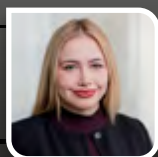


USING THE HORIZONTAL MERGER GUIDELINES TO EVALUATE LABOR MARKET EFFECTS OF MERGERS



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By Courtney Dyer, Courtney Byrd & Laura Kaufmann

For a number of years, the U.S. antitrust agencies have been signaling an increased focus on antitrust enforcement in labor markets. In addition, there have been growing calls for strengthened scrutiny of anticompetitive conduct in labor markets from economists and legal scholars. But, President Biden's 2021 executive order was the clearest signal to date that labor-related enforcement will likely become a centerpiece of U.S. antitrust policy. Now, the U.S. antitrust agencies are focused on updating the Horizontal Merger Guidelines that will no doubt include labor-market considerations in merger analysis. This development is an indicator that the future of merger review in the U.S. is likely to come with more rigorous investigations into the labor-market effects of proposed transactions and more challenges to transactions on the grounds of substantially lessening competition in labor markets.

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I. MERGER REVIEW AND THE HORIZONTAL MERGER GUIDELINES

Following growing calls for antitrust enforcement from economists, legal scholars, and the White House,² the Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) (together, the “agencies”) have begun to scrutinize more closely anticompetitive conduct in labor markets, including by assessing the effects of mergers on competition for labor. The DOJ’s recent challenge to a merger based on its labor market effects and the inclusion of labor-related requests for documents in merger investigations suggest that labor market effects, including the presence of no-poach agreements, are likely to become a more important fixture of merger review going forward.

Merger review is a critical means by which the antitrust agencies prevent anticompetitive conduct and increases in market concentration. When firms merge (and meet certain dollar thresholds for the size of the transaction and the size of the parties involved), the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”) requires the merging parties to notify the FTC and DOJ of the transaction and wait at least 30 days for the agencies to complete their review before they can close.³ During this initial 30-day waiting period, the agencies will decide whether they will clear the transaction and permit it to go forward (by letting the waiting period expire) or initiate a formal investigation by issuing a “Second Request” and possibly seeking to block the transaction pursuant to the Clayton Act. Section 7 of the Clayton Act prohibits mergers and acquisitions if “the effect of such acquisitions may be substantially to lessen competition, or to tend to create a monopoly.”⁴

In assessing strategic transactions, the agencies are guided by the Horizontal Merger Guidelines, which set forth the agencies’ “analytical techniques, practices, and the enforcement policy” with respect to mergers between competing firms.⁵ The Merger Guidelines generally endorse a market definition and concentration approach to merger review, using the Herfindahl-Hirschman Index (“HHI”) to calculate the level of market concentration resulting from a merger.⁶ Mergers that result in a small change in concentration or that result in unconcentrated markets are generally unchallenged.⁷ The agencies will scrutinize more closely mergers that result in moderately or highly concentrated markets with increases in HHI of at least 100 points.⁸ Mergers that result in highly concentrated markets and involve an HHI increase of more than 200 points are presumptively anticompetitive.⁹ Agencies will scrutinize applicable mergers for unilateral effects on competition, such as increased prices, reduced output, or diminished innovation, that may result from the elimination of competition between the merging parties.¹⁰ The agencies will also assess coordinated effects of the proposed merger to determine whether it will result in an increased risk of coordination or collusion among remaining competitors in the relevant market after the transaction.¹¹

2 See *Executive Order on Promoting Competition in the American Economy*, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (last visited April 1, 2022) (directing the Office of Economic Policy to submit a report on the effects of lack of competition on labor markets).

3 See Fed. Trade Comm’n, *Premerger Notification and the Merger Review Process*, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process> (last visited Mar. 21, 2022).

4 15 U.S.C. § 18.

5 See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (the “Merger Guidelines”).

6 *Merger Guidelines* at Section 5.3 (“Market Concentration”). The agencies calculate the HHI by adding the squares of the individual firms’ market shares (and those of their competitors) and consider both the post-merger HHI and the increase in the HHI resulting from the merger.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *Merger Guidelines* at Section 6 (“Unilateral Effects”).

11 *Merger Guidelines* at Section 7 (“Coordinated Effects”).

