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Why We Need Interagency Merger Review in Labor Markets

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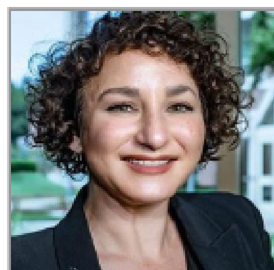
Why We Need Interagency Merger Review in Labor Markets



By Hiba Hafiz December 24, 2019

As empirical evidence of labor-market concentration mounts, academics and policymakers advance proposals to challenge or reverse its effects on workers' wages and labor-market options. Prominent among these is more aggressive review of the labor-market effects of mergers by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). My forthcoming essay, *Interagency Merger Review in Labor Markets*, argues for an alternative intervention: N.

Increasing evidence of labor market concentration and mergers' suppressive effects on wages has drawn attention to labor market regulation by antitrust scholars and enforcers, creating an unprecedented reform effort to apply antitrust law to employers. Proposals have concentrated on more thorough DOJ and FTC merger review to reduce labor market concentration and mitigate its effects – including reduced hiring, artificially suppressed compensation, employer collusion,and increasing inequality – by ensuring robust labor market competition.

While important in their own right, these proposals focus exclusively on reforming *antitrust* agencies' merger review. They do not contend with the limitations of exclusive antitrust agency jurisdiction as a doctrinal, prophylactic, institutional, and expertise-based matter, and they ignore the benefits of interagency labor market regulation.

First, as I and others argue elsewhere, there are real enforcement and doctrinal challenges to deploying antitrust law to mitigate employer buyer power. Neither the DOJ nor the FTC has ever blocked a merger based on an increase in labor market concentration. The 2010 Merger Guidelines require that a proposed merger's benefits exceed its costs in a single market when assessing merger-specific efficiencies, and as the DOJ's recent conditional approval of the merger between Sprint and T-Mobile suggests, the DOJ has focused exclusively on product market effects without considering labor market effects, even after its declared commitment to Congress to do so. Further, even if the agencies take action against a merger based on its effects in a relevant labor market, merging parties would have strong doctrinal support to argue that consumer welfare trumps worker welfare if the two conflict.

Second, workers themselves have limited *ex ante* mechanisms in an exclusive jurisdiction regime to ensure that their interests are protected in merger enforcement. The lion's share of DOJ/FTC merger challenges result in negotiated settlements; merger policy is effectively agency-administered with limited substantive judicial review. While Congress instructed courts in the Tunney Act and subsequent amendments to substantively review whether antitrust agency consent decrees serve the "public interest," courts have abdicated their role by deferring to the attorney general and raising the bar for intervention in Tunney Act proceedings. Further, limited transparency into agency deliberations and deal-making in consent decrees as well as political pressures virtually doom effective enforcement against mergers with labor market concentration effects. While workers can challenge mergers in private litigation, they face considerable obstacles procedurally (arbitration clauses, class action certification, expensive expert fees) and substantively (burden-shifting rule-of-reason analysis, wealthy counterparties, judicial reluctance to "unscramble the egg" post-merger). Robust agency intervention on behalf of workers would be critical to ensuring adequate representation of their interests in merger review.

Third, the antitrust agencies have limited expertise in labor market regulation. Their primary tools for predicting the effects of mergers – generally derived from the discipline of Industrial Organizations ("IO") – are limited in their ability to evaluate labor market effects. While IO can (imperfectly) predict compensation and reduced employment effects, it often misses market failures endemic to labor markets that can enhance a merged firm's buying power over workers. These include search costs, information asymmetries, heterogeneous preferences, matching costs, lock-in effects, and mobility costs as well

as insights from behavioral psychology such as cognitive heuristics hindering workers' risk assessments. Broader labor economic, industrial relations, and socio-psychological studies of worker productivity are also necessary to assessing merger effects on worker productivity and output. Finally, IO-based market power evaluations ignore the role of institutions – like labor unions and government workplace interventions – in the longer-term equalization of worker bargaining power relative to employers. In contrast, labor law enforcement can preempt employer buying power by ensuring employees' countervailing power while taking into account the complicated realities of labor markets.

To overcome the limitations of the current reform agenda, labor antitrust merger enforcement ought to be integrated with labor law enforcement through concurrent jurisdiction between the antitrust agencies and the National Labor Relations Board ("NLRB" or "Board") over merger review. Specifically, if the antitrust agency's screening of larger mergers through the Hart-Scott-Rodino review process predicts post-merger labor market concentration levels as "moderately" or "highly concentrated," the NLRB's review and sign-off under a "public interest" standard should be required for merger approval.

