



Competition in Labour Markets



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Foreword

A recent fall in the labour share of income in some countries has stirred a debate on monopsony and the market power of employers to reduce workers' wages or working conditions below competitive levels. The debate focused attention on the role that competition agencies may have to help ensure efficient labour input purchasing markets.

This paper sets out the economic drivers and effects of employer monopsony power in labour markets. It analyses when the creation or exercise of monopsony power by employers may infringe competition law and identifies the cases where competition enforcement can effectively address monopsony power in such markets.

It also looks at how monopsony power is exercised in digital markets, examining how the intermediation power of some big platforms may negatively affect wages and working conditions of self-employed platform workers.

Whilst competition law enforcement has been so far limited, competition authorities may have an increased role to play in labour input markets, particularly in addressing anticompetitive agreements that artificially creates monopsony power, abuses of monopsony power and merger transactions leading to increased monopsony power.

Finally, the paper looks at some practical and analytical challenges to the application of the traditional tools of competition enforcement analysis in these markets. It then discusses ways to overcome such challenges and proposed adjustments to these tools suggested in the recent literature, as well as competition advocacy solutions to address monopsony power in these markets.

This paper was prepared by Cristina Volpin and Chris Pike of the OECD Competition Division. It benefitted from comments by Pedro Caro de Sousa, Tony Curzon-Price and the OECD Employment, Labour and Social Affairs Directorate.

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Chapter 1. Introduction

Companies with large market power may be able – alone or collectively – to restrict output, increase price above the competitive level or affect other parameters of competition, such as quality of the goods and services or innovation. Similarly, buyers with market power, a phenomenon commonly referred to as ‘buyer power’, may significantly constrain sellers in commercial relationships due to their size, the relevance of the input sold and the availability of suitable alternatives.¹

In some cases, depending on the market structure, ‘buyer power’ may amount to ‘monopsony’. The term ‘monopsony’ was originally used in 1933 by Joan Robinson in *The Economics of Imperfect Competition*, in parallel to the term ‘monopoly’, to indicate the existence of a single buyer of a specific good or service in a market. It is common to distinguish between monopsony power and bargaining power as two forms of buyer power, both of which may reduce input prices. They may apply within a market framework or, when both sides have some market power, within a bargaining framework.

In a bargaining framework, typically applicable when there are a few sellers with some market power (or a monopolist supplier of the input), the exercise of bargaining power by the single buyer threatens a reduction in demand and countervails the market power of sellers, thereby pushing prices down towards competitive levels. Differently, in an upstream market where a single buyer exercises monopsony power and sellers have limited market power, the single buyer is able to affect the input price by reducing (in other words, it does not threaten but reduces) its demand, and, to maximise its profits, will buy less to drive input price down below competitive levels (OECD, 2008).

In labour markets, the term ‘monopsony’ is often more broadly intended to include monopsony and oligopsony and, for the purposes of this paper, is defined as “*any case where firms have some labor market power that allows them to determine wages*”.² On the demand side of labour markets (i.e. the labour input market where employers buy labour), therefore, there may be employers with large market power that are able to pay workers less than the competitive level by hiring fewer workers. Additionally, there is monopsony in labour input markets also when the employer/buyer of labour has the ability to worsen the employment terms and conditions by reducing employment, thus also driving wages below competitive levels.

Labour markets are different from product markets in that they are characterised by a number of ‘frictions’, i.e. factors contributing to a “*mismatch between the worker and the employer*” (Basu, 2008). Labour market frictions, and matching in particular, may significantly contribute to employer market power and make labour input markets more prone to monopsony than product markets to monopoly (Naidu et al., 2018, p. 554). As Manning (2003, p. 4) incisively put it, “*people go to the pub to drown their sorrows when they lose their job rather than picking up another*

one straight away” and he identifies “*ignorance, heterogeneous preferences, and mobility costs*” as “*the most plausible sources of frictions in the labor market*”. Recent studies support the observation that workers cannot easily change jobs as a reaction to wage decreases. Studies also estimate that the level of responsiveness of workers to wages decreases is overall low in Europe, the United States, Canada and Australia (Sokolova and Sorensen, 2018; Hirsch et al., 2018).

Recent research provides evidence of high levels of concentration in labour input markets in certain jurisdictions (Martins, 2018; Abel et al. 2018; Azar et al., 2018). A recent study, analysing vacancies advertised online, finds that the majority of US local labour markets are highly concentrated, displaying a Herfindahl-Hirschman Index (HHI) above 2 500, with high levels of concentration affecting 17% of the workforce (Azar et al., 2018). Another US study links an increase in employer concentration to a pay drop of 17%, suggesting that employer concentration increases labour market power (Azar et al., 2017). While these findings may vary depending on the definition of labour markets adopted, such levels of concentration have raised the attention of academics and governments, and stimulated the discussion on the risk that mergers with an impact on the demand side of labour markets may significantly increase employers’ market power.

Even in the absence of high levels of labour input market concentration, however, employers may artificially reproduce situations analogous to monopsony power by anticompetitive means, such as by entering into anticompetitive agreements reducing wages or workers’ mobility (Naidu and Posner, 2018). A number of competition authorities in the United States and in Europe recently investigated these practices, such as wage-fixing and no-poaching agreements. Alternatively, mergers may contribute to increase employers’ market power.

Independently of any increases in labour input market concentration, labour market friction impeding workers’ mobility or anticompetitive practices, it is also possible that employers have acquired market power due to the de-unionisation of the workforce (Benmelech et al., 2018). This may reduce the strength of the countervailing power of the employees/suppliers of labour facing monopsony power. For instance, a UK study looking at the private sector between 1998 and 2017 concludes that employers enjoy significant monopsony power, including those operating in competitive product markets. It finds that “*even though UK labour markets have not on average become much more concentrated, concentration – which varies a great deal across regions and industries – is having a bigger impact on wages than before*”³ (Abel et al., 2018), when wages are not covered by collective bargaining agreements.

Some commentators have advanced a suggestion that low levels of labour input market competition might be among the causes of wage stagnation (Azar et al., 2017; Rinz, 2018; Benmelech et al., 2018; Schieber and Casselman, 2018) and of the fall in the labour share of income⁴ (Autor et al., 2017; Barkai, 2016; Naidu et al., 2018).⁵ While these suggestions are disputed (Lipsius, 2018; Díez-Catalán, 2018), they have raised questions about the role of competition law and policy in addressing monopsony power in labour markets, particularly in a de-unionised world.

Competition law might be relevant in cases of:

- wage-fixing, no-poaching agreements or other collusive practices; or

- abuses of employer’s monopsony power; or
- further concentration of labour input markets through mergers.

Competition advocacy, market studies and others tools might contribute to addressing some of the drivers of monopsony power, such as matching, coordination and other labour market frictions that restrict workers’ opportunities to switch jobs.

It is generally accepted that competition laws apply equally to restrictions of competition on the demand and the supply side of markets⁶ and that “*similar legal standards*” should be adopted.⁷ In labour markets, however, employees selling their labour, and agreements they enter into to the purpose of improving working and employment conditions, are typically not subject to the application of competition law. The purpose of this exclusion is to shield collective bargaining activities from competition law, in the light of the social objective they pursue. The exclusion from competition law does not, however, extend to self-employed individuals that qualify as enterprises, nor, typically, to any collective agreements between workers that is not aimed at improving working or employment conditions.

Although the debate on the status of non-traditional workers is not new (OECD, 2019a, p. 17), a debate has recently been revived in relation to the application of competition law to workers in the context of the ‘gig’ economy. ‘Gig workers’ are broadly defined as those whose work “*consists of income-earning activities outside of traditional, long-term employer-employee relationships*”, including self-employed, free-lance, temporary and project-based work contracts.⁸ According to some commentators, the fact that certain categories of gig workers, such as those working for online platforms, are self-employed contractors and do not enjoy workers’ protection may contribute to reinforcing the monopsony-like power of the platform (Steinbaum, 2018b). While the qualification of these self-employed individuals as enterprises subject to competition law may vary in different jurisdictions, platform workers⁹ are not usually shielded from the application of competition law in their negotiations with the big platforms. The debate about the qualification of these workers has also raised the questions of whether tackling the market power of the platforms upstream, at the level of the contractual relationship with the platform worker, would be an effective solution to counteract their power.

Exclusions from the application of competition law do not normally cover the demand side of labour markets. Nonetheless, competition enforcement in labour markets seems to have been rare, if not unheard of, in most jurisdictions. Where it has occurred, competition enforcement has so far mainly focused on hard-core cartels, such as wage-fixing and no-poaching agreements (Naidu et al., 2018; Marinescu and Hovenkamp, 2018). In their merger control activity, competition authorities do not seem to have conducted in-depth analysis of monopsony power in labour markets. For instance, the US competition authorities have never blocked a merger because of its effects on the labour market, or ever analysed in detail such effects (Naidu et al., 2018; Marinescu and Posner, 2019). There has also been little to no activity against abuses of monopsony power in labour input markets.

A trend towards increasing agreement that competition enforcement should more thoroughly address monopsony power concerns on the demand side of labour market seems to be emerging. Some of the leading competition authorities have recently made labour markets the object of their focus. The US enforcers have

confirmed their willingness to scrutinise systematically the effects of mergers on labour markets.¹⁰ In 2016, they also adopted guidelines to inform human resources' professionals about the risks arising in connection with employers' hiring and compensation practices.¹¹ Similarly, the Japan Fair Trade Commission (JFTC) published in 2018 a Report of the Study Group on Human Resource and Competition Policy, aimed at discussing the application of the Antimonopoly Act to competition for human resources.¹²

Increasing attention is also being devoted to employment practices outside OECD jurisdictions. For instance, the Hong Kong Competition Commission (HKCC) has issued an Advisory Bulletin to raise awareness on the competition risk of these practices in 2018,¹³ while it has been observed that the recent policies adopted in China in favour of employees could indicate that China's competition authorities may soon start investigating no poaching and price-fixing agreements.¹⁴

In light of the renewed interest in enforcing competition law, where appropriate, against employer monopsony power, this paper discusses the effects of this power on workers and consumers, the limits of the application of competition law to labour input markets, and the best tools that competition authorities could use to deal with employment practices, abuses and mergers affecting the demand side of labour markets. Building on previous OECD discussions on the subject of the impact of competition on job creation (OECD, 2015) and monopsony and buyer power (OECD, 2008):

- **Chapter 2.** clarifies why competition law should be concerned with monopsony power in labour input markets and to what extent. It also illustrates the notion of monopsony, its causes and effects in labour input markets, and its impact on competition.
- **Chapter 3.** discusses competition enforcement in labour input markets, identifying the most common anticompetitive concerns on the demand side of these markets and the challenges faced by competition authorities in addressing these concerns.
- **Chapter 4.** looks at how non-enforcement competition tools, such as market studies and other advocacy powers, can be used to tackle issues arising from monopsony power or to strengthen the countervailing power of workers in labour markets.
- **Chapter 5.** concludes.

The analysis reveals that competition law may have a role in disciplining monopsony power that is artificially created, maintained or exploited in labour input markets, although competition authorities have so far largely overlooked these markets. When monopsony issues derive from the employer's business model itself, like for platform workers, or from natural factors such as matching, coordination or other labour market frictions, competition advocacy or other tools may be more apt to assist in the correction of these market failures.

Notes

¹ See, for instance, European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5–18, para. 64.

² Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf, p. 2.

³ W. Abel, S. Tenreyro, G. Thwaites (2019), “Monopsony in the UK”, CEPR Policy Portal, <https://voxeu.org/article/monopsony-uk>.

⁴ Studies documenting this phenomenon can be found for the United States and other countries, see M. Elsby, B. Hobijn and A. Sahin (2013), “The Decline of the U.S. Labor Share”, *Brookings Paper on Economic Activity*, vol. 44(2), pp. 1-63; L. Karabarbounis and B. Neiman (2014), “The Global Decline of the Labor Share”, *The Quarterly Journal of Economics*, vol. 129, pp. 61–10.

⁵ M. Whitehouse, “U.S. Labor Market Aren’t Truly Free”, Bloomberg, October 2018, <https://www.bloomberg.com/opinion/articles/2018-10-21/free-markets-could-make-workers-better-off>.

⁶ A notable exception is, for instance, Section 3 of the U.S. Clayton Act, which contains a prohibition of anticompetitive tying and exclusive dealing and captures the conduct of sellers not of buyers. See I. Marinescu, I. and H. J. Hovenkamp (2018), “Anticompetitive Mergers in Labor Markets”, Faculty Scholarship Repository University of Pennsylvania Law School, Research Paper No. 18-8, http://scholarship.law.upenn.edu/faculty_scholarship/1965.

⁷ The US Supreme Court stated that, given the analogous structure of monopoly and monopsony, predatory pricing and predatory bidding claims should be treated in a similar way in *Weyerhaeuser Co. v. Ross-Simmons Hardwoodlumber Co.* 549 US 312, 320 (2007).

⁸ See, for more details, <https://www.gigeconomydata.org/basics/what-gig-worker>.

