
Book Review

Posner, Eric A. *How Antitrust Failed Workers*

Ashutosh Kumar¹

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Over the last few years, share of capital has increased while labour share of national income acceleration has decreased globally (Autor et al., 2020; Gomis, 2019; Paul, 2020). Simultaneously, there have been growing concerns about rising concentration in the labour market, providing employers an upper hand over workers in bargaining power, which has redistributed revenues from workers' wages to managerial salary and profits (Furman & Orszag, 2015; Schmidt & Ellis, 2014). The concentration in a labour market may facilitate anti-competitive conduct among employers, which can take the form of anti-competitive agreements such as non-compete clauses in employment contracts and no-poaching agreements amongst employers, which are illegal and subject to antitrust law (Hesse, 2016; Taladay & Mehta, 2017). However, legal proceedings in cases of such collusion in the labour market have historically been fewer than in their product market counterparts (Marinescu & Posner, 2019; Naidu & Posner, 2022; OECD, 2020). Simultaneously, there has been an erosion of legal protection for workers under labour laws due to the collapse of union activity and the changing nature of workers, such as the emergence of informal workers and gig workers. In recent years, there has been a push in mature jurisdictions to extend the scope of application of antitrust law against employers exercising monopsony power to exploit employees (Balestrieri et al., 2018; Marinescu & Posner, 2019; OECD, 2020).

The book under review, authored by Eric A. Posner, provides a comprehensive discussion on the theory of monopsony, its impact on the labour market, and how antitrust law can account for anti-competitive

¹Joint Director (Economics), Competition Commission of India;
ashutosh@cci.gov.in

practices adopted by monopsonist employers. The book comprises three parts divided into nine chapters. Part I presents the theoretical backdrop of labour monopsony and its implications for wages and employment. Thereafter, the author provides a background of antitrust law in the US and suggests that labour monopsony can be addressed through antitrust law, although it has played almost no role in addressing the issue. The author argues that this neglect is due to the adoption of consumer welfare standards by legal theorists as well as economists' assumptions that labour markets are generally competitive. Part II explains various anti-competitive practices adopted by employers as well as frameworks and tools to analyse cases pertaining to the labour market. The author's discussion relies on an evidence-based analysis of the legal jurisprudence of antitrust statutes and economic literature in the last few decades in the US. The author argues that existing antitrust law could easily be applied to the labour market with a few reforms. Part III discusses the limits of antitrust law in correcting power imbalances in labour markets and suggests that, with a slight reform, antitrust law can be significantly more valuable in curbing illegal practices of employers. The book further argues that, while antitrust law can raise competition in the labour market, it cannot offset past distortions introduced into the labour market by monopsonists. In this regard, the author has suggested additional policy tools to counter labour monopsony and its distortions.

The book begins with a historical account of monopsony and the application of antitrust law in the US labour market. It proceeds to conclude that, after more than 100 years of antitrust law enforcement, courts have done little to clarify the confusion regarding the extent of application of antitrust law in the labour market. The reason behind this confusion is twofold. Firstly, antitrust laws and national labour laws embody two important but often conflicting pronouncements of public policy. Secondly, the US Supreme Court qualified labour's freedom from US antitrust law by requiring that labour unions act in their self-interest and not in association with non-labour groups. Thus, Posner points out that there is a partial inapplicability of antitrust law to labour unions and employees in their collective bargaining activities; however, the activities of employers as buyers of labour fall within the purview of the application of antitrust law.

The aforementioned bifurcation of the jurisprudence of antitrust law led to a bifurcation in economic theory. A group of economists advanced the field of industrial organisation to address issues related to the monopolisation of product markets, whereas another group of economists developed the field of labour economics, which focuses on labour and employment regulations. As a result, labour economists never focused on the development of tools relevant to estimating the impact of labour market power or monopsony. Similarly, legal scholars were influenced by the norms of consumer welfare that prevailed in the early 20th century, which focused more on product market analysis, as consumers were primarily being injured by price increases due to product market power.

