CPI's North America Column Presents:

A Proposed Pro-Labor Step for Antitrust

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Decades of aggressive mergers and acquisitions have concentrated markets, which can impose serious harm, including to the workers whose jobs are key targets of merger "efficiencies." We urge antitrust enforcers to protect both working Americans and healthy markets by specifying that, as a matter of prosecutorial discretion, layoffs of workers will not be considered pro-competitive "efficiencies" that can offset the harms of otherwise anti-competitive mergers.

The *Horizontal Merger Guidelines* of the U.S. Department of Justice Antitrust Division and the Federal Trade Commission (2010) state that "The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." They go on to state that one way – not the only way – for efficiencies to accomplish this is "by preventing price increases."

Some U.S. courts – though not the Supreme Court, at least not yet – have similarly ruled that "a defendant may rebut the government's *prima facie* case with evidence showing that the merger would create significant efficiencies in the relevant market" (*FTC v. University Health*, quoted in *FTC v. Arch Coal*).

The *Commentary on the Horizontal Merger Guidelines* issued by the two agencies (2006, on the preceding version of the *Guidelines*) elaborates: "Economic analysis teaches that price reductions are expected when efficiencies reduce the merged firm's marginal costs, i.e., costs associated with producing one additional unit of each of its products." Reductions in marginal costs – sometimes proxied for by variable costs – are here contrasted with reductions in fixed costs, which "typically are not expected to lead to immediate price effects and hence to benefit consumers in the short term."

The economic thinking behind such an enforcement strategy is straightforward. If production can be reorganized so as to maintain output while freeing certain inputs, these can go to alternative uses and produce other goods valued by society. Other things being equal, a direct increase in producer surplus – lower costs for the same output – should lead to increases in consumer surplus both directly, through lower prices of the goods produced in the subject market, and indirectly through output increases in other markets. As the argument is commonly stated by some economists and decision makers, the same thinking applies whether the inputs freed from the subject market are physical goods like oil and steel, or whether they are non-commodifiable resources, like human employees.

This suggests a thought experiment. Suppose an agency (or court) were just on the margin of deciding whether the efficiencies claimed from a merger were sufficient to overcome a loss of competition and so to lead to lower prices from the merger. Now suppose the parties bring in a new claim: We thought we were firing 10,000 workers, saving the combined company (say) $500M per year; we've just discovered that we can actually fire 20,000 workers, doubling those savings to $1B per year.

Would the decision no longer be a close call? Would the agency agree that firing 10,000 additional workers tips the scale toward making the merger a good thing for society? Would it matter if they were low-wage or high-wage workers? Would it matter if the unemployment rate were high or low? If the share of wages in the economy were becoming steadily lower?

Under other circumstances, we might agree that such questions should matter. If we were in a situation of low unemployment, great demand for labor, and rising wages, we might not oppose considering labor savings in merger review so much. But labor markets are not working well -- for at least partly macroeconomic reasons. So we suggest putting all these questions on the shelf, and recognizing that in fact labor's special nature is best treated, at least under our present circumstances, by disregarding layoffs entirely when counting merger efficiencies.

> Labor – human beings – is not just another commodity, special only because it requires lunch and bathroom breaks. Labor – human beings – is what society is, and is all about. As Karl Polanyi wrote in *The Great Transformation*:

Labor, land, and money are essential elements of industry; they also must be organized in markets; in fact, these markets form an absolutely vital part of the economic system. But labor, land, and money are obviously not commodities.... To allow the market mechanism to be the sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society. (pp. 72-73)

Why is labor different? Redundant workers suffer, and their families suffer, in ways that material and intangible assets cannot, when they become less desired. We suggest that in particular situations, labor markets display unusual frictions, under which workers made redundant do not quickly go to alternative uses and produce other goods valued by society. The result is that individuals, families, and even regions may suffer extended periods of unemployment, with both human costs and social costs unpriced in the merging companies' accounts. Those losses differ categorically from the fate of unemployed widgets. (Yes, we understand that widgets are produced by workers, but we are addressing first-order effects here.)

We are not arguing that merging firms should be prohibited from shedding workers. Firms permitted to merge by antitrust law should organize their production subject to their own judgment and the discipline of their markets. The law, however, should give them no *incentives* to shed workers, with more workers made redundant increasing the odds of a merger being approved. Such a result encourages narrow-blinkered economics to trump broader social impacts.

An obvious response to this argument is that the antitrust laws are not full-employment laws: if society wishes labor markets to operate more smoothly, there are mechanisms like training programs and demand stimulation available for addressing that goal directly. Societies also provide for their displaced and less fortunate with social safety nets. We applaud and encourage both. However, that doesn't justify a policy whose operation is based on the decidedly counterfactual assumption that labor markets work smoothly now. If a proposed merger promises to make thousands of workers redundant, and if we have good reason to believe they will not easily find alternative employment, then – to quote Richard Pryor – who are you going to believe, me or your lying eyes?

We respectfully propose that the U.S. enforcement agencies should disregard claimed savings that result only from layoffs in weighing merger efficiencies. A simple statement of changed enforcement intentions would do the trick – and help American workers.

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