⁹ Platform workers can be defined as “providing services via online platforms, where [the worker] and the client are matched digitally, payment is conducted digitally via the platform and the work is location-independent, web-based” and “providing services via online platforms, where [the worker] and the client are matched digitally, and the payment is conducted digitally via the platform, but work is performed on-location”. See for this definition, A. Pesole, M. C. Urzì Brancati, E. Fernández-Macías, F. Biagi, I. González Vázquez (2018), “Platform Workers in Europe”, Publications Office of the European Union, http://publications.jrc.ec.europa.eu/repository/bitstream/JRC112157/jrc112157_pubsy_platform_workers_in_europe_science_for_policy.pdf.

¹⁰ The Federal Trade Commission’s (FTC) Chairman Joseph J. Simons is reported to have instructed the Commission’s staff “to look for potential effects on the labor market with every merger they review”, see Senate Committee on the Judiciary (2018), “Oversight of the Enforcement of the Antitrust Laws”, Questions for Joseph Simons, Chairman, Federal Trade Commission, <https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs1.pdf>, p. 41.

¹¹ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 3.

¹² Japan Fair Trade Commission, Competition Policy Research Center (2018), Report of the Study Group on Human Resource and Competition Policy, https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf.

¹³ Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf.

¹⁴ O. Shah, D. Wang, M. L. Krotoski and O. Hammond (2018), “Are Your Employment Practices in Breach of Antitrust Law?”, Lexology, <https://www.lexology.com/library/detail.aspx?g=55f9cb5c-1467-424c-8994-48e451a6b18d>.

Chapter 2. Monopsony Power in Labour Markets

2.1. Applicability of competition law in the context of labour markets

Workers are not businesses, and so they are not the subject of competition law. Many jurisdictions have long established in the case law or adopted express exemptions in the law to waive the application of competition law to the activity of unions, in the spirit of the protection of the social objectives they pursue. For instance, in the EU, the case law confirmed that employees are, for the time of their employment relationship, considered as part of the businesses employing them and therefore part of the same legal entity under the single economic unit doctrine.¹ The Court of Justice of the European Union and the EFTA Court also clarified that collective bargaining concerning the negotiation of worker wages or employment terms and conditions are subtracted from the application of competition law.²

In the United States, the Clayton Act, Section 6 provides that “*the labor of a human being is not a commodity or article of commerce*” and that “*nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor [...] organizations [...] or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws*”. Section 20 prohibits restraining orders or injunctions in cases concerning employment disputes, unless aimed at preventing irreparable damage. In Canada, Section 4 of the Competition Act contains a similar exemption for collective bargaining activities.

These exclusions tend to be interpreted narrowly and typically they do not shield the activities of trade unions representing members of the liberal professions or other self-employed workers, including gig workers (Rubiano, 2013). While the application of competition law depends on the real qualification of the individual regardless of their formal status,³ it has been argued that there is nothing in the case law preventing the extension of the collective bargaining exception to self-employed in specific circumstances (Rubiano, 2013, p. 44).

A lively debate has arisen in relation to certain categories of gig economy self-employed contractors. Given that these individuals do not enjoy the traditional autonomy characterising independent professionals, some commentators have claimed that there may be a need to recognise their bargaining rights, also to counteract the exercise of monopsony power exercised by employers (Lao, 2017). The problem of the qualification of certain categories of self-employed workers emerges also outside the field of competition and, for instance, the recently adopted European Directive on transparent and predictable working conditions in the European Union⁴ expressly cover workers fulfilling the conditions of an employment relationship, regardless of the way in which the parties describe the

employment relationship. Given the growing importance of digital platforms,⁵ this reclassification issue is discussed in relation to platform workers in Section 3.4.1.

Importantly, however, the inapplicability of competition law to employees in their collective bargaining activity has no implication for its applicability to employers as buyers of labour, generally considered to fall within the scope of application of competition law.

2.2. Competition on the demand side of labour markets

Suppose that in a small town that is not well connected to the bigger city there is only one factory, and a number of specialised workers looking for employment that have no other factories at which they might work. Recognising that there are no good substitute employers for these specialised workers, the employer may have an incentive to set wages below the competitive level, i.e. the level that workers would be offered if there were another factory competing to hire from that pool of workers. In such a case, the factory may have significant monopsony power, because it can unilaterally set lower wages, without losing many workers. This would, to some extent, reduce the quantity or quality of what is produced, and may lead to higher prices in downstream markets depending on their degree of competition.

An employer monopsonist is able to decrease wages below the competitive level, reduce employment or dictate other working terms and conditions. In traditional economic models, monopsonies were thought to exist only in isolated labour input markets with a single employer in relatively specialised sectors. Newer models of monopsony suggest that monopsony may be less rare than commonly thought, with a number of factors creating, consolidating or facilitating the exercise of employers' market power (Staiger et al., 2010; Blair and Harrison, 2010, p. 1). As noted by Ashenfelter et al. (2010, p. 3), "*A single employer in a nominally competitive labor market can have monopsony power over his current workforce if workers bear a cost of job change, pecuniary or non-pecuniary*".

The level of labour supply elasticity, defined as "*the sensitivity with which workers react to changes in wages*" (Naidu et al., 2018), is commonly interpreted as evidence of labour market monopsony (Manning, 2003, p. 80). Past studies of specific job markets using this measure found little employer market power for jobs such as coal miners and nursing assistants (Boal, 1995; Matsudaira, 2014; *contra* Sullivan, 1989), while substantial market power was found for other jobs, such as schoolteachers (Falch, 2010; Ransom and Sims, 2010).

While measuring residual labour market elasticity can be methodologically difficult (Naidu et al., 2018, p. 560), some broader studies support the existence of a significant degree of employer monopsony power in many markets (Ashenfelter et al., 2010). Although European labour markets appear to have a higher level of residual labour supply elasticity than US, Canada and Australia, the level of responsiveness of workers to wages decreases are overall considered to be low (Sokolova and Sorensen, 2018; Webber, 2011; OECD, 2019a). An experimental study conducted in Mexico in 2013 with public officials found that a 33% increase in the wage offered brought about a 26% increase in applications, and estimated a low labour supply elasticity (Dal Bó et al., 2013). A German study confirms low labour supply elasticities, also noting that women's labour elasticity is lower than men's (Hirsch et al., 2010). Other authors confirm the low level of labour supply

elasticity for online labour markets, which are usually expected to have a higher degree of labour supply elasticity compared to others (Dube et al., 2018).

Multiple reasons might explain why these studies found low levels of labour supply elasticity. One possible explanation, discussed in more detail below, could be the widespread use of non-compete covenants in certain jurisdictions, constraining the mobility of workers like hairdressers and fast-food franchise employees (Dougherty, 2017). Other possible reasons are sensitivity to non-wage job characteristics, the costs of searching and changing job, employee's unwillingness to move beyond certain distances, limited information, negligible pay differences, lack of bargaining power in individual negotiation with the employer and general risk-aversion (for example, low propensity to leave local labour markets in unfavourable labour demand situations). Additionally, labour supply can be considered an extremely perishable commodity (Blair and Harrison, 2010, p. 81), given the costs of non-working for the individual, and low-income workers are likely to be less able to 'withhold supply' in response to lower wages than high paid ones. All these factors may significantly contribute to strengthening monopsony market power, particularly for low-wage workers.

A situation of monopsony may have important consequences on competition in labour input markets. In a way that is analogous to monopoly, monopsony can generate economic inefficiency.⁶ As Marinescu and Hovenkamp (2018, p. 11) explain, in competitive labour markets, companies pay workers the marginal revenue product of their labour, i.e. the amount of additional revenue generated by the worker. In monopsonistic scenarios, as in competitive markets, the monopsony employer maximises its profits from this input when the marginal cost of labour is equal to the marginal revenue product. If the single employer intends to make a new hire, however, it will have to raise the marginal wage. As a result, the marginal cost of labour is greater than the average cost of labour. To decrease the average cost of labour, the monopsonist lowers real wages, even if it may lose employees.⁷ How strong the impact is on the workforce depends on the residual labour supply elasticity and the ability of the monopsonist to wage discriminate, i.e. to pay different remuneration levels to different workers.

As a mirror image of monopoly, monopsony power (where sellers do not have market power) also creates deadweight loss, because the monopsonist pays less for labour input and thus loses the workers for which the salary offered is below what they are prepared to accept (reservation salary). An important negative implication of monopsony is that, absent real efficiencies such as economies of scale or scope, it can be expected to result in inefficient losses in production and employment.⁸

If the monopsonist cannot wage discriminate, the quantity (or quality) reduction in the downstream product market might be offset by the reduced cost of wages. If the monopsonist has market power in the downstream market, the reduced quantity of output may increase the price for consumers. If, however, the monopsonist faces a competitive downstream market, the price for consumers will not change, and the only impact of merger to monopsony would be the reduction in wages. Notably, the reduction in wages that the monopsonist achieves by withholding demand for labour is not passed onto consumers even if the downstream market is competitive. The reason being that, given the reduction in labour and the associated reduction in output, the monopsonist is unable to meet any additional demand that it might be able to generate by reducing its price. Therefore, it has no incentive to reduce price,

since this would simply reduce the margin. The monopsonist earns on the output that it produces (Church, 2008, p. 21; Blair and Harrison, 2010, p. 46).

If the monopsonist can wage discriminate, it can reduce wages to each workers reservation wage (rather than their marginal revenue product). While not inefficient in terms of total welfare (since output is not constrained), this would reduce the welfare of workers.

Some commentators consider, however, that although wage discrimination may occur, it can be difficult for employers to practice it effectively on a large scale, in particular due to pay equality reasons. As noted by Naidu and Posner (2018, p. 6), *“firms may not be able to observe [...] taste heterogeneity, and internal constraints on wage discrimination (e.g. internal equity) may force firms to post only one wage per job. This restriction is what makes labor market power inefficient: if firms could perfectly tailor the wage to each worker’s taste for working at that firm, there could still be market power, but it would not be inefficient”*. It is not excluded, however, that in the future algorithms will enable applying wage discrimination at the broader level (Naidu et al., 2018, p. 558).

Further, mergers may also lead to pro-competitive efficiencies that involve job losses. Where the merging firms have duplicated functions, they may, for example, make savings by removing duplicated roles between the organisations, or taking advantages of economies of scale or scope. This can generate savings for the firm that might be passed onto consumers. These efficiencies and the job losses they involve would not be anti-competitive. The reduced demand is genuine (due to the lack of any need for those duplicated roles) and may give the firm a comparative advantage that wins it additional market share. As such, it is not an artificial restriction of demand designed to reduce wages. While a public interest test in which the impact on employment is a relevant criterion (see Box 2) might identify both pro-competitive (or ‘efficiency enhancing’) and anti-competitive job losses as a concern, a monopsony theory of harm would need to distinguish between the two.

2.3. Addressing labour monopsony power under the consumer welfare standard

Given that the impact of labour monopsony power on the price of the final output may be limited, depending on the level of competition of the product market, a fundamental question to address is whether its negative impact on workers’ wages and working conditions is a concern from the competition law point of view. The question arises because the consumer welfare standard, in its literal interpretation as consumer and customer surplus,⁹ could be seen as an obstacle to the application of competition law to employer monopsony power in those cases where the conduct’s or the transaction’s effects are minimal at the product market level. This is confirmed by a traditional approach to these markets, according to which employer restraints were to be punished only if their effects were felt in a product market (Jerry and Knebel, 1984).

If the downstream market is competitive, the effect of monopsony on the product price may be limited. Under a strict interpretation of the consumer welfare standard, therefore, the implication would be that competition enforcers should focus only on per se and by object offences, such as wage-fixing and no-poaching agreements, because they do not require evidence of the effects of the conduct, and, in merger

control, should assess exclusively the effects of concentrations in the product market.

A number of commentators argue, however, that the fact that labour monopsony may not have a significantly negative impact on the product market should not prevent competition authorities from thoroughly investigating anticompetitive conduct and monopsony abuses, and assessing mergers effects in labour input markets. They contend that the criterion of consumer welfare may be misleading, as it implies that the primary policy concern is the welfare of the investigated business's costumers or consumers. As such, at least on a nominal level, it does not comfortably accommodate an effective enforcement of competition law in labour input markets and has been or would need to be interpreted more broadly.

Masterman (2016, pp. 1399-1400) suggests that the emphasis put on consumer welfare and producer welfare, as the only two components of the effectiveness of antitrust enforcement *“is largely an artefact inherited from economic partial equilibrium analysis, where economists consider a single market in isolation, assuming that conditions in other markets remain constant. [...] anticompetitive agreements between employers present courts with four different measures of welfare to evaluate: producer surplus, consumer surplus, employer surplus, and employee surplus.”*

Hovenkamp also notes that the word “consumer” in “consumer welfare standard” is not sufficiently comprehensive. He identifies that indirect as well as direct buyers also qualify as “consumers”. He says that the term is not apt to cover the supply side of the market. Notably, while suppliers of labour are clearly not “consumers” in the conventional usage, the injury caused by the exercise of monopsony power is analogous to that of monopoly. The result, in both cases, is output reduction and inefficiency, followed by higher prices to buyers and lower outlays to suppliers (Hovenkamp, 2019, p. 17). Even when a business has market power in the labour input market and competes downstream in the product market, *“the harm to suppliers of labor from suppressed output is just as certainly an injury to consumer welfare”* (Marinescu and Hovenkamp, 2018, p. 39). Therefore, the same logic that requires protecting consumers in the conventional sense also requires to protect suppliers in input markets. Although the label “consumer” does not need to be abandoned, it should be intended in this broader sense encompassing whoever *“is injured by either the higher buying price or the lower selling price that attends a monopolistic output reduction”*, including employees, whose harm is caused by reduced output and consequent decrease in wages (Hovenkamp, 2019, p. 18).

