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Labor Markets

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LETTER FROM THE EDITOR

Dear Readers,

This edition of the Antitrust Chronicle looks at the interaction between antitrust rules and labor markets.

Competition and labor rules are not obvious bedfellows. Labor regulation concerns, in its essence, collective bargaining with a view to enhance workers' economic outcomes. By contrast, competition rules encourage rivalry with a view to enhancing consumer welfare through dynamic processes.

Despite this difference in their underlying principles, the application of competition rules can nonetheless have significant impacts on labor regulation, and vice versa. Therefore, many argue that they cannot be viewed in isolation.

This Chronicle brings together a set of contributions from authors around the world that discuss this interaction, in light of the specific rules (in both domains) that apply in their jurisdictions.

The OECD Competition Day, which takes place on February 26, 2020 in Paris, will feature a diuscussion on the topic of Labor Markets and will include panelists featured in this edition of the Anititrust Chronicle.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors.

Sincerely,

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SUMMARIES

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The Anticompetitive Effects of Covenants not to Compete

By Eric A. Posner

Covenants not to compete, which prevent workers from quitting their employer and moving to a competing employer, have ambiguous effects on welfare, according to economic theory. Noncompetes may enable employers to invest in assets by protecting those assets from expropriation by workers or competitors, but noncompetes also interfere with labor market competition. Recent research, however, suggests that the anticompetitive effects of noncompetes are greater than any benefits, and thus that the existing common law regime for regulating noncompetes is too weak. A plausible step forward is to strengthen the antitrust law on noncompetes. A better antitrust law would shift the burden, allowing employers to use noncompetes only when they can prove that their use of noncompetes results in higher wages in the affected labor market.

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The Goals of Competition Law Debate and Competition Policy for Labor Markets

By Darryl Biggar, Allan Fels & Alberto Heimler

In recent years there has been an upsurge of interest in competition policy applied to labor markets. But the development of a coherent competition policy for labor markets requires us to confront an old debate: What is the economic foundation of competition law? We argue that both the total welfare and consumer welfare standards are flawed. An often-proposed alternative (the "protection of the competitive process standard") lacks a foundation in economic welfare principles and therefore provides no guidance in resolving trade-offs. Fortunately, there is an alternative. We suggest that a newly emerging approach, known as the transactions cost approach to competition law, offers promise as a credible alternative foundation for competition policy in labor markets and other antitrust markets more generally.

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Understanding the Economics in the Dispute Between the Writers' Guild of America and the Big Four Talent Agencies

By Hal Singer & Ted Tatos

The Writers Guild of America ("WGA") and the Association of Talent Agents ("ATA"), the latter of which is primarily represented by the Big Four or "Uber Agencies," have sparred over packaging fees since the mid-1990s. The WGA has considered these fees, which agents extract from production studios, to represent an inherent conflict of interest. The April 2019 expiration of the franchise agreement between the WGA and the ATA prompted the WGA to take a firm stand prohibiting packaging fees. This action has prompted a flurry of litigation, into which the U.S. Department of Justice has recently waded by issuing a statement of interest in clear favor of the talent agencies. This article argues that the DOJ's position is misguided from an economic perspective, and that the WGA's actions are protected by the labor antitrust exemption.

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The Bias Against Low-Wage Labor Markets in Merger Analysis

By Anant Raut

Why are labor harms so rarely pled in antitrust cases? One factor may be the bias against low-wage labor markets in merger analysis. This bias treats the exact same employee behavior as rational in high-wage markets and irrational in low-wage markets. This article concludes with recommendations on how to better account for labor effects more generally in antitrust.

SUMMARIES

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Collective Bargaining in Times of Platform Work

By Andrea Bassanini, Stijn Broecke, Sandrine Cazes, Andrea Garnero & Chloé Touzet

Collective bargaining can help workers and companies adapt to the opportunities and challenges of a changing world of work. Even if to some people collective bargaining may sound like a relic of the past, it is an instrument to reach flexible and consensual solutions to regulate the use of new technologies and shape new rights. However, low levels of organization among workers, in particular non-standard workers, pose a serious challenge to collective bargaining. This partly reflects legal obstacles for workers classified as self-employed, for whom the right to bargain collectively may be seen as infringing competition law. To bypass these obstacles and extend bargaining rights to some non-standard workers, some OECD countries have either adapted the labor law or tailored competition regulation.

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The (Nearly) Forgotten Case of Labor Concerns in Brazilian Competition Policy: Recent Developments and Lost Opportunities

By Alberto Barbosa Jr.

In the wake of new evidence of market power of firms over workers, as a widespread economic fact, it is worth revising how the unusual interplay between merger control and labor market regulation in Brazil has played out over the past years. The analysis of recent decisions by CADE, the Brazilian antitrust agency, reveals persisting inconsistencies in remedial practice since 2000s, about relevance of "employment measures" in merger review procedures, which could lead to conflicts between the CADE and public institutions responsible for enforcing labor laws. This short essay explores the consequences of such problem for the implementation of antitrust and how legal argumentation would be key to improving competition policy in Brazil.

WHAT'S NEXT?

For February 2020, we will feature Chronicles focused on issues related to (1) **Data**; and (2) **Disruptive Innovation**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES MARCH 2020

For March 2020, we will feature Chronicles focused on issues related to (1) **LeadershIP EU**; and (2) **The China Edition**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

THE ANTICOMPETITIVE EFFECTS OF COVENANTS NOT TO COMPETE

BY ERIC A. POSNER[1]

1 Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School.

New research in economics suggests that employee covenants not to compete play a significant role in the cartelization of labor markets and the suppression of wages. This research uses the variation in the strictness of the common law test for enforceability across states as a lever for determining the impact of noncompetes on wages, job mobility, and related factors. The studies show that in states where noncompetes are broadly enforceable, workers earn lower wages than do workers in states where noncompetes are subjected to greater restrictions or are prohibited. The explanation appears to be that workers subject to broader noncompetes lack a credible threat to quit if they are unhappy with their wages, and so lack bargaining power necessary to win raises from their employers. Because workers are effectively removed from the labor market, fewer employers will compete for them, and with fewer workers available, firms may be deterred from entering markets in the first place, further exacerbating the problem. This reduction in competition is, or ought to be regarded as, an antitrust violation. Yet courts have been unreceptive to antitrust challenges to noncompetes. This needs to change.

Employers have used noncompetes for centuries, and early on courts recognized that they could interfere with competition. In the common law, an employer could use a noncompete only if it could identify a "protectable interest" — usually trade secrets or customer lists — and prove that the noncompete was no broader than necessary to protect that interest. The common law test was not toothless but the sanction — merely nonenforcement — was. That meant that noncompetes were usually challenged only when they applied to relatively highly skilled employees of great enough value to a competing employer that the litigation costs of challenging the noncompete could be justified.

Until recently, it was thought that noncompetes were used mainly for such highly skilled workers. Whether or not a noncompete was overbroad in a particular case, the traditional understanding was that they were "customized" in the sense that they were negotiated individually to reflect the specific circumstances of a particular employee, as indeed the common law seemed to require. But this turns out not to be true. It appears that many people take jobs without reading sometimes lengthy employment contracts or reading but not fully understanding the terms of those contracts. In many cases, the noncompete is presented to employees after they accept employment. Reluctant to quit after having just accepted a job, uncertain about the legal effect of the noncompete, and optimistic about their future at their new employer, workers appear to be unwilling to demand additional compensation or to refuse to sign the noncompete.[2] Other workers who are initially unaware of noncompetes may eventually learn about noncompetes if their employers warn them against taking jobs with competitors or hear about coworkers who are prevented from doing so, but no doubt many workers never do learn about the noncompetes to which they are subject.

A survey conducted by the economist Evan Starr and his colleagues revealed that 18.1 percent of all workers in 2014 were subject to a noncompete, and that nearly 40% of all workers had at one time been subject to a noncompete; among workers without a college education the comparable figures were 14.3 percent and 26.6 percent.[3] The vast number of workers subject to noncompetes, including numerous low-skill workers, suggests that most noncompetes are standard terms in form contracts imposed by an employer on hundreds or thousands of employees. The employees, like consumers who are confronted with mass consumer contracts, can take it or leave it; they are not allowed to negotiate over boilerplate. The phenomenon is illustrated by the controversy over the Jimmy John's sandwich chain, which imposed noncompetes on its low-skill sandwich workers as well as managers and other employees.[4] These noncompetes were not negotiated, and they were likely in violation of the common law. The franchise withdrew them to settle claims brought by state attorneys general, and is now contesting a class action.

Employers benefit from noncompetes in two ways. First, a noncompete protects certain assets and investments from expropriation by workers. For example, a worker with access to trade secrets or customer lists may be lured away by a competitor who is willing to pay a high wage in return for that information. If an employer is not permitted to protect its assets with a noncompete, it may be unwilling to invest in these assets in the first place, to the detriment of the economy. The noncompete is used to prevent this type of expropriation. If this theory is correct, employers will pay workers subject to noncompetes higher wages than those who are free to leave in order to compensate the first group for lost future employment opportunities.

Second, a noncompete weakens the bargaining power of employees by preventing them from credibly threatening to quit if compensation stagnates or working conditions worsen. While in theory employees should bargain for a higher wage in return for giving up future employment opportunities, employees may be uninformed of the noncompetes in their contracts or unwilling to bargain with a new boss. And even if employees do demand wage premiums, other workers will pay the price. If noncompetes are widely used, they will prevent firms from entering a labor market because the relevant labor force is tied up. The reduction in competition among employers will hurt workers by enabling incumbent employers to charge below-market wages, leading to a reduction in employment and overall production.

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2 Matt Marx, The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals, 76 Am. Soc. Rev. 695(2009).

3 Evan Starr, J.J. Prescott & Norman Bishara, Noncompetes in the U.S. Labor Force, 16 (U. Mich. L. & Econ. Research Paper No. 18-013, 2019).

4 Dave Jamieson, Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements, HuffPost (Oct. 13, 2014), http://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180.

From the standpoint of public policy, only the first benefit counts in favor of enforceability of noncompetes. The noncompete is a contractual device for protecting valuable assets when other means — for example, enforcement of trade secrets law — fall short. The second benefit produces a deadweight cost for society, based on the standard understanding of monopsony. The employer's gain is less than the loss to workers and consumers because the employer must reduce production in order to suppress wages. This point is just the flipside of product-side antitrust theory: monopoly profits for the seller does not justify the deadweight cost for society generated by the contraction of production needed to keep prices high.

The social value of any particular noncompete, then, depends on the tradeoff between asset protection and reduction in competition. While one cannot in the abstract determine whether the benefit or cost is higher in any particular case, employers have strong incentives to use broad noncompetes because they obtain most of the benefit while the cost is externalized on society. The common law acknowledged this problem by allowing noncompetes only for the purpose of protecting assets, tolerating the inevitable reduction in competition only to the extent that this purpose was advanced. But courts never undertook or demanded from employers a serious empirical account of the two effects, and, as noted, imposed a weak sanction for overbroad noncompetes.

The extensive use of noncompetes, coupled with employers' incentives to overuse them, and the weak common law sanctions, has led many commentators to suggest that noncompetes do more harm than good. Indeed, a few states have banned employee noncompetes — most significantly, California, which enjoys the most innovative economy in the world despite the theoretical prediction that noncompetes are essential to innovation.[5] But until recently, there was no hard evidence.

In the last couple of years, however, the evidence has rolled in. The new studies consistently find that noncompetes lower wages. For example, Evan Starr and Michael Lipsitz found that a 2008 Oregon law that banned noncompetes for low-income workers increased average hourly wages by 2-3 percent, implying that the hourly wages of the fraction of workers subject to noncompetes increased by even more—as much as 14-21 percent.[6] Lipsitz, Kurt Lavetti, and Matthew Johnson found that wages increase with the restrictiveness of noncompete laws across states and across time. An increase in their measure of restrictiveness from the 10th to the 90th percentile is correlated with a 3-4 percent decline in annual wages.[7] In yet another paper, Natarajan Balasubramanian and a group of coauthors found that when Hawaii introduced a ban on noncompetes for tech workers, the workers' wages increased 4-5 percent compared to the wages of similar workers in states with the mean level of noncompete enforceability.[8] These papers come on the heels of earlier papers that found similar results, although noncompetes are associated with high wages for some groups, including physicians and CEOs.[9]

The evidence of wage reduction suggests that the main effect of noncompetes in American labor markets has been to reduce competition rather than spur innovation. The implications are troubling in light of another wave of new research that finds that American labor markets are far more highly concentrated than economists once believed. Researchers have calculated concentration levels for every labor market in the country and found that a large majority of them are dangerously concentrated, particularly in rural and other thinly populated areas.[10] The widespread use of noncompetes may help maintain these high levels of labor market concentration — by preventing new businesses from finding enough workers to enter existing labor markets. They are also likely to be effective at suppressing wages in labor markets that are highly concentrated since workers may have trouble finding alternative employment even if they are willing to take jobs that are outside the coverage of the noncompetes that bind them. The high level of concentration, accompanied by increasing use of noncompetes, may account for some of the most visible problems in the American economy: the decline in job mobility, the stagnation of wages below the highest percentiles, rising inequality, and stagnation of economic growth.[11]

5 Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. Rev. 575, 578 (1999).

6 Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

7 Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

8 Natarajan Balasubramanian et al., Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers (U.S. Census Bureau Center for Econ. Studies Paper No. CES-WP-17-09, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782.

9 For a summary of the empirical literature, see Eric A. Posner, The Antitrust Challenge to Covenants Not to Compete in Employment Contracts, Antitrust L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433.

10 See, e.g. Jose Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, Concentration in US Labor Markets: Evidence From Online Vacancy Data, NBER Working Paper No. 24395 (2018); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?, NBER Working Paper No. 24307 (2018); Brad Hershbein, Claudia Macaluso & Chen Yeh, Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data (unpub., 2018); Yue Qiu & Aaron Sojourner, Labor-Market Concentration and Labor Compensation (unpub., 2019).

11 See Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536 (2018).

Noncompetes are a problem for which antitrust law would seem to be the solution. As courts have recognized, noncompetes, as contractual restraints of trade, fall comfortably within the requirements of Section 1 of the Sherman Act. The noncompete is a contract in restraint of trade, as common law courts recognized, and it resembles exclusionary contracts on the product market side that courts have frequently struck down on antitrust grounds. But a survey of the cases reveals only a handful of antitrust challenges, virtually none of them successful.[12]

The lack of success can be attributed to a number of factors. Courts that have evaluated noncompetes under the antitrust laws agree that the rule of reason — rather than the *per se* approach — applies. The rule of reason is said to apply because noncompetes are ancillary to employment contracts rather than "naked" restraints, and they are vertical relationships to boot. More important, the long common law tradition recognizes that noncompetes, if narrow, can advance legitimate economic interests. Thus, courts have rejected arguments that noncompetes are *per se* illegal. But once the rule of reason is triggered, the obstacles to proof in typical cases where a single employee seeks to escape a noncompete are insurmountable. It is unlikely that a single noncompete could have a marketwide impact on wages and output, as the rule of reason requires. The employer's normal defense — that it needs the noncompete to protect its investment in assets or training — will often strike a court as just common sense.[13]

Employees might conceivably overcome these obstacles by bringing class actions. But here the problem seems to be that employees rarely know the terms of the employment contracts of their colleagues. If class action lawyers do not know which workers are subject to noncompetes, they cannot propose a class. This is a major distinction between antitrust litigation in labor markets and antitrust litigation in product markets, where contractual terms are either public or easily accessible through purchase of the goods and services offered by suspected monopolists. And even if the lawyers can identify the workers who are subject to the noncompetes, the different relationships of each worker with the employer — seniority, role in the organization, pay level, etc. — may defeat class certification. Because the ubiquitous role of noncompetes in employment relationships has become common knowledge only in recent years, it may never have occurred to lawyers that class-action claims against noncompetes were possible.[14]

In reaction to the Jimmy John's scandal and the academic research about noncompetes, several states have passed laws that ban noncompetes for low-income workers and restrict them in other ways. Some commentators have argued that California's ban on all employment noncompetes should be extended to the entire country. While these laws and proposals are understandable, the first approach is insufficient and the second is overbroad. Even if noncompetes on average suppress wages, tailored noncompetes in appropriate circumstances may benefit workers — and the economy at large — by enabling employers to make investments that result in higher wages as well as lower prices. Moreover, a ban on noncompetes only for low-income workers does not stop employers from imposing overbroad noncompetes on the rest of the workforce.