II. EXPANDING THE MERGER GUIDELINES TO REACH COMPETITION FOR LABOR

Notably, the Merger Guidelines say nothing about a merger's impact on labor markets.¹² Merger analysis has traditionally been focused on product markets rather than labor markets. And as noted in the Introduction to the Merger Guidelines, the agencies have historically evaluated mergers based on their impact on consumers, both direct customers and final, end consumers.¹³

Using the Merger Guidelines to assess the competitive effects of mergers on labor markets requires analyzing competition between merging firms for the hiring of the same types of workers, regardless of whether the merging firms compete in the same product markets. Merging firms can arguably compete to hire the same types of workers in the same geographic markets. A merger between employers could lead to a lessening of competition through unilateral effects and/or coordinated effects. Unilateral effects could result when the merger results in less competition for the types of employees the merged firm hires, possibly resulting in depressed wages or incentives to lower wages. Coordinated effects could arise if the number of firms competing to hire a specific type of employees is reduced, possibly resulting in collusive behavior among the remaining firms, such as wage-fixing or no-poach agreements.

Over the past few years, economists, law practitioners, and policy analysts have highlighted the problem of concentrated labor-market power and the lack of government enforcement to counter it. Recent economic studies have indicated that local labor markets, on average, tend to be highly concentrated.¹⁴ Higher concentration in labor markets is, in turn, associated with significantly lower wages for posted jobs.¹⁵ For example, Elena Prager and Matt Schmitt have found evidence of reduced wage growth among hospital workers following hospital mergers.¹⁶ The results of Prager and Schmitt's work "suggest that increased employer labor market power via mergers may indeed contribute to wage stagnation, but that such effects may apply in relatively narrow circumstances," i.e. where the increase in concentration following the merger is large and the workers' skills are industry-specific.¹⁷ Findings of this kind have led commentators to challenge what they see as a lack of government enforcement and to call for a more robust enforcement and regulatory regime, with many suggesting the agencies already have the tools to do so.¹⁸

As referenced above, merger analysis has traditionally been focused on product and service markets rather than labor markets, and the agencies generally analyze the merger's effect on the prices and supply of products and services rather than on wages.¹⁹ But many argue that the Merger Guidelines might still be the right tool to evaluate a merger's impact on labor markets. Eric Posner has characterized the agencies' lack of antitrust enforcement of mergers impacting labor markets as "a serious mistake, for which there is no justification" and has argued that the agencies can use the Merger Guidelines to evaluate the effects of mergers on labor markets.²⁰ Ioana Marinescu has advocated for more scrutiny of mergers between employers of similar types of employees by using HHIs based on U.S. vacancy data and the existing Merger Guidelines.²¹ Nancy Rose has suggested that the agencies devote greater attention to labor market impacts in "select merger investigations" where the firms

12 See Eric A. Posner, *How Antitrust Failed Workers* 76 (1st ed. 2021); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

13 Merger Guidelines at Section 1 ("Overview"). See also Ioana Marinescu, *The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law*, 53 Wharton Public Policy Initiative Briefs (2018).

14 See e.g. Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. R. 397 (Feb. 2021); José Azar, Ioana Marinescu, Marshall I. Steinbaum, & Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data* (National Bureau of Economic Research, Working Paper No. 24395, Feb. 2019), <https://www.nber.org/papers/w24395>; Efraim Benmelech, Nittai Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages* (National Bureau of Economic Research, Working Paper No. 24037, Feb. 2018), <https://www.nber.org/papers/w24037>; Ioana Marinescu, José Azar, & Marshall Steinbaum, *Labor Market Concentration* (National Bureau of Economic Research, Working Paper No. 24147, Dec. 2017), <https://www.nber.org/papers/w24147>; See Ioana Marinescu, *The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law*, 53 Wharton Public Policy Initiative Briefs (2018).

15 *Ibid.*

16 Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. R. 397-427 (2021), <https://www.aeaweb.org/articles?id=10.1257/aer.20190690>.

17 *Ibid.* at 399.

18 See e.g. Eric A. Posner, *How Antitrust Failed Workers* (1st ed. 2021); Hiba Hafiz, *Why a "Whole-of-Government" Approach is the Solution to Antitrust's Current Labor Problem*, Promarket (Nov. 18, 2021), <https://promarket.org/2021/11/18/antitrust-monopsony-government-labor>.