Hemphill and Rose (2018) contend that the restrictive interpretation of consumer welfare as protecting exclusively downstream buyers or final consumers happens to be the *“natural result of living in a world where most cases focus on reduced competition between sellers”*, but is not in keeping with the decisional practice in the United States. They argue that, to safeguard competition in input markets, identifying harm to sellers in an input market should be sufficient to support antitrust liability, and reject the view that harm to the merging firms' downstream buyers or final consumers must always be demonstrated for an antitrust claim to be brought. They further specify that *“adverse effects of increased monopsony power [...] observed entirely in input markets”* are captured by competition law. For instance, they consider that cases such as *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*¹⁰ (Box 1) and *Mandeville Island Farms, Inc. v. Am. Crystal*

*Sugar Co.*¹¹ can be interpreted as indicating that the US courts are prepared to recognise that antitrust liability might be found also when the output market suffers no adverse effects. They observe that “*antitrust law protects the competitive process, in service of preserving the welfare of the merging parties’ trading partners, whether buyer or sellers.*” According to Hemphill and Rose (2018), reduced competition between buyers should be treated as unlawful even where no harm is felt by downstream buyers.

Box 1. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. (2007)

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, Ross-Simmons filed a claim under Section 2 of the Sherman Act alleging to have been driven out of the market by Weyerhaeuser. According to the claim, Weyerhaeuser had engaged in a predatory buying scheme aimed at purchasing a quantity of raw material that would drive up the price and exclude rivals depending on the same input. By engaging in this conduct, Weyerhaeuser bade up the price of saw logs, in an attempt to monopolise the market and prevent Ross-Simmons’ profitability.

The US Supreme Court affirmed that “*Predatory-pricing and predatory-bidding claims are analytically similar. And the close theoretical connection between monopoly and monopsony suggests that similar legal standards should apply to both sorts of claims*”. In order to demonstrate the violation, Ross-Simmons was required to prove that:

- the bidding led to a raise of the cost of the output above the revenues generated in the sale of the output (below-cost pricing in the relevant output market);
- the “dangerous probability” for the predatory bidder to recoup the losses incurred in bidding up the input prices through the exercise of monopsony power.

The Supreme Court, in this instance, required the demonstration of effects in the downstream market. This decision is, however, relevant because it symmetrised the treatment of predatory pricing and predatory bidding, confirming that the supply and demand side of the market are both subject to competition law. It also expressly stated that “*Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits*”.

Hemphill and Rose (2018) note how “[t]he Court recognised that conduct directed to input markets might – but not always – also affect competition in output markets” (p. 2089).

Naidu et al. (2018, p. 587) propose the adoption of a revised “worker welfare standard” under which a merger would be cleared when it increases workers’ productivity, i.e. the workers’ marginal revenue product. The application of this standard would not lead to blocking all mergers that are harmful for workers, because harm to workers in competitive labour markets with little frictions would be easily offset by countervailing gains.

In contrast to these commentators, others suggest that the consumer welfare standard may be ill suited for an analysis of labour markets and should be abandoned. Steinbaum and Stucke (2018) propose abandoning the current ‘consumer welfare standard’ on the grounds that there is no real consensus between competition authorities¹² about the interpretation to be given to this notion nor on its qualification as the ultimate goal of competition law. They argue that constructing narrowly the consumer welfare standard would not justify prohibitions of wage-fixing and no-poaching agreements or other buyer cartels. Based on this premise, they propose a different ‘effective competition standard’, which consists in “*the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power*” (Steinbaum and Stucke, 2018). Specifically, the preservation of a competitive market structure would include the protection of upstream suppliers and workers (Steinbaum and Stucke, 2018).

It may be, however, unclear whether preserving a particular market structure would succeed in protecting either workers or consumers from a loss of competition. While it is possible to focus on guaranteeing opportunities for competitors, there is a risk that opportunities may be created on the backs of consumers and workers alike.

Although there may be questions about its effectiveness in capturing all negative effects of monopsony power, there seems to be no obstacles for competition authorities to apply competition law to the demand side of labour markets, if that is seen as lessening competition in specific circumstances.

Already in 1999, referring to *United States v. Cargill Inc. and Continental Grain Co.*,¹³ where the US District Court of Columbia had blocked a merger in the lack of any allegations of harm to consumers, the then Economics Director of Enforcement of the US Department of Justice (DoJ) Schwartz, had pointed to “*the possibility of monopsony harm without a spill-over to consumers*” and noted that “[I]nsisting on consumer harm is overly narrow.”¹⁴ In 2016, the then Acting Assistant Attorney General of the DoJ, Hesse affirmed in one of her speeches that “*a merger that gives a company the power to depress wages or salaries or to reduce the price it pays for inputs is illegal whether or not it also gives that company the power to increase prices downstream*” because US antitrust laws protect “*participants in the American economy broadly – not just in their capacity as consumers of goods and services*”.¹⁵ More recently, the Federal Trade Commission’s (FTC) Chairman Joseph J. Simons expressed concern that US enforcement may “*have been too permissive in dealing with mergers and acquisitions, resulting in harm to consumer welfare via increased prices, limited consumer choice, and harm to workers*” and specified that all these types of harm “*lie at the heart of the agency’s competition mission*.”¹⁶

So far, there appear to have been no cases tackling employer monopsony in the EU. In this jurisdiction too, however, the identification of the goal of competition law with the protection of the competitive process,¹⁷ seems to suggest that there may be scope and sufficient flexibility to consider the negative impact of labour monopsony under an analogous standard.

There is no disagreement on the importance for competition authorities to pursue adequately infringements in labour markets that are treated as hard-core cartels,

such as wage-fixing and no-poaching agreements, and to prevent the concentration of power in the hands of employers that may negatively affect consumers downstream. However, time will reveal if authorities and courts will become more active in their enforcement in labour markets, by looking at the competition in this input market also regardless of any impact on consumer welfare as narrowly interpreted.

2.4. Employment protection as a public interest objective

While, as mentioned, the traditional goals of competition are presented as the protection of consumer welfare or of an effective competition process, many jurisdictions have some public interest objectives that go beyond economic efficiency. These public interest considerations are often contained in competition or other laws to ensure that additional concerns beyond the economic goals of competition law are accommodated in the analysis of mergers effects. In OECD countries, these clauses are usually interpreted narrowly and carefully adopted (OECD, 2016).

The protection of workers' rights can be one of these 'exceptions' to the application of merger control laws. Under certain provisions, there may be measures of last resort to ensure that the interest of employment protection is safeguarded in circumstances in which it may be at odds with the competition enforcement pursued by an agency (Box 2). These provisions are not directly concerned with the reduction of competition of labour markets or with wages decreases arising from mergers affecting labour input markets. In effect, the test applied in these cases focuses on job creation and maintenance, if necessary at the expenses of competitive efficiencies.

While public policy exceptions in merger control can provide an effective way to preserve employment and safeguard workers' rights, they provide a rather crude sledgehammer that may not be sufficiently flexible to address concerns arising in labour input markets. To address these concerns, competition authorities are endowed with analysis' instruments that enable them to assess the trade-off between economic harm and efficiency gains in labour input markets. In addition, this tool, which is mostly designed to be used in exceptional circumstances, is unsuited to address monopsony issues on a systematic basis.

Box 2. Employment protection as a public interest consideration in merger control

Public interest considerations are included in many merger control regimes and they take various forms, sometimes requiring competition authorities to consider public interest in their assessment or endowing a different public body with the power to override a merger decision. In order to ensure the objective neutrality and technical character of competition agency decisions (OECD, 2016), this power to apply public policy exceptions is often in the hands of government bodies other than the agency, like, for instance, in Germany, France, the United Kingdom and the United States. In some cases, however, the competition agency has this power itself.

An often-mentioned example of a jurisdiction where this assessment is entrusted to the competition agency is South Africa. Section 12A(3) of the Competition Act

lists employment as one of the public interest considerations that the Competition Commission or the Competition Tribunal must take into account when considering the effects of a merger. For example, the Walmart/Massmart acquisition (2011) was approved by the Competition Tribunal with conditions concerning, among other things, employment. The conditions included funding a programme for the development of local suppliers and providing them with training. The decision was subsequently appealed by a trade union and the Competition Appeal Court required the creation of a supplier development fund and the reintegration of around 500 employees.

In Germany, the Bundeskartellamt only scrutinises mergers under competition law criteria. However, in case of prohibition, the parties can resort to the Federal Ministry for Economic Affairs and Energy to seek, in exceptional cases, ministerial authorisation on grounds outside the scope of competition. This power was used, for instance, when the Minister granted authorisation with conditions to the merger Edeka/Kaiser's Tengelmann (2016), based on job safeguarding and workers' right protection interests. The authorisation was appealed by the parties' competitors, but the appeal was withdrawn following the voluntary divestment of assets by Edeka to a competitor.

In the recent Financière Cofigeo/Agripole Group merger (2018), the French Ministry of Economy and Finance used for the first time its power to re-assess a transaction that had been cleared with divestment commitments. As provided by Article L430-7-1 of the French Commercial Code, the Minister used its power of "évocation" to clear the transaction without commitments, with a view to preserving the creation and stability of employment. According to the Ministry, the divestments ordered by the Autorité de la Concurrence were incompatible with the planned revitalisation of the industry and could have had significant negative impact on employment. Cofigeo was requested to maintain employment levels for a two-year period.

2.5. Sources of monopsony power in labour markets

A number of factors may allow the creation, consolidation or exercise of employers' market power. Distinguishing the various sources of monopsony power is important to determine whether the problem may arise organically. This would be the case, for instance, of market concentration or matching, coordination and other frictions that are typical of labour markets. Alternatively, monopsony power may be artificially created by the employer to exploit workers, for instance by means of wage-fixing, no-poaching agreements or other collusive practices, the abuse of monopsony power, or mergers that further concentrate the labour market. The main natural sources of monopsony power are addressed below, while the anticompetitive sources of monopsony power that artificially limit workers' choice or reduce workers' bargaining power are discussed in Chapter 3.

2.5.1. Concentration of labour markets

One of the first elements that may reduce labour market competition is concentration in the labour market, which limits opportunities for workers to change job when a real wage cut is proposed. It is important to recognise that the market definition of a labour input market, in which the market shares are

calculated to the purposes of measuring concentration, is distinct from the product market in which competing employers may also compete.

The geographic market for the product may be broad while the labour market may be narrower, or vice versa. Meanwhile the labour market might stretch across firms providing non-competing products. In the case of a merger, for example, branches of businesses could be spread across one or more countries and each country could be a local labour market. Further, various categories of workers are likely to have different options to switch to and thus belong to separate markets. As noted by Naidu and Posner (2018), *“the problem for labor market antitrust is that fragmentation is pervasive if not universal”*.

2.5.2. Matching and other labour market frictions

Matching and coordination frictions

One of the most important natural drivers of monopsony power can be found in matching frictions. As noted by Naidu and Posner (2018), *“because work is such an important part of people’s life, people are naturally concerned even about minor aspects of it, whereas most products – housing is probably the only exception – add relatively little value to one’s life”*. Unlike most product markets, where the seller tends to be indifferent to buyers’ identity, employers look for a specific set of skills and personal characteristics in the worker in the same way in which those looking for a job look for a workplace and working conditions that suit their preferences. Geographical constraints, often stronger for workers with a spouse or children, are also likely to narrow the options available to the worker. Therefore, a hire requires the matching of two complex set of preferences and characteristics, those expressed by the employer and those of the employee (Naidu et al., 2018).

In addition, workers do not possess the means to predict where other workers will apply, and companies do not have ways to estimate how many other applications a worker they intend to hire submitted. This lack of coordination may give rise to situations where certain jobs receive an excess of applications and others too few of them. Moreover, the inefficiencies generated by these matching and coordination difficulties discourage workers from searching at all, and increase worker inertia, which increase their employer’s monopsony power.

Information asymmetries and search costs

Typical search costs in labour markets are those relating to the costs of collecting information about job posts and comparing alternatives. As noted by George J. Stigler (1962, p. 103), *“The information a man possesses on the labor market is capital: it was produced at the cost of search, and it yields a higher wage rate than on average would be received in its absence”*.

When looking for a job, normally workers are provided with information about vacancies’ salaries, but they are unlikely to be in possession of a detailed account of the work environment and of other benefits and conditions,¹⁸ which makes comparing options difficult. The lack of standardisation concerning job positions, combined with the heterogeneity regarding the skills of the employee and the weight of personal elements in the matchmaking between employer and employee in many jobs, constitute an additional labour market friction (Albrecht, 2011, p. 237). On consumer markets, such concerns have led to agencies recommending

transparency and simplification of the key components of the product to facilitate comparison and prevent the overflow of information that has been labelled by some as ‘confusopoly’¹⁹ (OECD, 2018b).

The widespread use of the internet and online tools for job search has contributed to alleviating these asymmetries of information to a certain extent, but they have not solved them. For instance, a study highlights the impact of misperceptions about unemployment rate and the state of the labour market on the willingness of the employee to settle for a lower wage (Cardoso et al., 2016, p. 17).

