Monopsony in Labour Markets: The Corporate Law Contribution

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Abstract[*]

Orthodox economics, in general, assumes that labour markets are efficient, diffuse and competitive. However, recent research in the US and Europe has dispelled this myth by suggesting that they are far more concentrated than had previously been understood. In light of this evidence, this paper examines how the design of corporate law and institutions plays a part in facilitating and embedding labour market monopsony. This point is significant as standard economic theory directs that the payment of monopsonistic wage rates to employees may well overinflate the price that consumers pay for the goods and services that the monopsonist employer sells into product and services markets. As such, in certain conditions, corporate law reforms that address monopsony in labour markets may have positive knock-on effects on services and product markets as well as labour markets, enhancing overall welfare and benefitting both workers and the consumers of the products and services of such employers. This paper will provide a sketch as to the potential form of such corporate law reforms, focusing in particular on the regulation of takeovers.

1. Introduction

Orthodox economics provides a standard model of the operation of labour markets. According to this ecumenical account, they are both competitive and diffuse, owing to the sizeable numbers of (potential) prospective labour suppliers and hirers in play at both ends of the

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marketplace.[1] By this account, the wages paid to suppliers of labour, i.e. workers, will be expressed at the intersection of labour supply and demand.[2] This will reflect the specific marginal product of each worker, which is the proportion that they individually contribute to the overall productivity of the firm.[3] In this way, the wage is both efficient and just. And since the wage or salary of the worker is dictated by forces in the labour market, employers have no control over the rate of pay, which they are powerless to manipulate.[4] If they pay their workers less, they will quit and go to work for another employer paying the market rate, and if the workers claim more, the employer will replace them with new staff who are willing to work for less. Economic orthodoxy dismisses the relevance of imbalances in power dynamics in the labour market or particular employment relationships on wage rate outcomes. It is argued that the higher levels of bargaining power that employers wield over their employees has no effect on labour supply and demand interactions in the market. In the final analysis, the notion that labour markets are beset by monopsony is rejected out of hand or such conditions are written off as exceptional at worst.[5]

However, there is now growing evidence that labour markets do not operate as efficiently as predicted by standard economic accounts. Instead, the research of Azar, Naidu, Posner, Marinescu, Hovenkamp and others has demonstrated that there are strong grounds for thinking that concentration is a regular feature of labour markets, particularly in suburban and non-urban areas.[6] This is partially attributable to the fact that labour markets are far more

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[1] A. Marshall, *Principles of Economics* (Macmillan, 1890); J. R. Hicks, *The Theory of Wages* (Macmillan, 1932); R. D. Blair and J. L. Harrison, *Monopsony in Law and Economics* (Cambridge, UK, CUP, 2002) 1-2.

[2] J. Vercheran, "Labour – A Heterodox Approach" (Palgrave Macmillan, 2014) 53-55; M. L. Wachter, "Neoclassical Labor Economics: Its Implications for Labor and Employment Law" in C. Estlund and M. Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Cheltenham, Edward Elgar, 2012) 20, 21-22.

[3] J. Vercheran, "Labour – A Heterodox Approach" (Palgrave Macmillan, 2014) 62-65 and 162-165.

[4] R. S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford, OUP, 2017) 52.

[5] M. L. Wachter, "Neoclassical Labor Economics: Its Implications for Labor and Employment Law" in C. Estlund and M. Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Cheltenham, Edward Elgar, 2012) 20, 24; R. D. Blair and J. L. Harrison, *Monopsony in Law and Economics* (Cambridge, UK, CUP, 2002) 67; R. S Taylor, "Market Freedom as Antipower" (2013) 107 *American Political Science Review* 593, 596; M. Reynolds, *Power and Privilege: Labor Unions in America* (New York: Universe Books, 1984) 59 and R. S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford, OUP, 2017) 51.

[6] J. Azar et al*.*, *Labour Market Concentration*, NBER Working Paper No. 24147 (2017) https://www.nber.org/papers/w24147; J. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. 101886 (2020); OECD, *Competition in Labour Markets*, OECD.org (Feb.26 2020), http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm; S. Naidu et al., "Antitrust Remedies for Labor Market Power" (2018) 132 *Harvard Law Review* 536, 536-538; I. Marinescu and H. Hovenkamp, "Anticompetitive Mergers in Labor Markets" (2019) 94 *Indiana Law Journal* 1031, 1032-1033; E. Posner, *How Antritrust Failed Workers* (Oxford, OUP, 2020) 1-3; I. Marinescu & E. A. Posner, "Why Has Antitrust Law Failed Workers?" (2020) 105 *Cornell Law Review* 1343; E. Posner, "Antritrust and Labor Markets: A Reply to Richard Epstein" (2022) 15 *New York University Journal of Law & Liberty* 389, 392-397; S. Naidu &

locally orientated and geographically contingent than previously understood.[7] In addition, the phenomenon is not limited to the United States and extends to Europe,[8] with publications illustrating the existence of monopsonistic or oligoposonistic labour markets in Portugal,[9] the UK,[10] Norway,[11] Austria[12] and France.[13] There are two adverse consequences of such monopsony – one of which is certain and the other, potential: first, wage stagnation, inasmuch as the wage paid is lower than what otherwise ought to have been the competitive market rate reflective of the level of each worker's marginal product; and secondly, the possible over-inflation of the price paid by consumers or businesses for the products or services of the monopsonist employer: more explanation later on the dynamics of this process.

It is obvious that the rules, principles and doctrines of competition and anti-trust law can operate in a way that either constrains or enhances the degree of monopsony in the labour market. What is less clear is whether the form and content of corporate laws and norms of corporate governance have any role to play in facilitating and embedding the degree of monopsony in labour markets. The primary contention of this article is that the content of corporate laws, norms of corporate governance and their enforcement (or lack thereof) do indeed enable labour market monopsony to function as a wealth-threatening or wealth-minimisation device. In the same way, the reform of corporate law can provide a solution – albeit admittedly, partial – to monopsonistic wage rates. In particular, the form, substance and scope of corporate takeover regulations will have an impact on labour market monopsony levels.

