On Integrating Labor Market and Political Power Considerations Into a Consumer Welfare Analysis

Comments of Anant Raut[1]

In this paper, I attempt to bridge the gap between #hipsterantitrust and #getoffmyporchantitrust by showing how labor market effects and political power can be appropriately and meaningfully considered within a consumer welfare context.

There is a false schism between proponents of a traditional consumer welfare standard and those who advocate for a rethinking of the current enforcement approach (the "Brandeisians," or "New Left"), potentially under a public interest standard. The Brandeisians/New Left are correct that the existing approach has been flawed, but it's possible to incorporate some of their ideas without changing the standard, in two areas in particular: labor and political power.

- Labor

The enforcement agencies do take labor market effects into account in merger cases, but they bring them under the consumer welfare standard as employer monopsony claims. On the whole, this happens very rarely; only a few appear to have been pled over the past several years, and a cursory search suggests these have been monopsony claims for doctors and nurses following a health plan merger.[2] We don't see it at all for unskilled labor, because of the classical economic argument that unskilled labor will always get reallocated more efficiently into the vast pool of unskilled labor. But the arguments for recognizing harm against skilled labor apply in same measure to unskilled labor if you take a behavioral economics approach to **how labor actually behaves**.

There has been recent scholarship by labor economists indicating that the market for labor is far more concentrated than previously understood.[3] Such analyses focus upon the lack of a competitive market at the employer level, while making classical economic assumptions about the free movement of labor itself. My argument focuses on characteristics at the employee level of the labor market that enhance the market power of the employer post-merger, and how the failure to observe that by the enforcement agencies reflects potential bias against unskilled labor.

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[2] A search on the DOJ side found 4 in the past ~20 years. Complaint at 71, United States v. Anthem (D.D.C. July 21, 2016); Press Release, U.S. Department of Justice, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans (March 8, 2010); Complaint at 5, United States v. UnitedHealth Group, Inc. (D.D.C. December 20, 2005); and Complaint at 35, United States v. Aetna Inc. (N.D. Tex. June 21, 1999).

[3] See, e.g., Azar, A., Marinescu, I., and Steinbaum, M., "Labor Market Concentration (working paper)," December 2017.

In those cases where employer monopsony harm has been pled, the argument goes like this: doctors and nurses have invested so much time in their credentialing that they are more likely to accept a small pay cut than switch professions.[4] The argument also presumes that it is unreasonable to expect them to move to another location to practice.

A recent survey of medical school graduates ten years out showed fewer than 100% are still practicing physicians, indicating that career switching (to management consulting or hedge funds or hospital administration, for example) among these skilled professionals definitely does occur. So the assumption against switching is flawed.

Next, consider a factory worker who would be considered unskilled labor under traditional antitrust analysis. Assume this factory worker has worked at the same place for 15 years and now has the hours s/he wants, the shifts s/he wants, as well as excellent paid leave and benefits. Assume further that s/he has a mortgage, and children in local schools. All of these factors will make this factory worker just as likely to take a pay cut following a merger with the other factory in town, rather than quit her/his job and find another unskilled job (e.g., Jimmie John's) that pays at the same level. In other words, unskilled labor may demonstrate the same response as skilled labor to consolidation among competing regional employers, but traditional antitrust analysis treats the response of the skilled labor as rational and the unskilled labor as irrational, even though unskilled labor's response is both rational and foreseeable.

This "stickiness" of unskilled labor was touched upon recently in remarks by labor economist Alan Krueger before the Federal Reserve, remarking that, "…in many applications I think it is more appropriate to model the labor market as imperfectly competitive, subject to monopsony-like effects, collusive behavior by firms, *[and] search frictions*…"[5] (emphasis added)

As a <u>policy prescription</u>, the New Left can rightly question whether consistency and fairness dictate that enforcers should be pleading either fewer skilled labor employer monopsony harms in horizontal mergers, or *more unskilled labor* employer monopsony harms. Biases in the traditional analysis may be resulting in more protection under the antitrust laws for skilled labor. Such analyses could be tested by retrospective post-merger analyses of wage effects on unskilled labor. In addition, the agencies may benefit from bringing on labor economists and behavioral economists to assist in their approach.

- Political power

[4] *See* Aetna Complaint at 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."), repeated nearly verbatim six years later, UnitedHealth 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 a price reduction unprofitable.").

[5] A. Krueger, "Reflections on Dwindling Worker Bargaining Power and Monetary Policy," Address at the Jackson Hole Economic Symposium (August 24, 2018).