Switching costs

Switching costs in labour markets are likely to be higher than those for a consumer product. Examples are a new job that requires moving or a change in working times that requires the workers to hire a babysitter for their children. Like other factors limiting workers’ mobility and reducing workers’ incentives to change job, switching costs indirectly provide employers with monopsony power.²⁰

Health or retirement benefits provided by the employer are also likely to constitute job locks affecting workers’ mobility, particularly in those countries where discontinuity between employment periods affects health insurance coverage or the level of pension.²¹

Workers inertia

Behavioural economics also identifies inertia, or status quo bias, as a common irrationality of consumers (CCP, 2013). This is likely to apply to workers as well. In consumer markets, competition authorities are increasingly active in trying to find consumer-facing remedies to improve competition in markets, for instance, providing information, or communication at key trigger points to encourage consumers to consider switching (OECD, 2018b). Competition authorities have also acted to increase portability between different products in order to reduce switching costs. Parallels to each of these interventions might be similarly effective in labour input markets (for further details, see Section Chapter 4.).

Regulatory barriers to labour mobility

Another source of monopsony power can be regulatory barriers to labour mobility. For instance, licensing regulations that are not strictly necessary for quality control, health or security purposes, or that are too expensive may constitute a significant barrier to a new occupation for a worker. Lack of reciprocity in recognition of licensed professions between jurisdictions is also likely to further impede mobility.²² There is significant evidence that licensed workers tend to move less than unlicensed ones. In the United States, licensed workers are found to be 24% less likely to move to a different State than unlicensed workers of similar background.²³ Restricting rights to move and work in different countries may contribute to increase the monopsony power of employers.

Notes

¹ Court of Justice of the European Union, C-22/98, *Jean Claude Becu and others*, EU:C:1999:419, paras. 26-27.

² Court of Justice of the European Union, C-67/96, *Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:430, paras. 59-60; Court of Justice of the European Union, C-222/98, *Hendrik van der Woude and Stichting Beatrixoord*, EU:C:2000:475, paras. 22-27; EFTA Court, E-8/00, *Norwegian Federation of Trade Unions v. Norwegian Association of Local and Regional Authorities*, http://www.eftacourt.int/uploads/tx_nvcases/8_00_Judgment_EN.pdf, paras. 47-59.

³ Court of Justice of the European Union, C-413/13, *FNV Kunsten Informatie en Media*, EU:C:2014:2411, paras. 37-38.

⁴ The text of the Directive, currently available here <https://data.consilium.europa.eu/doc/document/ST-6188-2019-ADD-1/en/pdf>, provides minimum rights to all workers within its scope. These includes rights to complete information regarding essential aspects of work such as pay rate and starting date, banning widespread exclusivity clauses and limiting the duration of probation periods. According to commentators, the scope of the Directive will more easily cover on-demand workers, like those working for Uber and Deliveroo, than workers with more flexible arrangements, such as crowdworkers performing tasks online for platforms like Amazon Mechanical Turk, Upwork, and Clickworker. See B. Bednarowicz, B., “Workers’ rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?”, April 2019, <http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html>.

⁵ It is estimated that in Europe digital labour platforms are “worth 28 billion euros in turnover”. See A. Aloisi, V. De Stefano, S. Silberman, “A Manifesto to Reform the Gig Economy”, *Regulating for Globalization*, <http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/>.

⁶ See also US DoJ and FCT (2010), United States Horizontal Guidelines, <https://www.justice.gov/atr/file/810276/download>, p. 2: “Enhancement of market power by buyers, sometimes called “monopsony power,” has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.” See also I. Herrera Anchustegui (2017), “Buyer Power in EU Competition Law”, *Concurrences*, Paris, p. 52.

⁷ As Marinescu and Hovenkamp (2018) note: “*In a competitive labor market, each recruiting firm is small (a drop in the proverbial bucket) and it can hire as many workers as it wants at the market wage. In a monopsonistic labor market, the hiring firm has market power and hiring more workers necessitates an increase in wages. Therefore, if the labor market is perfectly competitive, wages are equal to marginal productivity and there is no incentive for companies to hire fewer workers to make higher profits by depressing wages. If the labor market is not perfectly competitive and companies are in a position to be able to pay workers below their marginal productivity, then wages and production are both lower than under the competitive equilibrium.*”

⁸ Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf, pp. 2-3.

⁹ For an analysis of the case law in the United States that confirms that the currently adopted standard is the ‘true consumer welfare’ and not the aggregate one, see S. C. Salop (2010), “Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard”, *Loyola Consumer Law Review*, vol. 22(3), p. 353.

¹⁰ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 127 S. Ct. 1069 (2007).

¹¹ *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948).

¹² The Authors quote the ICN (2011), “Competition Enforcement and Consumer Welfare Setting the Agenda”, <http://eulawenforcement.com/wp-content/uploads/2019/01/Competition-Enforcement-and-Consumer-Welfare-Setting-the-Agenda.pdf>.

¹³ *United States v. Cargill Inc. and Continental Grain Co.*, U.S. District Court D.D.C., case number 99 1875 (GK), final judgement 29 July 2000.

¹⁴ M. Schwartz (1999), Address on “Buyer Power Concerns And The Aetna-Prudential Merger”, October 20, 1999, presented at 5th Annual Health Care Antitrust Forum Northwestern University School of Law, Chicago, Illinois, https://www.justice.gov/atr/speech/buyer-power-concerns-and-aetna-prudential-merger#N_5_.

¹⁵ Acting Assistant Attorney General Renata Hesse of the Antitrust Division Delivers Opening Remarks at 2016 Global Antitrust Enforcement Symposium, “And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement”, Washington, September 2016, <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening>.

¹⁶ P. Guniganti, “Simons Includes Harm to Workers and Choice in Competition Mission”, February 2018, Global Competition Review, <https://globalcompetitionreview.com/article/usa/1153360/simons-includes-harm-to-workers-and-choice-in-competition-mission>.

¹⁷ See European Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27 April 2004, pp. 97–118, para. 105; CJEU, C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, June 2009, EU:C:2009:343, paras. 38-39.

¹⁸ Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf, p. 5.

¹⁹ S. Adams (1997), “The Dilbert Future: Thriving on Business Stupidity in the 21st Century”, Harper Collins, New York; J. Gans (2005), “The Road to Confusopoly”, presented at the ACCC Regulatory Conference 2005, <https://www.accc.gov.au/about-us/conferences-events/accc/aer-regulatory-conference/accc-regulatory-conference-2005>. See also C. M. Wilson and C. Waddams Price, “Irrationality in Consumers’ Switching Decisions: When More Firms May Mean Less Benefit”, *ESRC Centre for Competition Policy*, <https://econwpa.ub.uni-muenchen.de/econ-wp/io/papers/0509/0509010.pdf>; K. J. Cseres (2008), “What Has Competition Done for Consumers in Liberalised Markets?”, *The Competition Law Review*, vol. 4(2).

²⁰ Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf, p. 5.

²¹ Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf, p. 6.

²² Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf, p. 7.

²³ J. Furman and L. Giuliano (2016), “New Data Show that Roughly One-Quarter of U.S. Workers Hold an Occupational License”, <https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license>.

Chapter 3. Competition Enforcement on the Demand Side of Labour Markets

The recent literature observes there has been under-enforcement in labour markets compared to product markets (Naidu et al., 2018; Hovenkamp and Marinescu, 2018; Steinbaum and Stucke, 2018). Talking about a veritable ‘antitrust litigation gap’, Marinescu and Posner (2019) note that, in the United States, labour market anticompetitive agreements (Section 1 of the Sherman Act) cases decided per year are a tenth of the number of product market cases, while for abuses of dominance (Section 2 of the Sherman Act) the percentage decreases to one twentieth.

A number of reasons may explain this different level of enforcement in product markets and in labour markets in the practice of competition authorities. According to Naidu et al. (2018), reasons include: i) the focus of legal theory on product markets and consumer welfare; ii) the often unfounded assumption that labour markets are generally competitive; iii) the reliance on the existence of other tools to protect workers, such as the safeguards provided by labour market or employment law; and iv) the difficulties of private enforcement actions against employers due to their costs and the lack of a homogeneous interest in class actions.

The trend has recently begun to change with increasing number of cases of enforcement against no-poaching agreements in labour markets in various jurisdictions. To the extent that the consumer welfare standard may justify a more active enforcement in labour markets, a number of practical challenges arise in connection with the analysis of these input markets that competition enforcers may have to overcome.

Possible anticompetitive infringements arising in labour markets are described below, as well as merger control analysis that could be necessary to prevent the creation of monopsony power, with a focus on the analytical challenges that competition authorities may face and how to address them, both on the demand and the supply side of these markets.

Although commentators generally agree that the current framework is suitable to address these issues, some of them argue that changes could be welcome to stimulate and facilitate the enforcement against monopsony power. For instance, Marinescu and Posner (2018) and Steinbaum and Stucke (2018) argue that it would be beneficial to introduce some legal reforms or the use of presumptions to make it easier to bring antitrust litigation against employer monopsonists. These proposals are also discussed in the following sections.

3.1. Anticompetitive agreements

3.1.1. Wage-fixing and no-poaching agreements

Collusion is the most detrimental anticompetitive practice in labour markets. Typical forms of collusion are agreements to fix wages or working conditions, or to exchange information to coordinate on these competitive parameters. In these cases, employers competing in the same labour market agree on salaries and wage, or on any other aspect of the compensation policy¹ to employees, thus controlling the wage or benefits level or their range.²

A particular type of collusive practice are no-poach agreements by which companies agree to refrain from soliciting, hiring or recruiting one another's employees, essentially renouncing to compete for that input (the employees' labour). With these agreements, companies deprive workers of job opportunities, of the possibility to increase their salary or to better their working conditions,³ and, as a result, enforcement against this type of conduct in labour markets has been made the subject of guidelines in a number of jurisdictions.⁴

As noted by the US guidance, *"From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services"*.⁵ However, in its recent Advisory Bulletin on these issues, the HKCC indicated that it may prioritise the enforcement of those employment practices that see the involvement of actual or potential competitors in the same product or service market downstream.⁶

The US DoJ has been at the forefront of the fight against no-poach and wage-fixing agreements. Consent judgments were issued in the United States in 2010 against some high-tech companies that entered into agreements not to solicit each other's employees or to limit their hiring of the competitor's employees.⁷ Other collusion cases were, for instance, brought in the United States in the labour markets for nurses,⁸ fashion models⁹ and, more recently, in other sectors.¹⁰ A number of other jurisdictions have also had these practices on their radar. For instance, the United Kingdom,¹¹ France¹² and Italy¹³ recently imposed fines for price-fixing in the fashion modelling sector and, in the Netherlands, a civil court of appeal found anticompetitive an agreement between hospitals not to hire anaesthesiologists.¹⁴

These practices do not normally require competition enforcers to demonstrate the effects of the conduct. The UK, French and Italian cases in the fashion industry mentioned above were all treated as by object restrictions by competition authorities.

The US Antitrust Guidance for Human Resource Professionals specified that wage-fixing or no-poaching agreements that are qualified as 'naked', i.e. standalone agreements that are not ancillary or reasonably necessary for another transaction, concluded directly between employers or via an intermediary, are *per se* illegal.¹⁵ This means that they are considered illegal without requiring a consideration of possible pro-competitive effects, because *"they eliminate competition in the same irredeemable way as agreements to allocate customers or markets"*.¹⁶ In addition, the Guidance specifies that *"[g]oing forward, the DoJ intends to proceed criminally against naked wage-fixing or no-poaching agreements"*,¹⁷ a message restated time

and time again since.¹⁸ The perpetrators risk fines of up to USD 100 million (US dollars) and prison term of up to 10 years.¹⁹

With reference to this conduct, the Japanese Fair Trade Commission (JFTC)'s Study Group on Human Resources and Competition Policy commented that: “[...] normally, there is no room for consideration of whether such an action has pro-competitive effects, whether it has a public benefit purpose, or whether its means are appropriate”. The HKCC also considers these employment practices as having the object of harming competition.²⁰

3.1.2. Possible exceptions in the context of merger clearances

There are, however, specific limited circumstances in which these no-poaching agreements may be permitted by competition authorities in the context of their merger control competences.

One example in a number of jurisdictions is when no-poaching agreements are directly related and necessary to the implementation of a cleared merger transaction. Under the EU merger control regime, for instance, the Notice on restrictions directly related and necessary to concentrations (2005)²¹ considers non-solicitation clauses on the vendor to have a comparable effect and are therefore evaluated in a similar way to non-competition clauses.²² Notably, to be covered by a clearance decision of a concentration such clauses must be directly related (economically related) to the concentration and be strictly necessary for the implementation of a concentration that is compatible with the internal market under the EU Merger Regulation. This may be the case if such a non-solicitation clause would be necessary, as without it there would be reasonable grounds to expect that the sale of the target company or of part of it could not take place.²³ An example may be if certain employees would hold know-how that would be important to guarantee the transfer to the purchaser of the full value of the assets transferred.

Another example relates to the acceptance of remedies in the context of merger control by competition authorities. In the EU merger control regime, the Remedies Notice²⁴ sets out that, where the maintenance of the viability and competitiveness of a divestment business so requires, the commitments must foresee that the parties may not solicit or move identified personnel to their remaining businesses for a predetermined period²⁵ after closing.²⁶ ²⁷ Key personnel covered could include, for instance, management, R&D, and sales staff.

