LABOR MARKETS IN ANTITRUST MERGER REVIEWS

Summary of panel discussion

Bates White Economic Consulting

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On January 22, 2024, Bates White hosted a luncheon panel, “Labor Markets in Antitrust Mergers Review,” which featured presentations and a Q&A session with Eric Posner, Kirkland & Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago, and Mathis Wagner, Principal in the Antitrust and Competition Practice at Bates White Economic Consulting. William Stallings, Partner at Mayer Brown and co-leader of the firm’s Antitrust and Competition practice, moderated the panel. A summary of the discussion is below.

I. BRIEF HISTORY OF ANTITRUST LAW AND LABOR MARKETS

Professor Posner first spoke about the history of labor markets in antitrust regulation. Guideline 10 of the 2023 Merger Guidelines explicitly references labor markets, the first time they have been referenced in the history of the Guidelines.[1] The 2010 Horizontal Merger Guidelines recognizes mergers between competing buyers (§12) but does not make an explicit reference to labor. However, even before the release of the 2023 Merger Guidelines, the Department of Justice (DOJ) and Federal Trade Commission (FTC) recognized harms caused by labor monopsony, as seen from DOJ’s involvement in the Silicon Valley no-poach case (2010), FTC’s opposition of two Texas hospital mergers based in part on labor market effects (2020), and the DOJ’s successful blocking of the Penguin Random House and Simon & Schuster merger (2022).

Professor Posner pointed out that economics treats monopoly and monopsony as symmetrical phenomena and that buying and selling are not relevantly different and result in the same outcomes (i.e., inefficiency, lower output, and deadweight loss). Similarly, the law treats buying and selling labor as equivalent. The opinion in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (Supreme Court, 1948) states, “The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.”[2] However, there is a labor exemption in the Clayton Act (§6), which protects employees who organize, but some older cases imply that unions may have limited standing in antitrust law.[3]

Next, Professor Posner discussed tools with which to evaluate labor market issues, noting that the 2023 Merger Guidelines writes that “the same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor.” In his discussion of Herfindahl-Hirschman Index (HHI) thresholds, Professor Posner stressed that these measures should be lower for labor markets due to higher switching costs. The 2023 Merger Guidelines also acknowledge the point. When defining the market, common issues are the substitutability of workers and the definition of reasonable commuting areas. Using *Deslandes v. McDonald’s* (Seventh Circuit, 2023) as an example, he discussed at length how complex it is to define a labor market, as employees build firm-specific skills and relationships, specialize into certain fields, and have different degrees of commuting accessibility. He conjectured that antitrust regulators use the Bureau of Labor Statistics’ Standard Occupation Classifications (SOC) and the US Department of Agriculture’s Commuting Zones as a starting point for market definition.

Last, Professor Posner spoke about evaluating merger efficiencies. He cautioned against stating that a merger would reduce labor costs, a result that may be an indication of anticompetitive behavior (i.e., the merged firm gains market power, enabling it to suppress wages). Instead, procompetitive mergers should increase wages (equivalently, reduce prices) because of productivity gains. He also noted that when addressing labor market issues, consumer welfare is irrelevant, as cross-market balancing is not permitted by the law.

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[1] Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.
[2] Further reaffirmed in cases such as *Anderson v. Shipowners Association* (Supreme Court, 1926), *Todd v. Exxon* (2nd Cir., 2001), *NCAA v. Alston* (Supreme Court, 2021), Penguin Random House and Simon & Schuster merger (D.D.C., 2022), and *Deslandes v. McDonald’s* (7th Cir. 2023).
[3] For example, *Associated Gen. Contractors v. Cal. State Council of Carpenters* (Supreme Court, 1983).

II. RESOURCES AND TOOLS FOR MARKET DEFINITION

Mathis Wagner started by discussing data resources available to address defining labor markets. He posed that labor markets can be evaluated via product market analysis tools and provided an overview of issues to consider regarding market definition, market power, and consumer (worker) harm.

II.A. Occupational classifications and commuting zones for market definition

Dr. Wagner discussed two data products highlighted by the proposed Hart-Scott-Rodino prenotification guidelines:

1. The SOC, which provides a list of occupations by industry and geography with their respective definition and some statistics (e.g., employment numbers, mean wage, percentiles).

2. The Economic Research Service's Commuting Zones and Labor Market Areas, which provide geographic boundaries delineating labor market areas. While updates to this data product have been discontinued, Pennsylvania State University has created a similar product with data up to 2010.

