Why (European) Antitrust Law Should Not Treat Labor Markets Differently

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I Motivation

At least in the United States, there's a growing apprehension among policy architects and antitrust regulators regarding the operation of the domestic labor market. In 2021, the Biden administration has signed an executive order with the task to investigate the effects of a potential lack of labor market competition. Concerns are fueled by landmark cases against, notably, tech companies allegedly thwarting competition for employees, an observed rise in allegedly restrictive employment agreements (especially non-compete clauses), and a range of studies by macroeconomists documenting, for the US, that labor's share of income and of productivity gains has steadily declined over the last decades.[3]

The topic has also gained much attention among legal scholars.[4] And macroeconomists have been quick to quantify potential damage to society with models that picture oligopolistic firms exerting monopsony power over labor and monopoly power in the downstream market.[5] Moreover, it is likely that the US antitrust approach to labor markets will be shaped also by the notion of a "fair wage," given the Biden administration's appointment of prominent representatives of the Neo-Brandeis movement.

This debate is starting to find resonance also in Europe, notably as it comes at a time where we witness a wide range of attempts to "enrich" antitrust with other societal objectives, such as

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[3] For an overview see Press Release, U.S. Dep't of the Treasury, The State of Labor Market Competition (March 7, 2022).
[4] Singling out only one, see Eric A. Posner & Ioana E. Marinescu, *Why Has Antitrust Law Failed Workers?,* 105 CORNELL LAW REV. 1343-1394 (2020).
[5] See, for instance, Shubhdeep Deb et al., *What Drives Wage Stagnation: Monopsony or Monopoly?,* 20 J EUR ECON ASSOC. 2181-2225 (2022).

sustainability.[6] We argue in the following why it would, however, be unconvincing for European policymakers and antitrust authorities to jump the bandwagon, in particular regarding policies and enforcement practice on the European (rather than the national) level.

We proceed as follows. To set the stage, we offer a brief (and only selective) account of how competition in labor markets is treated under European antitrust law (Section II). In Section III we discuss (dis-)similarities in the treatment of buyer power more generally and that of labor market power. Section IV discusses the potential goal of fair wages. Section V offers our main conclusions.

II Competition in labor markets under European (antitrust) law

A. Restrictions imposed by firms

When firms conspire to impose no-poach agreements, for example, this can amount to horizontal collusion in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU). In a similar vein, non-competes with independent contractors my infringe upon the cartel prohibition if such restrictions exceed what is privileged by the so called ancillary restraints doctrine. The sweeping prohibition on collusion further limits the ability of firms to exchange information about wages or other aspects of employment contracts, unless an exemption under Article 101(3) TFEU applies. Such a legal exemption can be given if a restraint is necessary to yield efficiencies which ultimately offset any consumer harm that could arise from the reduction in competition.

The imposition of non-compete clauses on a firm's employees, in turn, faces constraints from labor law.[7] As labor related law varies considerably between jurisdictions, we cannot provide an account of the specific provisions. However, respecting such differences is vital so as to identify a potential "gap," from which an undue restriction of competition could arise, with negative consequences on prices, entry, and innovation.[8] Also, it must be acknowledged that such clauses can lead to dynamic

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[6] For a critical account of this overall tendency, but also proposals to incorporate sustainability, see Roman Inderst & Stefan Thomas, *Legal Design in Sustainable Antitrust*. (ZBW-Leibniz Information Centre for Economics, No. 253671, 2022); Stefan Thomas, *Chapter 8: Normative goals in merger control: Why merger control should not attempt to achieve better outcomes than competition,* in RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF COMPETITION ENFORCEMENT (Ioannis Kokkoris & Claudia Lemus et al. eds., 2022).

[7] We note that the recent proposal of the FTC to ban non-compete clauses in the US relies, however, on an enforcement of Section 5 of the FTC Act, which bans unfair methods of competition.