3.1.3. Exchange of information

As clarified by the United States, Japan and Hong Kong in guidelines issued in relation to human resources markets, sharing information with competitors about salaries and other working conditions may amount to tacit coordination.²⁸ A number of exchange of information cases in labour markets have been investigated and sanctioned in various jurisdictions.²⁹ The guidelines on exchange of information,³⁰ sometimes also in relation to a specific sector,³¹ issued by competition authorities confirm that, as a rule, exchange of non-competitively sensitive, public, old, aggregated information coming from untraceable sources via an independent third party is unlikely to raise concerns.

3.1.4. Franchisor-franchisee no-poaching agreements

It is reported that more than half of the major franchise companies in the United States contain no-poaching clauses in their franchising agreements, and that these agreements are more often adopted in low-wage industries (Krueger and Ashenfelter, 2018). Since they are concluded between franchisor and franchisee, these agreements may be considered to be of a vertical nature, and be justified by pro-competitive reasons, including the protection of know-how, investment in training and any intellectual and quasi-intellectual property rights connected to the relationship between franchisor and franchisee. However, to the extent that franchisor-franchisee no-poaching agreements could also be considered to contain horizontal restraints, this will affect the analysis of the pro-competitive efficiencies they may yield.

Commentators noted that there are good reasons to consider that the imposition of no-poaching clauses in the context of franchises may reduce competition. Their goal is employee retention at a specific franchisee outlet, which, by increasing the monopsony power of every franchisee in the same chain – depending on the labour input market in question – may have the effect of reducing labour supply elasticity and decreases wages relative to the marginal product of labour (Krueger and Ashenfelter, 2018, pp. 8-9). Therefore, various franchisees in a single labour market can exercise monopsony power collectively by means of the no-poaching agreements. In addition, these clauses have the potential to enhance the likelihood of further outside-franchise collusion (Krueger and Ashenfelter, 2018, p. 13).

Recently, the DoJ filed statements of interest in private antitrust cases pending before federal district courts,³² including in the context of franchise. In three fast food franchise cases, it provided guidance on when these agreements should be analysed under a per se/rule of reason standard.³³

Box 3. The US fast food franchise cases

In three recently settled fast food franchise cases (*Joseph Stigar v. Dough Dough, Inc. et al.*, *Myrriah Richmond and Raymond Rogers v. Bergey Pullman, Inc. et al.*, and *Ashlie Harris v. CJ Star, llc et al.*) the plaintiffs, former employees of the fast food franchisees, challenged no-poaching clauses contained in the franchise agreements, according to which the franchisees “will not employ [...] or seek to employ an employee of [the franchisor] or another franchisee”.

The DoJ specified that most franchisor-franchisee no-poaching agreements are usually vertical restraints and thus should be analysed under the rule of reason, in order to take into account both the pro-competitive and harmful effects of such restrictions. This, in particular, given that increased inter-brand competition may outweigh the reductions of intra-brand competition generated by the restrictions.

If, however, no-poaching agreements in the context of franchise effectively consist in naked horizontal market-allocation agreements, they should be treated as per se illegal. This is the case when:

- they are concluded by independent franchisees in the same chain;

- they are concluded by franchisees belonging to different chains and actually or potentially competing for employees;
- they are concluded by franchisor and franchisee when they are competitors for employees in the same geographic labour market (pp. 16-18).

Some commentators have even suggested that these covenants should be made illegal, regardless of whether they are entered into between various independent franchisors, or between franchisors and franchisees in the same chain, on the grounds that they may be rarely justified by reasons of investment protection (Krueger and Posner, 2018).

3.1.5. *Non-compete covenants*

Another factor that may negatively impact labour market competition and create a situation that resembles monopsony is the prevalence in certain jurisdictions of non-compete agreements. These covenants are concluded between employer and employee and prevent the employee from working for the employer's competitors, usually for a limited time or in a certain area. Like no-poaching agreements in the context of franchise, they can be used to achieve pro-competitive efficiencies, particularly with the purpose of preventing free riding of competitors with regard to know-how, training and trade secrets.³⁴ These clauses, however, also have the effect of limiting workers' options to work for the employers' competitors. They therefore may depress wages and reduce job churn, impeding a more efficient allocation of labour (see, for further details, OECD, 2019a).³⁵

In some countries, like Mexico,³⁶ non-compete covenants restraining employment are generally unenforceable. In some US states, like California,³⁷ North Dakota, Oklahoma, and Colorado,³⁸ such covenants are made void or unenforceable, with some limitations. In many other countries, such as Italy, Belgium, Luxembourg, Germany, France, Poland, the Netherlands, and the United Kingdom,³⁹ however, non-compete covenants are enforceable when they are reasonably limited as regards their duration, geographic scope and the restricted activity covered. Sometimes, compensation must be provided.

Some recent studies suggest that non-compete agreements are particularly widespread in some contexts. They were reported in 2014 to affect nearly 30 million US workers, i.e. around 18% of all workers, sometimes in circumstances that would not justify their use, for instance because no trade secrets concerns are involved (Starr et al., 2019, p. 2). In addition, a study has suggested that there is a correlation between non-competes and career detours, i.e. that workers subject to non-competes may move to a different technical field for fear of breaching the non-compete (Marx, 2011). This study also shows that businesses often obtain signature of non-compete only once the bargaining power of the worker is reduced, such as on the first day of work.

While their lawfulness and enforceability depends on the jurisdiction, non-compete agreements may be used by businesses in breach of competition law, to reduce the mobility of workers and exploit monopsony power in certain markets. Some commentators suggested banning non-compete agreements for those employees who earn "*less than the median wage*" in a particular country (Krueger and Posner, 2018, p. 12), given that in those cases they are rarely justified by trade secrets

protection or heavy investments in training for low-skilled workers. Other commentators suggested making any form of non-compete the subject of a *per se* prohibition (Steinbaum, 2018a). The FTC is now considering whether regulatory intervention may be appropriate.⁴⁰

3.2. Merger control

While competition authorities have devoted little attention to labour markets in merger control so far, many commentators have called for competition authorities to look at labour market effects in their merger scrutiny activity. Naidu et al. (2018, p. 572) note that the lack of merger scrutiny in these markets may have encouraged companies to engage in tacit coordination or anticompetitive mergers to achieve the goal of reducing wage competition whilst avoiding the more forceful enforcement activity that has sought to address collusive practices that achieve the same goal. This literature, specifically with reference to the United States, provides the legal-economic framework, as well as analytical tools for the assessment of these mergers, which is discussed below.

3.2.1. Mergers affecting the demand side of labour markets

While the application of merger control laws to the undesirable effects of buyer's power is generally uncontroversial, competition authorities appear to not have devoted much attention to monopsony restricting competition in product markets. For instance, in the EU, consideration was given to the demand side of the market and buyer market power,⁴¹ but so far not in the context of labour markets.

Naidu et al. (2018, p. 571) report that “*the DoJ and FTC have never challenged a merger because of its possible anticompetitive effects on labor markets, or even rigorously analyzed the labor market effects of mergers as they do for product market effects. Nor have we found a reported case in which a court found that a merger resulted in illegal labor market concentration.*”

Many merger control regimes adopt a substantive test that prohibits mergers when they substantially lessen or significantly impede effective competition, blocking mergers that can provide the merged entity with the ability to exercise market power. According to Marinescu and Hovenkamp (2018, p. 4), a merger between two actual or potential competitors in the same labour market should therefore be considered and treated as producing horizontal effects, regardless of whether the merging companies are also competitors in the product market.

While important symmetries exist between traditional tools applied for merger analysis in product markets and those in labour markets, the perspective must be changed to look at the buyer-side of these markets and this exercise may require an adjustment of the current toolbox, as indicated below.

3.2.2. Merger control analysis and challenges

Market definition

The first step of the substantive assessment of mergers is market definition. In labour markets, the market could be defined by adapting the framework that is provided by the hypothetical monopolist test and using the hypothetical monopsonist test. According to this test, the adoption of a small but significant and

non-transitory decrease in wages⁴² (SSNDW), which scholars suggest to fix at around 5% for a period of one year, would reveal if a significant number of workers would continue working at the hypothetical monopsonist's firm, thus identifying the bounds of the labour market (Naidu et al., pp. 575-576). While the hypothetical monopolist is not necessarily operationalised for product markets, and instead is used a conceptual framework, it is equally likely to be useful as a conceptual framework for focusing on substitutability when defining labour input markets.

Markets for highly specialised workers may be narrower than markets for generalists, because their experience and skills are likely to be applicable in a smaller range of jobs, providing them with less choice. However, the willingness of workers to substitute into different types of jobs is also relevant to the analysis and may widen or restrict the scope of the market. Workers are not indifferent, for instance, to criteria like working hours, annual leave or other benefits. Furthermore, low-skilled workers may be less mobile or more risk averse (see OECD, 2019a for further references).

Like for product markets, the geographic and time components also define the relevant market. From the geographic point of view, the market is defined by the willingness of the workers to relocate or to commute and the substitutability of the means of transport available to them (Naidu et al., 2018, p. 575). Workers' preferences play an important role also in the geographic market definition, with individual characteristics such as age, family status, health situation, etc. influencing the choice also among workers with otherwise relatively homogeneous skills. Time wise, commentators refer to relatively short periods of time, ranging from three months (Marinescu and Posner, 2019; Azar et al., 2018) to one year (Naidu et al., 2018), based on the assumption that most workers can only face short periods of unemployment and on data on median duration of unemployment.

Accounting for workers' preference is, like understanding heterogeneous consumer preferences for different aspects of a product, a complex challenge. Commentators therefore suggest developing and applying rules of thumb to be subsequently verified by means of econometric studies. Naidu et al. (2018, p. 576) provide the example of the impact on wages that can be provoked by simulated shocks to firm production processes or firm-specific input prices, which may help assess the willingness of workers to change job.

Other methods that may be used to verify or corroborate the results of econometric studies to determine substitutability between jobs may be using workers search data on online job platform. Employer surveys might also be helpful in forming presumptions on diversion ratios.

In alternative to the SSNDW test, and to facilitate the provision of evidence for plaintiffs in private enforcement, Marinescu and Posner (2018) recommend the introduction of a presumption based on a job characteristics approach. It would be based on i) the finest available occupational classification (they suggest using the 6-digit level of the Standard Occupational Classification in the United States), that groups virtually all occupations into categories;⁴³ and ii) a commuting zone.⁴⁴ While, as with product market definitions based on characteristics, this risks introducing errors into the analysis, these might be acceptable for agencies that have to make quick decisions. In alternative, the geographic market could also be defined as the area in which workers could find a similar job at reasonable costs. The

defendant would be entitled to provide evidence that the labour market should be defined differently.

Assessing market power

Central to a traditional merger analysis is the assessment of market power. This often begins with the market shares of the merging entities within the market that has been defined, as an important first indicator of market power. For the analysis of labour market concentration, the traditional Herfindahl-Hirschman Index (HHI) can be adopted to represent the sum of the squares of the individual market share of all the employers in the market. Guidelines from competition authorities indicating that a concentration level is low when below 1000-1500 and high when above 1800-2500 would equally be applicable to labour markets. According to some commentators (Marinescu and Posner, 2019, p. 10; Marinescu and Posner, 2018) the labour market share could be calculated, not on the share of workforce, but based on the share of vacancies by the employer within a particular labour input market. The vacancy share could serve as an indicator of the rate of growth of the company and of the availability of alternatives for workers in a given market. However, data on vacancy share may be less readily available than the share of employment and it is considered that, in practice, these values may tend to converge (Marinescu and Posner, 2018).

Naidu et al. (2018) further propose an equivalent to the ‘upward pricing pressure’ (UPP) analysis developed by Farrell and Shapiro (2010), that they label a ‘downward wage pressure’ (DWP) test. To calculate the DWP of the buying company, one should multiply the markdown of the target company, i.e. the “*percent by which the wage falls below the worker’s marginal revenue product*” by the diversion ratio from the target to the buyer company, i.e. the percentage of workers of the target who would move to the buyer if the target started paying less. Naidu et al. (2018) also suggest the scope for merger simulation to model employers’ behaviour in labour markets, in the same way that it models their pricing behaviour, as a further instrument that might be transposed from product market analysis into these labour input markets. Unionisation and collective bargaining might also be a relevant factor to be considered, since it would reduce the scope for the incentives provided by downward wage pressure to be acted upon.

Efficiencies

A fundamental element of merger analysis is the consideration of merger specific efficiencies. In labour markets, some productive efficiencies may arise, due, for example, to a better use of the workforce based on greater opportunities to specialise, or improved use of spare capacity. To the extent that this increases a worker’s marginal revenue product, some of the value of these efficiencies might be expected to accrue to the worker and others may reduce prices for consumers.

As with the costs of the merger, one important challenge to assessing efficiencies in labour market is the question of the consumer welfare standard. In particular, whether efficiencies from the merger counterbalance any harm to ‘consumer’ welfare that the merger may cause. Here there is again a question of whether the passing on of efficiency gains to final consumers via a price reduction is necessary, or whether an increase in wages or an increase in employment as a result of greater efficiency (and not division of the rent created by a loss of competition) are also

relevant. If adopted, the broad interpretation of consumer welfare discussed in Section 2.3, which looks at loss of efficiencies in the input market in the same way as loss of efficiencies in product markets, would allow competition authorities to consider such pro-competitive efficiencies, if substantiated as merger-specific.