Such interagency merger reviews applying a "public interest" standard are not unusual *outside* of labor markets. Joint merger review between the DOJ and the Federal Communications Commission ("FCC") (telecommunications mergers) and Federal Energy Regulatory Commission ("FERC") (electric power mergers) are prominent examples. In fact, interagency jurisdiction or cooperation on merger review between the antitrust agencies and other regulatory agencies is quite common, including in the railroad, banking, shipping, airline, and agricultural industries. A common thread in interagency review is accommodation of competition law and policy with the distinct policy goals of regulatory regimes tasked with fulfilling separate statutory mandates and some form of "public interest" standard. Responsibility for merger review ranges from regulatory agencies with exclusive jurisdiction (and the antitrust agencies like the Surface Transportation Board playing an advisory role) to concurrent jurisdiction (FCC/FERC) to mandated consultations and advisory roles for regulatory agencies. Thus, regulatory agencies condition mergers on satisfying the "public interest" under their regulatory mandates and exchange data and expertise on factors exacerbating post-merger effects on those mandates.

The Board's role in merger review could track the FCC's, with some improvements to avoid pitfalls of unpredictably broad discretion and the "double-veto." Merging parties would file an application for approval, and the Board would announce its acceptance through public notice. The agencies could develop a joint transaction team to ensure transparent and uniform internal procedures for processing applications. The team would detail staff and facilitate information-sharing between agencies. The Board could benefit from antitrust agencies' findings regarding market concentration in its assessment of labor market conditions and could provide evidence of concentration effects that may not emerge from merger enforcement. The Board could also coordinate with the DOJ/FTC on revisions to the Merger Guidelines and provide guidance on how labor market effects will be assessed during merger reviews. Interested parties could comment on proposed mergers, and any approval or conditions would be required to respond to significant public comments. To avoid delays, the Board could be required to complete its review and issue an order within 180 days of accepting the application for filing.

The NLRB is uniquely situated to assess labor-market merger effects because of its labor-management relations expertise and extensive industry-specific labor market data, including information about key indicators of labor market power and factors that may affect the significance of post-merger concentration levels. In doing its merger assessment, the Board could further solicit data and guidance from the merging parties; labor-related agencies, the Federal Reserve, and the IRS; competitors, employees, and customers of the merging parties; unions; and the general public. Congressional repeal of the ban on Board hiring of economists through the PRO Act would enable the Board to rely on analysis from a revived Division of Economic Research, the Board's original interdisciplinary research hub dismantled during the Red Scare.

Much like other interagency reviews, NLRB approval under its "public interest" standard would tolerate differences from antitrust agency standards. The Board would assess whether the proposed merger accords with the NLRA's statutory purposes and agency rules by substantially frustrating or impairing the objectives or implementation of the labor law, including ensuring equal bargaining power between employers and employees. Approval would be based on its assessment of whether potential public interest benefits outweigh public interest harms. The Board's discretion could be statutorily prescribed by specifying factors it would weigh, like the merger's impact on downward pressure on productivity-maximizing wages; labor's share of income; worker mobility; underemployment, misemployment, and unemployment rates; union density rates; and other considerations. The Board could refine these factors through notice-and-comment rulemaking.

The Board would focus on worker welfare effects in reviewing merging parties' efficiency defenses. In doing so, the Board would incorporate the expertise of labor economists, behavioral economists, sociologists of work, human resources, and psychological experts to compare estimated post-merger compensation with internal labor market wages and life-cycle earnings within a firm; union premiums within the industry; fairness expectations and potential effects on productivity; merger-specific workplace realities and productivity effects; and industry-specific revenue-sharing arrangements in collective bargaining agreements. As with other interagency review, the Board could shift burden-of-proof requirements: While the DOJ would bear the burden of establishing why a merger would be blocked, the merging parties would bear the burden of establishing why the Board should approve a merger.

Finally, much like the FCC and FERC, the NLRB could condition mergers on appropriate remedies to meet a public interest standard, including divestiture and other structural or behavioral remedies. Those could include an opt-out union; establishing card-check or rapid elections for union recognition; arbitration procedures for a first contract; requiring oversight and monitoring reports on hiring and terminations data, wage structures, outsourcing and subcontracting decisions; pledges to expand into new labor markets or face damages; and banning non-compete and class action waiver provisions in employment contracts.

A framework of concurrent jurisdiction through regulatory sharing is critical for developing a coherent, structural approach to labor market regulation that systematically addresses employer buyer power and its effects on inequality and constraining workers' access to economic opportunity.

This post comes to us from Professor Hiba Hafiz at Boston College Law School. It is based on her recent article, "Interagency Merger Review in Labor Markets," available here.

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