

The antitrust laws are not some meta-legislation authorizing whatever regulation activists want: Labor market edition

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In a [recent post](#) at the (appallingly misnamed) ProMarket blog (the blog of the Stigler Center at the University of Chicago Booth School of Business — George Stigler is rolling in his grave...), Marshall Steinbaum keeps alive the hipster-antitrust assertion that lax antitrust enforcement — this time in the labor market — is to blame for... well, most? all? of what's wrong with “the labor market and the broader macroeconomic conditions” in the country.

In this entry, Steinbaum takes particular aim at the US enforcement agencies, which he claims do not consider monopsony power in merger review (and other antitrust enforcement actions) because their current consumer welfare framework somehow doesn't recognize monopsony as a possible harm.

This will probably come as news to the agencies themselves, whose [Horizontal Merger Guidelines](#) devote an entire (albeit brief) section (section 12) to monopsony, noting that:

Mergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market. Buyer market power is sometimes called “monopsony power.”

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Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.

Steinbaum fails to mention the HMGs, but he does point to a [US submission to the OECD](#) to make his point. In that document, the agencies state that

The U.S. Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) [] do not consider employment or other non-competition factors in their antitrust analysis. The antitrust agencies have

learned that, while such considerations “may be appropriate policy objectives and worthy goals overall... integrating their consideration into a competition analysis... can lead to poor outcomes to the detriment of both businesses and consumers.” Instead, the antitrust agencies focus on ensuring robust competition that benefits consumers and leave other policies such as employment to other parts of government that may be specifically charged with or better placed to consider such objectives.

Steinbaum, of course, cites only the first sentence. And he uses it as a launching-off point to attack the notion that antitrust is an improper tool for labor market regulation. But if he had just read a little bit further in the (very short) document he cites, Steinbaum might have discovered that the US antitrust agencies *have*, in fact, challenged the exercise of collusive monopsony power in labor markets. As footnote 19 of the OECD submission notes:

Although employment is not a relevant policy goal in antitrust analysis, **anticompetitive conduct affecting terms of employment can violate the Sherman Act.** See, e.g., [DOJ settlement with eBay Inc.](#) that prevents the company from entering into or maintaining agreements with other companies that restrain employee recruiting or hiring; [FTC settlement with ski equipment manufacturers](#) settling charges that companies illegally agreed not to compete for one another’s ski endorsers or employees. (Emphasis added).

And, ironically, while asserting that labor market collusion doesn’t matter to the agencies, Steinbaum himself points to “the Justice Department’s [2010 lawsuit against Silicon Valley employers](#) for colluding not to hire one another’s programmers.”

Steinbaum instead opts for a willful misreading of the first sentence of the OECD submission. But what the OECD document refers to, of course, are situations where two firms merge, no market power is created (either in input or output markets), but people are laid off because the merged firm does not need all of, say, the IT and human resources employees previously employed in the pre-merger world.

Does Steinbaum really think this is grounds for challenging the merger on antitrust grounds?

Actually, his post suggests that he does indeed think so, although he doesn’t come right out and say it. What he does say — as he must in order to bring antitrust enforcement to bear on the low- and unskilled labor markets (e.g., burger flippers; retail cashiers; Uber drivers) he purports to care most about — is that:

Employers can have that control [over employees, as opposed to independent contractors] without first establishing themselves as a monopoly—in fact,

reclassification [of workers as independent contractors] is increasingly standard operating procedure in many industries, which means that **treating it as a violation of Section 2 of the Sherman Act should not require that outright monopolization must first be shown.** (Emphasis added).

Honestly, I don't have any idea what he means. Somehow, because firms hire independent contractors where at one time long ago they might have hired employees... they engage in Sherman Act violations, even if they don't have market power? Huh?

I get why he needs to try to make this move: As I intimated above, there is probably not a single firm in the world that hires low- or unskilled workers that has anything approaching monopsony power in those labor markets. Even Uber, the example he uses, has nothing like monopsony power, unless perhaps you define the market (completely improperly) as "drivers already working for Uber." Even then Uber doesn't have monopsony power: There can be no (or, at best, virtually no) markets in the world where an Uber driver has no other potential employment opportunities but working for Uber.

Moreover, how on earth is hiring independent contractors evidence of anticompetitive behavior? "Reclassification" is not, in fact, "standard operating procedure." It is the case that in many industries firms (unilaterally) often decide to contract out the hiring of low- and unskilled workers over whom they do not need to exercise direct oversight to specialized firms, thus not employing those workers directly. That isn't "reclassification" of existing workers who have no choice but to accept their employer's terms; it's a long-term evolution of the economy toward specialization, enabled in part by technology.

And if we're really concerned about what "employee" and "independent contractor" mean for workers and employment regulation, we should reconsider those outdated categories. Firms are faced with a binary choice: hire workers or independent contractors. Neither really fits many of today's employment arrangements very well, but that's the choice firms are given. That they sometimes choose "independent worker" over "employee" is hardly evidence of anticompetitive conduct meriting antitrust enforcement.

The point is: The notion that any of this is evidence of monopsony power, or that the antitrust enforcement agencies don't care about monopsony power — because, Bork! — is absurd.

Even more absurd is the notion that the antitrust laws should be used to effect Steinbaum's preferred market regulations — independent of proof of actual anticompetitive effect. I get that it's hard to convince Congress to pass the precise laws you want all the time. But simply routing around Congress and using the antitrust statutes as a sort of meta-legislation to enact whatever happens to be Marshall Steinbaum's preferred regulation du jour is ridiculous.

Which is a point the OECD submission made (again, if only Steinbaum had read beyond the first sentence...):

[T]wo difficulties with expanding the scope of antitrust analysis to include employment concerns warrant discussion. First, a full accounting of employment effects would require consideration of short-term effects, such as likely layoffs by the merged firm, but also long-term effects, which could include employment gains elsewhere in the industry or in the economy arising from efficiencies generated by the merger. Measuring these effects would [be extremely difficult.]. Second, unless a clear policy spelling out how the antitrust agency would assess the appropriate weight to give employment effects in relation to the proposed conduct or transaction's procompetitive and anticompetitive effects could be developed, [such enforcement would be deeply problematic, and essentially arbitrary].

To be sure, the agencies don't recognize enough that they *already* face the problem of reconciling multidimensional effects — e.g., short-, medium-, and long-term price effects, innovation effects, product quality effects, etc. But there is no reason to exacerbate the problem by asking them to also consider employment effects. Especially not in Steinbaum's world in which certain employment effects are problematic even without evidence of market power or even actual anticompetitive harm, just because he says so.

Consider how this might play out:

Suppose that Pepsi, Coca-Cola, Dr. Pepper... and every other soft drink company in the world attempted to merge, creating a monopoly soft drink manufacturer. In what possible employment market would even *this* merger create a monopsony in which anticompetitive harm could be tied to the merger? In the market for "people who know soft drink secret formulas?" Yet Steinbaum would have the Sherman Act enforced against such a merger not because it might create a product market monopoly, but because the existence of a product market monopoly means the firm must be able to bad things in other markets, as well. For Steinbaum and all the other scolds who see concentration as the source of all evil, the dearth of evidence to support such a claim is no barrier (on which, see, e.g., [this recent, content-less NYT article](#) (that, naturally, quotes Steinbaum) on how "big business may be to blame" for the slowing rate of startups).

The point is, monopoly power in a product market does not necessarily have any relationship to monopsony power in the labor market. Simply asserting that it does — and lambasting the enforcement agencies for not just accepting that assertion — is farcical.

The real question, however, is what has happened to the University of Chicago that it continues to provide a platform for such nonsense?

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