A further source of difficulties may be mergers that reduce competition for workers while delivering efficiencies for consumers. These are likely to be rare given the monopsony impact on output. It is possible, however, that they might occur, for example, in a vertical merger that eliminates double marginalisation while reducing competition between firms for some set of workers that are required at both stages of production. In these cases, the transaction could be analysed in a way similar to that which would be applied if a merger were harmful to consumer welfare in a certain product market but beneficial in a different product market. Commentators suggest that the adoption of remedies in those cases should, where possible, be tailored to address the harmful effects without curbing the benefits (Naidu et al., 2018, p. 587).

Remedies

To address concerns over the creation of positions of monopsony power in labour markets, behavioural remedies may, as in product markets, be ineffective and difficult to monitor, but structural divestment will also need to be carefully designed to account for their impact on product markets. A combination of structural and behavioural remedies may be more suitable in certain cases (Stutz, 2018).

When necessary, behavioural remedies may include, for instance, commitments to fund education and retraining programmes for workers. There is evidence of a connection between higher levels of education, on the one hand, and reduced monopsony power and increased labour share, on the other hand (Daudey and Decreuse, 2006). Naidu and Posner (2018) highlight the particular relevance of job-retraining programmes that allow specialised workers to develop more general and widely applicable skills, thus assisting in counteracting monopsony power.

3.3. Abuses of monopsony power

Like the other areas of enforcement examined above, abuses of monopsony power in labour markets have rarely been enforced.⁴⁵ However, some of the adjustments to the available analytical tools described above in the context of merger control could also be made in the context of enforcement against unilateral conduct cases: market definition, market power and efficiencies.

Marinescu and Posner (2018) recommend the adoption of legal rebuttable presumptions on dominance to facilitate bringing action against unilateral conduct by monopsonistic employers. In the absence of other evidence of monopsony power, they suggest to presume that significant market power exist where the employer employs more than 90% of the workforce or advertise more than 90% of the vacancies in a well-defined antitrust labour input market. They suggest that a percentage below 90% but above 50% would be a sign of ‘moderate’ labour market power.

Commentators have noted that one potential form that unilateral conduct in labour markets could take is predatory hiring. This conduct would occur when a monopsonist in a labour market, normally paying employees below-market wages, would raise wages above the marginal revenue product when new firms enter the labour input market to drive them out of it and eliminate competition for labour

(Naidu et al, p. 598). Where such behaviour might credibly be expected to allow the monopsonist to subsequently reduce wages or raise prices to consumers and hence recoup the temporary sacrifice in higher wages, the conduct might be considered exclusionary. Equally, agencies might want to consider the possibility of firms that have set predatory prices to consumers, subsequently recouping that sacrifice through lower wages once the rival has been successfully excluded. It must be noted, however, that in a monopsony case in the product market, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (see Box 1), the US Supreme Court required evidence of an increase in the prices of the downstream products.

Other possible forms of abuse might include i) the adoption of non-compete provisions and other clauses aimed at reducing or impeding workers' mobility; ii) preventing workers from disclosing information about salary and working conditions; iii) unfair labour practices; iv) incorrectly treating employees as self-employed; v) preventing workers from bringing class or other collective legal action (Marinescu and Posner, 2018, p. 14).

Marinescu and Posner (2018) also recommend that abuse of dominance provisions should cover conducts that are captured also by prohibition of anticompetitive agreements, such as wage-fixing or no-poaching agreements concluded by the dominant player, for those cases where it may be easier to bring action against a single monopsonist instead of a number of collusive employers. Croatia, for instance, scrutinised the effects of no-poaching agreements in the context of an abuse of dominance case in the market for specialised IT services.⁴⁶

The prohibition of preventing workers from bringing class or other collective legal action ensues from the widespread inclusion in US employment contracts of mandatory arbitration clauses, sometimes even in combination with class action waivers. It is estimated that around 60 million of American workers are bound by mandatory arbitration clauses (Colvin, 2018). These arbitration clauses are found to effectively discourage employees from bringing legal action, because i) arbitration claims are less likely to succeed and therefore are more rarely brought; and ii) the amount of awarded damages in successful claims is likely to be much less significant (Colvin and Gough, 2015). For this reason, commentators in the United States recommended to consider them abusive if adopted by a monopsonist employer (Marinescu and Posner, 2018, p. 14).

3.4. The monopsony power of digital platforms

A particular form of market power in labour markets is the 'intermediation power'⁴⁷ that some platforms hold. Digitalisation and the advent of the sharing economy bring considerable benefits for consumers and society at large, as well as to the labour market. For instance, digital platforms in some markets have radically increased output, creating jobs, providing flexibility, and increasing utilisation rates that lift the productivity of platform workers. They also allow platform workers to find work through multiple platforms at the same time, creating day-to-day competition between the platforms for their labour.

However, the platform model has also created problems for platform workers and contractors. In particular, by increasing the offer of labour, it has put pressure on the earnings of incumbent workers and contractors. To the extent that the emergence of platforms has forced firms to exit or change their structure (e.g.

minicab services in the United Kingdom), this has changed the nature of the labour that the market demands and made jobs less secure. Technological innovation and productivity represent inherent challenges to platform workers as well as opportunities, and policymakers need to equip workers to adjust to those changes. To the extent that these platforms are more efficient than previous business models (and not simply more efficient in their tax structure, see OECD, 2019b), the changing nature of demand for labour does not necessarily equal a loss of competition for labour. That is not to say, however, that platforms may not build positions of monopsony power, particularly thanks to the strength of the cross-platform network externalities of these multisided platforms.

3.4.1. The qualification of platform workers

As mentioned above, collective bargaining amongst employed workers benefits in principle from an exemption from competition law. Such exclusion is not available to self-employed workers. However, there have been calls to extend exemptions to certain non-traditional types of workers, and self-employed platform workers in particular, who have features in common with both self-employed and employed workers, to counterbalance the power of certain digital platforms (Lao, 2017; De Stefano and Aloisi, 2018). In addition, there are instances where the status of trade associations engaging in collective bargaining may be unclear and competition authorities are required to discern carefully situations falling within the scope of competition law.

While the recognition of the status of enterprise subject to competition law may be completely autonomous from the recognition of the employees' rights or obligations under labour or employment law (OECD, 2018a, p. 24), two important implications derive from the qualification of platform workers as employees or self-employed for the purposes of competition law.

The first implication is that being classified as self-employed⁴⁸ potentially exposes platform workers to accusations of anticompetitive practices where, acting as firms, they make agreements with one another.⁴⁹ Whether a platform can be considered to act as a hub-and-spoke cartel depends on whether there is a finding of an agreement to set prices through the platform between all individuals (for a detailed discussion, see Section 4.2 OECD 2018a).

The second implication is linked to the debate concerning the possibility that the lack of recognition of workers' rights and protection to these individuals may strengthen the intermediation power of platforms (Steinbaum, 2018b). Self-employed platform workers usually lack the legal protection and the entitlement to certain social benefits that are reserved to employees, while also lacking any bargaining power when 'negotiating' with the platform (Lao, 2017). Concerns have been voiced that by considering these platform workers as independent contractors, and being lenient in the application of competition law to platforms, means that some big tech companies will fall through the cracks of the system, allowing them to escape both labour and antitrust regulation.

3.4.2. The role of competition advocacy

The granting of employee's labour rights to self-employed platform workers, including collective bargaining rights, may be a way that policymakers choose to counteract the monopsony power in the hands of platforms. In some jurisdictions

governments have proposed or adopted the granting of exemptions for certain categories of self-employed workers, allowing them to bargain collectively. For instance, in Ireland in 2017 the Competition Act was amended to allow some categories of workers, such as freelance journalists and session musicians, benefit from the exemption (OECD, 2019a). The Australian Competition and Consumer Act permits businesses to engage in collective negotiations with suppliers or customers if they result in overall public benefits. Australia is also considering introducing a class exemption for collective bargaining for small businesses, agribusinesses and franchisees.⁵⁰ See, for more examples, OECD, 2019a.

Box 4. The OECD Employment Outlook (2019)

The recently published OECD Employment Outlook (EMO; OECD, 2019a) states that policy-makers should ensure that a correct qualification of the employment relationship is performed and provide collective bargaining rights to workers who may be unduly excluded (p. 207).

The EMO supports the view that the status of employee under labour law should be extended to specific groups of workers in the ‘grey zone’ between employee and self-employed (as it was done in Canada for ‘dependent contractors’), where tests of employee status point in opposite directions and genuine ambiguity remains (p. 207). Furthermore, the report considers exemptions of specific categories of self-employed or industries from the applicability of competition law, allowing them the right to bargain collectively, are a suitable solution to address monopsony power (p. 209).

The EMO argues that there is no reason to deny collective bargaining to workers that are subject to the same imbalance of power as those that are classified as employees, except if this poses a significant challenge to the effectiveness of competition policy (p. 209).

Although they may be difficult to define in practice, exemptions from cartel sanctioning could be considered for specific categories of occupations, where workers are most likely to have weak bargaining power, no influence on the content of their contractual conditions or few alternatives for switching jobs (pp. 208-209).

In cases where governments are considering the adoption of collective bargaining exemptions for certain categories for self-employed or specific industries or occupations, competition agencies may wish to engage in an analysis of the market to understand whether the exemption is justified by the need to countervail the exercise of monopsony power on the demand side of the labour market. To conduct such analysis, it could be useful to consider whether the relevant markets present the necessary conditions for the exercise of monopsony, which may include, in addition to the presence of a single or a few employers, an upward sloping curve of supply, a low level of responsiveness of workers to changes in wages or working conditions, the extraction of welfare from workers and barriers to entry for competing employers.⁵¹ Agencies will also need to satisfy themselves that any such exemption does not undermine the effectiveness of competition law in other markets, for example that it can be sufficiently well-defined as to target only those categories of workers that have been identified within a market study or other investigation as facing employers with monopsony market power.

In alternative, if they raise less concern from the competition law viewpoint, or in addition to these solutions, authorities may consider tackling the cause of the monopsony (rather than the symptom), for instance, high concentration or the barriers to mobility that discourage switching between platforms. As gig economy markets continue to evolve, and where platform workers are not classified as employees, agencies may consider constraints on their ability to work for rival platforms and to switch to platforms that offer them a higher price for their labour.

When analysing labour input markets *motu proprio* or when requested to do so by government, for instance, competition authorities may wish to propose measures to ensure portability of platform workers' ratings in order to help improve their mobility across platforms could be suitable. To be effective, these measures require overcoming some difficulties linked to the technical requirements of portability, issues relating to the potential for manipulation or biases of reviews mechanisms and the sharing of the workers' data.⁵² However, an approach focusing on the mobility of workers could avert the risk of unduly expanding the provision of immunity from the application of competition law in a way that betrays the original purpose of the exception and that may set a precedent that enables a wide range of enterprises to escape competition law liability.

An option, which might be considered, would be for policymakers to encourage self-employed platform workers to merge their independent businesses in an employee-owned mutual.⁵³ Such mergers of micro-businesses are unlikely to create market power unless they become large, but would allow for these groups of gig-workers to negotiate jointly with platforms, and to coordinate their switching between the platforms that they sell to when platforms seek to increase the percentage fee they charge gig-workers when they find work through the platform. Actions by platform to refuse to deal with such groups might find that they attract antitrust complaints from these merged organisations.

Competition authorities may also wish to cooperate with governments to increase transparency on relevant information concerning the employer. For instance, competition authorities could elaborate criteria for accrediting digital comparison tools in these markets, such as websites offering the possibility to run a comparison or providing a review system of different employers based on specific information (average pay, staff turnover, length and type of recruiting process), along the lines of Glassdoor.com,⁵⁴ that could reduce search costs or facilitate switching. A recent study conducted by the UK Competition and Markets Authority (CMA) shows that trustworthy price comparison websites may reduce search and switching costs for consumers, but also enhance the level of competition in a market, by facilitating market entry and growth.⁵⁵ The UK Office of Gas and Electricity Markets, Ofgem, for instance, accredited various online price comparison websites for energy tariff and supplier deals.⁵⁶

Another measure to correct information asymmetries characterising labour markets could consist, for instance, in a tool analogous to a verified standard certification system assessing the 'quality' of the employer (including workplace well-being) and labelling it in a simplified manner, based on defined criteria, for workers to obtain information in a quick and easy to understand manner.

Notes

¹ This includes agreements relating to gig work fees, insurance benefits, housing allowances, severance payments and the like.

² US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 3; Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf, p. 3; See Japan Fair Trade Commission, Competition Policy Research Center (2018), Report of the Study Group on Human Resource and Competition Policy, https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf, p. 4.

³ US Department of Justice, “No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute ‘No-Poach’ and Wage-Fixing Agreements”, Division Update Spring 2018, <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements>.

⁴ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 3; Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf, p. 1.

⁵ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 2.

⁶ Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf, p. 1.

⁷ United States v. Adobe Systems, Case No. 1:10-cv-01629, <https://www.justice.gov/atr/case-document/file/483426/download>.

⁸ US Department of Justice Antitrust Division, *United States and the State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corporation*, May 2007, <https://www.justice.gov/atr/case/us-and-state-arizona-v-arizona-hospital-and-healthcare-association-and-azhha-service-corp>.

⁹ More details on the Federal Trade Commission’s Council of Fashion Designers America case are available at <https://www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america>.