E. A. Posner, "Labor Monopsony and the Limits of the Law" (2022) 57 *The Journal of Human Resources* S284; C. Estlund, "Rethinking Autocracy at Work" (2018) 131 *Harvard Law Review* 795, 818-819.

[7] H. Hafiz, "The Law of Geographic Labor Market Inequality" (2024) *Pennsylvania Law Review* (forthcoming - 67); J. Azar et al, "Labor Market Concentration" (2022) 57 *Journal of Human Resources* S168, S179.

[8] Research by Satoshi et al illustrates that 18% of employees in Austria, Belgium, Czech Republic, Estonia, France, Germany, Latvia, Luxembourg, the Netherlands, Sweden, Switzerland, and the United Kingdom are working in labour markets that are moderately concentrated, with a further 11% in highly concentrated labour markets: Araki Satoshi, Andreas Bassanini, Andrew Green, Luca Marcolin and Cristina Volpin, "Labor Market Concentration and Competition Policy Across the Atlantic" (2022) 90 *University of Pennsylvania Law Review* 339, 342.

[9] Pedro S. Martins, "Making Their Own Weather? Estimating Employer Labour-Market Power and Its Wage Effects" 15 (Ctr. for Globalization Rsch., Working Paper No. 95, 2018).

[10] Will Abel, Silvana Tenreyro & Gregory Thwaites, "Monopsony in the UK" 3–4 (Ctr. for Econ. & Pol'y Rsch., Discussion Paper No. 13265, 2018).

[11] Samuel Dodini, Michael F. Lovenheim, Kjell G. Salvanes & Alexander Willén, "Monopsony, Skills, and Labor Market Concentration" 14 (Ctr. For Econ. & Pol'y Rsch., 2020).

[12] Gregor Jarosch, Jan Sebastian Nimczik & Isaac Sorkin, "Granular Search, Market Structure, and Wages" 43 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26239, 2019).

[13] Ioana Marinescu, Ivan Ouss & Louis-Daniel Pape, "Wages, Hires, and Labor Market Concentration" (2021) 184 *Journal of Economic Behavior & Organization* 506, 510–13.

It should be stressed that the methodological assumptions underpinning the economic models adopted in this paper are ones that cling faithfully to the tenets of orthodox economics. In this way, the analytical framing of this paper is one that proposes reforms nudging labour markets and wage/earning outcomes in the direction of – but without necessarily approaching or reaching – a competitive equilibrium. As such, while accepting that there is great value in more heterodox forms of economics – such as the new institutional economics of North and Williamson, or the institutionalist economic perspective of John R Commons – which alongside the nascent law and political economy scholarship interrogates and questions neoclassical perspectives, this paper applies the textbook neoclassical mode of analysis.[14] In doing so, it accepts that corporate law reform is itself insufficient to achieve the aforementioned competitive market equilibrium and that the proposals will need to operate alongside a broader suits of legal changes that take in anti-trust/competition law and labour law.[15]

The article is structured as follows: first, having provided some initial explanation of the evidence for, and the consequences of, labour market monopsony in section 2, the causes of this phenomenon are set out in section 3. Section 4 turns to an exposition of the ways in which corporate law and corporate governance standards make a contribution to the emergence of such monopsony. Sections 5 and 6 examine the existing corporate takeover and merger control regime before identifying the shape of potential corporate law and governance reforms that could tackle labour market concentration and monopsony. Section 7 draws together relevant conclusions from the foregoing discussion, making the point that corporate law reform will be insufficient.

2. The Evidence for, and Implications of, Monopsonistic Labour Markets

Monopsony is the opposite of the term "monopoly" and its origins can be ascribed to the twentieth century economist Joan Robinson: if imperfect competition in a product market gives rise to monopoly, this means that there is only one supplier of that product; and by the same token, if imperfect competition in a product market gives rise to monopsony, then this is

[14] New Institutional Economics: R. Coase, "The Nature of the Firm" (1937); R. Coase, "The Problem of Social Cost" (1960); D. C. North, *Institutions, Institutional Change and Economic Performance* (CUP, 1990); and O. Williamson, "The New Institutional Economics: Taking Stock, Looking Ahead" (2000) 38 *Journal of Economic Literature* 595. Institutionalist economics: J. S. Commons, *Institutional Economics* (Macmillan, 1934), S. Deakin, D. Gindis, G. M. Hodgson, K. Huang and K. Pistor, "Legal Institutionalism: Capitalism and the Constitutive Role of Law" (2017) 45 *Journal of Comparative Economics* 188. Law and political economy: J. S. Purdy, D. Singh Grewal, A. Kapczynski and K. S. Rahman, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis" (2020) 129 *Yale Law Journal* 1784.

[15] S=For discussion, see D. Cabrelli, "Labour Market Monopsony and the Employment Relationship" (forthcoming).

equivalent to only one buyer of the relevant product.[16] Meanwhile, oligopoly and oligopsony refer to those circumstances where there are only a few firms selling into or buying from a particular market. There are two principal techniques that are commonly adopted by anti-trust and competition lawyers to determine the degree of concentration in product markets, i.e. the level of monopoly or oligopoly.[17] The first is the "concentration ratio" which measures the market share of the top "N" firms in a particular market, e.g. "C4 = 60%" means that the top four firms have captured 60% of the market share. While useful, the chink in the concentration ratio's armour is that it fails to cover the distribution of the market share held by the remaining firms. It can be contrasted with the Herfindahl-Hirschman Index (HHI) methodology which is used extensively by the European Commission to identify a lack of competition in product and services markets.[18] It identifies the square of the fraction of the market controlled by firms selling into a particular market, multiplied by a factor of 10,000.[19] Where the figure of 0 is produced, this is consistent with no concentration whatsoever, compared with a value of 10,000 which is attained where there is a single monopolist in operation.[20] A calculation that provides a figure below, but closer to, 10,000, is consistent with oligopoly in the market: e.g. a value of 1,500 or 2,000, depending on the jurisdiction concerned.[21]

When the HHI is flipped and applied to the labour market – to gauge the effect of firms buying from that market – the results have been surprising. They have shown either moderate or high levels of monopsony.[22] The academic literature also suggests that 10% higher concentration in the labour market is responsible for a drop in wages, ranging from values of 0.1% to 1%.[23] As such, the effect on the wage levels of the workers of monopsonist employers is suppressive, to the extent that they are set below the market equilibrium competitive rate,

[16] Joan Robinson, *The Economics of Imperfect Competition* (London, MacMillan, 1969).