[8] Notably, there exist profound differences regarding the maximum duration of a post-employment non-compete clause or the minimum compensation that a former employee must obtain, next to when such contracts are deemed unreasonable.

efficiencies, such as protecting a firm's investment in specific human capital, next to the protection of business secrets.[9] But we also acknowledge that even if certain clauses were deemed illegal in court, the law remains ineffective unless such infringements are actively challenged.[10]

B. Collective agreements as exemptions from antitrust

The ability for both, firms and employees, to collude on the terms and wages in labor contracts is considerably expanded by specific jurisprudence exempting collective bargaining among employees and employers from the cartel prohibition. This exemption is also referred to as the Albany-doctrine. The Court of Justice in Albany concluded on the inapplicability of the cartel prohibition on collective bargaining between employers and the employed workforce considering that EU law and national laws recognize and even encourage collective bargaining between those parties aiming at a high level of employment and social protection.[11] In 2022, the European Commission issued its "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons."[12] There, it ventures to clarify the scope of exemptions from Article 101(1) TFEU of collective bargaining even beyond the boundaries currently emanating from the case law. Also, the Commission defines scenarios in which it will not intervene against collective bargaining of self employed persons despite a possible infringement of Article 101(1) TFEU, if such agreements are considered legitimate to correct an "imbalance in bargaining power."[13] Such collective bargaining agreements do possibly include a collusion on "remuneration, rewards and bonuses,"[14] viz. agreements that are commonly referred to as hardcore price fixing.

This article is not the appropriate venue to generally discuss the economic implications of such a politically intended shift in bargaining power and wages, particularly in terms of efficiency. It should be noted, though, that irrespective of its scope, the Albany-doctrine is not rooted solely in considerations of efficiency. It represents an expression of broader societal and political objectives,

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[9] For a sceptical view on such efficiencies, however, see Autoridade da Concorrencia, *Labor Market Agreements and Competition Policy,* (Issues paper, Box 2, 2021).

[10] For the widespread prevalence of potentially also non-enforceable clauses in Italy see Lorenzo G. Luisetto et. al., *Non-compete Agreements in a Rigid Labour Market: The Case of Italy.* (IZA Discussion Papers No. 16021, 2023).

[11] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430, para. 54 et seqq.

[12] EU Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*, (OJ 2022 C 374/2, 2022).

[13] *Id.* para. 9.

[14] *Id.* para. 15.

akin to more direct interventions into labor contracts, such as minimum wages. We will return to this topic later.

We now aim at identifying potential cases where we can most transparently illustrate our more economic points. For this, we consider the labor market implications of a potential merger between firms. Often, if not even typically, firms should have only minimal, if not negligible, power in the labor market post-merger. However, there may be specific circumstances under which a merger can substantially impact workers' outside options, given their particular occupation and skills. Hospital mergers have frequently been cited as prime examples, and we have observed a wave of such mergers on both sides of the Atlantic. In the following sections, we outline our central thoughts on how to address such a potential increase in labor market power.

III Dealing with firm "buyer power" in the labor market

A. The role of the relevant "pricing institution" in the labor market

We adopt the viewpoint that the primary metric in European antitrust law is that of consumer welfare.[15] Assuming that the hypothetical merger does not result in a significant lessening of downstream competition, from a consumer welfare perspective our focus should be on how a potential exercise of demand side market power in the upstream market affects a firm's input prices and thereby indirectly the prices and quantities in the downstream market. We previously noted that macroeconomic models, that are influential in the discussion at least in the United States, posit that market power, both upstream and downstream, is exercised in the same way, namely by withholding quantity. This single "shrinkage" strategy of firms with market power then depresses upstream (labor) prices as well as it inflates downstream final goods prices thanks to a reduction in output quantity. If this accurately depicted how the labor market functions, then an exercise of upstream demand side labor market power could indeed be detrimental to both, efficiency and consumer welfare.

However, as we discuss next, also the opposite effect on labor quantity and downstream prices can be true. When a merger deteriorates the outside options for workers, thereby increasing the merged firm's bargaining power, the resulting reduction in wages could lower the firm's costs and induce

[15] We do, however, recognize the existence of divergent views that place considerable emphasis on protecting the competitive process as an inherent additional or even primary or exclusive goal, although it often remains unclear in what way the workability of a competitive process can be defined in a given case and how this goal is capable of accounting for efficiencies, e.g. within Article 101(3) TFEU, in a coherent way.

a reduction in its downstream price, potentially also expanding employment. In other words, the impact of exercising upstream market power on efficiency and consumer welfare crucially depends on what can be referred to as the "pricing institution."