A better approach would be to strengthen the antitrust laws. The antitrust laws already ban exclusionary terms with anticompetitive effects, and so it does not require new legislation to apply antitrust principles to noncompetes. The way forward is clear. Courts already treat contract terms as presumptively illegal under the antitrust laws (either under the "*per se*" or "quick look" approach) when experience teaches that they are normally used for anticompetitive purposes. On the product market side, the most common *per se* violation is a price-fixing or output-fixing agreement. On the labor market side, the analogous violations are wage-fixing and no-poaching agreements. A no-poaching agreement involves two employers who agree not to hire away each other's employees. A noncompete is very similar. Although a noncompete binds the employer and employee, rather than two employers, it has a greater anticompetitive effect than a no-poaching agreement since the noncompete prohibits the employee from working for any of the employer's competitors while a no-poaching agreement prohibits employees from going to work with only one of the employer's competitors. Moreover, because most employees have little bargaining power, an employer can more easily negotiate or impose favorable noncompete agreements with employees than no-poach agreements with competitors. Thus, if no-poaching agreements are presumptively illegal, noncompetes should be as well.

It might be argued in response that employees can protect themselves from the harmful effects of noncompetes by demanding higher pay or refusing to take the job, whereas they are helpless when their employer enters a secret no-poaching agreement with another firm. But there are two problems with this argument. First, as noted earlier, employees are rarely able to protect themselves through bargaining. Second, even if they are, employees have no reason to take into account the effects on third-party workers who are deprived of work because of the contraction of the labor market. These third-party effects may be as bad as, or worse than, those of no-poach agreements.

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12 See Posner, *supra*.

13 For some representative cases, see *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972); *Bradford v. New York Times Co.*, 501 F.2d 51, 59 & n.5 (2d Cir. 1974); *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir. 1977); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 269 (7th Cir. 1981); *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, 720 F.2d 1553, 1560-1561 (11th Cir.1983).

14 Arbitration clauses also pose a significant barrier to litigation, including class litigation.

Employers should be permitted to defend themselves against antitrust challenges to their noncompetes by showing that a noncompete has resulted (or will result) in higher wages. However, courts should be skeptical of such a defense when a noncompete binds low-skill or low-wage employees, and in other cases should demand high-quality empirical proof from the employer. Legal reform that shifts the burden of proof to the employer should be sufficient. A worker who seeks to escape a noncompete should prevail unless the employer can make a positive case that the noncompete does more good than harm.

Courts should be receptive to a stronger antitrust regime for noncompetes because it flows naturally from existing antitrust principles, and is based on strong empirical research. If they are not, then legislation may be necessary.

THE GOALS OF COMPETITION LAW DEBATE AND COMPETITION POLICY FOR LABOR MARKETS

BY DARRYL BIGGAR, ALLAN FELS & ALBERTO HEIMLER[1]

1 Respectively, Special Economic Advisor, Australian Competition and Consumer Commission ("ACCC"), Professorial Fellow, Melbourne Law School, and former chairman of the ACCC; Professor of Economics, Italian National School of Government, (Scuola Nazionale dell'Amministrazione), Rome, Italy, and Chairman, Working Party 2 of the OECD Competition Committee. The views expressed are the authors' own.

I. INTRODUCTION

In recent years there has been a substantial increase in interest in the application of competition law to labor markets. We believe this is a positive development. Labor markets have, for too long, been seen as off-limits to competition enforcers. As a first step in the reinvigoration of antitrust enforcement in the context of labor markets, several recent papers have sought to articulate a clear competition policy for labor markets.[2] In developing a competition policy for labor markets, antitrust economists are forced to confront, once again, the question of the economic goals of competition policy. The application of competition law and policy to the new domain of labor markets forces us to look again at old debates.

Until recently, the conventional wisdom among most competition scholars was that competition law and policy seeks to promote some form of consumer welfare. But in recent years this approach has come under sustained attack. This loss of confidence has arisen, in part, from concerns that an exclusive focus on the downstream or output side of the market (as the consumer welfare standard seems to require) has the potential to overlook anti-competitive harm in upstream or input markets – precisely the domain in which labor markets fall. It doesn't seem right to begin our analysis of competition policy in labor markets by applying an economic standard which essentially neglects the economic consequences of anti-competitive actions in input markets upstream.

As economists, it seems more natural to us to apply the concept of total welfare or total surplus – the same concept that is applied throughout the economic analysis of public policy. This approach identifies the key economic harm from the exercise of market power as the loss in welfare known as deadweight loss. Over the years many highly regarded economists have argued that competition decision-makers should seek to apply a concept of total economic welfare in all areas of competition policy analysis.[3] All of the recent academic papers exploring the application of competition policy to labor markets have implicitly or explicitly adopted a "total welfare" approach.[4]

However, there is a fundamental problem: It is universally recognized amongst competition scholars that competition authorities do not behave as though the promotion of the traditional concept of total economic welfare is their primary concern.[5] If competition agencies do not pursue total economic welfare in their other enforcement activities, why should we expect them to do so in the context of labor markets?

This article suggests that there is another way. For the reasons set out below, we believe that a newly emerging approach – known as the transactions cost approach to competition law – offers promise as a credible economic foundation for competition law in general, and to competition law and policy in labor markets, in particular.

This paper does not seek a full elaboration of competition policy for labor markets based on the transaction cost approach. Such an elaboration is beyond the scope of this short paper. Instead, we merely seek to turn a spotlight on the economic foundation for competition policy, particularly in the context of labor markets.

II. AN ECONOMIC FOUNDATION FOR COMPETITION IN LABOR MARKETS

What, exactly, is the economic foundation for competition policy? This question becomes particularly important in the context of competition policy in labor markets.

A. Consumer Welfare and Input Markets

According to the conventional consumer welfare standard, in assessing whether or not a particular action should be deemed to be anti-competitive (i.e. in breach of the competition law), attention should be paid to the impact on downstream consumers. If consumers are not left worse off, the practice is deemed to be benign, if not actually efficient or pro-competitive. Heyer's so-called First Theorem of Antitrust can be summarized

2 See, e.g. Naidu, Suresh, Eric A. Posner, E. Glen Weyl, (2018), "Antitrust Remedies for Labor Market Power," 132 *Harvard Law Review* 536; Azar, José, Ioana Marinescu & Marshall Steinbaum, (2019), "Antitrust and Labor Market Power," Research Brief, Economics for Inclusive Prosperity, May 2019.

3 See, e.g. Farrell, Joseph & Michael Katz, (2006), "The Economics of Welfare Standards in Antitrust," 2 *Competition Policy International* 3, 6-7; Carlton, Dennis W., (2007), "Does Antitrust Need to be Modernized?," 21 *Journal of Economic Perspectives* 155-176.

4 See Naidu, Posner & Weyl (2018) *supra* note 2; Hovenkamp, Herbert, (2019), "Competition Policy for Labour Markets – Note by Herbert Hovenkamp," OECD Roundtable on Competition Issues in Labour Markets, June 5, 2019.

5 Heyer, Ken, (2012), "Welfare Standards and Merger Analysis: Why Not the Best?," (2012) 8 *Competition Policy International* 146-172; Farrell & Katz (2006) *supra* note 3.

as follows: "If consumers are hurt by the merger, it is anti-competitive and should be blocked. If consumers benefit, the merger is pro-competitive and should be allowed."[6] According to Herbert Hovenkamp (2019):

> Antitrust law in many jurisdictions defines its consumer welfare goal in terms of low consumer prices. For example, mergers are challenged when they threaten to cause a price increase from reduced competition in the post-merger market. While the consumer welfare goal is under attack in some circles, it remains the most widely expressed goal of antitrust policy in the United States.[7]

Despite its popularity, the consumer welfare standard has several, fundamental flaws. First, and perhaps foremost, the consumer welfare standard, with its exclusive focus on the buyer side of the market, seems particularly ill-suited to the analysis of competition issues in input (or supplier) markets. On a strict consumer welfare standard, market power exercised by dominant buyers in labor markets (or other input markets) is at worst benign, and is possibly beneficial, for downstream consumers. This is a problem for scholars who seek to develop competition principles in labor markets.[8]

Indeed, as Naidu, Posner and Weyl (2018) point out, the exercise of market power by a dominant buyer in labor markets might be considered pro-competitive: "wage suppression even as it hurts workers, at least benefits consumers."[9] Hovenkamp (2019) observes that anti-competitive restraints in labor markets might result in lower prices to consumers, which should be *promoted* under the consumer welfare standard:

> Focusing entirely on [output] price makes it awkward to work the supply side of markets into debates about consumer welfare. Labor markets are a notable example. Labor appears in the market as suppliers, not as purchasers. While consumers-as-consumers benefit from lower prices, combatting restraints in labor markets generally focuses on wage suppression. That is, today the principal problem of competition policy in labor markets is wages that are too low, not those that are too high.

In seeking to develop a sound competition policy for the labor market, the consumer welfare standard is of little use. We cannot develop sound competition principles for labor markets by starting with an economic approach which asserts that the exercise of market power by a dominant firm in labor markets is benign or even pro-competitive.[10]

In any case, competition enforcers do not, in practice, behave as though "consumer welfare" is their primary concern. Many antitrust scholars have pointed out that a literal application of the consumer welfare standard would exempt anti-competitive practices on the buyer side of the market, such as merger to monopsony, as long as those practices did not result in harm to consumers.[11] This is inconsistent with the way that most antitrust laws are drafted and in the way the majority of competition enforcers around the world behave. In practice, competition law "is applicable to monopsony power even where there is no harm to consumers downstream, under analogous legal standards as those of product markets."[12]

B. Total Welfare as the Foundation of Competition Policy

Is there an alternative to the consumer welfare standard? As economists, the most natural economic foundation for competition policy is the same welfarist foundation that is used throughout all of public policy analysis – the concept of total welfare. Many highly respected economists have argued that, when it comes to competition policy, governments and courts should seek to maximize a concept of total economic welfare, usually reflected in the sum of producers' surplus and consumers' surplus.

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6 Heyer (2012) *supra* note 5.

7 Hovenkamp (2019) *supra* note 4.

8 This is a key part of the critique of Hipster Antitrust. See Khan, Lina, (2017), "Amazon's Antitrust Paradox," 126 *Yale Law Journal* 710-805.

9 See also Azar, Marinescu & Steinbaum (2019) *supra* note 2.

10 In addition, the consumer welfare standard is inconsistent with standard economic welfare principles which take into account the welfare of both sides of a market (producers and consumers).

11 Carlton (2007) *supra* note 3, page 158: "if only consumers matter, then a buying cartel should be perfectly legal and indeed should be encouraged."; Kaplow Louis & Carl Shapiro, (2007), "Antitrust," in A. Mitchell Polinsky & Steven Shavell, *Handbook of Law and Economics* (2007), page 1168: "If only consumer welfare mattered, increases in buyer power through horizontal mergers and otherwise might be praised, not condemned."

12 OECD (2019), "Competition Concerns in Labour Markets – Background Note," DAF/COMP(2019)2, 5 June 2019, page 34. Hovenkamp (2019) *supra* note 4, page 6 emphasises that the merger provisions of the Clayton Act "apply to any merger whose effects may be substantially to lessen competition or create a monopoly in any line of commerce, not distinguishing buyer from seller effects."

Hovenkamp, for example, argues that competition policy should focus exclusively on output, not price:

> We would do better … to define [the goal of competition law] in terms of output rather than price. Competition policy should strive to facilitate the highest output in any market that is consistent with sustainable competition. … When 'consumer welfare' is defined in terms of output it becomes much easier to articulate a defensible competition policy that does everything that antitrust can properly do to ensure a healthy economy, reflecting both the buy and sell sides of the market.[13]

Hovenkamp's focus on output, rather than price, is a direct consequence of the total welfare standard. Hovenkamp is correct that, if competition authorities are serious about pursuing a total welfare standard, they should focus exclusively on sales volumes and not on price.

Unfortunately, it is universally agreed amongst competition economists that competition enforcers *do not* pursue the textbook concept of total economic welfare. For example, Heyer concludes:

> Neither the US competition authorities, nor competition authorities in most other economies, appear willing to adopt explicitly and unambiguously a total welfare standard for merger enforcement.[14]

Farrell & Katz (2006) go further to argue that competition authorities routinely ignore the total welfare implications of the economic models they use. They conclude: "Evidently, either we don't trust those models, or we don't believe in a purely welfarist total surplus standard."[15]

In addition, the competition laws themselves, especially those that follow the EU model, include examples of possible violations which are difficult to justify if promoting conventional total welfare is their primary concern.

Nonetheless, the total welfare standard has been adopted in the recent papers arguing for stricter competition law enforcement in labor markets. For example, Naidu, Posner and Weyl (2018):

> monopsony power … creates waste: some workers would have been willing to work for the employer if they had been paid their full marginal revenue product, but will quit if they are paid the marked-down wage the monopsonist offers. This leads to increased unemployment or non-employment as workers find prevailing wages unacceptable and exit the labor force or refuse to take available jobs.

Despite its adoption by Hovenkamp, Naidu et al., and others, is the total welfare standard a sound foundation for competition policy in labor markets? We believe there are reasons for concern.

The first reason for concern is that, due to inelasticity of labor supply and/or the ability of labor hirers to price discriminate, the economic welfare loss from market power in the labor market (as conventionally measured) may simply be too small to justify intervention. For those who believe in the need for re-invigoration of antitrust enforcement in labor markets, this is a serious intellectual hurdle to overcome.

For example, Krueger[16] emphasizes that the overall elasticity of labor supply is very low - any given change in wages results in a very small reduction in employment. It follows that the deadweight loss from a reduction in wages is likely to be small.

Even if the elasticity of labor supply is material, the impact of market power on employment levels may be insignificant if the labor-hirer is able to price discriminate. The potential for price discrimination is far greater in labor markets than in most product markets. In most consumer-product markets, prices are public and posted before the seller knows anything about the identity of the buyer. In contrast, wages and salaries

13 Hovenkamp (2019) *supra* note 4.

14 Heyer (2012) *supra* note 5, page 154. See also Lande, Robert H., (1989), "Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust," 58 *Antitrust Law Journal* 631 (1989).

15 Naidu, Posner & Weyl (2018) *supra* note 2 seem to want to have a bet each way, although their paper is explicitly based in the conventional economic notion of total economic welfare, they abandon this approach at a key point, arguing that a merger which lowers wages to workers should be prevented, regardless of the impact on total economic welfare.

16 Krueger, Alan B., (2018), "Reflections on Dwindling Worker Bargaining Power and Monetary Policy," Luncheon Address at the Jackson Hole Economic Symposium, August 24, 2018.

are typically highly confidential information. Individual workers may have an idea of the range of salaries for work of a particular category, but workplace taboos make it difficult to know exactly what other workers are paid. This materially increases the scope for the labor-hirer to engage in wage discrimination.

Furthermore, many employers pursue a practice of not revising wages until the employee expresses a willingness to take up an outside offer. At this point the employer (who has a lot of information about the employee, including their willingness and ability to relocate to find alternative employment) may match the outside offer. This practice ensures that each employee is paid just enough to keep them in the present employment – a form of "perfect wage discrimination." According to Naidu, Posner and Weyl (2018) "the emergence of sophisticated prediction algorithms applied to vast troves of human resource data suggest that the ability to wage discriminate in the future may be expanded."

If the labor hirer can discriminate effectively, the deadweight loss from the exercise of market power in the labor market is likely to be small. The total welfare foundation, with its primary focus on deadweight loss, provides, at best, a mediocre grounds for intervention in labor markets.

