Comments on the 2023 Draft Merger Guidelines: A Labor Market Perspective*

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Abstract

The DOJ and FTC clarify the role of labor market power ("monopsony") in the 2023 draft merger guidelines. The draft states in Guideline 11 that the structural presumption threshold applies to labor market concentration, while also suggesting that a stricter threshold may be warranted in labor markets. The post-merger Herfindahl-Hirschman Index (HHI) that defines a highly concentrated market is 1800, which is lower, and so stricter, than the 2010 guidelines. We provide five comments on the draft guidelines based on our recent work Berger, Hasenzagl, Herkenhoff, Mongey, and Posner (2023). (1) Explicitly addressing monopsony in the draft guidelines is grounded in economic theory and empirical research. (2) Workers benefit from the lower threshold for highly concentrated markets. (3) The narrow nature of labor markets and high degree of monopsony power in the U.S. may warrant an even lower threshold. For example, merger simulations indicate that workers would benefit if the agencies lowered the HHI threshold further—to 1500 or 1000. (4) Worker welfare is central to the 2023 draft guidelines but the language is not always clear about this. The guidelines should make clear that degradations of "worker welfare" or "total compensation" indicate anticompetitive effects. (5) Dominant firms that can slow wage growth – but not freeze or cut wages – are subject to Guideline 7.

The DOJ and FTC clarify the role of labor market power ("monopsony") in the 2023 draft merger guidelines. The draft states in Guideline 11 that the structural presumption threshold applies to labor market concentration, while also suggesting that a stricter threshold may be warranted in labor markets. The threshold, which is defined in Guideline 1, is also stricter than the 2010 HMG's: $\Delta HHI > 100$ in a highly concentrated market ($HHI > 1800$) or the merged entity's market share exceeds 30%.

Our comments focus on the labor market-related guidelines. All subsequent references to HHI refer to the labor market HHI. We use firm payroll to define labor market shares and HHIs.

1. Explicitly addressing monopsony in the draft guidelines is grounded in economic theory and empirical research

That monopsony is just as harmful as monopoly permeated the economics profession when Joan Robinson coined the word in her book Robinson (1933). Recent analyses based on U.S. Census data

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reveal a significant degree of monopsony power in U.S. labor markets (Berger, Herkenhoff, and Mongey (2022), Yeh, Macaluso, and Hershbein (2022)). Antitrust remedies are studied and advocated in Naidu, Posner, and Weyl (2018), Marinescu and Hovenkamp (2019), and Posner (2021), among others.

2. Workers benefit from the lower threshold for highly concentrated markets. See Berger et al., "Merger Guidelines for the Labor Market," NBER 2023 (henceforth, BHMMP)

- We simulate a representative set of mergers and then compute worker welfare using two merger review criteria:

  I. **2023 draft guidelines:** Block merger if post-merger $HHI > 1800$ and $\Delta HHI > 100$

  II. **2010 guidelines:** Block merger if post-merger $HHI > 2500$ and $\Delta HHI > 200$

- We report worker welfare gains relative to the pre-merger economy. Welfare gains are totaled across all workers in the labor market affected by a merger.

- **2023 draft guidelines:** The average merger permitted by the 2023 draft guidelines produces aggregate gains of $\$19,963$ for workers in the affected labor market.

- **2010 guidelines:** The average merger permitted by the 2010 HMG produces aggregate losses of $\$35,000$ for workers in the affected labor market.

- Relative to the 2010 HMG, permitted mergers under the 2023 draft guidelines increase average worker welfare by $\$55,000$ in affected markets.

- The 2023 draft guidelines block many more mergers that harm workers than the 2010 HMG do.

Model background. In BHMMP, we develop a theory in which a finite number of firms in each of many labor markets compete for workers within and across labor markets. Workers' willingness to move across markets and switch employers determines the degree of monopsony power in the economy. Small firms compete more locally for labor, and since labor is more mobile within each labor market, they pay near-competitive wages (i.e. the workers marginal product of labor). Larger firms must compete within and across markets, and since its harder for workers to move between markets, they're able to pay their workers less than their marginal product of labor.

We estimate the model on U.S. Census data. Markets are defined to be 3-digit NAICS industries within commuting zones (e.g., furniture manufacturing within the Minneapolis commuting zone). We show that our market definition passes the hypothetical monopsonist test – a firm that controls one of our labor markets would impose a 5% or greater non-transitory wage reduction. We then validate the model by simulating a representative set of mergers and showing that it replicates observed post-merger wage and employment losses as documented in a leading empirical study (Arnold, 2020).