B. A primer on "buyer power"

This connects to the broader discussion on buyer (or countervailing) power. In contexts other than that of labor markets, buyer power has been a much debated subject both at the European level and in various national jurisdictions.[16] In the context of the respective literature, it is generally agreed that the exertion of upstream market power in most examined antitrust scenarios manifests itself predominantly as bilateral bargaining power, as opposed to the behavior of a quantity-withholding monopsonist. The repercussions of this are profound, particularly in terms of probable welfare effects, which we will shortly delve into. Following this, we will consider the applicability of these assumptions to labor markets and identify instances where a distinct treatment may be warranted.

Analytical approaches to buyer power in input markets frequently frame the phenomenon within the confines of a bilateral oligopoly, where manufacturers or providers of certain input products are juxtaposed with their corresponding buyers. In situations where buyers and sellers can negotiate contracts that are sufficiently flexible across multiple units, a redistribution of rents due to a shift in bargaining power can occur without affecting the volume of procured products. When all suppliers remain in the market, efficiency and consumer welfare are then unaffected within this admittedly static analysis, on which we focus. In instances where contracting is not fully efficient, so that the realization of joint surplus and that distribution of such surplus cannot be entirely disentangled, the exercise of buyer power will indeed influence the quantity supplied. The literature typically represents this through the lens of linear contracting, whereby the focus of negotiations is a singular wholesale price at which an upstream firm supplies its product. Unless the upstream firm operates in a fully competitive market and possesses no bargaining power, the wholesale price is expected to exceed marginal costs. As the buyer gains more bargaining power and consequently lowers the marginal costs, the gap between the wholesale price and marginal

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[16] We have written extensively on this subject in academic literature and as expert advice to agencies and international organizations. See, for instance, the two contributions in Roman Inderst and Nicola Mazzarotto, *Buyer power in distribution,* in ABA ANTITRUST SECTION HANDBOOK, ISSUES IN COMPETITION LAW AND POLICY 1953 (W. Dale Collins ed., 2008). See also Stefan Thomas, *Ex-ante and ex-post control of buyer power,* in Abusive Practices in Competition Law 283 (F. Di Porto & R. Podszun eds., 2018).

costs narrows, prompting the buyer to demand a larger quantity. Unless the buyer is a perfect price-taker in the downstream market, it will pass on some of its reduced costs to the final market, thereby reducing deadweight loss and increasing consumer surplus.

C. Conceptualization of the labor market demand side

With such a wider perspective of buyer power in mind, how should we now conceptualize the operations of labor markets and with this the exercise of firms' upstream market power? Undeniably, there is no one-size-fits-all answer. Moreover, it is apparent that the response hinges significantly on the institutional characteristics specific to the country or even the sector under scrutiny. We structure our discussion along what we perceive to be key strands of the academic literature, as this provides additional support for our argument that there is not a single "right" conceptualization of the interaction between firms and labor.

For an extended period, the prevailing market model in U.S. labor economics was that of search markets. That model often incorporated bilateral negotiations, where participants considered as given their respective alternative options, such as discovering another job vacancy or another job seeker. Some variations of these models involve firms setting prices, yet they exclude the strategic exercise of market power, as firms take workers' outside options as given, or collective bargaining. [17] Another strand of the earlier literature has looked at collective bargaining. Importantly, negotiations may expand beyond wages to encompass other aspects of a firm's workforce. When negotiations also include employment size, mere shifts in bargaining power between unions and firms may impact only the total wage bill, not the supplied quantity of labor employed. This is akin to the efficient-contracting perspective on the exercise of buyer power, as discussed above. To the contrary, under what is often referred to a "right-to-manage" approach, a firm my increase employment when it successfully negotiates wages downwards.