C. The Protection of the Competitive Process

Are there alternatives to the total welfare or consumer welfare standards? In recent years, there has been increasing support for the proposition that the primary purpose of competition law is the protection of the *process of competition* (see, for example, Khan[17], and Wu[18]). This approach has a long historical tradition and has recently received surprising support from such distinguished authorities as Carl Shapiro[19] and Renata Hesse[20].

We are sympathetic to, and respect, those who advocate for the "protection of the competitive process" standard. We acknowledge that much of the day-to-day work of competition law enforcers can loosely be described as "protecting the competitive process."

But, the protection-of-the-competitive-process standard lacks a foundation in conventional economic welfare concepts. As a consequence, this standard cannot make clear predictions in circumstances where competing economic objectives are placed in conflict. Intervening in a market will often involve trade-offs between the interests of different market participants, or between conflicting objectives, such as trade-offs between innovation and productive efficiency, or between incentives for upstream innovation and downstream investment. The competitive process standard is silent on such trade-offs. As FTC Commissioner Caroline Wilson has pointed out, this leads to the risk of unpredictability and inconsistency.[21]

III. THE TRANSACTION COST APPROACH TO COMPETITION LAW

An alternative economic foundation for competition law has recently been proposed.[22] This approach, known as the transaction cost approach to competition law, argues that competition law exists to protect, and thereby promote, sunk, relationship-specific investments in the economy.

This approach starts from the observation that nearly all on-going economic relationships will require some form of sunk investment by one or both of the transacting parties. Such sunk investments are well known in labor markets. Most workers spend years developing general human capital (e.g. a general education) together with a wide range of special skills (e.g. as a chef, or carpenter). These investments are made in the expectation that they will raise the wage of the labor-supplier in the long-run.

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17 *Supra* note 8.

18 Wu, Tim, (2018), "The 'Protection of the Competitive Process' Standard," Federal Trade Commission Hearings, November 1, 2018.

19 Shapiro, Carl, (2017), "The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?," statement before the Senate Judiciary Committee, December 13, 2017.

20 Hesse, Renata, (2016), "And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement," Speech to 2016 Global Antitrust Enforcement Symposium, Washington DC, September 20, 2016.

21 Wilson, Christine, (2019), "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get," Address at George Mason Law Review Symposium, February 15, 2019.

22 See Biggar, Darryl & Alberto Heimler, (2019), "Re-Thinking The Foundation of Antitrust Law in the Era of Hipster Antitrust: Is Protecting Sunk Investments a Primary Economic Rationale for Antitrust Law?," under review at *Journal of Antitrust Enforcement*.

But the sunk investment of labor suppliers is not limited to human capital. In most cases the supply of labor requires the physical presence of the labor supplier. As a result, most labor markets are strictly local (within commuting distance). Most workers will therefore make a significant sunk investment in a location. For example, a worker may choose to relocate her family to find a job in a small town. The worker and her family take some time to get established in the community – to find a job for her spouse, to establish relationships with neighbors, to develop local service relationships (e.g. a local doctor or dentist), to get the kids set up in schools and so on. The time and cost required to establish these arrangements is a form of sunk investment in reliance on the expectation of employment in the town.

Like all sunk investments, these sunk investments face the threat of hold-up - the threat that, once sunk, the other party to the transaction will seek to change the terms and conditions of trade.[23] In the context of labor markets, the threat of hold-up is the threat that, once the worker has become established in a job the labor-hirer will cut the wages (or, equivalently, refuse a promised increase in wages).

Fortunately, competitive markets offer some protection against the threat of hold-up. In a competitive market, the investment by one side of the market is not specific to one particular trading partner. In the event of an attempt at hold-up, the party who has made the sunk investment can switch to another trading partner. If there is more than one suitable potential employer within commuting distance, a worker faces at least some protection against hold-up: In the event of a threat to cut in wages the worker can, in principle, switch to an alternative employer.

In addition to competitive markets, certain private arrangements can offer some protection against the threat of hold-up. The most common example is a simple contract. A worker who must make a substantial sunk investment in relocating his/her family may seek a long-term employment contract, rather than risk that, after relocating, a promised pay rise will not materialize. Another possible mechanism for protecting against hold-up is vertical integration as in the case of worker-owned co-operatives.

But vertical integration and long-term contracts are not always feasible. Almost by definition, relatively few workers are in a position to purchase the company that employs them. Very few companies are organized as worker co-operatives. It is theoretically possible to envisage a labor contract which specifies the terms and conditions of the labor supply that would apply in the event of a change in the market structure (e.g. a merger, or insolvency) that changed the outside options for the worker. But, in practice, such contracts are infeasible. Furthermore, theory suggests that the life of the contract must be as long as the life of the underlying sunk investment. But some sunk investments may last decades (e.g. the human capital investment by a doctor in training). Long-term labor supply contracts with a life of decades are almost completely infeasible.

As a consequence, circumstances can arise where in an on-going economic relationship the sunk investment of one side is subject to the threat of hold-up. In the absence of government intervention, this could have a chilling effect on investment. Valuable economic activity would be foregone. For example:

- Workers may be unwilling to move to a "company town" with a single employer, even though their productivity would be higher in that location, due to the threat that, once there, wages would not increase as promised;
- Individuals would be unwilling to invest in new skills or human capital out of fear that there would be no increase in wages to justify the cost of the investment.

Conversely, on the other side of the market, in circumstances where it is the *labor suppliers* that have market power (either individually or collectively), labor-hirers (firms) may be unwilling to invest in more productive equipment, out of fear that, once the investment is sunk, the workers will hold-out for a bigger share of the firm's profit.

According to the transaction cost approach to competition law, a transacting party exercises market power when it engages in hold-up; that is, when it seeks to change the terms and conditions of trade. The economic harm from the exercise of market power is the chilling effect this has on incentives for socially-valuable investment.

23 The role of sunk investments in labour markets is highlighted in a number of papers. For example, Wachter, Michael L. & George M. Cohen, (1987), "Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure and Relocation," 136 *University of Pennsylvania Law Review* 1349: "Workers make sunk investments in their jobs by agreeing to long-term implicit contracts that provide for 'deferred compensation', that is, below-market wages at early stages of employment and above-market wages at later stages. … [W]orkers invest in job-specific training and deferred compensation represents the quasi-rents earned on this training. … Once workers make a sunk investment in monitoring or job-specific training the firm acquires bargaining power over them because it can strategically force the workers to suffer a sunk cost loss by misrepresenting product market conditions, thereby expropriating the workers' expected return."

The transaction cost approach to competition law suggests that competition law steps in to protect, and thereby promote, the sunk investment of transacting parties. Specifically, competition law imposes two types of controls:

(a) In the case of parties in a dominant position (i.e. a firm in a position to engage in hold-up) competition law imposes strict limits on its ability to engage in hold-up – including limits on its ability to price discriminate, to change its prices, or on its ability to withhold services; and

(b) In the case of parties which might collectively be in a dominant position, through merger or collective arrangements, competition law imposes strict limits on their ability to merge or collude to put them in a position to engage in hold-up.

IV. THE BENEFIT OF THE TRANSACTION COST APPROACH TO COMPETITION LAW

In our view, the transactions cost approach to competition law is valuable for two reasons: (a) it is based in conventional economic total welfare or total surplus principles; and (b) it can help understand and explain the behavior of competition decision makers in situations where the total welfare and the consumer welfare standards are lacking.

As just noted, the transactions cost approach is based on total welfare or total surplus principles. The key difference to the way in which the total welfare approach is normally applied is that the transactions cost approach allows for the transacting parties to make sunk investments which shift their supply or demand curves. The resulting change in welfare can easily exceed (by many orders of magnitude) the economic harm due to the deadweight loss. In this sense the transactions cost approach allows for a more dynamic framework compared to the "static" model within which the total welfare concept is usually applied.

In our view, this small change in the economic model leads to predictions which are more consistent with competition laws and competition decisions in practice. For example, under the conventional total welfare standard, we should expect to see competition authorities approve mergers which enhance the ability of parties to price discriminate. In contrast, under the transactions cost approach, price discrimination – by allowing the dominant firm to charge different prices depending on the degree of reliance by its customers on its services – will allow the dominant firm to surgically expropriate some of the value of the sunk investment, reducing the incentive to invest. Rather than actively encouraging price discrimination, the transactions cost approach to competition policy suggests that we should expect to see competition authorities taking a dim view of price discrimination, consistent with what we observe in practice.

Similarly, we have seen that, under the conventional total welfare standard, competition authorities should turn a blind eye to mergers where demand is inelastic (downstream) or supply is inelastic (upstream). The transactions cost approach to competition law suggests that it is precisely when demand or supply is inelastic that the sunk investments of trading partners are most exposed to the risk of being expropriated.

In the same way, it is common for competition authorities to take action to control the behavior of firms in a dominant position – whether in a dominant position in an output market, or in an input market (such as a labor market). Under the conventional total welfare approach, the justification for such intervention is limited to situations in which rivals in an upstream or downstream market are excluded from the market.[24] In contrast, under the transactions cost approach, actions by a dominant firm to expropriate the sunk investment of trading partners should be prohibited (whether market participants are excluded or not). This might include engaging in price discrimination, or reducing the prices to long-standing input suppliers, such as labor-suppliers.

We can also contrast the transactions cost approach with the consumer welfare standard. As noted earlier, a strict application of the consumer welfare standard might require a competition authority to turn a blind eye to anticompetitive behavior upstream (such as in the labor market) particularly when such behavior might allow the firm to lower prices to consumers downstream. Under the transactions cost approach however, as long as the upstream suppliers have made material sunk investments, the transactions cost approach suggests that competition authorities should prevent firms from taking advantage of their position to expropriate the value of investments upstream. This might include, for example, both the case of a dominant employer lowering wages to captive employees, or a dominant on-line platform taking advantage of its position to exploit the sunk investment of its suppliers.

24 Here we are putting aside the "exploitative" abuse of a dominant position which is present in EU, but not U.S. or Australian competition law. But even in the case of an exploitative abuse the total welfare standard says that the dominant firm should be able to charge what it likes provided it does not reduce total sales volumes.

Finally, we consider that the transactions cost approach offers benefits over the "protection of the competitive process" standard. For example, there could in principle arise trade-offs between the need to protect sunk investment by trading partners, or sunk investment by the dominant firm itself. Such trade-offs have no resolution under a "protection of the competitive process" standard. The transactions cost approach allows us to continue to view competition not as an end in itself, but as a means to an end – an end which we can continue to assess through a conventional economic welfare lens.

In summary, we suggest that, alongside the range of other labor market regulations, competition law has a role to play in protecting workers from the threat of hold-up by labor hirers. A full articulation of the implications of the transactions cost approach to labor market competition policy is beyond the scope of this paper. We consider that this approach offers credible foundation for competition policy in the context of labor markets. More generally, in our view, the transactions cost approach to competition law offers promise as a credible economic foundation in many other antitrust markets in the future.

UNDERSTANDING THE ECONOMICS IN THE DISPUTE BETWEEN THE WRITERS' GUILD OF AMERICA AND THE BIG FOUR TALENT AGENCIES

BY HAL SINGER & TED TATOS[1]

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I. INTRODUCTION

The long-simmering dispute between the Writers' Guild of America ("WGA") and the Association of Talent Agents ("ATA") rose to a crescendo in 2019. The conflict raises complex economic questions of relative bargaining power and coordination rights — namely, when can workers coordinate on wages, and when can firms coordinate on prices, in ways that do not run afoul of the antitrust laws?

The parties had been operating under the Artists' Manager Basic Agreement of 1976,[2] which was due to expire at midnight on April 13, 2019. Negotiations between the two sides on a new agreement stalled after the top talent agencies, WME Entertainment ("WME"), Creative Artists Agency ("CAA"), International Creative Management Partners ("ICM"), and United Talent Agency ("UTA") (together, the "Big Four") refused to abandon the practice of charging packaging fees charged to production companies. Packaging fees occur when the talent agency requests payment from the production company that hires the writer instead of a commission on the writer's salary.

The WGA contends that the packaging fees represent a significant conflict of interest for the Big Four and thus violate California law, which holds that talent agents owe a fiduciary duty to conflict-free representation to the writers they represent. The new WGA Code of Conduct[3] prohibited talent agents from deriving "any revenue or other benefit from a Writer's involvement in or employment on a motion picture project, other than a percentage commission based on the Writer's compensation or fee." Given the financial windfall the Big Four obtained for decades from packaging fees, the prohibition on securing such fees precipitated the impasse between the WGA and the Big Four.

On April 12, 2019 sensing a deadlock, the WGA announced that "we are about to enter uncharted waters" and called on its members to fire any talent agent who refused to abide by the newly-implemented code of conduct.[4] In a show of solidarity, mass firings ensued, as writers — including celebrities such as Stephen King, David Simon, and Patton Oswalt — fired their agents.[5] The WGA quickly followed by filing suit against the Big Four in California state court on April 17, 2019, alleging breach of fiduciary duty and unfair competition.

In June, the talent agencies fired back. WME, CAA, and UTA, the two former of which are responsible for over 79 percent of packaging,[6] filed antitrust claims alleging that the WGA's actions constituted a group boycott that violated the labor antitrust exemption. As such, the talent agencies alleged that the concerted firing of talent agents represented a *per se* violation of Section 1 of the Sherman Act, which prohibits combinations that unreasonably restrain trade. WME's complaint, for example, contends that WGA solicited the assistance of third parties, such as smaller talent agencies, directors, producers, managers, and lawyers, as well as studios, in buttressing its position against the Big Four's insistence on packaging fees.[7]

In August, the WGA dismissed its state court claim and filed suit in federal court alleging similar conduct as well as claims of racketeering and antitrust violations against the Big Four talent agencies.[8]

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2 WGA, Artists' Manager Basic Agreement of 1976, available at https://www.wgaeast.org/wp-content/uploads/sites/4/2018/09/amba1976.pdf.

3 WGA, Code of Conduct, available at https://www.wga.org/uploadedfiles/employers_agents/agencies/wga_code_of_conduct_4-13-19.pdf.

4 New York Times, Hollywood Upended as Unions Tell Writers to Fire Agents (April 12, 2019), available at https://www.nytimes.com/2019/04/12/business/media/hollywood-writers-agents-fire.html.

5 Fortune, Hollywood Writers Fire Agents in Show of Solidarity Over Financial Disputes (April 15, 2019), available at https://fortune.com/2019/04/15/hollywood-writers-fire-agents/.

6 Hollywood Reporter, Television Packaging Deals: All the Confusing Questions Answered (April 3, 2019), available at https://www.hollywoodreporter.com/news/what-exactly-are-packaging-fees-a-writers-agents-explainer-1198974.

7 Complaint filed by William Morris Endeavor Entertainment, LLC against Writers Guild of America, West, Inc. and Writers Guild of America, East, Inc. before the U.S. District Court, Central District of California, Western Division, on June 24, 2019, available at https://www.courthousenews.com/wp-content/uploads/2019/06/WilliamMorrisWGA-COMPLAINT.pdf.

8 Hollywood Reporter, Writers Guild Moves Agency Lawsuit to Federal Court, Adds Racketeering and Antitrust Claims (August 19, 2019), available at https://www.hollywoodreporter.com/thr-esq/writers-guild-moves-agency-lawsuit-federal-court-adds-racketeering-antitrust-claims-1233123.