II.B. General notes regarding market power

Dr. Wagner emphasized that market concentration measures will be even more important for labor market cases because wage markdowns are more difficult to estimate. Other aspects to consider include the definition of appropriate concentration thresholds, switching behaviors of workers, unions and bargaining dynamics, and restrictive agreements including non-compete, non-solicitation, and no-poach clauses.

II.C. Three takeaways regarding consumer (worker) harm

Dr. Wagner left the audience with three takeaways he considered important for measuring consumer (worker) harm:

1. Merger reviews should focus on wages rather than employment. Decreased wages due to monopsony power discourages workers and reduces employment. That's inefficient and can trigger Agency concerns. However, efficiencies justifying a merger can also potentially reduce the amount of labor needed by the merged firm. There is a danger that potential reductions in labor of this kind can be used to block mergers, thereby protecting employment via inefficient ways.

2. Labor market conditions can harm the product market. Monopsony and oligopsony lead to a decrease in employment, which will result in reduced output. Both labor and products can be thought of as separate markets, but there is also no clear tension between those perspectives.

3. There are many features specific to labor markets that need to be evaluated through the antitrust lens. While product market tools may be transformed and applied to labor markets, it is important to consider these features individually.

III. FURTHER CONSIDERATIONS IN LABOR MARKET ANTITRUST

III.A. Industries with expected scrutiny

The panelists shared insights on industries likely to face higher scrutiny in labor market antitrust cases, acknowledging the challenge of pinpointing specific cases. Dr. Wagner emphasized the significance of the broadness of observed labor markets, noting that narrower markets may be more susceptible to scrutiny. Professor Posner added that markets with high concentration, such as the hospital and airline industries, are probable candidates.

III.B. Efficiencies

In the beginning of the discussion, panelists discussed under what conditions a merger would or would not be considered a potential threat to competition. In the proposed hypothetical scenario, two merging firms would have a substantial increase in efficiency but an increase in layoffs. Professor Posner stressed the importance of understanding why workers are being laid off. He highlighted the expectation of increased wages when efficiencies are passed through, so understanding the rationale for employee layoffs even with efficiencies is essential for determining legality or causation of harm.

Further in this conversation, a question was posed on the ability to review efficiencies that may occur in monopoly versus monopsony side cases. Dr. Wagner emphasized the need to observe effects on the labor and product sides simultaneously, deeming unilateral direction insufficient.

III.C. Measuring harm using HHI

The panelists discussed whether using reductions in HHI is enough for the Agencies to support their argument of potential of harm for merging parties. Professor Posner opined that HHI should be substantive enough, but it is often up to the discretion of judges whether additional analysis is necessary. The discussants cited JetBlue–Spirit merger case, in which HHI alone was deemed as insufficient evidence. However, they also mentioned the Texas COPA case, noting that the FTC used HHI to show that the proposed merger of hospitals would increase concentration in the market and be a threat to competition.

III.D. Employee perspective

The panelists discussed the weight that employees and unions should have when their firm is merging. Professor Posner highlighted historical union support for mergers because it was easier to bargain with one entity instead of multiple, but that has changed over time. He and Dr. Wagner underscored the importance of considering and balancing employee opinions and customer testimony in product markets. However, they emphasized balancing employee and union testimony with the awareness that neither may always have the motivation to protect labor competition.

III.E. Non-wage-related job benefits

Discussion touched on nonpecuniary factors other than wages that the Agencies should consider when evaluating labor market outcomes. The panelists recognized the significance of these additional elements in fully assessing the impact of a merger and likened the consideration of non-wage benefits to examining changes in product quality on the market side. While acknowledging the potential challenges in quantifying ancillary benefits like shift flexibility, office conditions, or company culture, the panelists highlighted their possibility of quantifiability and cited examples, including assessing healthcare, family leave policies, and compensation for various job-related risks as ways the Agencies can quantify quality or benefits between firms.

III.F. Remedies

An audience member asked how remedies proposed by merging firms should be analyzed in labor market scenarios. Professor Posner responded that Agencies and parties need to analyze proposed remedies on the

labor side the same way as on the product side; if a remedy is deemed acceptable in the product market, then it should be viewed as sufficient on the labor side.

III.G. Job frictions

The panelists agreed on the distinctive nature of the labor market, characterized by large search frictions and stickiness for employees. First, the panel noted the empirical evidence indicating significantly higher switching costs in this market. Second, Professor Posner pointed out that while most products are commoditized, allowing for easy research and substitution, jobs are highly differentiated, making it challenging for employees to experiment or conduct thorough research. Additionally, there is a unique dynamic in the labor market due to employee-employer relations. Unlike firms adjusting product prices, employers cannot simply lower wages without facing backlash and anger from employees.