However, as Posner explains, certain events in the US over the last decade have drawn the attention of scholars as well as antitrust authorities towards the activities of employers who have used their market power over the labour market to suppress wages and control the mobility of workers. For example, in 2010, the US Department of Justice (DOJ) initiated an antitrust case against big tech companies, including Apple and Google, for entering no-poach agreements. Thereafter, a 2017 report revealed that several companies imposed no-poach clauses on their franchisees. Meanwhile, the Federal Trade Commission (FTC) and the antitrust division of the DOJ jointly issued a guidance for human resource professionals with respect to the applicability of antitrust laws in the employment market. These events prompted the publication of research papers that documented the pervasiveness of labour monopsony, which suppresses workers' wages.

Against the aforesaid backdrop, Posner proposes that antitrust law be brought to bear against labour monopsony. According to him, enforcement of antitrust law in labour markets should be stronger than product markets, as labour markets are likely to be more concentrated than product markets and more susceptible to anti-competitive behaviour by firms.

Labour Monopsony and its Measurement

In labour markets, a *monopsony* is a sole or dominant employer in a labour market, which allows it to determine wages. The author identifies several sources of labour market power or monopsony from economics literature, such as search friction, job differentiation, and labour market

concentration. According to him, these sources also have counterparts in the product market, viz., search friction, product differentiation, and market concentration.

The author further argues that labour markets are much more vulnerable than product markets due to matching frictions that restrict workers' opportunities to switch jobs. He further explains that the functioning of the labour market differs from the product market, as hiring an employee requires two sets of preferences and characteristics to match – those of the employer and of the employee. Alternately, in the product market, the buyer only cares about the nature and characteristics of the product in question.

The author then discusses tools to assess the monopsony of labour market power. He mentions that defining the relevant market is a preliminary step towards the assessment of market power, which is relatively unexplored in the literature of competition law and economics. The author briefly mentions that the relevant product (labour) market can be defined by the nature of the work, its intensity, flexibility, and so on, whereas the geographical market can be defined by the willingness of workers to relocate or travel for a particular work.

According to the author, the most direct measure of assessing labour market power is labour supply elasticity, which refers to the sensitivity with which workers react to changes in wages; a relatively low level of elasticity indicates the existence of monopsony in the market. The author also introduced the term *residual labour supply elasticity*, which is used if the labour market power of a particular firm is to be measured and refers to the sensitivity with which workers react to changes in wages at a particular firm. High residual labour supply elasticity of a firm indicates that the labour market from which a firm hires its workers is competitive, and the firm will not be able to exploit workers.

The second method to analyse labour market power is through markdown, which is analogous to the markup used in product market analysis. Markdown estimates the gap between the wage and the marginal revenue product of workers. A high markdown indicates a firm's high monopsony power. The markdown is the direct measure of labour power of a firm and is inversely related to the elasticity of labour supply.

The author has discussed *diversion ratio* as another measure of market power, defining it as the proportion of customers switching from one product to another in response to a price increase of the former. This ratio would be higher when two firms producing these products are close competitors. Another well-known tool to assess concentration in labour market is the Herfindahl–Hirschman Index (HHI), which can be calculated as the sum of squares of the individual market share of all employers in the labour market.

Anti-Competitive Conduct in the Labour Market

The author mentions that courts in the US rarely adjudicate the Sherman Act for cases related to the labour market. Most cases are dismissed for reasons such as plaintiff's failure to define relevant labour market and failure to show that demand for employees is inelastic. However, plaintiffs have relatively greater success in proceedings against employers who have entered no-poaching agreements, i.e., agreements between two or more firms not to hire away each other's employees.

The author further argues that, depending on the facts and circumstances of cases, no-poach agreements may be analysed under either the per se or rule of reason standard. In case of a "naked" no-poach agreement, i.e., where the agreement has no purpose other than to restrict competition, the per se standard is applied, otherwise the rule of reason is applicable. The second issue in the analysis of such cases is whether the agreement is vertical or horizontal; in case of the former, the question arises whether the agreement is naked or ancillary. If a restraint is considered naked, the restraint is per se unlawful, whereas the rule of reason standard is applied in cases of ancillary as well as vertical agreements.