II. DOJ WEIGHS IN ON BEHALF OF THE AGENCIES

On November 26, 2019, the U.S. Department of Justice ("DOJ") issued a statement of interest in this matter. The Antitrust Division asserted that several main factual disputes exist and, in the DOJ's opinion, should be adjudicated at trial, including whether the WGA used nontraditional means in coordinating their dealing, and whether such coordination "serve only legitimate labor law objectives or also further any illegitimate goals such as abusing monopsony power over agents or eliminating competition in a business market."[9]

It is impossible to miss that the tenor of the DOJ's statement is consistent with stances it has recently taken against workers in other matters, including against Uber drivers in Seattle.[10] The DOJ's statement is also consistent with what some have dubbed the Trump administration's overarching anti-worker agenda.[11] By focusing exclusively on the coordination of the writers, the DOJ's statement places the probative onus on WGA, and entirely ignores the potentially anticompetitive coordination among the Big Four in setting packaging fees. Whether the current trend in antitrust law – by authorizing large, powerful firms as the primary mechanisms of economic coordination – allocates coordination rights appropriately has been the subject of scholarship by law professor Sanjukta Paul.[12]

Was the DOJ's intervention misguided? To answer that question, one has to understand the bargaining strength of the two sides in this dispute. In its complaint, the WGA alleged that "Agency compensation via packaging fees is possible because, after substantial consolidation within the industry, the Agencies now control access to all of the key talent necessary to create a new television show or feature film, including not only writers but also actors and directors." Put differently, the Big Four's dominant position in the key labor (input) markets for producing movies and television shows enables them to secure hundreds of millions of dollars in annual packaging fees from production companies. Such fees, at best, are often unrelated to talent compensation; at worst, they are inversely related.

III. HOW PACKAGING FEES CREATE A CONFLICT OF INTEREST

Generally, agents acting as representatives for talent receive compensation in the form of commissions equal to a percentage of the talent's pay. Traditional commissions in the talent agent market equal ten percent of the talent's pay. However, packaging fees can be far more lucrative, as evidenced by the talent agencies' collective unwillingness to forgo them, even at the risk of alienating their own writer clients. Notably, the Big Four all use the same "3-3-10" packaging fee structure in their dealings with production companies.[13] Under this format, the production company pays the talent agency via three revenue streams:

- Three percent (3%) of the base network license fee per episode;
- Three percent (3%) of the base network license fee, deferred and payable out of 50 percent of the net profits on the show; and
- Ten percent (10%) of the "back-end" or Modified Adjusted Gross Receipts ("MAGR") when the show is sold into syndication, which can occur multiple times for popular shows.

A key point worth noting is that the talent agencies obtain their fees "off the top" — that is, out of the gross profits. Writers also receive a percentage of the back-end syndication deal, but their fees are based on the remaining adjusted gross receipts *after* talent agency fees.

A hypothetical case makes the conflict clear. Suppose a packaged show has reached syndication (and the first two "3s" out of the 3-3-10 have been paid), and the production company sells the show into first round of syndication for $50 million. The final "10" represents the ten percent out of the syndication deal that the talent agency receives as part of the "packaging fee." Suppose the writer's contract with the production company also calls for the exact same percentage as the agency — namely, a ten percent cut out of syndication. One would be tempted

9 See DOJ Statement of Interest in *William Morris Endeavor Entertainment v. Writers' Guild of America*, November 26, 2019, available at https://www.justice.gov/atr/case-document/file/1221511/download.

10 Roosevelt Institute, Feds Side Against Alt-Labor, November 16, 2017, available at https://rooseveltinstitute.org/feds-side-against-alt-labor/.

11 Center for American Progress Action Fund, President Trump's Anti-Worker Agenda, August 28, 2019, available at https://www.americanprogressaction.org/issues/economy/reports/2019/08/28/174893/president-trumps-anti-worker-agenda/.

12 Paul, Antitrust As Allocator of Coordination Rights, UCLA Law Review, Vol. 67, No. 2, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861.

13 See *supra* note 6.

to assume that both the agency and the writer would get the same amount, $5 million, because they get the same percentage. But that is not the case. The talent agency is paid "off-the top," ten percent of $50 million, or $5 million. The writer's percentage is applied to the remaining $45 million *after* the agency's $5 million has been paid. Thus, the writer gets ten percent of $45 million, or $500,000 less than the agency. The talent's pay is subordinate to that of the agent representing her/him.

In contrast, under the traditional commission-based compensation, the agent would receive ten percent of the writer's earnings. In the above example, absent packaging fees, assuming the same contract, the writer would receive ten percent of $50 million, or $5 million. The agent would receive a ten percent commission on the $5 million, or $500,000. Note that, in this case, the writer received $4.5 million in both cases, with or without packaging fees. The talent agent, however, receives $50 million with packaging fees, but only one-tenth of that, $500,000, without.

So, one might ask, how is the writer harmed? One should remember that studios know they must pay the talent agents a hefty packaging fee. Thus, the packaging fees that the talent agents receive reduces the pool of compensation from which the writers can be paid. In other words, the ten percent of the syndication that the writer received in this case would be likely affected by the existence of packaging fee. The production company could pay the writer fifteen percent instead of ten and both it and the writer would be better off. The writer would receive $7.5M, the production company would keep $42.5 million instead of only $40.5 million ($50 million less $5 million to agent less $4.5 million to writer) under the packaging fee scenario. The agent would receive $750,000.

The example shows how the agency can earn more than the talent itself on a packaged production. This agent-skewed distribution is anathema to more competitive labor markets, where not only are such arrangements non-existent, but agents' percentage is limited by the labor union. For example, Tom Condon, head of CAA's football sports agency, cannot earn more than the talent he represents on a contract, because the commission an agent can earn is capped by the NFL Players Association at three percent.[14]

Scripted television writers, who were subject to the packaging fees until the WGA's April 2019 prohibition, have faced an altogether different scenario. In her 2015 statement as a candidate for the WGA Board, Meredith Stiehm, the acclaimed writer for *Cold Case, ER, Homeland*, and other hit shows, offered her situation as an example:

> When I created *Cold Case*, my agents packaged it. It was my first show, and I was a rube – when they told me I would benefit too, since they wouldn't take their 10% from my salary, I bought it. I just didn't do the math. It wasn't until year seven of my show when I was tasked with slashing the budget that I finally noticed that my agency was making $75,000 per episode – more than I was. I was stunned. And even worse, they had a percentage of the profits.[15]

That the agencies earn more than the writers suggests that the Big Four are charging supracompetitive commissions for their services.

Further, the talent agencies continue to earn packaging fees in perpetuity. This is because agents' compensation is tied not to the talent but to the show. For example, even if an agency no longer represents a certain writer, it would still continue to earn packaging fees from a show it had packaged.

Talent agencies have attempted to justify earning such fees by asserting that packaging involves putting together "comprehensive groups of key talent," as UTA claimed in its Answering Brief in *Lenhoff Enterprises v. UTA*. However, the term "packaging fee" is a misnomer in the modern era of agencies. In the 1950s, agents such as Lew Wasserman of MCA would bring teams of talent to studios.[16] That changed even as of 30 years ago, however, as noted in a 1989 New York Times article about Michael Ovitz.[17] Agencies can command a packaging fee even if they represent a single creative element, as explained in Gross' Programming for TV, Radio and the Internet.[18]

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14 Fortune, *The World's Most Powerful Sports Agents 2019: Soccer's Jonathan Barnett Takes Over At No. 1* (October 21, 2019), available at https://www.forbes.com/sites/jasonbelzer/2019/10/21/most-powerful-sports-agents/#613064313b27.

15 Meredith Stiehm, Candidate Statement for WGA Board 2019, available at http://www.meredithforwga.com/2016-candidate-statement.

16 See Christopher Ming, *Notes From Powerhouse: The Untold Story Of Hollywood's Creative Artists Agency*, available at https://christopherming.com/notes/powerhouse-the-untold-story-caa-james-andrew-miller/.

17 New York Times, *Hollywood's Most Secret Agent*, July 9, 2019, available at https://www.nytimes.com/1989/07/09/magazine/hollywood-s-most-secret-agent.html.

18 Gross, L., et al., *Programming for TV, Radio & The Internet, Second Edition: Strategy, Development & Evaluation*, 2nd Edition (Focal Press, 2005).

In its statement of interest, the DOJ cited the agencies' First Consolidated Complaint in listing an array of "representative examples of work" that talent agencies may perform on packaged shows. Documentary evidence from Sony Pictures serves not only to undermine such claims, but also to show how packaging fees reduce output, a signature characteristic of anticompetitive conduct according to the consumer-welfare standard that undergirds antitrust law.

In 2015, Wikileaks released 173,132 emails and 30,287 documents leaked from a hack of Sony Pictures.[19] These documents shine an unflattering light on the nature of packaging fees charged by the Big Four. For example, in a March 5, 2014 email, Tom Rothman, the chairman of Sony's TriStar Production and now the chairman of Sony's Motion Picture Group since February 2015, commented that:

> Also, interesting and a significant development in the director driven project world, is the stuff about caa [CAA] internal packaging control. They are demanding and getting fees now on these from the financiers (they call it a 'packaging fee' and are keeping as many emerging high end filmmaker projects *off the market* until they have full control. (emphasis added)

Likewise, in a June 13, 2014 email, then Sony TV boss Steve Mosko responded to an agency's request for a package fee:

> No need to worry about package. I've killed the deal w tribune. Your email was ill timed. Its [sic] hard for us to *create new business opportunities* when you put your hand out looking for a check…when you have done nothing and we are trying to put money in your clients [sic] pocket. Your cost made the decision for us Unreal. (emphasis added)

As indicated by these quotes, the output effect of packaging fees is decidedly negative.

Moreover, the Big Four agencies seldom, if ever, compete on price; the 3-3-10 packaging fee has been the industry's "standard" for many years. The logic that agencies, in the absence of any coordination, would be expected to compete on price finds support in the factual record. Prior to the mid-1990s, the standard industry package fee was 5-5-15.[20] After starting CAA along with his former partners at William Morris, Michael Ovitz's fledgling CAA undercut the industry standard by lowering its package fee to three percent, the standard that has existed since the demise of the franchise agreement known as Rule 16(g) in 2002 and continues today.

The price competition stopped at the now "standard" levels, which is particularly surprising given the current litigation. Indeed, one would expect that the agency that broke ranks by offering to forgo packaging fees would capture a significant infusion of talent, at the expense of the holdout agencies.

19 The Verge, *Wikileaks Has Published The Complete Sony Leaks In A Searchable Database*, April 16, 2015, available at https://www.theverge.com/2015/4/16/8431497/wikileaks-sony-hack-emails-north-korea-julian-assange.

20 See *supra* note 16.

IV. THE BIG FOUR HAVE COME TO DOMINATE ACCESS TO THE PRODUCTION COMPANIES

Co-packaging occurs when more than one talent agency brings a talent element to a show, necessitating a split in the packaging fee. In the case of two talent agencies, each would get 1.5-1.5-5, or half the standard 3-3-10 fee. In such cases, the agencies that split the package effectively become horizontal shareholders. They now have common ownership in an anticipated future income stream.

Notably, both packaging and co-packaging are the province of the Big Four. The following table is excerpted from a declaration submitted in the *Lenhoff v. UTA et al.* litigation by Ted Tatos, one of the authors of this article, who was engaged by Plaintiff Lenhoff Enterprises, a boutique literary agency.

	BEFORE	AFTER	
	2001 - 2002 Season	2014 - 2015 Season	2015 - 2016 Season
Total Shows Packaged	119	350	454
Uber Agency Package Totals	81	330	434
Uber % of Total Show Packages	68%	94%	96%
Total Number of Agencies Serving Market	77	43	43
# Agencies With Market Share > 0	15	11	10
Co-Packaged Shows	27	98	144
Shows Co-Packaged Between Ubers Only	12	98	144
Shows Co-Packaged Between Ubers and Other Agencies	13	12	23
Shows Co-Packaged Between Only Non-Uber Agencies	2	0	0
Possible Ways of Choosing Two Firms out of Total with	105	55	45

Of particular note, by the 2015-16 season, the Big Four or "Uber" agencies held 434 of the 454 packages (or 96 percent); their prior share was just 68 percent in the 2001-02 season. When co-packaging occurred in the shows analyzed in 2014/15 and 2015/16, it always involved at least one of the Big Four.

In light of these data, any claim that a standardized package fee is procompetitive because it enables co-packaging is absurd. First, it is readily obvious that co-packaging could occur absent a packaging-fee model. Each agency would receive the commission on its talent, just as agents for athletes on a basketball team receive a commission on the athlete(s) they represent, not on the entire team's budget. Second, to qualify as potentially procompetitive under the consumer-welfare standard, the standardized package fee would have to result in higher output and lower prices. In other words, co-packaging would have to be the driver, or cause, of any increased output. Evidence for this is quite the opposite, as observed in direct quotes above from Sony executives.

The factual record indicates that the market for representing talent is highly concentrated and dominated by four firms that all charge the same package fee and have done so for decades, notwithstanding changing economic conditions or other market forces. Indeed, as Judge Berzon observed in the Ninth Circuit's hearing on the Lenhoff v. UTA matter, "whether or not [Plaintiff] sufficiently pled the horizontal price fixing… it frankly seems to me their strongest argument if adequately pled…" With respect to the packaging fees, Judge Berzon explained:

> the argument here would be…something along the lines of there was a complete change and it was a complete change to a specific set of numbers…those specific numbers [packaging fees] never changed and have never been undercut by any of these four people [the Big Four]…what's odd about this is not just that everybody charges $1.99, it's that it's a specific scheme, with specific numbers at different stages and it's not varied from.[21]

The issue in *Lenhoff v. UTA et al.*, as Defendants observed, was that Plaintiff did not adequately plead price fixing. If they had, UTA's attorney acknowledged at the hearing, "I think it would be a different case … it would be an entirely different case."

21 See recording of the hearing available on YouTube at https://www.youtube.com/watch?v=GQaL-lx5jgw.

Given this highly concentrated market structure among talent agents and the existence of packaging fees through which such agents accrue supracompetitive profits, it is surprising that the DOJ would assert that "[w]hile unions can restrict agent compensation when pursuing a legitimate union goal such as avoiding conflicts of interest, it is not a legitimate goal for a union to exert *monopsony power* over agents simply to extract additional rents" (emphasis added). To the extent there is any power imbalance here, that power resides with the Big Four, as they collectively control access to the production companies that purchase writing talent. By analogy, if a handful of real estate agents came to dominate brokerage services at a mountain resort and charged homeowners a supracompetitive commission, it would not be an "abuse of monopsony power," as the DOJ describes it, for the homeowners to coordinate their response with the aim of driving commissions back towards competitive levels.

And it is beyond surprising to observe that the DOJ has intervened not by investigating evidence of potentially collusive price-fixing by talent agencies, but rather by inquiring whether the WGA may have breached the labor exemption to antitrust in coordinating its writers' dealings with agents. By questioning that aspect and only that aspect, the DOJ is signaling a hostility to the labor exemption to antitrust. It is settled law that the labor exemption covers labor union activities; the WGA is merely coordinating among its own members as to the terms and condition of the writers' contracts, not on any activity in the product market, as DOJ wrongly asserts. That is classic union activity. In siding against workers in favor of powerful firms, the Antitrust Division is once more cementing rather than dispersing economic power.

THE BIAS AGAINST LOW-WAGE LABOR MARKETS IN MERGER ANALYSIS

BY ANANT RAUT[1]

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I. INTRODUCTION

Blistering critiques of the last five decades of antitrust enforcement have led us to a debate, several years in, over whether and how to improve the current approach. A voluble part of the ongoing discussion has been whether antitrust, content for decades to rely on price and output effects, should take into account more than just the end price for consumers, such as the impact that consolidation would have on employees of the merging parties. Scholars and critics from this neo-Brandeisian school of thought have called for antitrust to generally better account for these types of labor effects.

The landmark antitrust labor case would be a merger case where the competitive harm is to the employees of the post-merger entity. Neither enforcement agency has ever brought one, but there are signs that the FTC may be searching for just such a case to bring. But there is a bias built in to how traditional antitrust economics distinguishes the characteristics of "skilled labor" and "unskilled labor" markets. Left uncorrected, enforcers may focus too intently on mergers involving high-wage labor markets while ignoring the same competitive harm occurring in their low-wage counterparts.

