2018/12/antitrust-remedies-for-labor-market-power/.

7 Eric A Posner, "How Antitrust Failed Workers," Oxford University Press, September 10, 2021.

8 Elena Prager and Matt Schmitt, "Employer Consolidation and Wages: Evidence from Hospitals," *American Economic Review*, (2021), 111 (2): 397–427.

9 Chen Yeh, Claudia Macaluso, and Brad Hershbein, "Monopsony in the US Labor Market," *American Economic Review* (2022) 112 (7): 2099–2138.

10 José Azar, Ioana Marinescu, Marshall Steinbaum, and Bledi Taska, "Concentration in US labor markets: Evidence from online vacancy data," *Labour Economics,* 66, (2020).

11 Perry Stein, "Some critics say Biden administration lawyers are using antitrust law inappropriately to tackle labor and social issues," November 11, 2022, *Washington Post*, https://www.washingtonpost.com/national-security/2022/11/11/antitrust-biden-random-house-schuster/.

12 Dan Papscun, "Penguin-Simon Deal Block Spotlights DOJ Antitrust Focus on Labor (1), November 21, 2022, *Bloomberg Law*, https://news.bloomberglaw.com/antitrust/penguin-simon-deal-block-spotlights-doj-antitrust-focus-on-labor.

as the group of people with similar skills who live within a reasonable distance of an employer. However, with remote work, companies can hire people anywhere. Regulatory differences between different locations may also play a role in the definition of the relevant labor market. Finally, identifying which jobs workers can move between is not trivial. A careful assessment of job requirements and salaries is strictly needed to shed light on the correct definition of the relevant labor market.

In assessing the impact of a merger or acquisition on a labor market, some of the same concepts used in analyzing the effects on product and service markets can be used. Concentration measures, such as the Herfindahl-Hirschman index, can be calculated for labor markets in much the same way as product markets. The effect of the merger on the level of employment as well as on the level and growth of wages can also be estimated.[11] Other relevant areas such as the effect of the merger on the quality of a job (such as the work environment or benefits other than salary), on the availability of comparable jobs, or on the potential entry of new employers can also be quantified. This step is important. Documenting the impact of the merger or acquisition also allows for the design of possible remedies.

The challenge of mergers based on labor market grounds set to become more common

Companies planning a merger or acquisition should consider the potential effects of the deal on labor markets. Antitrust law has so far mostly focused on product market concentration and its effect on prices. However, the blocking of Penguin Random House’s proposed acquisition of Simon & Schuster suggests that antitrust regulators may challenge mergers and acquisitions on labor grounds in the future.

Challenges to mergers affecting the labor market could be especially important in highly differentiated labor markets or those requiring high-paying skills (e.g., bestselling writers, nurses and doctors, or commercial pilots), where it may be easier for regulators to allege that workers may lack comparable employment opportunities when employers merge.

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