According to the author, non-compete agreements also negatively impact labour market competition. These agreements are entered into between employer and employee and prevent employees from working for competitor firms. The author mentions that antitrust law takes aggressive stances on no-poaching agreements but fails to take action on non-compete clauses, as the theoretical categories used by antitrust law view non-competes as vertical rather than horizontal agreements, and as per the provisions of antitrust law, horizontal agreements are suspected because they directly reduce competition. The author argues that this perception of the courts is not true, as a non-compete has greater anti-

competitive effect than a no-poaching agreement; the former prohibits employees from working for competitors, whereas the latter prevents employment only with competitors with whom the employer has signed an agreement.

Mergers

The author mentions that competition regulators have devoted little attention to labour markets while assessing cases related to mergers, and therefore, the tools to analyse such issues are also not developed. As regards the economic tool to define relevant market, the author has mentioned that competition authorities or courts may adopt a small but significant and non-transitory decrease in wages (SSNDW), which is analogous to a small but significant and non-transitory increase in price (SSNIP). The author further mentions that, in recent years, the upward pricing pressure (UPP) approach of measuring concentration in the product market has been used in merger analysis to estimate unilateral effects resulting from a merger. Analogous to UPP, downward wage pressure (DWP) can be used to estimate labour harm. The regulator may also calculate markdown (the amount by which workers' wages are below their marginal revenue product) to estimate labour harm. If either of these two figures exceeds the efficiency benefits of the proposed merger, the merger is prohibited depending on the facts and circumstances of the case.

The author mentions that "efficiencies" is the most important factor to be considered during merger analysis in product market cases, which is subject to a consumer welfare standard. According to the author, by analogy to consumer welfare, labour market competition should be subject to the worker welfare standard. The application of worker welfare standard means that the merger would be permitted if it sufficiently increases workers' marginal revenue product in a manner that will not be fully absorbed by lower prices or increased employer profits.

Gig Economy and Independent Contractors

The existing labour laws recognise a distinction between two types of workers – employees and contractors. A worker classified as an employee is protected by the minimum wage law whereas a contractor is not, though their work may be similar. The author mentions that, owing to technological advancements, workers traditionally classified as employees

are being treated as contractors and being exploited, as they are not entitled to the protections of employment laws. The author further states that legal tests for distinguishing employees and contractors are ambiguous, with the common being control, i.e., a worker will be considered an employee if the labour buyer (employer) “controls” her, otherwise she will be a contractor. Further, the author elucidates the legal status of gig workers and states that they are suspended between employee and contractor and thus, do not fall under the purview of labour laws.

Conclusion

The book provides a new context within which to apply antitrust resources to labour market problems by merging economic thinking with legal insight. Application of the author’s proposition by antitrust authorities would be specifically helpful in promoting labour and social welfare in the face of erosion of workers’ protections with the changing nature of employment and collapse of union activity. Of late, there has been a push in mature jurisdictions to extend the scope of application of antitrust law against employers who exercise monopsony labour power to exploit employees. The book makes a strong argument that there is a scope for competition authorities to address such competition issues in the labour market without interfering with labour laws. As the labour market remains unexplored territory for most competition authorities, they could conduct research to better understand the issues of labour market concentration.

While the book focuses on the US, literature suggests that such anti-competitive conduct is prevalent globally, including in India. The provisions of the Competition Act, 2002 (‘Act’) are applicable upon trade unions as well as monopsonist employers if the activities of any such union aim to restrain competition or harm consumers, or attempt to bring about any understanding or agreement so as to limit or control production, supply, markets, etc. Recently, it was reported that two large firms in India have entered into a no-poaching agreement, which will be applicable on all their businesses (Gopalan, 2022). Further details of this alleged agreement are not available in the public domain. The aforementioned agreement or labour market collusion in India would fall within the ambit of Section 3(3) of the Act.

As proposed by the author, analysis of such cases pertaining to the labour market involves a different approach from those in agreements dealing with the product market. The Competition Commission of India (CCI) has investigated a few cases involving the issue of trade unions, e.g., Case No. 32 of 2013 (*Shri P.V. Basheer Ahamed vs. M/s Film Distributors Association, Kerala*) and Case No. 19 of 2014 (*Shri Vipul A. Shah vs. All India Film Employee Confederation*). In both cases, CCI held that the concerned trade associations have contravened the provisions of Section 3(3) of the Act by imposing restrictions to limit the concerned market. However, as per information available in the public domain, CCI has not investigated any cases of anti-competitive conduct of monopsonists in the labour market till date.