By this author's estimation, neither enforcement agency (the Department of Justice's Antitrust Division and the Federal Trade Commission's Bureau of Competition) has ever challenged a merger on the basis of post-merger employer monopsony power. Why haven't labor harms been pled more? In part, because for many years labor cuts have been treated crudely, horribly, as a benefit of mergers. Terminating the livelihood of human beings is still referred to in the Orwellian argot of merger analysis as an "efficiency."

True, the enforcement agencies have this decade brought no-poach cases, which involved agreements among several hugely successful companies to keep their best engineering or illustrating talent from being paid their fair market rates.[2] But these were straightforward Section 1[3] price-fixing agreements where the prices were salaries rather than consumer goods. Similarly, I and others have argued that non-compete clauses where no trade secrets or intellectual property is involved should also be treated as a violation of the antitrust laws, but again, that falls under a traditional horizontal restraints theory.

The unicorn case, and certainly the most trailblazing, would be one where the enforcement agencies challenged a merger because after the merger the new company would be in a position to pay its employees less. It makes a sort of intuitive sense – it's the thing employees fear second-most following a merger announcement, behind termination itself – yet it's never been done. In traditional merger analysis, enforcement agencies are always focused on the competitive effects of the product of the merging companies – will the price of plane tickets go up once these two airlines merge? Will indie movies get shut out of distribution if this mainstream theater chain buys this independent movie chain? Will this global beer giant's crappy midlevel beer get pricier once it buys out this craft brew that everyone likes? Never is the analysis on what happens to the employees of the companies themselves after they merge.

And here I'd like to preempt the terminology most often used and reject the categorization of employees as "skilled" and "unskilled" labor. Describing a market at the outset as "unskilled labor" begets the outcome you're looking for, that any one of these workers is wholly replaceable by another one. But just because one set of jobs is more easily learned and has fewer credentialing requirements doesn't mean that that worker lacks "skills"; that worker, in fact, may be acquiring skills that make that worker especially valuable to a competitor company in the same space, even the subject of a bidding war. A better, and certainly less offensive, pair of labels is high-wage and low-wage labor markets.

2 See Press Release, "Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area" (July 31, 2018), available at https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they; *United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation*, No. 1:18-cv-00747 (2018); *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (2010); and *United States v. Adobe Systems, Inc., et al.*, No. 1:10-cv-01629 (2010).

3 15 U.S.C. 1.

II. THERE HAS NOT YET BEEN AN EMPLOYER MONOPSONY MERGER CHALLENGE, BUT THERE LIKELY WILL BE

There's nothing preventing the enforcement agencies from taking labor effects into account as part of the merger analysis. Without even changing the existing consumer welfare standard, where many of the fires of the current antitrust debate have raged, agencies absolutely can take labor effects into account, under plain vanilla monopsony power theory. A monopsony labor theory of harm can be summarized as follows: in the market for employee services, the post-merger entity will now have amassed sufficient market power to underpay employees relative to what they would be able to ask for in a more competitive market. Put another way, once Company A buys Company B, the combined company can pay its employees less (or reduce benefits or some other form of compensation) because it has the clout to do so.

But this author looked, and could not find a single instance in over two decades' worth of merger challenges of either enforcement agency pleading a harm to the employees following the merger.[4] Now the tide is turning, and I think that eventually we will. In October 2018 remarks to the American Bar Association, then-Director of the FTC's Bureau of Competition Bruce Hoffman stated that the FTC was investigating monopsony, including labor monopsony issues, in three major merger investigations.[5]

Based upon traditional antitrust economic theory, I expect enforcers to look for a seminal case in a merger involving specialized, high-wage labor like engineers or doctors, and assume that none exist in low-wage markets. The rationale under the traditional economic models used in antitrust is as follows: high-wage labor is more locked in and less likely to switch professions or geography than take a post-merger pay cut, whereas low-wage labor has a lot more low-wage labor options, so post-merger employers have no real leverage to cut their wages. This is the bias against low-wage labor markets in antitrust, and it is flawed because of real world work that demonstrates the opposite behavior in low-wage labor markets. Yet traditional antitrust treats the exact same choices made for the exact same reasons and treats the behavior in high-wage markets as rational, and as anticompetitive effects, and the behavior in low-wage markets as irrational, essentially penalizing the worker for acting reasonably.

III. ANTITRUST TREATS HIGH-WAGE LABOR MARKETS LIKE DUDLEY DURSLEY AND LOW-WAGE LABOR MARKETS LIKE HARRY POTTER

We can build what the hypothetical high-wage labor market employer monopsony case will look like. High-wage labor is a more attractive candidate for an enforcement agency because of the ways it can be more easily defined as a market. In this example, we'll use doctors employed by a pair of merging hospitals or health systems. In defining high-wage labor as a market, the enforcers will plead the following assumptions: doctors have invested so much time in their credentialing that they are more likely to accept a small pay cut than switch professions. Enforcers will also plead that it is unreasonable to expect these doctors to move to another location to practice.

We can anticipate these arguments from how the enforcement agencies have pled the next closest thing, harms to physician reimbursement rates from potential health plan consolidation.[6] Look at the assumptions built into the calculation of post-merger market power in these cases.

See, e.g. *U.S. v. Aetna and the Prudential Insurance Company*, Complainant 27: "A small but significant decrease in the prices paid to physicians by these buyers would not cause physicians to seek other purchasers of their services or to otherwise change their activities (away from providing physician services towards other uses or leisure) in numbers sufficient to make such a price reduction unprofitable." Further, "[a] small but significant decrease in the prices paid to physicians would not cause physicians to relocate their practices outside of the Dallas and Houston markets in numbers sufficient to make a price reduction unprofitable."[7]

4 The search was somewhat cursory, due to the author's lack of a grant or junior associate to whom to farm the work out to.

5 Feinstein, D. & A. Teng, "Buyer Power: Is Monopsony the New Monopoly?," *Antitrust*, Vol. 33, No. 2 (Spring 2019). Unrelated, but no less interesting, is the fact that Bruce Hoffman once poked my infant son in both eyes while misperforming a magic trick.

6 Because the impacted physicians are not employees of the merging entities but third parties selling them a service, these cases are classic monopsony buying power cases, not employer monopsony cases.

7 Complaint at 29, *U.S. v. Aetna, Inc. and the Prudential Insurance Company of America*, No. 3-99 CV 1398-H (N.D. Tex. 1999), available at https://www.justice.gov/atr/case-document/file/483516/download.

The argument was repeated nearly verbatim six years later in *U.S. v. UnitedHealth Group, Inc. and PacifiCare Health Systems, Inc.*, Complaint at 33: "A small but significant decrease in the price paid to physicians would not cause physicians to seek other purchasers of their services or to otherwise change their activities (away from providing physician services) in numbers sufficient to make such price reduction unprofitable."[8]

In contrast, traditional antitrust is unlikely to even see employer monopsony harm in low-wage labor markets because of its unhesitating embrace of the classical economic argument that low-wage labor will always get reallocated more efficiently into the vast, undifferentiated pool of general low-wage jobs. There is no harm because there is no market power, and there is no market power because the low-wage workers can swim back into the sea of low-wage labor and swim back out into completely different low-wage positions. As a result, employers daren't wage monopsony power.

As a result of these assumptions, when enforcers see high-wage labor accepting a pay cut rather than switch jobs after a merger, the high-wage workers are victims, the pay cuts are unavoidable, and the result is an antitrust harm. By contrast, when low-wage workers do the same, they are people with better options making decisions not in their self-interest, the pay cuts are avoidable, and the result is not an antitrust harm.

IV. WHY THIS APPROACH IS FLAWED

These disparate outcomes stem from flawed assumptions about both labor markets.

First, on the high-wage labor side, the assumptions that lead to a conclusion of post-merger employers having wage power are overly broad and not borne out in real world data. Take the physician employee example above. Surveys of medical school graduates on their 10-year reunions have found that fewer than 100 percent of them were still doctors. A casual perusal of some medical school alumni magazines demonstrates a variety of seemingly fulfilling non-medicine career choices: some choose to go into hospital administration, some leave practice for full-time academia, and some switch professions entirely, joining even more lucrative fields like hedge funds or the pharmaceutical industry, or obtain yet another degree and defend their colleagues against medical malpractice cases. In addition, while complicated, it is far from pioneering for a nurse or doctor to move to a new area to practice.

But putting aside how much conventional antitrust analysis may overstate how much market power a post-merger employer may have in certain high-wage markets, it definitely understates how much may occur in low-wage markets. This is a reality that classical economics misses, but behavioral economics does not.

Low-wage labor markets aren't the amorphous miasma of interchangeable jobs that classical economics would have you believe. On the contrary, there are a number of reasons why low-wage labor, facing a pay cut, may stay in the same job rather than take a better-paying low-wage job elsewhere. Some of these factors, as detailed in an October 2016 report by the White House Council of Economic Advisors, include information asymmetries and search frictions.[9] Job seekers may not know about all relevant job openings at a given time. And while a considerable industry including LinkedIn and recruiters and headhunters has built up around matching qualified high-wage candidates for high-wage openings, there has been less profit and motivation to do so on the low end, where we see less efficient methods of communications such as job fairs and word of mouth.

Nor may people in low-wage jobs seek out higher-paying opportunities where you expect them to. There is a "stickiness" to jobs that contradicts assumptions about labor movement. So-called job lock can result from any number of factors. Prior to passage of the Affordable Care Act, workers with pre-existing conditions were afraid to switch jobs and either lose their insurance or have their premiums go up considerably. Others can only take certain jobs that work with their childcare arrangements. One study[10] has found that U.S. job seekers are 35 percent less likely to apply to a job 10 miles away than one within their own zip code.[11] As economist David Autor sums it, "It turns out the real world is not that

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8 Complaint at 33, *U.S. v. UnitedHealth Group, Inc. and Pacificare Health Systems, Inc.*, 1:05 CV 02436 (D.D.C. 2005), available at https://www.justice.gov/atr/case-document/file/514011/download.

9 "Labor Market Monopsony: Trends, Consequences, and Policy Responses," Council of Economic Advisers Issue Brief (October 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

10 Marinescu, Ioana, & Roland Rathelot. 2018. "Mismatch Unemployment and the Geography of Job Search," American Economic Journal: Macroeconomics, 10 (3): 42-70.

11 This author has passed on applying for jobs that would require switching onto one additional Metro line.

close to that best-case scenario. People don't move really readily; they have skills that are specific to their industry, they have attachments to their jobs, it's wrapped up in their identity. And then the shocks, because they're so geographically concentrated, they're highly, highly disruptive."[12]

A management-level professional at a factory may under classical economic theory be considered "unskilled," and therefore willing to switch jobs. But that job may be "sticky" because that senior-level employees has now earned the shifts that s/he wants, the vacation time that s/he wants. So it becomes much easier to understand why that professional, facing a 5 percent pay cut (the test in antitrust), would be willing to accept that rather than start over with no seniority at an entirely new company.

But under traditional antitrust economic theory, the same choices made for the same reasons under the same circumstances are treated as rational behavior in high-wage labor markets, and irrational behavior in low-wage labor markets. Classical antitrust theory penalizes the low-wage laborer for making the exact same jobs choices as the high-wage laborer, resulting in a blind spot of antitrust analysis, whereas a behavioral approach that takes into account real world behavior should find the same competitive harm.

V. WHERE THIS ARGUMENT FITS WITH THE OTHER WORK BEING DONE ON ANTITRUST AND LABOR

Some of the other work on labor antitrust has focused on hidden concentration at the employer level, resulting in coordinated effects and wage depression. This work is important in uncovering additional reasons that low-wage labor markets are not acting as predicted. However, the critique I am leveling is at a flaw within application of the consumer welfare analysis itself, and the way it protects and penalizes the exact same behavior in two types of labor markets.

Other arguments have focused on whether antitrust needs to adopt a public interest standard in order to account for labor effects. South African law, for example, requires its competition authorities to consider the effects of a merger on employment. Competition authorities divide the work force into three main categories – unskilled, semiskilled, and skilled – and appear to be focused more on retraining the employees who are going to lose their jobs and making sure they are not forgotten and left to their own devices as pawns of greater corporate machinations. While I have no objection to taking labor effects into account that way, my argument is more that of "treat them the same" under existing law not "find a way to make sure they get taken care of."

VI. SOME WAYS TO MAKE A BAD SITUATION BETTER

What can enforcers do to better take into account labor effects? I offer five policy prescriptions that range from taking better account of labor effects in merger analysis to better protecting low-wage labor markets generally.

- *Establish an interagency labor task force to examine these issues*. The White House or Congress should mandate the creation of an interagency labor task force. The task force would include the DOJ Antitrust Division and the FTC's Bureau of Competition and could include, among others, principals from the Department of Agriculture, Department of Commerce, and the National Economic Council. An interagency group would force the two enforcement agencies to harmonize enforcement approaches on this issue, and obtain input from peer agencies with greater experience in labor or the effects of consolidation on low-wage labor markets. Precedent for such interagency working groups already exists – the Committee on Foreign Investment in the United States (CFIUS) is an interagency working group that is convened as needed to evaluate and approve certain foreign investments in the United States.

- *Bring in labor specialists*. The enforcement agencies should permanently hire labor specialists, to help with all of their investigations, but in particular to help correct any bias against low-wage labor in merger analysis. This means hiring labor lawyers, labor economists, and behavioral economists.

12 Aleem, Z., "'Another kick in the teeth': a top economist on how trade with China helped elect Trump," Vox (March 29, 2017), available at https://www.vox.com/new-money/2017/3/29/15035498/autor-trump-china-trade-election.

- *Consider labor effects in every merger case*. While there is no "checklist" for merger evaluation at the enforcement agencies, and theories are considered anew even in mergers in the same industry or parties from a prior attempt taking another run at the altar, there can be a tendency to dismiss certain types of harm out of habit, and stick to the product market effects. The remedy could be as simple as an internal directive from each agency requiring case teams to include a paragraph in their recommendation memos affirming that they considered labor effects and how this supports challenging or not challenging the merger.

- *Bring a labor effects case in a merger with no downstream product market effects*. There will be a temptation to bring an employer monopsony case in a merger with downstream product effects, so that the effect on high-wage labor can be added as a secondary count to a more traditional core complaint – that the merger will result in price or output effects on the product market. For example, the primary harm alleged in the two DOJ complaints cited above was that the merger would raise the cost of health insurance; the labor harms were secondary. The problem with doing it this way is that judges may rule on the mainstream argument without addressing the labor harm. To truly advance this issue, the agencies have to move forward without a safety net and bring a labor harm-only case. The paradigmatic case would be one where, for example, two coal mines in a two-coal mine town merge – presumably not enough market power to affect the market for coal, but enough to affect the local labor market for coal miners.

- *Legislatively limit* Amex *to prevent abuses of the gig economy*. At this point, everyone is still kind of feeling out exactly what the decision in *Ohio v. Amex*[13] means for their corner of antitrust law. However, it could theoretically worsen conditions for low-wage labor by enabling, for example, a ride-sharing platform like Uber that brings together riders on one side of the platform with gig drivers on the other side of the platform to justify harming the driver side of the platform because it would in some way enhance competition on the rider side of the platform. The solution would require defining the boundaries of *Amex* to prevent this kind of abuse, either by passing legislation or bringing subsequent enforcement actions to limit the reach of the holding.

13 *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

COLLECTIVE BARGAINING IN TIMES OF PLATFORM WORK

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I. INTRODUCTION

Workers for platforms such as ride-hailing or food delivery apps are increasingly demanding better working conditions and stronger regulation of the sector in both the United States and the European Union. Strikes, i.e. workers logging off from the app, have recently taken place in the United Kingdom, Belgium, the Netherlands, France, Germany, Australia, and Hong Kong. Despite remaining relatively limited in scope, platform work has become one of the most visible and controversial symbols of the "new world of work."

While platforms are a recent development, triangular employment relationships are not new. For several decades, it has been commonplace for temporary agency workers to be hired by a staffing agency and assigned to work in another firm. However, a key difference between staffing agencies and platforms is that agency workers have an employment contract, while most platform workers are (rightly or wrongly) classified as self-employed. Having such a status means that those workers may not be covered by the standard rights and protections that employees enjoy. However, even if they are considered to be self-employed on paper, some of these platform workers, and several other workers in less visible but similar situations, have some of the characteristics of employees and, like them, might be in an unbalanced power relationship when employers have a higher degree of control over the employment relationship than they do.