Table 1: Post-merger average wage gains for 2023 and 2010 merger review criteria

	A. 2023 draft guidelines	**B. 2010 guidelines**
Prevent mergers above threshold $(HHI, \Delta HHI)$	(1800, 100)	(2500, 200)
	(1)	(2)
Change in average wage assuming 5 percent efficiency gain		
Permitted mergers	0.04%	−0.14%
Blocked mergers	−5.99%	−8.61%

Note: Merger simulation is designed to match a representative set of firms based on Arnold (2020). Mergers are assumed to generate a 5% efficiency gain. We compute the average market-level wage in the pre-merger economy and compare that to the average market-level wage in the post-merger economy. The percent change in those average wages is reported below. Panel A applies the 2023 draft guidelines. In Column (1), all mergers with post-merger concentration/change in concentration above $(HHI = 1800, \Delta HHI = 100)$ *are blocked. Panel B applies 2010 guidelines and applies a parallel method. See BHMMP for details.*

Table 2: Post-merger change in average worker welfare for 2023 and 2010 merger review criteria

	A. 2023 draft guidelines	**B. 2010 guidelines**
Prevent mergers above threshold $(HHI, \Delta HHI)$	(1800, 100)	(2500, 200)
	(1)	(2)
Change in average welfare assuming 5 percent efficiency gain		
Permitted mergers	\$19,963	−\$35,972
Blocked mergers	−\$805,476	−\$994,940

Note: see Table 1 note and BHMMP for details. Mergers are assumed to generate a 5% efficiency gain. Welfare is computed in each labor market using a first-order approximation. We report worker welfare gains relative to the pre-merger economy. Welfare gains are totaled across all workers in a labor market. For instance, if total worker welfare is X post-merger and Y pre-merger, then worker welfare losses occur whenever $X < Y$ *and worker welfare gains occur when* $X > Y$*. The average welfare gain/loss across affected markets is reported. Welfare is in 2014 dollars.*

Model merger simulation. We simulate a representative set of mergers based on Arnold (2020). We assume mergers yield a 5% efficiency gain.[1] Our analysis focuses on the impact of mergers on average wages and worker welfare. All wage changes and welfare changes are computed relative to the pre-merger economy. Positive average wage gains imply positive welfare gains for workers. Welfare gains are totaled across all workers in a labor market.

The 2023 draft guidelines are simulated in Column (1) of Table 1. The average wage gains for workers affected by permitted mergers are 0.04%. This wage increase translates into a worker welfare gain.

Column (1) of Table 2 shows that, for mergers permitted by the 2023 draft guidelines, workers enjoy a welfare gain of \$19,963 in each labor market affected by the merger, on average. Where the draft guidelines block a merger, welfare losses of \$805,476 are avoided in each affected labor market, on

[1]This is a conservative estimate; merger-specific efficiency gains from mergers may well be lower, in which case HHI thresholds should also be lower. See BHMMP for a review of the recent literature on post-merger efficiency gains.

average.

Column (2) of Table 2 shows that workers are significantly worse off if the agencies revert to the 2010 guidelines. Consummated mergers generate welfare losses of $35,972 in each affected labor market, on average. The 2010 HMG block mergers that generate welfare losses of $994,940 in each affected labor market, on average—meaning that the 2010 HMG fail to block many of the harmful mergers that the 2023 draft guidelines would block.[2]

Summary: BHMMP supports the agencies' decision to reduce the HHI threshold for the structural presumption as applied to labor markets.

3. The narrow nature of labor markets and high degree of monopsony power in the U.S. may warrant an even lower threshold. For example, merger simulations indicate that workers would benefit if the agencies lowered the HHI threshold further—to 1500 or 1000 (see BHMMP)

- Labor markets are narrower than products markets, warranting stricter HHI thresholds.
- Preventing mergers that result in post-merger $HHI > 1000$ and $\Delta HHI > 100$ yields worker welfare gains of $70,327 in each affected labor market, on average.
- Preventing mergers that result in post-merger $HHI > 1500$ and $\Delta HHI > 100$ yields worker welfare gains of $42,400 in each affected labor market, on average.

The agencies suggest that a lower concentration threshold than 1800 may be appropriate for the structural presumption in labor markets (and other cases of monopsony) but the threshold is left unspecified in the draft guidelines. See p. 25 ("The level of concentration at which competition concerns arise may be lower in buyer markets than in seller markets, given the unique features of certain buyer markets"). We believe that conceptual and quantitative factors unambiguously support a lower concentration threshold for labor markets. Casual experience and empirical evidence indicate that it is harder for workers to switch employers than for consumers to switch products.[3] Our estimated model supports the view that workers' willingness to move across labor markets is low. Estimated markdowns in single-firm markets are over 70% (Berger, Hasenzagl, Herkenhoff, Mongey, and Posner, 2023). Consequently, our quantitative merger simulations imply that stricter definitions of "highly concentrated markets" are warranted.