It is pertinent to mention that the US court recently blocked a merger between two major publishing houses—Penguin Random House and Simon & Schuster—as it had the potential to cause harm to workers—in this case, authors—through consolidation among publisher/buyers (Department of Justice, 2021; Explained Desk, 2022). CCI may also consider such factors related to labour harm while assessing the merger, depending on the facts and circumstances of the case.

The recent literature on monopsony in the labour market and fall in the labour share of income have encouraged global competition authorities to apply competition laws to labour markets, and CCI may not be far behind. Further, in the face of growing labour market flexibility and capital market liberalisation in India, which is conducive to enhancing the welfare of capital whilst potentially causing deleterious effects on workers (Patnaik, 2016; Patnaik, 2021; Stiglitz, 2002), issues related to wage fixing and exploitation of workers are likely to come to the forefront. Therefore, for businesses to remain competitive in labour markets, employers or human resource professionals must ensure that their employment practices comply with competition laws.

References

- Autor, D., Dorn, D., Katz, L. F., Patterson, C., & Van Reenen, J. (2020). The fall of the labor share and the rise of superstar firms. *The Quarterly Journal of Economics*, 135(2), 645–709.

- Balestrieri, F., Mantovanelli, F. G., & Seitz, S. (2018). The Department of Justice and Federal Trade Commission guidance for human resources professionals and recent comments by enforcement officials related to no-poaching agreements. *Distribution: The Newsletter of the Distribution & Franchising Committee of the Section of Antitrust Law of the American Bar Association*, 22(1).
- Competition Commission of India, Case No. 19 of 2014 (Issued on October 31, 2017).
- Competition Commission of India, Case No. 32 of 2013 (Issued on December 23, 2014).
- Department of Justice. (2021). *Justice Department sues to block Penguin Random House's acquisition of rival publisher Simon & Schuster* [Press release]. <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>
- Explained Desk. (2022). Why a US court blocked Penguin Random House and Simon & Schuster merger. *Indian Express*. <https://indianexpress.com/article/explained/why-a-us-court-blocked-penguin-random-house-and-simon-schuster-merger-8245165/>
- Furman, J., & Orszag, P. (2015). *A Firm Level Perspective on the Role of Rents in the Rise in Inequality*. [Presentation at Columbia University's "A Just Society" Centennial Event in Honor of Joseph Stiglitz].
- Gomis, R. (2019). *The Global Labour Income Share and Distribution*. ILO.
- Gopalan, K. (2022). 'Talent hard to find': What Ambani-Adani 'no-poaching pact' really means. *Business Today*. business.today.in/latest/corporate/story/talent-hard-to-find-what-the-ambani-adani-no-poaching-pact-really-means-348149-2022-09-26
- Hesse, R. B. (2016). *And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement* [Presentation at the Global Antitrust Enforcement Symposium].
- Marinescu, I., & Posner, E. A. (2019). Why has antitrust law failed workers? *Cornell L. Rev.*, 105, 1343.
- Naidu, S., & Posner, E. A. (2022). Labor monopsony and the limits of the law. *Journal of Human Resources*, 57(S), S284–S323.

OECD. (2020). *Competition in Labour Markets*.

Patnaik, P. (2016). Economic liberalisation and the working poor. *Economic and Political Weekly*, 51(29).

Patnaik, P. (2021). Three Decades of Economic Liberalization. *IDEAs Blogs*.
<https://www.networkideas.org/news-analysis/2021/08/three-decades-economic-liberalization/>

Paul, S. (2020). *Understanding the global decline in the labor income share*. IZA World of Labor.

Schmidt, K. G., & Ellis, B. C. (2014). The relative bargaining power of employers and unions in the global information age: A comparative analysis of the United States and Japan. In *Enterprise Law*. Edward Elgar Publishing.

Staiger, D. O., Spetz, J., & Phibbs, C. S. (2010). Is there monopsony in the labor market? Evidence from a natural experiment. *Journal of Labor Economics*.

Stiglitz, J. E. (2002). Employment, social justice and societal well-being. *International Labour Review*, 141(1-2), 9-29.

Taladay, J., & Mehta, V. (2017). Criminalization of wage-fixing and no-poaching agreements. *Competition Policy International (CPI)*, June.