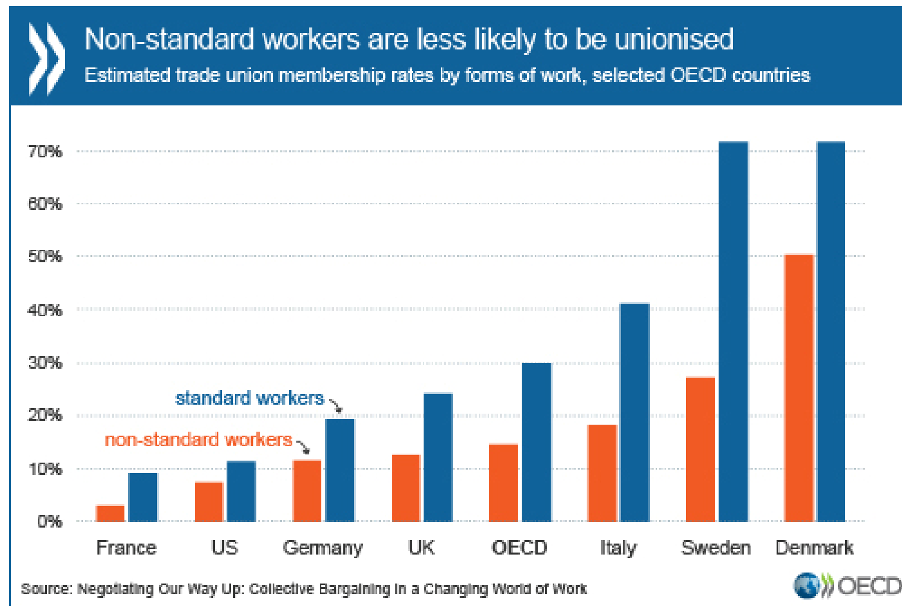
Why are unbalanced employment relationships (which are not limited to platforms) a problem? Is it just a question of social justice? No, it is also an issue of economic efficiency. When workers have limited options (because they work in areas with few employers, or have limited possibilities to move, or their skills are not easily transferrable) and are unable to negotiate their working conditions, employers can inefficiently suppress wages and employment – a situation usually referred to as labor market monopsony.

Several public authorities, from national governments to city councils, are scratching their heads to find a balance between ensuring good working conditions for all workers and a level-playing field for all companies while not restraining new forms of business that offer job opportunities to workers that may have not found another one. Some are considering stricter regulation of working hours as well as minimum pay. Others are pushing platforms to self-regulate through codes of conduct or charters.

Tribunals are also struggling with the problem. Many court cases have weighed in on the debate in several countries, in particular to disentangle whether platform workers are really self-employed or just in a disguised form of standard, salaried employment. In several countries, platform workers have been re-classified as standard employees. In others, the self-employed status of platform workers has been validated. In Europe, the European Court of Justice (in Case C-434/15) even ruled on the nature of the business itself, holding that Uber acts as a transportation service provider rather than a mere technological intermediary and therefore has duties and responsibilities towards its workers that a simple intermediary would not have.

II. COLLECTIVE BARGAINING AS A TOOL TO SELF-REGULATE THE NEW WORLD OF WORK

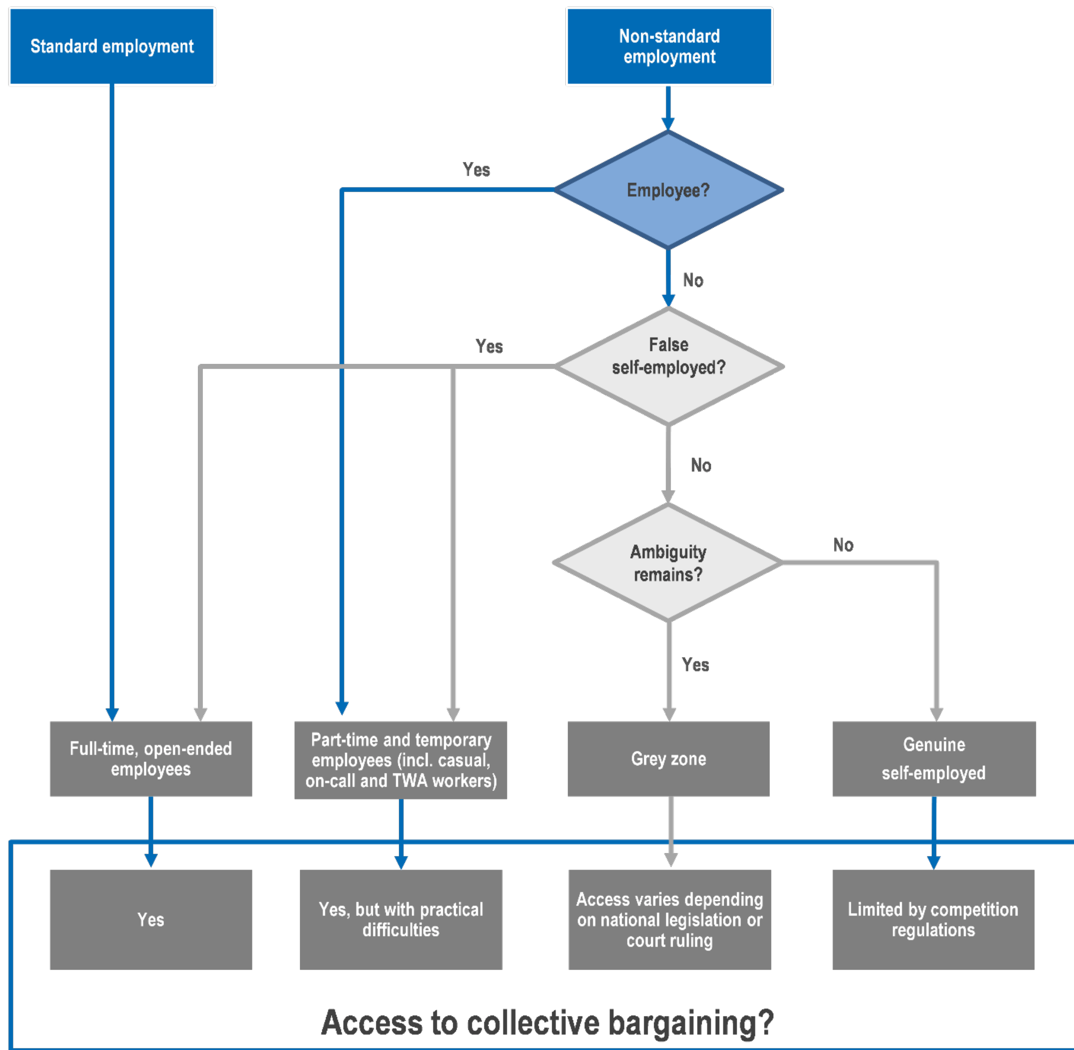
Beyond government interventions, social partners can also find solutions on their own via collective agreements. Even if for many people collective bargaining and organized labor sound like relics of the past, they provide a form of self-regulation which can prove more flexible and tailored than one-size-fits-all solutions through legislation. However, as shown by the figure below, non-standard workers are 50 percent less likely to be unionized, on average, than standard employees.



This lower level of unionization partly reflects the practical difficulties of organizing non-standard workers (who might be more fearful of retaliation when joining a union and/or be less attached to a particular workplace because they frequently change jobs), as well as the fact that collective bargaining historically developed around standard employees.

It also results from legal obstacles to collective bargaining for some non-standard workers such as the self-employed. If ILO Convention 98 on the right to organize and bargain collectively refers to "workers" in general, in practice, the right to bargain for non-salaried workers is subject to legal discussion as possibly infringing antitrust rules. As illustrated in the chart below, while salaried workers face only practical difficulties in exercising their collective rights, workers in the "grey zone" between the usual definitions of employee and self-employed, where genuine ambiguity exists about their employment status, as well as genuine self-employed workers, who might nonetheless be in unbalanced power relationships with their employer/client, may also be barred from bargaining collectively due to laws prohibiting cartels, which tend to consider them as "undertakings." The argument that collective bargaining for self-employed workers is incompatible with competition law has also been used in the United States by Uber to challenge a 2017 ordinance by the City of Seattle that allowed drivers to unionize and bargain together. In the European Union, the European Court of Justice in 2014 ruled that only "false self-employed" workers are not to be considered undertakings for the purpose of competition rules while the "other self-employed" should continue to be seen as "enterprises" and therefore barred from bargaining collectively.

Access to collective bargaining for different forms of employment, current situation



Source: OECD Employment Outlook 2019, OECD Publishing, 2019.

The European Union Commissioner for competition, Margrethe Vestager, has recently called for "gig economy" workers to be allowed to collectively bargain for their rights. "We need to make sure that there is nothing in the competition rules to stop those platform workers from forming a union, to negotiate proper wages as you would do in any other business," Ms. Vestager said.[2] How can this be done in practice?

First and foremost, by effectively enforcing existing labor regulation. In some cases, some of these workers are simply "falsely self-employed," i.e. they have working arrangements that are essentially the same as those of employees but contracts define workers as self-employed in order to avoid regulations, taxes, and unionization. In the United States, the Department of Labor has estimated that between 10-30 percent of workers are misclassified, and that this could have a significant impact on tax revenue.[3] Enforcing the correct classification would also give access to collective bargaining to these workers. Fighting misclassification may require revising and/or harmonizing definitions of employee and self-employed statuses as well as strengthening regulatory enforcement by facilitating third-party actions and reducing the costs of filing classification complaints for workers.

However, no matter how effective enforcement is, there will always be workers who are genuinely difficult to classify and will belong to a grey zone between dependency and self-employment. Independent contractors and freelancers such as ride-hailing drivers and delivery workers often fall into this category. This occurs because they simultaneously share some of the characteristics of employees (e.g. they cannot set their

2 See https://www.competitionpolicyinternational.com/eu-vestager-says-collective-bargaining-in-gig-economy-would-not-be-cartel-like-behavior/.

3 Brumm, F. (2016), Making Gigs Work The new economy in context, University of Illinois - Urbana Champaign.

own rates of pay, cannot be replaced in executing their tasks by someone else, are financially dependent on one main "customer") and some others of the self-employed (e.g. they can choose when to work; they use their own equipment; they can work for competing platforms). As a consequence, the factors relevant to the tests used by courts to determine whether a worker is an employee or not point in different directions, which typically leads courts to conclude that the worker is not an employee, and therefore must be considered self-employed. Yet, these workers usually are in the same unbalanced power relationship with their "employer(s)/customer(s)" as employees, and evidence suggests that they are even more exposed to monopsony[4] than standard employees. The consequences of power imbalances on pay and employment levels tend to be stronger when workers are unable to organise and bargain collectively. When workers negotiate individually (or do not negotiate at all), employers' buyer power is usually not offset by sufficient bargaining power on the side of workers.

III. PROVIDING COLLECTIVE BARGAINING RIGHTS

There is, therefore, a strong argument in favor of extending collective bargaining rights to workers in the grey zone. The main difficulty is to identify some criteria for providing access to collective bargaining to avoid giving unregulated freedom to own-account self-employed workers – that is, self-employed without employees – to form cartels (even small ones), as this could have clear negative consequences for consumer welfare. In particular, the challenge is to avoid that extending bargaining rights would threaten the effectiveness of the cartel prohibition in competition law – for example by risking giving *de facto* a blanket authorization to cartels of true business undertakings, which typically face multiple consumers (e.g. plumbers agreeing to divide a geographical market among themselves).[5]

There are two approaches to providing bargaining rights to workers who find themselves in an unbalanced power employment relationship. The first consists in tailoring labor regulations to define *ex ante* the categories of workers who have access to bargaining right; the second touches competition regulations.

Some OECD countries have followed the first approach by defining specific categories of workers in the "grey zone" with clear boundaries, such as the dependent self-employed (own-account self-employed who are financially dependent on one client). Since the mid-1960s in Canada, collective bargaining legislation at the federal level (and in several provinces) has explicitly defined "dependent contractors," allowing for their inclusion in the same bargaining unit as permanent full-time employees and usually with the same collective agreements (while it is uncommon for dependent contractors to have a separate collective agreement from permanent employees, this is legally permissible). In a similar vein, dependent contractors in Korea, *parasubordinati* in Italy, *Arbeitnehmerähnliche Personen* in Germany, or *TRADE* in Spain are included in collective bargaining (or in the case of Spain they can sign specific "professional interest agreements," *acuerdos de interés profesional*) even if not formally employees.

When the categories are too narrow, this approach risks leaving out most workers in unbalanced power relationships with their *de facto* employers. Other countries have thus developed categories with less defined boundaries, such as "person working for money" in Poland or "workers" in the United Kingdom, who are simply defined as individuals who work under a contract to provide a personal service. In these countries, these categories have a number of employment rights, including access to collective bargaining. While being more inclusive, this solution nonetheless leaves room for judicial uncertainty and may create opportunities for downgrading employees into such a third worker category.

Another option consists in inverting the logic of the multi-factor tests for specific protections. A worker is then considered an employee, with respect to those protections, except if it can be proved that she is a self-employed. This route is followed by a number of U.S. States as regards liability to unemployment benefit contributions and, less frequently, overtime pay and minimum wage. California, through the AB5 legislation,[6] has recently enacted this principle for all protections defined in its labor code. Other countries are considering similar moves.

All these models for the extension of rights and protections through labour law draw a clear line between workers and business undertakings. Therefore, if used for extending access to collective bargaining, in particular at the company level, they have the advantage of not giving a blanket authorisation to cartels of undertakings facing multiple consumers.

A second, complementary, approach consists in tailoring competition regulations. Such objectives could be pursued either by adopting a pragmatic approach *vis-à-vis* groups of self-employed workers most exposed to unbalanced power relationships or by introducing explicit legal exemptions from the enforcement of the prohibition to bargain collectively.

4 M. Keith Chen, Judith A. Chevalier, Peter E. Rossi & Emily Oehlsen (2019), "The Value of Flexible Work: Evidence from Uber Drivers," *Journal of Political Economy*, vol. 127, no. 6.

5 *U.S. v. Joseph P. Cuddigan, et al.*, https://www.justice.gov/atr/case/us-v-joseph-p-cuddigan-et-al.

6 See https://legiscan.com/CA/text/AB5/2019.

In many cases, regulators and enforcement authorities have taken a case-by-case approach to avoid a strictly procedural analysis of cases involving those workers with little or no bargaining power and exit options. Moreover, in several countries (e.g. in France, Italy, and Spain), independent unions of platform workers *de facto* negotiate working conditions for their members even if they are classified as self-employed without any intervention from national antitrust authorities. The risk associated with this approach is that it potentially creates uncertainty since it could be reversed without any legislative reform.

Few OECD countries have introduced explicit exemptions to the cartel prohibition for certain forms of self-employed sectors or occupations. In 2017, the Irish Parliament amended the Competition Act to include voice-over actors, session musicians and freelance journalists among the occupational categories that have the right to negotiate. Furthermore, it also opened the possibility to access collective bargaining for "fully dependent self-employed" and not only "false self-employed" workers.[7] Under Irish law, trade unions have to apply for the exemption, prove that the workers they want to represent fall in one of these two classes, and show that their request will have "no or minimal economic effect on the market in which the class of self-employed worker concerned operates," and not "lead to or result in significant costs to the State." The 2017 Irish amendment has attracted many criticisms and is currently being debated at the International Labour Organization ("ILO"). Irish employers as well as the International Organization of Employers, on the one hand, expressed their concern about the lack of clarity in the criteria used to identify "fully dependent" and "false" self-employed workers. They also contested the lack of employer consultation in determining the application of those criteria – currently the law states that the Government must make the decision in consultation with a trade union only. On the other hand, those in favor of extending bargaining rights to self-employed workers experiencing power imbalance find the dependency criteria too stringent (a platform worker can work for more than two platforms and still be economically dependent). The condition of "no or minimal economic effect on the market" may also be a potentially insurmountable practical limit for workers.