Lower concentration threshold for labor markets. Based on Tables 5 and 7 of BHMMP, workers are better off if the agencies adopt the following merger review thresholds for labor markets:

- Prevent merger if post-merger $HHI > 1000$ and $\Delta HHI > 100$, or
- Prevent merger if post-merger $HHI > 1500$ and $\Delta HHI > 100$.

[2]The lower average loss of blocked mergers for the 2023 draft guidelines indicates that those guidelines block harmful but low-harm mergers, which pulls down the average; but the 2023 draft guidelines also block the same high-harm mergers that the 2010 HMG block. Accordingly, in aggregate, the 2023 guidelines block more harmful mergers than the 2010 HMG do.

[3]On the high cost of switching jobs, see Ransom (2022). These costs include risk and psychological stress as well as the financial burden.

Both thresholds yield worker welfare gains relative to the current 2023 draft guidelines. To reach this conclusion, as before, we simulate a representative set of mergers, and we assume a 5% merger efficiency gain.

Column (1) of Table 7 in BHMMP illustrates average wage changes when we block mergers in which the post-merger HHI exceeds 1000 and change in HHI exceeds 100. For a 5% efficiency gain, permitted mergers yield average wage gains of 0.19%. Positive wage gains imply that workers are better off with this stricter HHI threshold.

Column (1) of Table 5 in BHMMP shows that consummated mergers generate welfare gains worth $\$70,327$ in each labor market involved in a merger, whereas blocked mergers generate welfare losses worth $-\$724,053$ in each labor market involved in a merger.

Column (3) of Table 7 in BHMMP applies the 2010 HHI threshold for "moderate" concentration ($HHI > 1500, \Delta HHI > 100$) to labor markets. This policy yields an average wage gain of 0.11%. Among permitted mergers, Column (3) of Table 5 in BHMMP shows that this stricter threshold makes workers better off than the current 2023 draft guidelines, on average.

Summary: The narrow nature of labor markets and high degree of monopsony power estimated in the U.S. by BHMMP imply that workers benefit by defining a highly concentrated market to be a post-merger HHI above 1000 or 1500.

4. Worker welfare is central to the 2023 draft guidelines but the language is not always clear about this. The guidelines should make clear that degradations of "worker welfare" or "total compensation" indicate anticompetitive effects

The agencies write "Where a merger between employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality" (p. 26).

A worker's valuation of non-wage benefits, workplace quality and working conditions depend on their preferences, as stated on p. 26 of the draft guidelines: "workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently."

These statements imply that worker welfare must be measured when determining whether changes in benefits or workplace quality have "degraded" post-merger. For example, the introduction of part-time shifts may benefit working parents but hurt low-income individuals without children.

Guideline 11, as stated, does not make clear that worker welfare may improve if wages decline but non-wage benefits and workplace quality improve post-merger. This conceptual point is based on Berger, Herkenhoff, Kostøl, and Mongey (2023). In their framework, worker welfare is the sum of two components: non-wage benefits and wages. The number of firms in the market affects both components of worker welfare. Reductions in wages can be offset by greater non-wage benefits (e.g., lower wages can be offset by more flexible scheduling).

Non-pecuniary forms of compensation are often extremely significant in the employment setting,

while wage rigidity may encourage employers to exercise labor market power by degrading amenities and job conditions rather than by lowering wages. See Maestas, Mullen, Powell, Von Wachter, and Wenger (2023).

When measuring whether a merger delivers anticompetitive labor market effects, each component of compensation must be considered, and degradation of one component does not necessarily imply degradation of other components. Introducing "degradation of total compensation" or "degradation of worker welfare" to the draft guidelines would make this conceptual point clearer.

5. Clarify that dominant firms that can slow wage growth – but not freeze or cut wages – are subject to Guideline 7

The opening paragraph on p. 26 states that "slower wage growth" post-merger is the relevant threshold for anticompetitive effects. Subsequent language in paragraph 5 on p. 26 suggests a stricter threshold of "wage freezes" and "wage cuts" when applying Guideline 7 (the dominant firm provision) to the labor market. Dominant firms that can slow wage growth – but not freeze or cut wages – are considered anticompetitive according to the opening paragraph of p. 26 and should be subject to Guideline 7. The language governing the threshold for anticompetitive wage effects should be made consistent throughout the draft guidelines.

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