Recently, U.S. labor economics has veered in a different direction, modeling the labor market similarly to a firm's output market.[18] In these models, firms are viewed as quantity setters, facing an upward sloping labor supply curve, or they set a single wage, also facing an upward sloping labor supply curve. This modeling approach has gained popularity in labor and macroeconomics,

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[17] As the wage level affects workers' "on-the-job search" for better options, a firm may still face an upward sloping supply or retention curve. See Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment,* 39 Int. Econ. Rev. 257–73 (1998); also Alan Manning, *Monopsony in Labor Markets: A Review.* 74 ILR REV. 3–26 (2021).

[18] For this development see David Card, *Who Set Your Wage?,* 112 AM ECON REV. 1075-90 (2022).

also because of how seamlessly it integrates into structural models of both up- and downstream markets. However, these models have essentially hardwired implications. They don't allow for the possibility that the exercise of buyer power for labor input could both reduce wages and increase output. The repercussions of a firm's potential exercise of upstream labor market power rest solely on the elasticity of the labor supply to the individual firm.[19] Given infinite elasticity, a firm essentially behaves as a price taker. Conversely, if a firm's own labor supply exhibits some level of inelasticity, it faces a trade-off and strategically lowers its wage, leading to a reduction in its employment and ultimately, its final output.

Importantly, as in these models the firm unilaterally sets the wage, the last unit of labor does not earn a "rent," so that it is no longer supplied when there is even only a small reduction in the wage. As we have pointed out, such a rent may however arise from collective bargaining or even from pre-employment firm-worker bargaining. And it may also arise when workers use their position within the firm to negotiate wages upwards ("intrafirm bargaining").[20] Then, these monopsonistic models simply no longer apply.

IV Fairness and antitrust

We now pivot to a distinct argument frequently raised in the context of labor markets: the proposition that labor prices shouldn't solely be driven by market forces but should adhere to some concept of fairness. In legal scholarly writings, this fairness notion is sometimes framed as the "welfare of the merging firms' trading partners" be they consumers, or suppliers, the latter including workers as the suppliers of labor.[21] The trading partners' welfare (including the workers' interest in decent wages), in this conception, should be protected as an end in itself irrespective of whether the exertion of demand side power eventually leads to a reduction in consumer rent or not. We contend in the following discourse that while such an argument could indeed influence the collective decision-making process and, consequently, policy formulation, it shouldn't factor into an antitrust evaluation.

[19] We refer to a recent meta-study for empirical research on supply elasticity: Anna Sokolova and Todd Sorensen, *Monopsony in labor markets: A meta-analysis,* 74 ILR REV. 27-55 (2021). The authors report vastly different estimates, documenting discrepancies between different countries but notably also (often discarded) findings of also negative relationships between wages and employment.

[20] See Lars A. Stole and Jeffrey Zwiebel. *Intra-Firm Bargaining under Non-Binding Contracts,* 63 REV ECON STUD. 375–410 (1996).

[21] C. Scott Hemphill and Nancy L. Rose, *Mergers that harm sellers,* 127 Yale L.J. at 2079, 2091 et seq. 2078-2109 (2018).

Before laying out our argument, we make, however, several observations. Our first observation is that we are not blind to the fact that considerations of fairness play even a crucial part in national laws that govern business practices, such as the German law on unfair competition. Fairness is also a concept used in the European Union's Digital Markets Act (DMA), which came into force in November 2022.[22] We are also aware of the fact that representatives of the European Commission have used "fairness" as an attribute to describe the proper enforcement of competition law. Also, the ECJ has alluded to the notion of un-fairness in order to describe the anticompetitive nature of exploitative prices under Article 102 TFEU.[23] As to the use of fairness as a competition law paradigm in these examples, we observe that the notion of fairness still lacks a clear and unified, overarching conceptual foundation in relation to the phenomenon of competition as an economic process. To put it differently: despite the recourse to fairness, it has not evolved into a commonly recognized principle which could be explained in an unambiguous way in an antitrust context. To postulate that a "fair price" is desirable is one thing, but to explain why a certain price is unfair in antitrust terms, for example, is another matter.