The Australian Competition and Consumer Act also allows businesses to collectively negotiate with suppliers or customers if the Australian Competition and Consumer Commission considers that collective bargaining would result in overall public benefits. The Australian Competition and Consumer Commission is currently undertaking a public consultation process regarding the creation of a class exemption for collective bargaining by small businesses (including independent contractors). A class exemption for collective bargaining would effectively provide a "safe harbor," so businesses that met eligibility criteria could engage in collective bargaining without breaching competition law and without having to seek approval from the Australian Competition and Consumer Commission.

Legal exemptions for specific categories of self-employed workers also exist in other OECD countries. For example, in 1996, the U.S. Department of Justice and Federal Trade Commission jointly ruled that physician networks which "collectively agree on prices or price-related terms and jointly market their services" do not infringe anti-cartel regulation provided that "they constitute 20 percent or less of the physicians in each physician specialty in the relevant geographic market" – 30 percent if physicians are not prevented from belonging to multiple networks.

In practical terms, targeted exemptions by sector or occupation are not always easy to define and apply; the list may need frequent updating, and the potential reversal of exemptions is a source of legal uncertainty for workers and businesses alike. For instance, in 2010 in New Zealand, following an industrial dispute in the film industry, the government passed an amendment to the Employment Relations Act effectively preventing all workers in the film industry (considered independent contractors) to enter into collective bargaining. The current government has declared its intention to restore the right to engage in collective bargaining for film industry workers.

In addition, as outlined before, small cartels can induce suboptimal outcomes for consumers. For that reason, any exemption aimed at granting bargaining rights to self-employed workers in situations of power imbalance should be based on a comprehensive costs-benefits analysis. One way to focus on workers in real need of access to collective bargaining would be to prioritize exemptions to those groups of self-employed workers that are likely to have few outside options.

7 The Irish law defines precisely the two cases: A "*false self-employed worker*" is an individual who (a) performs for a person the same activity or service as an employee of the other person, (b) has a relationship of subordination, (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work, (d) does not share in the other person's commercial risk, (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned, and (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking. A "*fully dependent self-employed worker*" is an individual (a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and (b) whose main income in respect of the performance of such services under contract is derived from not more than two persons (Competition (Amendment) Act 2017).

A more radical approach to ensure that all self-employed workers experiencing power imbalance have the right to negotiate their own terms of employment – with no precedent in OECD countries and in conflict with most existing regulations – is discussed in the academic literature[8] and among trade unions.[9] This consists in reversing the current presumption that self-employed workers do not only provide labor but also services by means of an independent business organization that they actually own and manage – which justifies their exclusion from collective bargaining. Under this approach, the burden of proof would be shifted onto those who propose the restriction, in particular regulation enforcement authorities. The main argument used in support of this approach is that "the right to bargain applies to all workers with the sole possible exception of those explicitly excluded by the text of ILO Convention No. 87 and No. 98" (notably, armed forces and the police) and "self-employed workers are not among those excluded and, therefore, the Conventions are deemed as fully applicable to them."[10] However, not all OECD countries have signed and ratified the ILO Conventions. Moreover, a reversion of the burden of proof would conflict with most existing antitrust regulations and it would likely increase the burden for antitrust authorities that would have to check *ex post* the validity of a large number of agreements. Moreover, while aimed at ensuring that all workers in unbalanced power relationship are covered, the inversion of the burden of the proof may be exploited more effectively by relatively stronger and more organized groups of workers.

IV. CONCLUSION

In conclusion, the development of new forms of work offers the opportunity for legislators to reflect on possible adaptation to labor and competition legislation, which were designed in a world where the two opposed poles of salaried work and self-employment stood far apart. In large part, this issue is not new – but the platform economy has shone new light on it. Addressing the issue of worker classification to ensure that employment contracts match the real nature of the employment relationship is a first necessary step. However, regulators and enforcement authorities also need to reflect on how workers in the grey area between dependency and self-employment and those self-employed in situations of strong power imbalance *vis-à-vis* their client/employer can be empowered to negotiate and organize collectively.[11]

8 See, for instance, B. Creighton & S. McCrystal (2016), "Who is a 'Worker' in International Law?," Comparative Labor Law and Policy Journal, Vol. 37/3, pp. 691-725 and V. De Stefano & A. Aloisi (2018), "Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers," in Bellace, J. & B. ter Haar (eds.), Labour, Business and Human Rights Law, Edward Elgar Publishing Ltd., https://dx.doi.org/10.2139/ssrn.3125866.

9 Fulton, L. (2018), Trade Unions protecting self-employed workers, ETUC, Brussels.

10 Quotes from pages 14 and 15 in V. De Stefano & A. Aloisi (2018), "Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers," in Bellace, J. & B. ter Haar (eds.), Labour, Business and Human Rights Law, Edward Elgar Publishing Ltd., https://dx.doi.org/10.2139/ssrn.3125866.

11 For further reading, see the OECD, "Employment Outlook, 2019," available at https://www.oecd-ilibrary.org/employment/oecd-employment-outlook_19991266, and OECD, "Negotiating Our Way Up: Collective Bargaining in a Changing World of Work," available at http://www.oecd.org/employment/negotiating-our-way-up-1fd2da34-en.htm.

THE (NEARLY) FORGOTTEN CASE OF LABOR CONCERNS IN BRAZILIAN COMPETITAION POLICY: RECENT DEVELOPMENTS AND LOST OPPORTUNITIES

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I. INTRODUCTION

The perceived success of competition policy in Brazil compared to other jurisdictions in Latin America[2] hides inconsistencies in the decision-making of the Brazilian antitrust agency, Conselho Administrativo de Defesa Econômica ("CADE") regarding an unusual topic: the interplay between the merger control regime and labor market regulation. While such policy interactions could be seen as an old miscarriage of "antitrust justice" in developing countries, influential scholars are now advocating, in a turn of the tide, for merger remedies to prevent monopsony power in U.S. labor markets.[3]

In the wake of new evidence of market power of firms over workers, as a widespread economic fact, it is worth revising how the intersections of those different regulatory domains have played out in Brazil over the past years. As I have argued elsewhere,[4] the unresolved contradiction in CADE's remedial practice about the relevance of "employment measures" in merger control may lead to conflicts between the antitrust agency and public institutions responsible for enforcing labor laws.

This short essay explores the consequences of such a problem for the implementation of antitrust and how legal argumentation would be key to improving competition policy in Brazil.

II. PROBLEM: MERGER CONTROL, LABOR MARKETS REGULATION AND POLICY INCONSISTENCIES

During the 1990s, CADE official documents indicated an explicit concern with the possible impact of transactions on the employment level in the economy, as cost-cutting mergers could allow for the discharge of workers made redundant after businesses' reorganization. CADE's 1996 Annual Report, for instance, stated that competition policy promotes social welfare by minimizing both private and social costs, so that merger control should involve a more comprehensive analysis of the outcomes of transactions under review.[5]

According to that Annual Report, the relevant social costs to be considered include negative externalities of mergers affecting labor markets, such as the frictional unemployment of low-skilled workers that, as a short-run byproduct these transactions, could eventually become structural unemployment. In view of the risks of unemployment in the long run, legal measures (i.e. antitrust remedies) applied by CADE in merger review procedures could thus neutralize macroeconomic inefficiencies produced by transactions deemed efficient in a microeconomic sense.[6]

To that end, CADE and the Brazilian Ministry of Labor entered into a cooperation agreement to jointly elaborate and monitor job training programs, which would be implemented by merging firms as condition for clearance of the transaction under review by the antitrust agency.[7] The legal basis for mandated job training programs, as stated in the CADE's Annual Report, would be provisions of the Brazilian 1994 competition legislation determining that employment levels are taken into account in the design of remedies against anticompetitive transactions.[8] Again, according to that Annual Report, only then would the enforcement of competition laws converge with the constitutional clauses that establish the promotion of full employment in Brazil as a guiding principle for economic regulation.[9]

2 Francisco Ribeiro Todorov & Marcelo Maciel Torres Filho, *History of Competition Policy in Brazil: 1930-2010*, 57 Antitrust Bull. 207, 254 (2012).

3 See Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L.J. 1031 (2019) and Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018).

4 Alberto Barbosa Jr., *About Law, Economics and Argumentation: The forgotten case of labor concerns in Brazilian competition Policy and Why it still matters*, 5 U. Balt. J. Int'l L. 137 (2017).

5 CADE, Relatório Anual 1996 37-38 (1997).

6 CADE, Relatório Anual 1996 39 (1997).

7 CADE, Relatório Anual 1996 37 (1997).

8 See Law No. 8,884 of June 11, 1994 [Derogated], Art 58, Parag.1: "Performance commitments [legal instruments for antitrust remedies] will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances."

9 See Brazilian Federal Constitution of 1998, Art. 170, IV.

An extensive analysis of CADE's merger decisions revealed that antitrust remedies were eventually applied to minimize harmful effects of mergers on the workers employed by the merging firms. In fact, two types of these "employment measures" were identified, both of which were designed to cope with possible plant-closings and mass layoffs: (i) temporary maintenance of the employment level at the company's plants and facilities; and (ii) implementation of job training programs for workers dismissed due to the internal reorganization of the merged company. These cases are indicated below:

Year	Merger Decision	Parties	Employment Policy Measures
1995	AC 19/1994	Oriento Indústria e Comércio S.A. and Ajinomoto Co. Inc.	Employment level maintenance
1996	AC 24/1995	Grace Produtos Químicos e Plásticos Ltda. and Crown Química S.A.	Job training program
1996	AC 24/1995	Santista Alimentos S.A. and CARFEPE S.A. Administradora e Participadora	Job training program
1996	AC 24/1995	Kolynos do Brasil Ltda., Colgate-Palmolive Company and K&S Aquisições Ltda.	Job training program
1996	AC 14/1996	Siderúrgica Laisa S.A. and Cia. Siderúrgica Pains	Job training program
1997	AC 79/1996	Panex S.A. Indústria e Comércio and Alcan Alumínio do Brasil S.A.	Job training program
2000	AC 08012.005846/1999-12	Fundação Antônio and Helena Zerrenner – Instituição Nacional de Beneficência et al.	Employment level maintenance / Job training program

Nonetheless, as CADE's merger decisions developed after 2000, those employment measures seemed to be tacitly excluded from the agency's repertoire of antitrust remedies. This could mean that, for the last decade, the agency has adopted a different reading of the competition statute and the constitutional provisions that set the basis for economic regulation in Brazil. Any such departure from CADE's early remedial standard in merger cases, however, was not followed by further notice or account for the new administrative practice.

To be sure, legal remedies requiring companies to maintain their employment levels were applied after 2000 as a sort of preliminary order, meant to assure the effectiveness of CADE's final decisions. In these cases, however, the remedy's purpose does not seem to be the promotion of full employment nor the defense of competition in labor markets.

For example, in *Sadia/Perdigão*,[10] the transaction was cleared in 2011 under commitments by the merging parties to refrain from discharging, without cause, the personnel of manufacturing facilities that would be sold as a divestiture remedy. The same kind of commitment of "employment level maintenance," ancillary to the divestiture of production units, was conditional to CADE's approval in merger cases like *Camargo Correa/CIMPOR*[11] and *Rede D'or/Hospital Sta. Lúcia*,[12] decided in 2012 and 2013, after the enactment of new legislation[13] that omitted any explicit reference to employment level in CADE's legal remedies.

In any event, it remains unclear whether the Congress, after the 2011 legislative reform, has deliberately excluded concerns with the regulation of labor markets from the scope of antitrust policy. Despite the lack of a relevant provision in the current competition statute, commentators still hold that, in view of the Brazilian Constitution and its "full employment" clause, the interests of workers affected by potentially anticompetitive transactions should be reflected on the legal remedies adopted in merger control.[14]

10 Ato de Concentração No. 08012.004423/2009-18.

11 Ato de Concentração No. 08012.002259/2012-18.

12 Ato de Concentração No. 08700.004150/2012-59.

13 Law No. 12,529 of November 30, 2011.

14 See João G. Rodas, Direito Econômico e Social - Atualidades e Reflexões sobre Direito Concorrencial, do Consumidor, do Trabalho e Tributário 160 (2012).

III. DEVELOPMENTS: RECENT CASES, "EMPLOYMENT MEASURES" AND LOST OPPORTUNITIES

Recent merger cases have once again led to discussions of the relevance of remedies to the maintenance of employment levels after the transaction is closed and cleared by the antitrust agency. Particularly, it seems that the 2016 decision in *HSBC/Bradesco*[15] was a lost opportunity for CADE to define the contours of the policy interactions between merger control and labor market regulation in Brazil.

In that case, unionized bank employees, represented by the *Sindicato dos Bancários e Financiários de Curitiba*, joined the merger review procedure as an interested third party. According to the employees' union, after the acquisition of HSBC's operation in Brazil, Bradesco should be required to maintain its pre-merger employment level, in order to secure the transaction's "global efficiency."

In response to the union's claim that the maintenance of employment levels had already been utilized as a merger remedy, CADE stated that such measures could not be understood as efficiency-enhancing in antitrust sense. And, for that reason, according to the reporting commissioner, these legal remedies could not be imposed by the antitrust agency nor demanded from the merging parties when negotiating commitments for the conditional approval to a transaction.

More generally, the reporting commissioner for *HSBC/Bradesco* and other members of CADE's internal tribunal concurred in their understanding that concerns relating to a merger's impact on the labor markets (e.g. redundancy of employees) should be addressed by specific public policies, for which the antitrust authority is not responsible. That understanding, however, along with the statement by the reporting commissioner that commitments to maintain employment level could only be adopted voluntarily by the merging parties, seem inconsistent with CADE's decision-making in the 1990s.

In the early days of the 1994 Brazilian antitrust statute, parties to a merger review procedure had little room to bargain over the remedies proposed by CADE. The fact that CADE and the Ministry of Labor had cooperation agreements to implement job training programs also reinforces the conclusion that, until 2000, there was an explicit goal in Brazil's antitrust policy that was mandatory also for merging firms: the preservation of the employment level in the economy via remedies that "neutralize macroeconomic inefficiencies" arising from anticompetitive transactions.[16]

Finally, the "employment measures" associated with structural remedies were considered in the 2019 case *Prosegur/Transfederal*,[17] although promptly dismissed because, for one of CADE's commissioners, the workforce employed by the merging parties was not particularly specialized. This could mean that the divestiture of assets from the merged firm, should it be necessary for antitrust clearance, would be attractive to actual or potential rivals regardless of the employment level at the divested facilities.

Again, this recent case seems to reinforce CADE's current practice, as established after 2000, to regard employment measures as remedies not meant to address competition concerns in labor markets, but rather as ancillary to the success of structural remedies.

Interestingly, Brazilian scholars have identified CADE's awareness of employers' anticompetitive conduct that could harm competition among employees.[18] For instance, concerns with no-poaching agreements[19] and the exchange of sensitive information about salaries and benefits have been already investigated in CADE's conduct enforcement procedures.[20] This comes in tandem with recent law-and-economics literature proposing that U.S. antitrust authorities make use of remedies to cope with monopsony power in labor markets.

However, those same commentators concede that, as regards for CADE's current merger practice, the agency has not consistent or explicitly raised concerns relating to the effects of potentially anticompetitive transactions in the relevant labor markets.[21]

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15 Ato de Concentração nº 08700.010790/2015-41.

16 CADE, Relatório Anual 1996 39 (1997).

17 Ato de Concentração nº 08700.003662/2018-93.

18 Amanda Athayde Linhares Martins Rivera et al., *O improvável encontro do direito trabalhista com o direito antitruste,* 24 Revista do IBRAC 65-93, 82 (2018).