[17] OECD (2021), *Methodologies to measure market competition, OECD Competition Committee Issues Paper* 11-13*,* available at https://oe.cd/mmmc

[18] See the guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ((OJ [2004] C31/5) Arts 16-21.

[19] S. Naidu et al., "Antitrust Remedies for Labor Market Power" (2018) 132 *Harvard Law Review* 536, 576 and A. Manning, "Monopsony in Labor Markets: A Review" (2021) 74 *ILR Review* 3, 8.

[20] See E. Posner, *How Antritrust Failed Workers* (Oxford, OUP, 2020) 26-27, 69-70 and 36.

[21] For example, the value will be higher in the US, but lower in the EU.

[22] S. Naidu et al., "Antitrust Remedies for Labor Market Power" (2018) 132 *Harvard Law Review* 536; I. Marinescu and H. Hovenkamp, "Anticompetitive Mergers in Labor Markets" (2019) 94 *Indiana Law Journal* 1031; E. Posner, *How Antritrust Failed Workers* (Oxford, OUP, 2020); I. Marinescu & E. A. Posner, "Why Has Antitrust Law Failed Workers?" (2020) 105 *Cornell Law Review* 1343; S. Naidu and M. Carr, "If You Don't Like Your Job, Can You Always Quit? Pervasive Monopsony Power and Freedom in the Labor Market" (2022) 3 *Journal of Law and Political Economy* 131.

[23] S. Naidu and M. Carr, "If You Don't Like Your Job, Can You Always Quit? Pervasive Monopsony Power and Freedom in the Labor Market" (2022) 3 *Journal of Law and Political Economy* 131, 134. See also Y. Qiu and A. Sojourner, "Labor-Market Concentration and Labor Compensation" (2023) ILR Review (forthcoming) 1.

which is where the point at which labour supply and demand intersect. Rather than being paid their marginal product, workers are receiving less than standard economic models would predict. And it has even been estimated that the pay packets of workers are worth only 80-85% of the value of what they would have been paid at the competitive market rate.[24]

Economic models have illustrated the impact of wage suppression on the prices charged by monopsonistic employers for their goods and services to business and consumers in the product and services markets. One might expect that the employer would pass on the savings they have derived from lower wages to the consumers of their goods and services. Indeed, this is one possibility: there is evidence that the business models of firms such as Amazon and Walmart do precisely that, i.e. they lower their input costs by paying exploitative wages to their workers in order to offer the lowest possible prices to their customers.[25] This is what we will call possibility number 1 ("Possibility No. 1). The economic literature has presented a number of mechanisms by which lower wages may be filtered through downstream to the product or services market to the benefit of consumers and businesses. First, where the labour supply is inelastic and demand and supply are equal. Secondly, if the employer is a single monopsonist in the labour market and sells into a perfectly competitive product or services markets where those in competition with the employer experience marginal costs. In such a case, the competitors would increase their output to make good the monopsonist's fall in output. Other situations where consumers will not be harmed by lower input costs in the labour market are where the monopsonist employer substitutes labour for capital or responds to the lower input costs by increasing investment levels that generate new employment and displace the effects of the monopsony.[26]

However, to claim that this proposition is one of general application would be wide of the mark.[27] Instead, economic modelling demonstrates that there are two other possibilities, both of which harm consumers and firms purchasing goods and services from monopsonist or oligopsonist employers. First, when selling in the product or services market, the monosponist employer may also be a monopolist: this stands to reason, since if there is only a single buyer

[24] S. Naidu and M. Carr, "If You Don't Like Your Job, Can You Always Quit? Pervasive Monopsony Power and Freedom in the Labor Market" (2022) 3 *Journal of Law and Political Economy* 131, 134 and 153. S. Naidu et al., "Antitrust Remedies for Labor Market Power" (2018) 132 *Harvard Law Review* 536, 538 and 565.
[25] L. M. Khan, "Amazon's Antitrust Paradox" (2017) 126 *Yale Law Journal* 710.
[26] L. Alexander & S. C. Salop, "Antitrust Worker Protections: The Rule of Reason Does not Allow Counting of Out-of-Market Benefits" (2023) 90 *University of Chicago Law Review* 273, 282-283.
[27] L. Alexander & S. C. Salop, "Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers" (2023) 90 *University of Chicago Law Review* 273, 280.

of a specialist form labour of a particular type in an industry, then it may also (but not necessarily) be a monopolist when it sells its products or services (designed, produced or served by those workers) into the product or services market. In such a case, product prices charged to consumers and firms will be higher than the competitive market rate. This will result in higher prices for consumers and firms who purchase those products or services. This is what we refer to as possibility number 2 ("Possibility No. 2).

As for the second alternative possibility, it may be that the product or services market into which the monopsonist employer sells its products or services is instead competitive. But how can it be that the monopsonist employer is not also a monopolist when it engages with the product or services market – after all, if the monopsonist employer is the only buyer of labour that is needed to deliver a product or service, then surely that firm will be the only seller of those products or services? Although initially counterintuitive, a moment of reflection reveals how it is perfectly possible for an uncompetitive labour market to operate closely alongside a competitive product and services market. For example, consider the situation where the labour market from which the employer hires its labour is concentrated in a particular geographical area, but the product or services market into which it sells its goods or services is regional, national or international. In such a case, the latter may quite conceivably boast a very large number of market participants. As such, the monopsonist employer will not be a monopolist and will have capacity to respond to the fall in their input prices (i.e. the cost of labour) by controlling their firm-specific productivity levels so that they can increase their output profits when they sell their products or services.[28] They can do so by adjusting their productivity rate (i.e. the volume of the products or services they supply to the market) so that it is consistent with the relevant price at which products and services of the kind that they manufacture or supply are presently being sold in the market.[29] They then sell their own goods or services into the market at that level. The most straightforward way for the monopsonist employer to reach the correct rate of product that reflects the price for the goods and services in the competitive product or services market is to restrict the supply of labour that it hires from the labour market.