That is also mirrored by the existing enforcement paradigms of the EU-Commission in relation to demand side bargaining power. To date, European competition law enforcement has not assessed the outcome in upstream markets in terms of an equitable distribution of rent. It would be misguided to "enrich" competition law and its enforcement with such an objective, or similarly, to characterize the ideal market outcome, which the enforcement of antitrust law should achieve, with such a feature. Our reasons hold true regardless of the identity of the considered market, be it the labor market or a market for other goods and services.

When the objective of maximizing consumer welfare clashes with the goal of a presumed "fair" distribution of rents, there is simply no single metric that can reconcile the two objectives. The task of prioritizing one over the other would then fall to the authorities or courts. This would likely increase legal uncertainty. Additionally, it would make the process susceptible to political influence, given the large margin of discretion it would involve. More importantly, we believe neither antitrust authorities nor courts have a mandate to exercise such discretion, as this represents a balancing of societal priorities that should be left to the respective political processes.

[22] The DMA does not constitute part of the European Union's antitrust law.

[23] Case 27/76. *United Brands Company and United Brands Continentaal BV v Commission of the European Communities.* Chiquita Bananas. ECLI:EU:C:1978:22, para. 252. (14th Court. 1978).

Indeed, when focusing on the labor market and wages, it falls to the political process to establish boundaries for acceptable wages (and other working conditions), thereby reflecting societal priorities and shared beliefs. It is also within the purview of politics to decide on the set of tools to be employed, such as minimum wage provisions or the partial exemption of labor markets from antitrust law provisions. As societal preferences or market and technology conditions change, politics can adjust its objectives and the chosen set of tools accordingly. This, in turn, sets the guidelines and constraints within which market forces operate.

Therefore, it would be a mistake to enlist antitrust law to achieve an outcome that is deemed to be "fair" as a notion that is detached from a clear welfare metric. Delegating the production and consumption of goods and services, along with the setting of prices, to the market liberates antitrust policy from this task and generates economic freedom, free from political interference and control, within set boundaries. By definition, the market outcome is a priori uncertain, and high or low prices serve to signal a shortage or an excess in supply, enabling market forces to respond. Antitrust law, which interferes with firms' freedom, derives its legitimacy from the protection of this process. This speaks against an alternative conception of antitrust law and its enforcement that would aim for a specific desirable outcome, such as "fairness" (ignoring the challenge of operationalizing this objective).

V Some (initial) conclusions

In conclusion, we provide a brief synopsis of our main arguments, which we've grouped into three key points.

(European) Antitrust law encompasses various provisions that safeguard workers as input providers from practices that could restrict competition, such as wage information sharing or no-poach agreements. Moreover, labor law offers additional protection, limiting the applicability of non-compete clauses and often requiring substantial compensation. The enforcement of these laws, however, varies at the national level, as does the relevance of collective agreements, which are exempt from antitrust law. Therefore, whether an enforcement gap exists in the application of antitrust law to labor markets, or if competition is unduly restricted by agreements imposed by firms or negotiated either individually or collectively, should be analyzed with the national legislative framework in mind. Data or studies from countries outside Europe, notably, should be interpreted with caution.

(European) Antitrust also has a long-standing practice of dealing with the exertion of buyer power in upstream markets. The commonly accepted paradigm here is that of bargaining rather than monopsony power. The recent academic literature, however, models labor markets symmetrically to final product markets. It suggests that firms with market power exert this by withholding demand, invariably leading to deadweight loss and a decrease in consumer welfare. These models are, however, not applicable if, due to collective or individual bargaining, also the marginal unit of supplied labour enjoys a rent. Therefore, conclusions about the implications of, for instance, firm mergers, should not be drawn without an analysis of the prevailing pricing/wage-setting institution.

We observed that the European Commission has recently extended antitrust exemptions for collective bargaining to 'solo self-employed persons' to a certain extent. National labor laws protect individual workers' rights, and national policies, such as on minimum wages, aim to rectify market outcomes deemed inadequate. We contend that antitrust law and its enforcement should not be influenced by concerns about what constitutes a 'fair' wage and the appropriate distribution of rents between firms and workers. These issues should be addressed through politics and democratic decision-making.