Response to the Request for Information on Merger Enforcement  
April 10, 2022

The Federal Trade Commission and the Department of Justice have requested public comment on “how the agencies can modernize enforcement of the antitrust laws regarding mergers.” Our research focuses on the intersection of antitrust enforcement and labor markets, and we therefore focus in this comment on how the potential for mergers to harm workers in labor markets should inform the agencies’ approach to merger enforcement.

**Empirical Background**

A number of studies have shown that labor markets in which employers are more highly concentrated exhibit lower wages, in line with theories of classical labor market monopsony: if a few employers have a high share of all available job openings, workers do not receive as many job offers and hence earn less than they would if there were abundant opportunities.¹ Moreover, at least two studies show a causal (negative) effect of horizontal mergers on workers’ wages, particularly for those workers whose outside employment options are likeliest to be curtailed as a result of the merger.² Finally, beyond the literature on labor market concentration per se and on the effect of horizontal mergers as a cause of concentration, there’s ample evidence that labor markets are not perfectly competitive and that employers enjoy market power as a matter of course.³ All of this justifies the attention to labor markets that the agencies have paid in their request for information, and moreover, the inclusion of a separate, dedicated section oriented toward preventing harm to competition in labor markets in any revised guidelines the agencies promulgate.

We therefore encourage the federal agencies to enjoin mergers that increase concentration in labor markets, or otherwise threaten to increase employer power in labor markets and thereby reduce wages, diminish benefits, or impair working conditions in the affected markets.

**Labor Market Definition**

Unlike traditional (“one-sided”) goods markets in which consumers choose which and how many goods to purchase on the basis of prices and product characteristics, labor markets are “two-sided” in that workers pick jobs while employers also pick workers.⁴ This basic fact militates in favor of narrow market definitions, since a worker’s set of choices over jobs is confined to those employers that will consent to hire the worker. A wide literature exists that foregrounds the idea that job-specific ‘amenities’ like employer-provided benefits, working hours, and commuting time, curtail workers’ labor supply elasticity vis a vis their

---


3 Chen Yeh, Claudia Macaluso, and Bradley Hershbein, “Monopsony in the U.S. Labor Market,” January 11, 2022, https://drive.google.com/file/d/1dQ9Q0EthLTAV-4O4QNRmCyFF9Y0Msqwm/view.

employer. In other words, employers have significant latitude to dictate pay without their workers leaving,\(^5\) even in the case where there may appear to be similar employers and/or employers of similar workers in the vicinity.

In our work, we have defined labor markets by commuting zone (a geographic delineation of a metropolitan area), 6-digit occupation in the Standard Occupational Classification, and calendar quarter. Concentration in a labor market so defined is computed from the market shares of individual employers, where the shares are taken from employment counts, or alternatively, from counts of hires or of job advertisements.

As previously mentioned, we find that when labor markets defined this way are more concentrated, workers earn less.\(^6\) We have also found that labor market concentration in markets so-defined is a reasonable index of employer market power, as measured by the applications elasticity to changes in wage (a partial proxy for the labor supply elasticity).\(^7\)

This definition has the advantage that the Bureau of Labor Statistics publishes occupational employment down to the 6-digit level and by county, which can be aggregated to commuting zones, so we view it as a usable benchmark. Having said that, there’s reason to believe that these dimensions are too wide: geographic patterns of job applications are strongly decreasing in distance,\(^8\) well short of the size of most commuting zones, and it appears that job titles, rather than 6-digit occupations, are a better measure of how workers view their available job options than occupations are (because occupations often contain jobs at different levels of seniority, and, for example, inexperienced workers know they are not credible candidates for employment in senior roles).\(^9\) This fact underlines the two-sided nature of labor markets and the resulting paucity of outside employment options for many workers.

**Structural Presumption**

*United States vs. Philadelphia National Bank*, the Supreme Court held that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” This so-called structural presumption has equal application in labor markets. Therefore, if a merger results in a concentrated labor market, or would bring about a significant increase in concentration in a labor market, it can be presumed to impair labor market competition.\(^10\)


\(^10\) “Economic theory provides support for the established legal presumption that a merger in a market is likely to have adverse competitive effects when it occurs in a concentrated market and makes it more concentrated (i.e., increases the HHI), regardless of whether it is possible to find an empirical relationship between price and the HHI.
Part of the justification for applying the structural presumption is that the documented negative effects of labor market concentration are found throughout the observed range of concentration, i.e. the marginal effect of greater concentration is significant whether or not the market ‘starts’ as concentrated or unconcentrated, with no thresholds apparent in the data. However, the two-sidedness of labor markets, as well as the documented evidence of harm from concentration in markets across the range of concentration, suggests that any concentration threshold for applying the structural presumption should be lower in labor markets than it is in standard output markets.