¹⁰ United States v. EBay Inc., Case5:12-cv-05869 (N. D. Cal.), <https://www.justice.gov/atr/case-document/file/494626/download>; United States v.

Lucasfilm, Case 1:10-cv-02220, <https://www.justice.gov/atr/case-document/file/501626/download>; US Department of Justice Antitrust Division, *United States v Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation*, April 2018, <https://www.justice.gov/atr/case/us-v-knorr-bremse-and-westinghouse-air-brake-technologies>.

¹¹ UK Competition and Market Authority, *Conduct in the modelling sector*, March 2017, <https://www.gov.uk/cma-cases/conduct-in-the-clothing-footwear-and-fashion-sector>.

¹² Autorité de la Concurrence, Décision n° 16-D-20 du 29 septembre 2016 relative à des pratiques mises en oeuvre dans le secteur des prestations réalisées par les agences de mannequins, <http://www.autoritedelaconcurrence.fr/pdf/avis/16d20.pdf>.

¹³ Autorità Garante della Concorrenza e del Mercato, I789 – Agenzie di modella, October 2016, http://www.agcm.it/dotcmsDOC/allegati-news/I789_ch_istr_sanz.pdf.

¹⁴ Gerechtshof's-Hertogenbosch, May 2010, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2010:BM3366>. For an account in English, see G. Gürkaynak et al. (2013), “Competition Law Issues in the Human Resources Field”, *Journal of European Competition Law and Practice*, vo. 4(3), p. 203.

¹⁵ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 3.

¹⁶ US District Court Western District of Pennsylvania, *In re: Railway Industry Employee No-Poach Antitrust Litigation*, Civil No. 2:18-MC-00798-JFC, MDL No. 2850, February 2019, Statement of Interest of the United States of America, <https://www.justice.gov/atr/case-document/file/1131056/download>, p. 9.

¹⁷ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 4.

¹⁸ See US Department of Justice, Press release, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation, October 2016, <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals>; US Department of Justice, Press release, Principal Deputy Assistant Attorney General Andrew C. Finch Delivers Remarks at the Heritage Foundation, January 2018, <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage>;

¹⁹ Douglas Tween, “No poach agreements: What’s the big deal?”, *Linklaters*, Summer 2018, <https://www.linklaters.com/en/insights/publications/2018/september/no-poach-agreements-whats-the-big-deal>. See also J. M. Taladay and V. Mehta (2017), “Criminalization of wage-fixing and no-poaching agreements”, *Competition Policy International*, <https://www.competitionpolicyinternational.com/criminalization-of-wage-fixing-and-no-poaching-agreements-2/>.

²⁰ Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf, p. 3: “The Commission’s view [...] is that price fixing and market sharing arrangements have the object of harming competition”.

²¹ Commission Notice on restrictions directly related and necessary to concentrations, Official Journal C 56, 05.03.2005, p. 24-31.

²² Commission Notice on restrictions directly related and necessary to concentrations, Official Journal C 56, 05.03.2005, p. 24-31, paras. 26 and 41.

²³ According to para 13 of the Notice to determine whether a restriction is necessary, account should be taken of its nature, also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires.

²⁴ Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Official Journal C 267, 22.10.2008, p. 1-27.

²⁵ According to the Commission, “the non-solicitation period, dependent on the circumstances of the case, should normally be two years”, see paragraph 24 of the Explanatory Note on Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation of 5 December 2013.

²⁶ Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Official Journal C 267, 22.10.2008, para. 110.

²⁷ There are many merger decisions of the European Commission that contain such non-solicitation clauses in the Commitments. One example is COMP/M. 7567, *Ball/Rexam*, para. 994, where the Commission refers to factors for considering the importance of key personnel for a divested business the fact that it was “operating in a concentrated and capacity-constrained industry, a high degree of continuity of key staff would be crucial for the ability of the Divestment Business [...] to serve its customers and compete effectively in the market immediately after the divestiture”. The accepted commitments included a non-solicitation clause for such identified key personnel.

²⁸ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 4; See Japan Fair Trade Commission, Competition Policy Research Center (2018), Report of the Study Group on Human Resource and Competition Policy, https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf, p. 7; Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf, pp. 4-5.

²⁹ See, for some references to US and Turkish cases, G. Gürkaynak et al. (2013), “Competition Law Issues in the Human Resources Field”, *Journal of European Competition Law and Practice*, vol. 4(3), pp. 211-212.

³⁰ See Japan Fair Trade Commission, Competition Policy Research Center (2018), Report of the Study Group on Human Resource and Competition Policy, https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf, p. 7; US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>, p. 5.

³¹ US Department of Justice Antitrust Division and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care, August 1996, <https://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care>.

³² US District Court Middle District of North Carolina, Danielle Seaman v. Duke University et al., Civil No. 1:15-cv-462, Statement of Interest of the United States of America, March 2019, <https://www.justice.gov/atr/case-document/file/1141756/download>.

³³ US District Court Eastern District of Washington, Joseph Stigar v. Dough Dough, Inc. et al., Myrriah Richmond and Raymond Rogers v. Bergey Pullman, Inc. et al., Ashlie Harris v. CJ Star, llc et al., Case 2:18-cv-244, 246, 247, Statement of Interest of the United States of America, March 2019, <https://www.justice.gov/atr/case-document/file/1141731/download>.

³⁴ US Department of the Treasury, Office of Economic Policy, “Non-compete Contracts: Economic Effects and Policy Implications”, March 2016, <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>, p. 3.

³⁵ US Department of the Treasury, Office of Economic Policy, “Non-compete Contracts: Economic Effects and Policy Implications”, March 2016, <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>, pp. 3-4.

³⁶ Article 5 of Mexico’s Federal Constitution provides that “The State cannot permit the execution of any contract, covenant, or agreement having for its object the restriction, loss or irrevocable sacrifice of the liberty of man, whether for work, education, or religious vows”.

³⁷ The relevant provisions is contained in Section 16600 of the California Business and Professions Code, available here https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=7.&title=&part=2.&chapter=1.&article=.

³⁸ See Section 9-08-06 of the North Dakota Century Code; Section 15-217 of the Oklahoma Statute; Section 8-2-113(2) of the Colorado Revised Statutes. For further details, see R. W. Gomulkiewicz (2015), “Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation”, UC Davis Law Review, vol. 49, p. 265.

³⁹ Norton Rose Fulbright, “A comparison of laws in selected EU jurisdictions relating to post-contractual, non-competition agreements between employers and employees”, August 2017, <https://www.nortonrosefulbright.com/en-fr/knowledge/publications/9807eea3/a-comparison-of-laws-in-selected-eu-jurisdictions-relating-to-postcontractual-noncompetition-agreeme>. For information on other countries, see https://www.fcblegal.com/xms/files/Meritas_Guide_to_Employee_Non-Compete_Agreements_in_EMEA_2017.pdf.

⁴⁰ S. Parts (2019), “Simons: Non-Compete Rulemaking May Come Soon”, *Global Competition Review*, https://globalcompetitionreview.com/article/usa/1191083/simons-non-compete-rulemaking-may-come-soon?utm_source=05%2f08%2f19-13%3a24%3a25-946+-+Non-compete+rulemaking+may+come+soon%2c+Simons+says&utm_medium=email&utm_campaign=05%2f08%2f19-13%3a24%3a25-946+-+Non-compete+rulemaking+may+come+soon%2c+Simons+says&utm_term=Non-compete+rulemaking+may+come+soon%2c+Simons+says&utm_content=88308&gator_t d=6ORV9KIyesURB8CcRMLAQuMTHvrStkhlov3m2dk1p4NzfMLDb%2b8Wti4h70Vqy bd3t39C9mCmxtSunRqXPtEKrJjQrI45A5Agtwj%2ffnREuBfU7lc3SvWuCCnxKClHCs3 jY5HYwaNuejIG91ZeqrjUghX%2fZM7FZqXZmFmpuBv0P3HxC%2bWUrfxnQGMNa J23kEta80ce%2bLxwThR%2fyqp5XqRShkPFYU3eIB135Ge69LR1q1ITxOBwmX1lJyZ mNsd%2fHFbEVYxEgItUkkmF71T8zVbzA%3d%3d.

⁴¹ See, for example, European Commission, Case IV/M.1221, *Rewe/Meinl*, 3 February 1999,

http://ec.europa.eu/competition/mergers/cases/decisions/m1221_19990203_600_en.pdf, paras 71-74; Case IV/M.784, *Kesko/Tuko*, 20 November 1996, http://ec.europa.eu/competition/mergers/cases/decisions/m784_19961120_610_en.pdf, paras. 133-135. For a consideration of the countervailing bargaining power of the buyer in one of the markets, see Case COMP/M.3680, *Alcatel/FinMeccanica/Alcatel AleniaSpace and Telespazio*, 28 April 2005, http://ec.europa.eu/competition/mergers/cases/decisions/m3680_20050428_20212_en.pdf, paras. 71-74.

⁴² It may be observed that the level of responsiveness of workers to a decrease in wages should be assessed based on real wages, although it is likely that employees would prove to be less sensitive to reductions of real wage due to inflation than to a reduction of the nominal wage in the form of a pay cut.

⁴³ The Standard Occupational Classification (SOC) system (<https://www.bls.gov/soc/>) is a US system that assists public agencies to classify uniformly workers by occupation. The 2018 SOC lists 867 detailed occupations.

⁴⁴ The authors of the study use ERS Commuting Zones (<https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/>), defined by the US Department of Agriculture to categorise geographic areas as local economies.

⁴⁵ See I. Marinescu and E. Posner (2019), “Why Has Antitrust Law Failed Workers?”, <http://dx.doi.org/10.2139/ssrn.3335174>, who note “*We have not found a single Section 2 labor monopsony case, ever, in which the claim survived a summary judgement motion*”.

⁴⁶ Concurrences, “The Croatian Competition Authority accepts commitments proposed by a company operating in the provision of specialised IT support to leasing companies (Gemicro)”, June 2015, <https://www.concurrences.com/en/bulletin/news-issues/june-2015/The-Croatian-Competition-Authority-73955>; M. Bradvica, “Competition Agency scrutinises ‘non-poaching’ agreements”, April 2015, International Law Office, <https://www.internationallawoffice.com/Newsletters/Competition-Antitrust/Croatia/Mislav-Bradvica-in-cooperation-with-Schoenherr/Competition-Agency-scrutinises-non-poaching-agreements>.

⁴⁷ “Intermediation power” can be defined as “the power of platform intermediaries when other firms depend on their services for access to sales and procurement markets”. See, for this definition, H. Schweitzer (2018), “Modernising the law on abuse of market power”, <https://www.law.ox.ac.uk/business-law-blog/blog/2018/10/modernising-law-abuse-market-power>.

⁴⁸ For instance, the question whether ride-sharing service drivers are employees of the platform was answered in different ways by US and UK courts. See Labor Commissioner of the State of California, Case No. 11–46739 EK, *Uber v. Barbara Ann Berwick*, which qualified drivers as employee due to the control exercised by the platform, <https://www.scribd.com/doc/268911290/Uber-vs-Berwick>. Drivers were instead considered independent contractors in other US States, like Texas, Georgia and Pennsylvania, see M. Isaac and N. Singer, “California says Uber is Driver is Employee, Not A Contractor”, New York Times, 17 June 2015, <https://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html>. In the UK case *Aslam, Farrar and others vs Uber*, Case 2202550/2015, for instance, the Employment Tribunal recognised the employee status of Uber drivers, <https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>.

⁴⁹ See, for more details, J. Nowag (2016), “The UBER-cartel? UBER between Labour and Competition Law”, Lund Student EU Law Review, vol. 3, <http://dx.doi.org/10.2139/ssrn.2826652>.

⁵⁰ <https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption>.

⁵¹ I. Herrera Anchustegui (2017), “Buyer Power in EU Competition Law”, *Concurrences*, Paris, p. 37.

⁵² S. O’Connor (2018), “Let gig workers control their data too”, *Financial Times*, <https://www.ft.com/content/a72f7e56-3724-11e8-8b98-2f31af407cc8>. For a study on “reputation inflation”, discussing how the relevance of post-transactions reviews decrease with time, see A. Filippas, J. J. Horton and J. M. Golden (2018), “Reputation Inflation”, <http://john-joseph-horton.com/papers/longrun.pdf>. For a different problem in the product market, where a recent study found that the speed and rate at which certain products sold on Amazon.com were reviewed by consumers revealed that they were fraudulent, see E. Woollacott (2017), “Amazon’s Fake Review Problem Is No Worse than Ever, Study Suggests”, <https://www.forbes.com/sites/emmawoollacott/2017/09/09/exclusive-amazons-fake-review-problem-is-now-worse-than-ever/#32b58b247c0f>. See also G. Kelly (2017), “Give me my reputation back”, <https://gavinkellyblog.com/give-me-my-reputation-back-clfa5daca78c>.

⁵³ UK BIS Department for Business, Innovation and Skills (2011), “A Guide to Mutual Ownership Model”, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31678/11-1401-guide-mutual-ownership-models.pdf. See also R. Mabud, “Uber and Lyft’s IPOs Will Generate Millions - But For Who?”, *Forbes*, <https://www.forbes.com/sites/rakeenmabud/2019/03/28/fixing-worker-misclassification-as-uber-and-lyft-prepare-to-go-public/#544192dc3d6d>.

⁵⁴ <https://www.glassdoor.fr/index.htm>.