19 See Processo Administrativo nº 08012.002812/2010-42.

20 See Processo Administrativo nº 08700.006386/2016-53.

21 Amanda Athayde Linhares Martins Rivera et al., *O improvável encontro do direito trabalhista com o direito antitruste,* 24 Revista do IBRAC 65-93, 84-85 (2018).

IV. CONSEQUENCES: LEGITIMACY, COMPETENCE CONFLICTS, AND POLICY IMPLEMENTATION

This nearly forgotten contradiction in Brazilian antitrust, about the discontinuation of employment measures in merger control, remains unresolved as a legal matter to the extent that the policy reasons behind any such change in CADE's administrative practice are still missing or, at best, not entirely articulated with the agency's previous decisions. Unsurprisingly, the absence of explicit grounds to motivate regulatory decisions raises concerns as to the transparency and accountability of decentralized policy-making in the administrative state.

Political analyses addressing the functions of independent administrative agencies commonly focus on issues of democratic legitimacy of non-majoritarian institutions.[22] In the procedural dimension, the lack of justification for abandoning the employment remedies means that CADE has failed to meet the "reason-giving requirements" for policy-making,[23] which ensure the legitimacy of regulations via judicial review, public participation, or democratic debate.

Likewise, to the extent that any such regulatory shift has not yet been justified, CADE's decisions in merger cases remain contradictory, reducing the legitimacy of Brazilian antitrust in a more substantial dimension, related to social expectations about policy consistency and technical expertise of regulators.[24] However, while legitimacy problems become relevant in contexts of diverging regulatory decisions, these concerns do not tackle the specific consequences of inconsistent decision-making for the policy implementation process.

In the traditional framework for implementation analysis,[25] the regulatory output of agencies involves, along with adjudicatory decisions and regulations, some "general transitive goals,"[26] which include both statutory objectives and the declared intentions of agency officials about the policy pursued. The same analytical framework suggests that the successful implementation of regulatory policies depends on supportive public institutions – the sovereigns of the regulator – that control legal and financial resources provided to implementing agencies.[27]

Considering the provision of legal resources, a non-supportive attitude by sovereign institutions (i.e. legislatures, chief executives, and courts) could impact negatively on policy implementation, creating conflicts over the specific goals to be carried out by the implementing agency. Courts in particular, when opposing statutory policy objectives, can restrict the implementation process by adjudicating cases according to adverse interpretations of the relevant legislation.[28]

Getting back to Brazilian antitrust, the unmotivated interruption in the use of employment measures confers some ambiguity on the regulatory outputs, for CADE has stated in official documents from 1990s that employment levels are relevant in merger control. This inconsistency in CADE's decision-making aggravates the institutional risk that policies outside the domain of the governing statutes affect the implementation of the regulatory goals pursued by the agency.[29] In the final analysis, it means that the ambiguous antitrust practice in Brazil regarding the role for merger control in the regulation of labor markets could even allow labor policies to impair the current implementation of the competition policy.

There is room for two examples here. In 2012, CADE reviewed a merger between two airline companies, Gol and Webjet.[30] Despite the expected economic efficiencies, the agency found that this transaction would harm competition in several markets, so antitrust clearance was dependent on legal remedies to protect consumers of air transport services from the market power held by the merged firm. Following the merger review procedure, after the transaction was consummated in compliance with CADE's approval conditions, 70 per cent of acquired company's employees were discharged.

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22 Giandomenico Majone, Regulating Europe 292 (2002).

23 Giandomenico Majone, *The regulatory state and its legitimacy problems*, 22 West Eur. Polit. 1–24, 14 (1999).

24 Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. Public Policy 139, 191 (1997).

25 Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 Policy Stud. J. 538–560 (1980).

26 Paul A. Sabatier, *Regulatory policy-making: Toward a framework of analysis*, 17 Nat Resour. J 415, 420 (1977).

27 Sabatier & Mazmanian, *supra* note 25 at 551.

28 Paul Sabatier & Daniel Mazmanian, *The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives*, 5 Policy Anal. 481–504, 499 (1979).

29 Sabatier, *supra* note 26 at 552.

30 Ato de Concentração No. 08012.008378/2011-95.

In response, the Labor Prosecutor's Office brought a civil action against the airline companies, claiming that the layoff amounted to unlawful discharge in violation of the labor laws. After a first trial decision and appeal proceedings, the reviewing court of the Brazilian Labor Judiciary found the layoff to be illegal. The appellate court also declared – though not as primary ground for its ruling – that the protection of workers against mass layoffs is an implicit condition for antitrust clearance of mergers.[31] It means that, regardless of the legal remedies designed by CADE in that merger case, the labor courts' reading of the antitrust statute would imply some extension of the competition policy also to labor markets.

A second example is a merger involving two large orange processing companies, Fisher and Citrovita, review by CADE in 2011.[32] Because the transaction was found to have anticompetitive effects on the demand-side of markets for raw fruit, the conditions for antitrust clearance involved legal remedies meant to control the buyer power of the merged company, in order to protect orange farmers and, indirectly, juice consumers. After the merger review process, a juice processing plant was shut down as a stage in a process of business reorganization, and 173 employees were discharged.[33]

This time, the Labor Prosecutor's Office responded by starting administrative proceedings to investigate whether CADE could be held liable for mass layoffs resulted from merger approved by the antitrust agency.[34] Based on allegations that the agency had not cooperated with the investigation, the public prosecutor in charge brought a legal action in 2013, requesting a court order to access confidential records of merger cases.[35]

It is worth noting that both of those cases do not correspond to the typical judicial review by courts judging the legality of policy outputs of administrative agencies. The jurisdiction of labor courts in Brazil covers disputes related mainly to employment relations and collective bargaining, having no power to review the lawfulness of decisions by the antitrust agency.[36] Nevertheless, it seems clear that an escalating conflict between CADE, labor courts and public prosecutors could impact the implementation process in a way equivalent to the shortage of legal resources produced by non-supportive sovereign of the regulator.

The institutional scenario conducive to those institutional conflicts between CADE and other public authorities, regardless of the its dimensions, remain present in Brazilian antitrust policy even after *HSBC/Bradesco*, despite the fact that, in such case, both employer firms and employees' union had their say in the merger review procedure.

V. ANALYSIS: REGULATORY TRANSPARENCY AS LEGAL ARGUMENTATION

Granted, the lack of justification for changes in CADE's administrative practice since 2000 cannot be seen as to immediately cause any threat against the authority of its own regulatory decisions. What can be argued, thought, is that, had CADE been more transparent about its decision-making, the remaining inconsistencies in merger control could have been resolved, and courts and public prosecutors would be less likely to interfere with the implementation of the competition policy carried out by the agency.

Considering again the legitimacy problem, the ideal of transparency in agency decision-making would imply not only presenting reasons that inform the administrative activity, but, most importantly, making arguments to persuasively justify policy decisions.[37] This point is premised on the recognition that regulatory decisions by independent agencies are embedded in a legal discourse. It means that, although legal rules alone do not entail determinate and objective outcomes of regulatory policy, the law does influence the implementation process.

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31 See Recurso Ordinário em Ação Civil Pública No. 000161839.2012.5.01.0023 (TRT 1).

32 Ato de Concentração No. 08012. 005889/2010-74.

33 Gustavo Porto, Citrovita fecha unidade de Matão, interior de São Paulo - Economia Estadão, http://economia.estadao.com.br/noticias/negocios,citrovita-fecha-unidade-de-matao--interior-de-sao-paulo,104529e (last visited Mar 14, 2015).

34 Livia Scocuglia, MPT processa Cade por não entregar documentos em inquérito Consultor Jurídico, http://www.conjur.com.br/2013-out-08/mpt-processa-cade-negar-documentos--apuracao-dispensa-massa (last visited Mar 14, 2015).

35 Processo No. 0011506-28.2013.5.15.0081 (Vara do Trabalho de Matão).

36 Brazilian Federal Constitution of 1998, Art. 114.

37 See Frank Fischer & Gerald J. Miller, Handbook of Public Policy Analysis: Theory, Politics, and Methods 223 (2006).

Following this line of reasoning, two theoretical perspectives become pertinent to the implementation issues analyzed here. From an institutionalist approach, law can be understood as a particular constraint on bureaucratic behavior, i.e. an institution that structures regulatory action, shapes preferences of agency officials, and is reciprocally affected by their actions.[38] This constraining effect of law in agency decision-making, however, does not derive only from the meaning of legal texts or the content of legal categories.

Moving on to a discursive approach, the law extends its effects on bureaucratic behavior also at the "less tangible, but no less significant, level of affecting expectations as to the form and operation of a regulatory or decision-making process."[39] These expectations, concerning the values associated with law, play an important role in the functioning of a regulatory system, as they bear on the way that legal rules are expected to be applied.[40] This cultural aspect of legal discourse, therefore, reveals the conventions, assumptions and world views that constitute the tacit understanding shared by those who interpret the law.

Accordingly, the perception of the intangible effects of law on agency decision-making leads to the notion of "community constructed interpretations."[41] This idea becomes useful as basis for regulatory strategies meant to overcome legal uncertainty problems by creating an interpretative community among agencies, courts and target-groups of regulation.[42] Although the creation of such regulatory interpretive communities demands long-term development, mostly based on the uniform education and training of their members, another contributing factor would be deepening the argumentative process underlying the decisions by the implementing agency.

In fact, legal disputes on the lawfulness of policy decisions, involving agencies and reviewing courts, and recurrent complaints by regulators regarding the judiciary's alleged misunderstanding of regulation, illustrate the contrast between interpreters with different interpretive pre-understandings.[43] In Brazilian antitrust, the problem of distinctive legal rationalities utilized by CADE and labor courts to interpret the Brazilian competition statute becomes clear when it comes to remedies like the "employment measures." CADE's regulatory action presupposes an economic analysis of the market power that may result from anticompetitive mergers; to labor courts the unbalanced bargaining power favoring companies is the very assumption behind the laws that regulate the industrial relations between employers and workers.

However, in construing the meaning of statutory texts, agency decision-makers could build comprehensive arguments about interpretation[44] to convince those participating in the legal discourse, such as courts, and justify regulatory decisions. To that end, agencies would, for instance, engage in justification efforts based on the coherence of legal system, interpreting the law and arguing that their decisions fit a rationally constructed set of rules, principles and past decisions.

VI. FINAL REMARKS

Having said all that, this essay does not claim that CADE and labor courts and other public authorities integrate to the same regulatory system, let alone propose that an interpretive community should be established between them. Nevertheless, in taking regulatory transparency as an instance of legal argumentation, the purported consistency in antitrust practice becomes an implicit requirement for the argumentative justification of decisions by the agency.

In view of the economic analysis inherent to regulatory decision-making, consequentialist arguments[45] about market efficiency come to be as important to antitrust law as the coherence arguments mentioned above. Thus, if potential risks to antitrust implementation are to be tackled via legal argumentation, as suggested, the question about possible intersections between competition policy and other regulatory domains would be better answered with a plausible combination of arguments based on both coherence and consequences.

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38 Julia Black, *New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making*, 19 Law Policy 51–93, 81 (1997).

39 *Id.* at 83.

40 *Id.* at 91.

41 See Julia Black, Rules and Regulators 18 (1997).

42 *Id.* at 31–32.

43 *Id.* at 34.

44 Neil MacCormick, Rhetoric and The Rule of Law 121 (2005).

45 See, e.g. MacCormick, *supra* note 33 at 101.

Accordingly, the recent evidence of monopsonistic or oligopsonistic competition in most labor markets should be accounted for in CADE's argumentative efforts to justify implementation choices in competition policy. Most importantly, the contradictions arising from inconsistent remedial practice about the "employment measures" in merger control could be finally unraveled through interpretative arguments addressing four topics:

(i) how the reading of the 1994 antitrust statute had changed in the late 2000s with respect to the maintenance of employment level at the merging parties, as legal remedy against potentially anticompetitive transactions;

(ii) to what extent the Brazilian competition law, as construed after 2000, incorporated economic knowledge (i.e. theoretical models and empirical analyses) to evaluate the efficiency of the "employment measures";

(iii) the impact, if any, of the 2011 legislative reform with respect to CADE's remedial practice in merger control; and

(iv) the legal and economic grounds for the current implementation of antitrust and how it can be reconciled with CADE's past policy choices to promote the interplay of merger control and labor market regulation.

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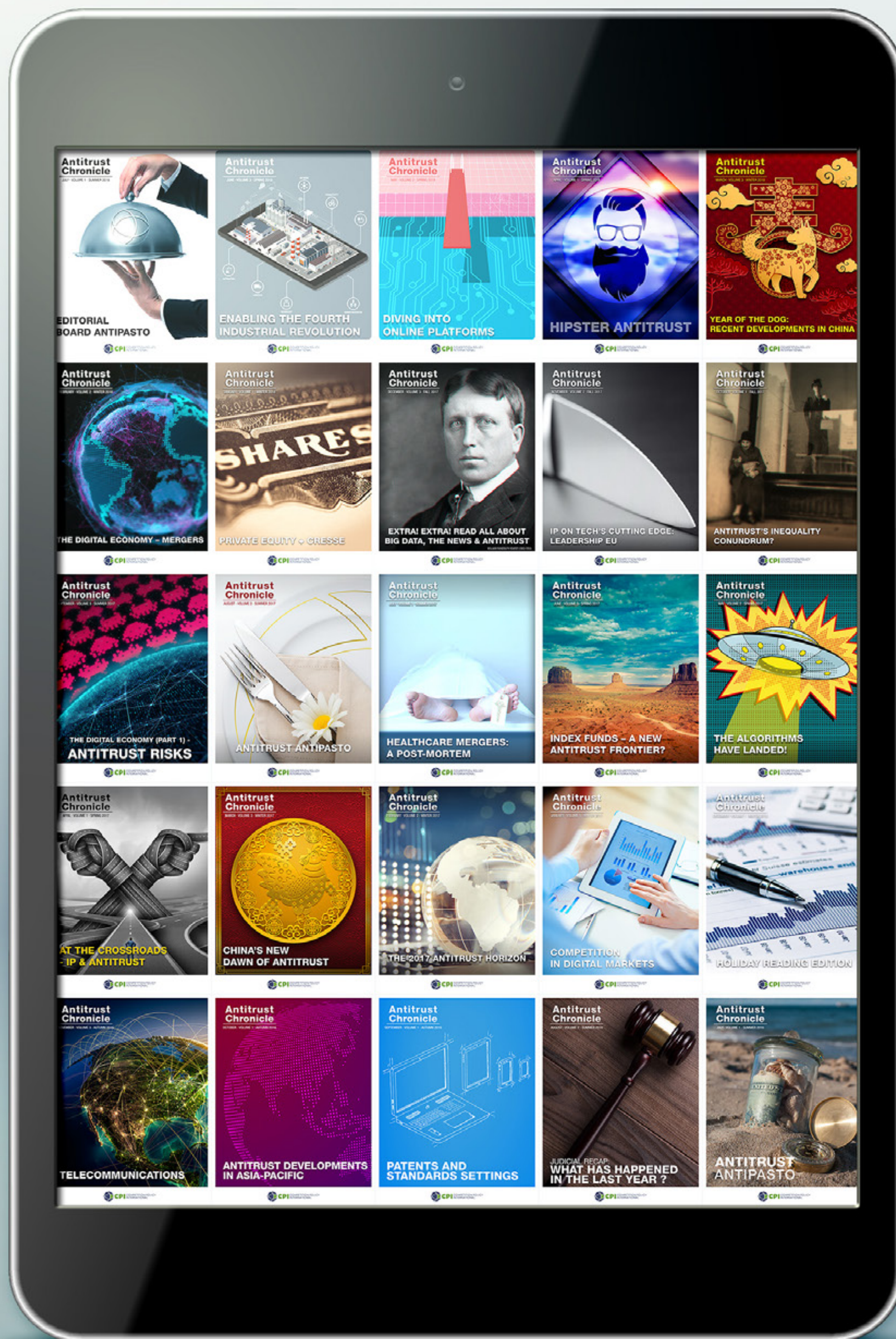

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