Moreover, we consider it to be unlikely that a merger that increases concentration in a labor market would be ‘cured’ by entry of additional employers or by the expansion of incumbent employers with small pre-merger market shares, at least on a timeframe that is likely to address the harm done to workers already working in that labor market.

Finally, hiring is more concentrated than employment in levels, but studies that use an employment share or hiring share to compute concentration in a labor market generally come to similar conclusions about wage effects. Thus, if the agencies use hires to measure employer market shares, market share thresholds for triggering structural presumptions should be higher than if employment count shares are used.

Other Evidence of Market Power

Employer market power is pervasive and can be established through other means than concentration. In the course of merger investigations, the agencies have uncovered evidence of employer power in the form of noncompete, no-poach, and non-solicitation agreements, all of which are relevant to ascertaining the likely competitive effects of a merger ex-ante (in part because they establish that the merging parties compete in labor markets11, or alternatively, in the case of noncompetes, they provide evidence as to the size of the labor market employers perceive themselves to be hiring from). In addition, they are, of course, potential sources of liability in themselves.

We therefore encourage the agencies to investigate whether such competition-relevant labor market restraints are in place in their merger investigations as a matter of course, and to seek information from merging parties as to employment and hiring counts in each labor market, as well as payroll and job history data for their workers.

---

11 A no-poach or non-solicitation agreement not only shows that employers compete in the same labor market, but also that the labor market is not perfectly competitive. Indeed, if the labor market were perfectly competitive, the restraint would not be effective as employees could easily find other jobs (see: Marinescu, Ioana, and Herbert Hovenkamp. 2019. “Anticompetitive Mergers in Labor Markets.” Indiana Law Journal 94 (3): 1031.).
**Balancing**

Projected harm to competition in labor markets as a result of a merger cannot and should not be balanced against benefits to other stakeholders, such as consumers. There are a number of reasons for this: there’s no actual mechanism by which any compensation would flow from benefited stakeholders to harmed ones, nor is there any reason to think *a priori* that competitive harm in labor markets would be related to pro-competitive benefits in output markets. Finally, the attempt to measure the purported benefits and harms and to thereby come to a final judgment about the balance of harm is administratively and empirically hopeless, since it requires interpersonal utility comparisons for which economics is ill-equipped.

**Merger Efficiencies**

The extent to which an efficiencies defense exists in merger law is a matter of current controversy. We make no claim about the legal question, but we are concerned that claimed prospective efficiencies proffered by merging parties often amount to the anti-competitive exercise of monopsony power in labor markets, e.g. by reducing employment and pay to incumbent or future workers. We therefore recommend the agencies to adopt the view that in order for a merger ‘efficiency’ to be cognizable as a defense against competitive harm (if there even is such a defense in the caselaw), merging parties must demonstrate that

1. The efficiency does not result from the exercise of monopsony power, and
2. If the efficiency is the result of increases in technological efficiency in the labor process, that wages increase accordingly.

Efficiencies that economize on labor by making workers more productive ought to be cognizable only insofar as worker pay increases accordingly.

**Vertical Mergers**

To our knowledge, there is no extant empirical research related to the effect of vertical mergers in particular on competition in labor markets. However, mergers that may be classified as vertical due to the parties’ relation in the supply chain that delivers final goods to consumers may in fact be horizontal in labor markets. One merger that the FTC recently reviewed and challenged as a vertical merger, Lockheed-Martin’s acquisition of Aerojet Rocketdyne, appears to have threatened competition for aerospace and general engineers in Camden, Arkansas where both merging parties have operations. That pattern is probably common for vertical mergers, where suppliers and customers are geographically proximate.

**Remedies**

As a rule, remedies must cure the competitive harm from mergers. Thus, where mergers are deemed to threaten competition in labor markets, any remedy must ensure that doesn’t happen, either by enjoining the merger or protecting the threatened workers. In *United States v. Ford* (1971), the Supreme Court upheld a remedy, in that case for a vertical merger, that required employment, wage structure, and pension obligations to be preserved at a divested plant.

---

12 That may also be the case in the proposed merger of Microsoft and Activision-Blizzard, which is under review as we draft this comment.
Aside from making stipulations of that kind in consent decrees and merger settlements more broadly, the agencies can also remedy the threat of employer monopsony power by ensuring that workers’ right to union representation and collective bargaining are protected. Indeed, empirical evidence shows that the competitive harm of employer concentration is mitigated where workers enjoy collective representation.\textsuperscript{13} We encourage the agencies to bind employers/acquiring parties to neutrality agreements (also known as ‘labor harmony agreements’) with labor organizations in union representation elections to be held post-merger, as a behavioral remedy to competitive harm in labor markets.

---

\textsuperscript{13} Prager and Schmitt, “Employer Consolidation and Wages: Evidence from Hospitals”; Benmelech, Bergman, and Kim, “Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?”