⁵⁵ UK CMA (2017), Digital Comparison Tool Market Study – Final Report, <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf>.

⁵⁶ <https://www.ofgem.gov.uk/consumers/household-gas-and-electricity-guide/how-switch-energy-supplier-and-shop-better-deal/compare-gas-and-electricity-tariffs-ofgem-accredited-price-comparison-sites>.

Chapter 4. Non-Enforcement Tools to Address Labour Monopsony Power

The anti-competitive creation or maintenance of monopsony power can be tackled by competition enforcement. The competition law enforcement framework may be, however, unsuited to address some of the ‘natural’ sources of employer monopsony power, such as concentration that is not caused by merger activity. Competition advocacy or other policy initiatives, also outside competition, may be better placed to address monopsony originating from other sources of monopsony power, such as labour market frictions.

Competition advocacy, for instance, may help to identify pro-competitive solutions where the demand side of labour markets is not working effectively. In the same way that product markets cannot work well for consumers without there being empowered and informed consumers who can switch when prices rise, labour input markets may not work as efficiently unless workers have the information and ability to switch when their real wages are cut. In this sense, the increasingly well-recognised role for consumer-facing remedies in product markets (OECD, 2018b) may have a natural counterpart in worker-facing remedies.

Similarly, like consumer protection policy safeguards customers against conduct by firms without market power, there may also be other policy initiatives better placed to protect workers. Governments may find it suitable to adopt regulations or other initiatives outside the competition framework to address distortions created by the accumulation of power in the hands of employers.

In addition to tailored collective bargaining exemptions, discussed above, it is possible that minimum wage regulation, in particular for low-income categories of workers, may represent a solution to address situations where the market is not functioning efficiently and *ex ante* ‘price regulation’ is the most effective way to tackle the market failure. This solution, however, may not be effective for some workers in the grey zone between dependent and self-employment (OECD, 2019a).

4.1. Market studies

There are many advocacy tools in the hands of competition authorities, such as guidance notes, opinions, policy papers, and advocacy to government or to stakeholders. Among these, market studies or inquiries are an effective investigative tool in product markets where it is suspected that the market is not working effectively, but where it remains unclear whether or not that is in fact the case, and if so what are the origins of the market failures it presents. Market studies enable the competition agency to take a holistic and neutral approach to understanding the nature of a given market and its imperfections. They also allow agencies to make evidence-based recommendations or, where such power exist in

a given jurisdiction, take responsibility for imposing remedies that address the features that can restrict, prevent or distort competition in the market.

Given the likelihood that market power in labour input markets will often not derive from actions by firms, market studies could be helpful to understand the extent of monopsony power in a specific labour market, its causes and its static and dynamic effects.¹

In prioritising the labour input markets to study, agencies might consider the labour share of income in different sectors and how it has changed over time. Those agencies that see a role for themselves in supporting inclusive growth might also consider the socio-demographic make-up of the workers in the candidate markets. Priority might also be given to studying markets that impact upon a wide range of different labour input markets, for example by investigating inefficiencies in education, skills and housing markets that may reduce workers' geographic or job mobility.

The recommendations that may emerge from market studies of particular labour input markets might include a whole range of initiatives to increase competition between employers for staff. For instance, measures to improve access to certain labour markets, information for workers, search costs or switching costs reduction, such as the certified standard certification system or working environment comparison tools mentioned above could be considered.

In some cases, for example, the market study may result in the recommended adoption and monitoring of compliance of a code of conduct. An example of a market enquiry dealing with monopsony power against small suppliers is the UK Competition Commission (CC) investigation of competition in the groceries industry concluded in 2008. The CC found that a number of retail supermarkets enjoyed significant market power in UK local input markets. While not all the concerns identified by the CC may find a parallel in labour markets,² it is worth noting that, amongst other recommendations, the agency recommended the strengthening of the provisions of the Supermarkets Code of Practice, including an overarching fair and lawful dealing provision and the prohibition for retailers from making retrospective adjustments to terms and conditions of supply.³ The Competition Commission also required the establishment of an Ombudsman to monitor compliance with it.⁴ Analogous solutions might be proposed in labour markets, along the lines of the "Crowdsourcing Code of Conduct", adopted by a number of German platforms to guarantee the fair treatment and improve the working conditions of their workers.⁵

In cases where, during the course of the market study, monopsony power is identified, calls to create counterbalancing bargaining power for workers may be made (see OECD, 2019a). Recommendations that facilitate workers jointly exercising countervailing buyer power might be considered in some cases. For instance, recommendations that facilitate consumers forming buyers' clubs to exercise countervailing buyer power have been endorsed in some occasions by competition authorities. The Netherlands Authority for Consumers and Market issued guidelines for hospitals and health insurers envisaging the possibility of joint purchasing of prescription drugs.⁶ The UK CMA, in its energy market investigation of 2016, noted, *inter alia*, that the remedies⁷ would help third party intermediaries willing to organise collective switching efforts to access the relevant data.⁸

However, competition agencies may wish to make a clear distinction between workers and independent self-employed contractors, and to avoid encouraging joint action amongst the latter. Instead, they may wish to recommend that government provide greater clarity on the distinction between those groups to reduce the risk on any anticompetitive agreements being struck amongst those whose status is unclear.

4.2. *Ex post* merger assessments

A useful first step to begin to understand the magnitude of the issues that have been raised, and the importance to accord these theories of harm in future merger cases, is to study the impact of labour monopsony by *ex post* assessments of past merger decisions. This would enable agencies to determine whether labour monopsony effects have been overlooked, what signs there might have been of such a risk, and in which circumstances the remedies imposed on the product market may also have addressed or solved labour market issues. Evidence could be collected concerning changes over time, to determine whether merger activity may be giving rise to monopsony power more frequently now than in the past and for what reasons.⁹

US FTC’s Chairman Joseph J. Simons has recently announced that the “*feasibility of conducting merger retrospectives in a number of industries*” is being explored, although “*a good candidate merger that we previously reviewed with data robust enough to enable a retrospective evaluation of the labor market effects*” appears to not be available yet for this purpose.¹⁰

4.3. Guidelines for HR professionals and other advocacy initiatives

There may also be value in competition authorities developing recommendations or guidelines for HR professionals. As mentioned above, the US Antitrust Guidance for Human Resource Professionals (2016) was issued to draw attention to the anticompetitive practices affecting human resources. The Guidance is addressed to HR professionals, acknowledging that these experts are best placed within a company to detect and prevent competition law infringements relating to hiring and compensation decisions.¹¹ Similarly, the JFTC’s Study Group on Human Resources and Competition Policy¹² and the HKCC Advisory Bulletin¹³ aimed at providing a theoretical framework for the application of competition law to labour markets. All these guidelines provide a description of the main anticompetitive conducts concerning hiring and employment conditions, and examples of such conducts.

It has also been suggested that competition authorities could adapt their merger guidelines to clarify expressly that the effects of transactions in labour markets will be scrutinised (Krueger and Posner, 2018). For example, in the United States, it has been suggested that the Horizontal Merger Guidelines should be amended to refer to the analysis of monopsony power and to include presumptions or other analytical devices that could facilitate the assessment for competition authorities.¹⁴

Other initiatives could be undertaken to promote awareness among workers, particularly non-unionised workers, about the risks connected to signing non-compete covenants and arbitration clauses.

Notes

¹ FTC, Full Transcript of FTC Hearings “Competition and Consumer Protection in the 21st Century”, Session 3, Day 2, 16 October 2018, Georgetown University Law Center, https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18.pdf, p. 117 (M. Gaynor).

² The Competition Commission proposed this remedy in response to the damage to investment from retrospective adjustments to the terms of supply by retailers, a situation that may find similarities in labour markets. See, for further information, UK Competition Commission, “The supply of groceries in the UK market investigation”, Final Report, April 2008, https://webarchive.nationalarchives.gov.uk/20140402235418/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf.

³ According to the fair and lawful provisions, supermarkets were required to “at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing shall be understood as requiring Supermarkets to conduct their trading relationships with Suppliers, without distinction between ongoing or once-off dealings or between formal or informal arrangements, in good faith, without duress and in recognition of the Suppliers’ need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.” See, for the other provisions, UK Competition Commission, “The supply of groceries in the UK market investigation”, Final Report, April 2008, https://webarchive.nationalarchives.gov.uk/20140402235418/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf, pp. 14-15.

⁴ For further details, see UK Competition Commission, “The supply of groceries in the UK market investigation”, Final Report, April 2008, https://webarchive.nationalarchives.gov.uk/20140402235418/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf.

⁵ <http://crowdsourcing-code.com/>. See also A. Aloisi, V. De Stefano, S. Silberman, “A Manifesto to Reform the Gig Economy”, *Regulating for Globalization*, <http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/>.

⁶ The Netherlands Authority for Consumers and Market (2016), “Guidelines on collective procurement of prescription drugs for medical specialist care”, ACM/TFZ/2016/401860,

⁷ According to Section 138(2) of the Enterprise Act, the UK Competition and Markets Authority may take such action as it considers reasonable and practicable to remedy, mitigate or prevent the adverse effect on competition or on costumers emerging from a market investigation.

⁸ UK Competition and Markets Authority (2016), “Energy market investigation”, <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>, p. 671. See also UK Competition and Markets Authority (2007), “The competitive effects of buyer groups”, Economic Discussion Paper, <https://www.rbbecon.com/downloads/2012/12/oft863.pdf>.

⁹ FTC, Full Transcript of FTC Hearings “Competition and Consumer Protection in the 21st Century”, Session 3, Day 2, 16 October 2018, Georgetown University Law Center,

https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18.pdf, p. 116.

¹⁰ Senate Committee on the Judiciary (2018), “Oversight of the Enforcement of the Antitrust Laws”, Questions for Joseph Simons, Chairman, Federal Trade Commission, <https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs1.pdf>, pp. 22-23.

¹¹ US Department of Justice Antitrust Division and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, <https://www.justice.gov/atr/file/903511/download>.

¹² Japan Fair Trade Commission, Competition Policy Research Center (2018), Report of the Study Group on Human Resource and Competition Policy, https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf.

¹³ Hong Kong Competition Commission, Advisory Bulletin of 9 April 2018, Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment, https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf, p. 1.

¹⁴ FTC, Full Transcript of FTC Hearings “Competition and Consumer Protection in the 21st Century”, Session 3, Day 2, 16 October 2018, Georgetown University Law Center, https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18.pdf, p. 118.

Chapter 5. Conclusion

Concerns relating to wage stagnation and a reduction in the labour share of income in some countries has raised questions on monopsony and the buyer power held by employers on the demand side of the labour market. Many commentators have pointed to the loss of efficiency and harm to workers that take place when monopsony power allows employers to withhold demand for labour.

Three important points emerge from the recent literature. Firstly, some recent models of monopsony in labour markets suggest that monopsony power may be less rare than commonly thought, with a number of factors creating, consolidating or facilitating the exercise of employers' market power. These include characteristics such as asymmetries of information, heterogeneous preferences and mobility costs. Secondly, as opposed to buyer power in product markets, which may yield pro-competitive effects, monopsony power in labour markets is unlikely to do so. Thirdly, many commentators are of the opinion that the competition law framework is applicable to monopsony power even when there is no harm to consumers downstream, under analogous legal standards as those of product markets.

So far, however, competition authorities around the world have taken little, or no, action to address labour monopsony and to ensure competition in labour input markets. This may be due to the specific challenges arising from the particular characteristics that make these markets function somewhat differently from other markets, which may lead to some uncertainty as to which types of case might be anticompetitive and prioritised for investigation, as well as to how to demonstrate to the requisite degree that such conduct is indeed anticompetitive.

This paper analyses when the exercise of monopsony power by employers may infringe competition law, looking at anticompetitive agreements concerning hiring and working conditions, such as wage-fixing and no-poaching agreements; abuses of employer's monopsony power; and further concentration of labour input markets through mergers.

It also explores the theoretical and practical challenges associated with analysing and addressing competition concerns regarding monopsony power in labour markets. Indeed, the specific characteristics of labour markets require competition analysis be adapted to overcome the challenges that present themselves to enforcers in these markets. For instance, tools like the SSNIP test would need to be adjusted to measure the impact on workers of a small but significant and non-transitory decrease in wage, while the substitutability between jobs would need to be assessed by taking into account, to a certain extent, workers' preferences, like working hours, annual leave or other benefits.

Given the rising importance of these markets, the paper also looks at how the intermediation power of certain platforms, combined with the lack of recognition

of workers' rights to self-employed platform workers may amount to a situation analogous to monopsony. Calls have been made to extend employee's right to collective bargaining to these self-employed platform workers to counteract the monopsony-like power in the hands of platforms. This solution, however, may entail anticompetitive risks. As such, competition authorities may prefer to use their advocacy powers in such instances to propose measures that correct asymmetries of information and facilitate the mobility of self-employed platform workers to other platforms.

In any case, a trend towards a more systematic scrutiny of the competition issues arising in labour input markets seems to be emerging in certain jurisdictions. Current competition law frameworks seem to allow enforcement and advocacy actions in labour input markets, and current tools and competition analysis in these markets need to be adapted, developed further and discussed amongst agencies. Like for product markets, competition in labour markets is important to ensure that such markets are functioning well and efficiently. Competition authorities may therefore wish to prioritise the scrutiny of labour input markets more in the future.

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