One aspect of the political power of companies with large market share that can and should be factored into antitrust analyses is the externalization of costs. For example, a recent Businessweek article reported that Amazon.com's Amazon Web Services unit struck a deal with an Ohio municipality to locate one of its facilities there in exchange for not having to pay its power bill.[6] Instead, the article reports, the costs are being borne by local ratepayers, who have seen their electricity bills go up.

> "Over the past two years, Amazon has almost doubled the size of its physical footprint worldwide, to 254 million square feet, including dozens of new data centers with vast fields of services running 24/7. In at least two states, it's also negotiated with utilities and politicians to stick other people with the bills…"[7]

In the words of an economist quoted in the article, "'That's de facto cost-shifting….Other businesses and households in Ohio are now bearing all the costs of those riders.'"[8]

A separate Businessweek article from October 2017 chronicled how Amazon reached a deal with a different town in Ohio that excepts it from paying taxes for several years.[9] As a result, local police and fire are being utilized more, because they now have to serve Amazon's warehouse, but without receiving additional tax revenue to offset the increased cost.

> "In 2014, after negotiating with JobsOhio, Amazon agreed to spend $1.1 billion to build three data centers in the state in exchange for a 15-year exemption on state and local property and sales taxes, up to $77 million. The value of the tax breaks will increase proportionately if Amazon spends more on construction or expansion of the data centers….JobsOhio negotiated a $4 million tax credit to offset payroll costs….It also gave Amazon $1.4 million in cash."[10]
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> "[The new facilities, says Steve Little, the fire district administrator, are] 'almost a million square feet we have to protect, but we get no extra money….We have no voice in these deals, and we get no cash. Our residents are being forced to pay instead.' In November, voters in Little's district were asked to approve a five-year, $6.5 million property tax levy to keep the fire department operating."[11]
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> "[The article concludes:] Bottom line: Amazon's nine-figure tax incentives in Ohio have strained local public services as the state's employment growth continues to lag the national average."[12]

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[6] M. Frazier, "Amazon Isn't Paying Its Electric Bills. You Might Be.," Bloomberg Businessweek (August 20, 2018)
[7] *Ibid.*
[8] *Ibid.*
[9] M. Frazier, "Amazon Is Getting a Good Deal in Ohio. Maybe Too Good.," Bloomberg Businessweek (October 25, 2017)
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*

(Though the examples above refer to Amazon.com, my point is not an anti-Amazon one, these are simply two well-documented examples. This argument would apply to any large company able to obtain relief from ordinary expenses, such as taxes, from municipal, state, or federal government that is not available to the entire class of companies with which that company competes.)

This ability to extract economic benefits from state and local legislatures is a form of political power only available to the largest corporations. Yes, these companies may then be able to offer customers low prices, but only because they no longer have to bear the full cost of their operations.

The ability to lobby for these benefits is protected as a matter of First Amendment, and under *Noerr-Pennington* doctrine.[13] However, there is no reason that the competitive consequences have to be ignored.

Company-specific tax breaks and financial incentives at the municipal, state, or federal level should be presumptively anticompetitive for their likelihood of enabling predatory behavior by subsidizing supracompetitive margins. As a <u>policy</u> proscription, one way to take this political power into account is by factoring it into any Section 2 analysis applying an equally efficient rival ("EER") test. The EER test is used a screen to distinguish illegal exclusionary conduct from aggressive but legal competition, by comparing whether a rival with a comparable cost structure could match the party in question's behavior. While marginal costs are taken into account in an EER test, this type of political largesse, which directly benefits a competitor's cost structure, is not. What I propose is that when determining whether the competitor is pricing below cost, the EER test should take into account costs that a rival would be reasonably expected to bear, and square up the competitor's costs with what its costs would be absent political power. As a practical matter, you would **add back in** the utility costs in the above example that were being shifted by the company onto ratepayers. *Failure to account for company-specific tax breaks and incentive payments under the EER test may suggest that we need to abandon these judicially-created tests entirely in favor of new models better calibrated to detecting actual predatory behavior.*

From a <u>policy</u> perspective, one of the gains from political power can thus be quantified and factored into a Section 2 analysis under the consumer welfare standard. Companies that lack political power would have a legal basis for challenging the lower cost basis obtained by their competitor through political power. This would also create incentives for local governments to have more transparent discounts and benefits that are made available to an entire class of companies, rather than to individual competitors which unfairly and undeniably distorts the competitive process.

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[13] *See* E.R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) *and* United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).