[28] S. J. Schwab, 'Law-and-Economics Approaches to Labour and Employment Law' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 115, 135 and 142; R. D. Blair and J. L. Harrison, *Monopsony in Law and Economics* (Cambridge, UK, CUP, 2002) 45-48.

[29] J. B. Kirkwood, Powerful Buyers and Merger Enforcement (2012) 92 Boston University Law Review 1485, 1498.

And obviously, this entails hiring fewer workers.[30] This is what we will call possibility number 3 ("Possibility No. 3).

In the case of both of these two alternative possibilities, i.e. Possibility No. 2 & 3, the monopsonist employer is behaving in the product market in a way that suggests it has higher marginal input costs than a firm that does not have monopsony power.[31] And in both these two, there will be sufficient scope for competition authorities to intervene on the basis of the consumer welfare standard if any of the harmful consequences for the product and services market are the direct effect of a takeover or merger; contrast this with the legal position in the case of Possibility No. 1 where regulatory intervention would be out of the question, since any adverse repercussions will directly affect the workers of the merged entity, rather than the latter's consumers: more detail later on the legal mechanics in play here.

The end result of this analysis is the emergence of a clear connection between suppressed wages/lower input costs and higher prices charged by monopsonist employers to consumers in the market, i.e. a direct wage/price link. What is interesting is that economists have suggested that this is a common, rather than rare, phenomenon and that the most that the consumer can hope for is that there is no adjustment in the product price rather than a reduction if the lower input costs were channelled through to them.[32] Seen from this perspective, less efficiency may well stalk *both* the labour and product/services markets, combining to produce an overall reduction in social welfare to the detriment of all, which demands a policy correction and response. The question to be addressed in this paper is how and whether company law reform has any role to play in inoculating such markets from such anti-competitive outcomes by heightening the degree of worker and consumer protection.

3. The Causes of Monopsonistic Labour Markets

Before we can understand whether the content and shape of corporate laws and corporate governance norms can have any effect on labour markets and the wages paid to workers, it is important to first set out the main factors that give rise to monopsony. By doing this, we can

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[30] R. G. Noll, ""Buyer Power" and Economic Policy" (2005) 72 *Antitrust Law Journal* 589, 599-600.

[31] OECD, "Monoposny and Buyer Power" (DAF/COMP(2008)38) (17 December 2009), available at 44445750.pdf (oecd.org) at 9 and 30-35.

[32] R. G. Noll, ""Buyer Power" and Economic Policy" (2005) 72 *Antitrust Law Journal* 589, 606-612; E. Posner, *How Antritrust Failed Workers* (Oxford, OUP, 2020) [ ] and A. Devlin, "Questioning the Per Se Standard in Cases of Concerted Monopsony" (2007) 3 *Hastings Business Law Journal* 223, 224 and Z. Chen, "Buyer Power: Economic Theory and Antitrust Policy" (2007) 22 *Research in Law & Economics* 17, 28.

assess whether there is any link between the two and understand what might persuade workers to work for less than the value of their marginal product. In the academic scholarship, it is generally claimed that the causes of monopsonistic labour markets are threefold, with each present to varying degrees.[33] In shorthand, these can be described as "labour market concentration", "job differentiation" and "search costs/frictions and job exit/quit and switching/mobility frictions/costs." First, concentration will subsist in a labour market where too many workers are chasing too few jobs from a single firm, or too few firms. It is claimed that the existence of concentration and lack of competition in labour markets is symptomatic of the fact that many of them are geographically limited in size.[34] Where there is only one employer, or a few employers, in a particular industrial sector of the economy and geographical locality, the employer or employers can take advantage of the scarcity of demand for the services of workers by fine-tuning the wages and contractual terms and conditions that they offer to their staff. The second cause is the phenomenon known as job differentiation, which is also responsible for incentivising workers to stick with their existing jobs. Here, the word "differentiation" is a reference to the remuneration packages, benefits and amenities that different employers offer and make available to their staff, which encourages them to stay put. Examples can range from bespoke benefits such as free or subsidised childcare, gym & leisure facilities (close to, or at the employer's premises), to flexible packages enabling staff to work from home and/or conferring generous holiday annual leave entitlements, as well as supportive line managers and genial colleagues.

The category of "job differentiation" can be contrasted with the third and final cause of monopsony, which are *search costs/frictions* and *job exit/quit and switching/mobility frictions and costs*.[35] Unlike the former – which incentivises staff to stay in their existing positions – the

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[33] S. Naidu et al., "Antitrust Remedies for Labor Market Power" (2018) 132 *Harvard Law Review* 536, 553-556; I. Marinescu & E. A. Posner, "Why Has Antitrust Law Failed Workers?" (2020) 105 *Cornell Law Review* 1343, 1349-1352; B. E. Kaufman, 'Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives' in K. Dau-Schmidt, S. D. Harris, and O. Lobel (eds), *Labor and Employment Law and Economics* (Cheltenham, Edward Elgar, 2009) 3, 15-16 and 30-33 and S. J. Schwab, 'Law-and-Economics Approaches to Labour and Employment Law' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 115, 140.

[34] J. Azar et al, "Labor Market Concentration" (2022) 57 *Journal of Human Resources* S168, S179.