19 See Ioana Marinescu, *The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law*, 53 Wharton Public Policy Initiative Briefs (2018).

20 Posner, *How Antitrust Failed Workers* at 76, 78, 84–85.

21 See Ioana Marinescu, *The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law*, 53 Wharton Public Policy Initiative Briefs 7 (2018).

“are significant employers of the same type of specialized labor (including senior management talent), but their products may not be sell-side substitutes, or may not overlap enough to hit the guideline concentration thresholds on the product side.”²²

Similarly, Rose has suggested subjecting merging parties that have entered into labor market agreements with one another, such as no-poach agreements, to antitrust scrutiny under the Merger Guidelines even when the parties do not compete in the traditional product market sense, since “these labor market agreements suggest competition for a common pool of employees.”²³ Rose has also opined that the agencies could design remedies in the merger context, such as divestitures, “with attention to the geography of labor markets as well as product markets.”²⁴ For example, while the agencies may review product market competition between merging firms at a national level, they could still examine labor market effects at a local level, such as in proximity to the merging parties’ facilities. In the more general monopsony context, C. Scott Hemphill & Nancy Rose have argued for a rethinking of how the agencies treat mergers that harm sellers (e.g. workers selling their labor) and have opined that harm to sellers in an input market resulting from a merger is sufficient to support antitrust liability and that harm to the merging firms’ downstream purchasers or final consumers is not necessary.²⁵

III. INCREASED ANTITRUST AGENCY FOCUS ON THE LABOR MARKET EFFECTS OF MERGERS

Although the current Merger Guidelines say nothing about a merger’s impact on wages, the growing chorus of criticism from economists, academics, and practitioners may be bringing about change to the enforcement policies of the antitrust agencies. Specifically, the Merger Guidelines include a section on monopsony power generally, noting that the agencies review mergers of competing buyers (which would ostensibly include employers as “buyers” of labor) by employing an approach analogous to its review of mergers of competing sellers, but are otherwise silent on the issue.²⁶

In an executive order issued in July of last year, President Biden delivered a clear signal to the antitrust agencies that a focus on labor-related enforcement should be a centerpiece of his administration’s antitrust policy.²⁷ The order, “Promoting Competition in the American Economy,” encouraged the FTC and the DOJ to, among other things, incorporate an examination of the mergers’ impacts on labor markets into the Merger Guidelines.²⁸ Since then, the agencies have taken up the mantle. In January of this year, the FTC and the DOJ announced a joint, public inquiry the goal of which is to strengthen enforcement against illegal mergers by ensuring that the “merger guidelines accurately reflect modern market realities and equip [the agencies] to forcefully enforce the law against unlawful deals.”²⁹ The agencies noted that “[r]ecent evidence indicates that many industries across the economy are becoming more concentrated and less competitive—imperiling choice and economic gains for consumers, *workers*, entrepreneurs, and small businesses . . . Illegal mergers can inflict a host of harms, from higher prices and *lower wages* to diminished opportunity, reduced innovation, and less resiliency,” clearly signaling that the calls for an increased focus on the labor-market effects of mergers have not fallen on deaf ears.³⁰ Specifically, one of the areas of inquiry on which the agencies are seeking public input is the:

Impact of monopsony power, including in labor markets: The agencies seek input on how to address the issue of buyer power in more detail in the guidelines. Labor markets are a key example of buyer power, and the agencies seek information regarding how the guidelines should analyze labor market effects of mergers.³¹

22 Nancy L. Rose, *Thinking Through Anticompetitive Effects of Mergers on Workers* 6, Continuing Legal Education Material for American Bar Association 2019 Antitrust Spring Meeting (Feb. 2019), <https://economics.mit.edu/files/20284>.

23 *Ibid.*

24 *Ibid.* at 7.

25 C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L. J. 2079 (2018).

26 See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* Section 12 (“Mergers of Competing Buyers”) (2010). Using the market definition and concentration approach of the Guidelines could add substantial work to the merger review process because while product markets tend to be national, labor markets are almost always local. See Posner, *How Antitrust Failed Workers* at 79.

27 See *Executive Order on Promoting Competition in the American Economy*, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (last visited April 4, 2022).