[35] See T. Ransom, "Seniority and Monopsony in the Academic Labor Market" (1993) 83 *American Economic Review* 221; J. Fox, "Estimating the Employer Switching Costs and Wage Responses of Forward-Looking Engineers" (2010) 28 *Journal of Labor Economics* 357; T. Ransom, "Labor Market Frictions and Moving Costs of the Employed and Unemployed" (2022) 57 *Journal of Human Resources* S137; S. Naidu & E. A. Posner, "Labor Monopsony and the Limits of the Law" (2022) 57 *The Journal of Human Resources* S284, S299 and H. Hafiz, "The Law of Geographic Labor Market Inequality" (2024) *Pennsylvania Law Review* (forthcoming - 21). Of course, there are also costs to employers in terms of worker replacement costs and potential liabilities: see the discussion in C. Estlund, "Losing Leverage: Employee Replaceability and Labor Market Power" (2023) 90 *University of Chicago Law Review* 437, 439-441.

latter serve to discourage staff from looking for, or switching, jobs. In this way, they function as a break on the mobility of labour and so limit the supply of workers in the market in precisely the same way as job differentiation. For example, search costs and frictions are a product of the asymmetric power in the employment relationship, with the employer possessing a more reliable and accurate reserve of information than their employees about the job roles, positions, employee preferences, packages, amenities and benefits offered in the same industry or sector or by their direct competitors, etc.[36] In such a case, the worker's access to quality information about the next best alternative employment in the labour market and attendant remuneration package, is impaired.[37] As for switching and mobility frictions and costs, these will exist for a number of reasons. The relevant factors include those that are job-related, such as post-employment non-compete covenants, while others may be personal to the employee, such as poorer access to good quality schools, or longer commuting times from and to the family home, in the case of the next best alternative job in the labour market.[38]

There are a number of ways in which we can think of these three categories as offering incentives to employers to pay their existing staff a wage package that is less than the equilibrium wage rate. First, in the case of concentration, employers can ensure that their staff earn less by entering into collusive wage agreements with their competitors to supress wages. Alternatively, the same effect can be achieved by acquiring their direct competitors, i.e. in the context of a horizontal takeover or merger. In that case, the removal of a competitor will have an impact on the external labour market, compressing the number of acquirers of skills in the relevant sector. Likewise, the employer's awareness of the powerful factors that incentivise their staff to stick with their existing jobs will also incentivise them to suppress their wages.

[36] G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 49.

[37] H. Collins, 'Theories of Rights as Justifications' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 137; S. Deakin, 'The Contribution of Labour Law to Economic and Human Development' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 156–169; S. Deakin and F. Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer, 2000) 29.

[38] E. Posner, *How Antritrust Failed Workers* (Oxford, OUP, 2020) 104-105; T. Ransom, "Labor Market Frictions and Moving Costs of the Employed and Unemployed" (2022) 57 *Journal of Human Resources* S137, S139, S157 and S163; E. P. Starr, J.J. Prescott & N. D. Bishara, "Noncompete Agreements in the US Labor Force" (2021) 64 *Journal of Law & Economics* 53, 75–82; E. Starr, J.J. Prescott & N. Bishara, "The Behavioral Effects of (Unenforceable) Contracts" (2020) 36 *Journal of Law, Economics & Organization* 633, 660–665; M. S. Johnson, K. Lavetti & M. Lipsitz, "The Labor Market Effects of Legal Restrictions on Worker Mobility" SSRN 31–37 (Oct. 12, 2021), available at https://perma.cc/9YP8-ZCB3; E. Starr, "Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete" (2019) 72 *Industrial & Labor Relations Review* 783, 812–814; I. Marinescu and J. Rosenfeld, "Worker Power and Economic Mobility" 12-24, available at SSRN at Worker Power and Economic Mobility: A Landscape Report by Ioana Elena Marinescu, Jake Rosenfeld:: SSRN.

And the very same point can be made in respect of the key elements that discourage them from researching the alternative jobs in the market and/or switching.

4. The Corporate Law & Governance Contribution to Monopsonistic Labour Markets

At this juncture in the discussion, the connection that there might conceivably be between corporate law rules/corporate governance standards and either of the three aforementioned causes of labour market monopsony comes into focus. For instance, it is not altogether clear how job differentiation or switching and mobility frictions/costs might be intensified by the substance or reach of corporate laws. After all, in what way might company laws or corporate governance codes encourage workers to stick with their jobs or disincentivise them from moving to another employer or finding out information about other employment opportunities in the labour market? While true, the fundamental point is that there is evidence that the design and span of company laws can feed into the first contributory factor, i.e. the tightening of concentration in the labour market. And there are at least two particular mechanisms by which the shape, content and ambit of corporate laws and governance standards may enable a greater level of imperfection in competition to be brought to bear on labour markets.

First, higher levels of labour market concentration may emerge by virtue of the form that takeover market regulation takes. Where the applicable measures shackle key actors from intervening to prevent takeovers from proceeding that are likely to be anticompetitive from the perspective of labour (rather than product or services) market outcomes, higher concentration is the result. Secondly, changes in the pattern of shareholder ownership and governance structures of the largest listed public corporations that have been promoted by corporate laws and corporate governance norms can have indirect (and unintended) consequences on labour markets. By way of illustration, as has been noted in the academic literature, (i) reforms designed to strengthen corporate governance by holding managers and directors to account and/or intended to enhance shareholders' rights and (ii) the post-GFC promotion of shareholder stewardship codes and activism policies, are far from benign when it comes to their impact on labour markets.[39]

If we probe the first factor in greater detail - which focuses on the operation of the market for corporate control in the same economic sector, i.e. horizontal takeovers - the

[39] Z. Goshen & D. Levit, "Agents of Inequality: Common Ownership and the Decline of the American Worker" (2022) 72 *Duke Law Journal* 1, 8-10, 27-28, 36, 38-39, 50-51.

standard prescription for takeover regulation is that it ought to encourage such activity on the ground that the synergies produced by horizontal integration – that is to say, the acquisition by one corporation of another in the same sector of the economy – will result in greater efficiencies via "value creation".[40] It is also claimed that one of the mechanisms by which that result will be achieved is through post-takeover economies of scale, in terms of which input costs are spread out across a much higher rate of product.[41] In addition, a horizontal takeover will also cut out duplication of efforts, lowering the wage bill of the resultant entity.[42] And as all corporate lawyers know well, the existence of the market for corporate control has a disciplinary effect on managers and directors of corporations, directly disincentivising them from shirking or engaging in other self-serving conduct, such as frittering away the company's assets on some pet project(s). This leads to more competent and efficient management.[43] It also feeds into tackling the much wider principal-agent problem that exists in large public corporations,[44] which it has been argued is an issue that the modern incarnation of company law has largely been created to address.[45] Once all of these cost savings and efficiencies are aggregated, the input costs of the post-takeover business are lower, which it can then pass on to the consumers of its products and services as lower prices.[46]

However, there is also evidence that horizontal takeovers and mergers can have negative consequences for the staff of both the target and the bidder and on employment in general. For example, multiple studies have charted the adverse effects of takeovers on staff numbers via mass lay-offs and redundancies. There are also accounts of downward pay rate adjustments subsequent to horizontal takeovers, as well as drops in productivity levels and the

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[40] D. Kershaw, *Principles of Takeover Regulation* (Oxford, OUP, 2016) 3.

[41] D. Kershaw, *Principles of Takeover Regulation* (Oxford, OUP, 2016) 3.

[42] D. Kershaw, *Principles of Takeover Regulation* (Oxford, OUP, 2016) 3-4

[43] H. Manne, 'Mergers and the Market for Corporate Control' (1965) 73 *Journal of Political Economy* 110; F. Easterbrook and D. Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer" (1981) 94 *Harvard Law Review* 1161; F. H. Easterbrook and D. R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 112.

[44] See Michael C Jensen & William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure" (1976) 3 J Fin Econ 305; Eugene F Fama, "Agency Problems and the Theory of the Firm" (1980) 88 J Pol Econ 288; Eugene F Fama & Michael C Jensen, "Separation of Ownership and Control" (1983) 26 JLE 301; Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991); Stephen M Bainbridge, "The Board of Directors as Nexus of Contracts" (2002) 88 Iowa L Rev 1; Jonathan R Macey, "Fiduciary Duties as Residual Claims: Obligations to Non-shareholder Constituencies from a Theory of the Firm Perspective" (1999) 84 Cornell L J 1266; William Bratton, "The Nexus of Contracts Corporation: A Critical Appraisal" (1989) 74 Cornell L Rev 407.

[45] Reinier Kraakman et al, eds, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford, UK: Oxford University Press, 2017) at 2.

[46] However, as noted above when discussing the three possible responses of a monopsonist employer, it is by no means certain that those lower input costs will be channelled through.

dilution of employment terms and conditions.[47] If the inevitable result of the horizontal takeover is that there are fewer hirers of labour in the relevant industry in which the takeover activity occurred, the consequence will be less competition. And if competition levels fall, this signals more concentration and an increased capacity and potential for lower wages. For this reason, one of the causes of monopsony in labour markets – concentration and less competition – is a logical consequence of the promotion of an active market for corporate control.

Academic scholarship has also stressed the significance for labour markets of the growth in the level of institutional investment in the largest listed public corporations.[48] Over the past forty years, corporate governance regulations have been adjusted to introduce rules that pare down management agency costs (in accordance with "agency theory" that responds to the aforementioned principal-agent problem), with a view to strengthening the corporate governance of big business. This has ushered in an era of strong governance, which gives shareholders extended rights and control measures over decisions taken by managers and directors.[49] Over time, the impact has been the emergence of a corporate governance framework that is characterised by large blocks of concentrated shareholder ownership, e.g. investment management firms such as BlackRock, Vanguard, etc. These large market players

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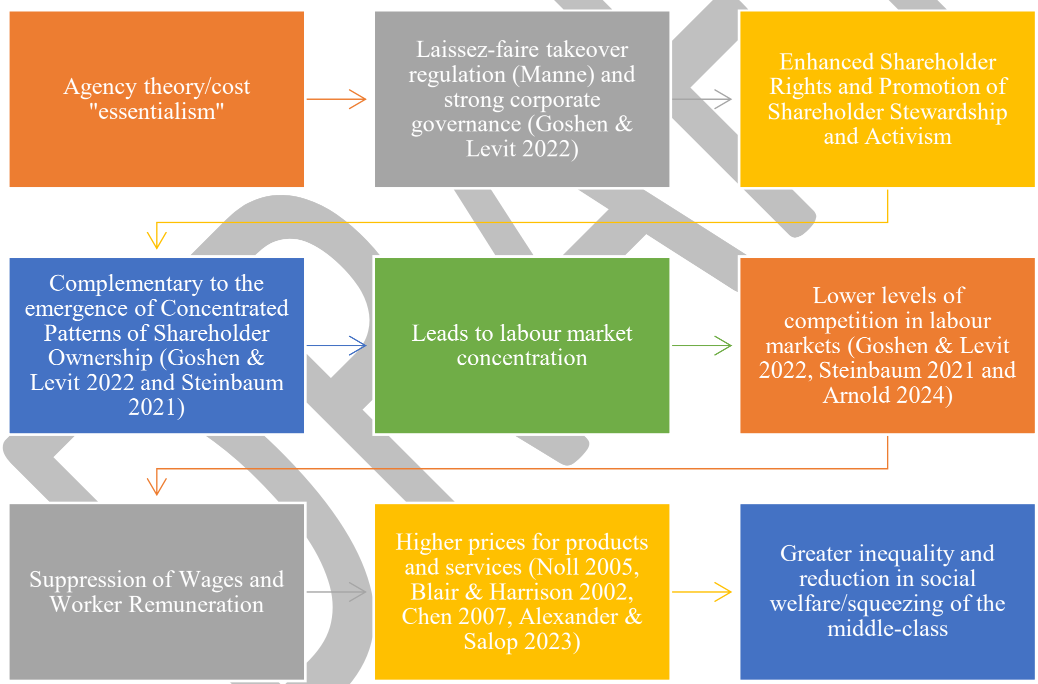
[47] M. Conyon, S. Girma, S. Thompson, and P. Wright, 'Do Hostile Mergers Destroy Jobs?' (2001) 45 *Journal of Economic Behavior and Organization* 427; M. Conyon, S. Girma, S. Thompson, and P. Wright, 'The Impact of Mergers and Acquisitions on Company Employment in the United Kingdom' (2002) 46 *European Economic Review* 31;
K. Coucke, E. Pennings, and L. Sleuwaegen, "Employee Layoff under Different Modes of Restructuring: Exit, Downsizing or Relocation" (2007) 16 *Industrial and Corporate Change* 161; X. Li, 'Productivity, restructuring, and the gains from takeovers' (2013) 109 *Journal of Financial Economics* 250; A. Johnston and W. Njoya, 'Employee Voice in Corporate Control Transactions' in A. Bogg and T. Novitz (eds.), *Voices at Work* (Oxford, OUP, 2014) 400; A. Pendleton, 'The Employment Effects of Takeovers', in J. Cremers and S. Vitols (eds.), Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive (Brussels, European Trade Union Institute, 2016) 71;
J. Cremers and S. Vitols, *Takeovers with or without Worker Voice: Workers' Rights under the EU Takeover Bid s Directive* (European Trade Union Institute-2016) 11; O. Dessaint, A. Golubov and P. Volpin, 'Employment protection and takeovers' (2017) 125 *Journal of Financial Economics* 369; Pendleton and H. F. Gospel, 'Markets and Relationships: Finance, Governance, and Labour in the United Kingdom' in A. Pendleton and H. F. Gospel (eds), *Corporate Governance and Labour Management: An International Comparison* (Oxford, OUP, 2004) 59–60.