28 *Ibid.*

29 See Fed. Trade Comm’n, *Fed. Trade Comm’n and U.S. Dep’t of Justice Seek to Strengthen Enforcement Against Illegal Mergers*, <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers> (last visited Mar. 25, 2022).

30 *Ibid.* (emphasis added).

31 *Ibid.*

Put simply, this indicates the potential for a notable change in course on the part of the agencies vis-à-vis changes to the Merger Guidelines, or at least an expansion of the current Guidelines to address labor market effects of mergers.³² Previously, the agencies had exhibited some interest in the effect on non-competition agreements in the context of merger review, but not more broadly the labor-market effects of mergers.³³ Indeed, the FTC has challenged non-competition agreements submitted in conjunction with HSR notification in the past.³⁴ What is more, its interest in the effects of non-competition agreements shows no signs of flagging.³⁵

Similarly, a recent DOJ action to block a merger also signals that the agency is not afraid to challenge a transaction that it believes may have labor-market effects.³⁶ In late 2021, the DOJ challenged a proposed merger between the publishing companies Penguin Random House and Simon & Schuster under Section 7 of the Clayton Act because the DOJ alleged that the merger “would likely result in substantial harm to authors of anticipated top-selling books.”³⁷ According to the DOJ’s complaint, the proposed transaction would “likely cause author income to be less than it would be otherwise” and “make it harder for authors to earn a living by writing books.”³⁸

IV. CONCLUSION

Although the antitrust agencies have been signaling a focus on strengthening efforts around antitrust enforcement in labor markets since their revision of the Antitrust Guidance for Human Resource Professionals in 2016,³⁹ President Biden’s clear directive in the form of an executive order appears to have brought the chorus of calls from economists, academics, and practitioners to a crescendo. Most notably, the antitrust agencies appear poised to adopt changes to the Merger Guidelines that would incorporate labor-market considerations into their analysis of the competitive effects of mergers going forward, separate and apart from their continued pursuit of anticompetitive conduct in labor markets in the form of wage fixing or no-poach agreements. If that happens, we can expect to see more rigorous investigations into labor market effects of proposed transaction and potentially more merger challenges to transactions substantially lessening competition in labor markets in the future.

32 In the interim, more and more merging parties are receiving Second Requests calling for documents related to competition for labor.

33 See Fed. Trade Comm’n, “All” means All: Submit side agreements with an HSR filing, <https://www.ftc.gov/enforcement/competition-matters/2017/12/all-means-all-submit-side-agreements-hsr-filing> (last visited Mar. 25, 2022) (reinforcing that the reporting requirements of the HSR Act require filers to submit to the agencies all non-compete agreements between the parties when notifying a reportable transaction).

34 See e.g. Complaint, *In the Matter of Oltrin Solutions, LLC; JCI Jones Chemicals, Inc; Olin Corp.; and Trinity Manufacturing, Inc.*, FTC File No. 111-0078 (Mar. 7, 2013); Complaint, *In the Matter of NEXUS Gas Transmission LLC. et al.*, FTC File No. 191-0068 (Sept. 13, 2019); Complaint, *In the Matter of Axon Enterprise, Inc. and Safariland, LLC*, FTC File No. 181-0162 (Jan. 3, 2020).

35 See Fed. Trade Comm’n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, <https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues> (last visited Mar. 25, 2022) (The FTC held a public workshop to examine promulgating a rule that would restrict the use of non-competition clauses in employment contracts).

36 See U.S. Dep’t of Justice, *Justice Department Sues to Block Penguin Random House’s Acquisition of Rival Publisher Simon & Schuster*, <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon> (last visited Mar. 25, 2022) (“[T]his merger will cause harm to American workers, in this case authors, through consolidation among buyers . . .”).

37 See Complaint, *U.S. v. Bertelsmann SE & Co.*, No. 1:21-cv-2886 (D.D.C. Nov. 2, 2021) at para. 7.

38 See Complaint, *U.S. v. Bertelsmann SE & Co.*, No. 1:21-cv-2886 (D.D.C. Nov. 2, 2021) at paras. 60 and 9.

39 See U.S. Dep’t of Justice, *Antitrust Guidance for Human Resource Professionals*, <https://www.justice.gov/atr/file/903511/download> (last visited Apr. 4, 2022).

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