[48] Z. Goshen & D. Levit, "Agents of Inequality: Common Ownership and the Decline of the American Worker" (2022) 72 *Duke Law Journal* 1 and M. Steinbaum, "Common Ownership and the Corporate Governance Channel for Employer Power in Labor Markets" (2021) XX(X) *The Antitrust Bulletin* 1.

[49] For example, the EU Shareholder Rights Directive 2017/828/EU (OJ [2017] L132/1) (amending 2007/36/EC (OJ [2007] L184/17)) and rule 21.1 of the UK Takeover Code preventing managerial defensive measures in the event of a proposed takeover, reserving the decision on the bid to the shareholders. Many argue that this is a consequence of the ascendancy of agency theory in corporate law: Mark J Roe, "The Institutions of Corporate Governance" in Claude Ménard & Mary M Shirley, eds, *Handbook of New Institutional Economics* (Heidelberg, Germany: Springer, 2008) at 372-374 and 384-385; Paul A Gompers, Joy L Ishii & Andrew Metrick, "Corporate Governance and Equity Prices" (2003) 118 Q J Econ 107; Reinier Kraakman et al, eds, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford, UK: Oxford University Press, 2017) at 29-31.

tend to compel managers and directors to prioritise shareholder returns and share buyback schemes over investment in the firm's staff, equipment or new business projects and ventures. This leads to wholesale negative impacts on social welfare: e.g. insofar as there is underinvestment in the economy, greater labour market concentration, with monopsonistic wages paid below the competitive market level, inflated prices charged by monopsonist employers for the products and services they supply to consumers and businesses, leading to greater income inequality overall.[50] The net effect is a vast transfer of wealth from labour and the middle classes to capital and the so-called 1%. The entire process is illustrated in figure 1, with the main scholars' claims identified:

Figure 1: Correlation between Factors



5. The Corporate Law & Governance Contribution to Monopsonistic Labour Markets: Potential Regulatory Responses

5.1 Introduction

[50] See see M. J. Roe and M. Vatiero, "Corporate Governance and Its Political Economy" in J. N. Gordon and W. Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance* (Oxford, UK, OUP, 2015) 56.

Having considered the impact that the content and shape of company law and corporate governance standards can have on labour markets, we now turn to an analysis of how corporate law might be able to assist in shifting the dial in the direction of a more equitable and competitive market equilibrium. One option would be to take another look at takeover and merger regulation in corporate law. In essence, the key question here is whether the existing dynamic landscape and regime regulating mergers in the UK ought to be adapted to address the aforementioned frequently overlooked, yet critical concern: the potential adverse impact of a proposed horizontal takeover on the labour market. In order to achieve that objective, it is essential to first outline the regulatory structure that is currently in place. And what is striking about merger control in the UK is that it generally envisages limited intervention based on the consumer welfare standard. In this way, it is contingent on the proven occurrence of post-takeover harmful outcomes in the product and services markets. That is to say that regulatory provisions only enable takeovers and mergers to be prevented where there is evidence that the resultant entity will have more detrimental outcomes ex post for consumers and businesses in terms of the prices set for the products or services sold or supplied in the market. The "default" merger review regime in the UK is set out in the Enterprise Act 2002 (EA 2002). Of course, it is a creature of competition law, rather than corporate/company law. It involves the investigation of a proposed takeover deal by an independent competition authority – the Competition and Markets Authority (CMA)[51] – only if it qualifies as a "relevant merger situation"[52] and meets a certain jurisdictional turnover threshold.[53] The prevailing stance in the UK's merger control policy is that the primary focus should be on assessing how the transaction will impact competition: has it, or will it, cause a substantial lessening of competition within any market in the UK *for goods or services*.[54] What is particularly crucial to note at this juncture

[51] In that way, the UK merger control process is independent of political influence and the UK Government does not play any formal role within the CMA merger control investigations.

[52] That is, when as a result of a transaction, enterprises "cease to be distinct" so in effect, they have come under common ownership or control. See Enterprise Act 2002, section 23. See also the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 (SI 2020/627).

[53] Either the turnover test (met if the UK turnover associated with the acquired enterprise exceeds £70 million) or the share of supply test (met if, as a result of the merger, at least 25% of goods or services of any description supplied in the UK (or in a substantial part of it) are supplied by, or to, the merged entity): see Enterprise Act 2002, section 23. Certain mergers that fall below the jurisdictional thresholds for a standard competition-based review (i.e. transactions which meet all the requirements for a relevant merger situation, other than the UK turnover or share of supply test) may also undergo scrutiny based on "special public interest" considerations: see Enterprise Act 2002, section 59. The categories of cases to which the Secretary of State has power of intervention on this basis are limited by legislation. They are currently restricted to specific mergers within the newspaper and broadcasting sectors which substantially affects the country's supply of newspapers or its provision of broadcasting: see Enterprise Act 2002, section 59(3)(b).

[54] Enterprise Act 2002, section 22.

is how the effect of the potential takeover or merger *on the labour market* is not considered as part of the default competition review. To that extent, whether there will be a detrimental outcome on the labour market is overlooked – which will be the effect of the aforementioned Possibilities No. 1, 2 and 3 – and is not a criteria for the CMA to call in and evaluate the horizontal takeover or merger.

When a merger raises public interest concerns, it may attract an additional level of scrutiny from the British Government. Where the relevant merger is expected to operate contrary to the public interest, the Secretary of State for Business, Energy & Industrial Strategy ("Secretary of State") is allowed to take over the decision-making role from the CMA by issuing a "public interest intervention notice".[55] The public interest considerations on which the notice may be predicated are deliberately restricted in scope to media concerns such as media quality, plurality and broadcasting standards, the stability of the UK financial system and the capability to combat and mitigate the effects of public health emergencies.[56] Upon issuing an intervention notice, the Secretary of State assumes the role of the final decision-maker on whether the merger operates or may be expected to operate against the public interest, and on any remedies.[57] The CMA remains responsible for investigating the impact of the merger on both the public interest and competition issues,[58] while the Secretary of State makes an ultimate decision based on the reports of CMA's findings. If a merger can be shown to operate against the public interest, the Secretary of State can impose additional conditions on a proposed horizontal takeover transaction to address public interest concerns or decide to prohibit it altogether.[59]

As such, absent any anticipated anti-competitive concerns relating to the consequences for consumers and firms buying from the product or services markets, the scope for key actors to interfere is very limited indeed. However, albeit restricted in scope, the position here can be contrasted with what has *never* been a ground for the prevention of a horizontal takeover, namely whether it will give rise to greater concentration levels *in the labour market*. This is surprising, since research has indicated the existence of a link between mergers, concentrated

[55] Enterprise Act 2002, section 42(2).
[56] Enterprise Act 2002, section 58. The list of public interest considerations previously also included national security, but this consideration was removed following the UK Government's decision to route takeover transactions that raise national security concerns through a separate review regime: see the National Security and Investment Act 2021 ("NSI Act").
[57] Enterprise Act 2002, section 54.
[58] Enterprise Act 2002, sections 44 and 50.
[59] Enterprise Act 2002, sections 54 and 55.

labour markets and monopsony.[60] In effect, the claim has been made that the liberal regulation of horizontal takeovers promotes greater concentration of corporate ownership, which then leads to higher concentration in labour markets. And this is not a new claim. For example, writing in the 1950s, Braverman noted how capital in the modern age and incarnation of capitalism tends to be monopolistic, leading to the emergence of large institutional shareholders and cross-shareholdings. In his research, he noted how this often generates monopsony power over labour, which strengthens over time.[61] This takes the argument full circle to reiterate the basic point made above, namely that monopsony levels may well increase where a takeover or merger diminishes the number of market participants in a particular sector.

In each of the cases identified as Possibility No. 1, 2 & 3, negative labour market effects is precisely the outcome for employees and workers in the context of a corporate takeover or merger. The burning issue for resolution is whether a more nuanced set of policy prescriptions are thus necessary. After all, we must be reminded of the detrimental impact on overall social welfare in light of the possible consequential effects on product and services markets (i.e. the driving down of employer-firm productivity to maintain the prices of products and services at the market level). The suggested remedy presented in this article involves assigning authority to a well-placed person or entity capable of intervening, and, if necessary, suspending, a change of control transaction when the transaction is expected to have an adverse impact on a public interest, with a particular focus on preventing the creation of a labour market monopsony. Alternatively, the suggested reform would take the shape of empowering the Government or the existing regulator to intervene to investigate and/or stop a takeover or merger from going ahead if the consequences are likely to result in declining wages for workers and/or higher output prices for consumers and businesses who buy from the monopsonist employer in the product or services market.

5.2.1 Entrusting Directors with Public Interest Intervention

[60] D. Arnold, "Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes" (2024) *American Economic Review* (forthcoming).

[61] H. Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (New York, Monthly Review Press, 1974) [ ]. For the closeness of the reverse link between strong labor power and concentrated corporate ownership, see M. J. Roe and M. Vatiero, "Corporate Governance and Its Political Economy" in J. N. Gordon and W. Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance* (Oxford, UK, OUP, 2015) 56 and M. Vatiero, "Varieties of Capitalism, Competition, and Prosocial Corporate Purposes" (forthcoming).

If it is accepted that the promotion of more active regulation of horizontal takeovers is warranted where either of the three possibilities identified in section 2 are in play – owing to the labour market concentration that they generate – the key question is who would be the most appropriate constituency to exercise any power to intervene in any reformed regulatory regime. One obvious candidate constituency that is internal to the target company is its directors. The reformed power provided to the directors could be based on the existing public interest test (which currently enables the CMA to intervene), but expanded to enable consideration of the potential and/or anticipated adverse labour market outcomes of the takeover and/or the potential for concentration. In effect, the power to challenge a proposed takeover would be conferred on the directors of the target company by reference to such an enlarged public interest test. This would also entail the carving of an exception to, or a suspension of, the board neutrality rule contained in Rule 21.1 of the Takeover Code. In this way, the directors would have the capacity to engage in managerial defensive conduct – to ward off the takeover – without the consent of the shareholders of the target company where they have reasonable grounds for suspecting that the revised and enlarged public interest test has been satisfied.

At the heart of this proposal is the recognition that the shareholders of the target company, who currently hold decision-making powers in relation takeovers pursuant to the board neutrality rule set out in Rule 21.1 of the Takeover Code, cannot realistically be expected to safeguard the interests of labour in the context of change of control transactions. To give priority to the interests of the employees would often be against their own financial interests and at their own expense given that shareholders' interests frequently conflict with those of the other stakeholders of the firm, including the employees. Owing no fiduciary obligations to the companies they invest in,[62] it is rational for shareholders to prioritise their own financial interests in maximising the returns on their investments. Under the existing provisions of the Takeover Code, the target directors are required to provide the company's shareholders with information and express their views on the effects of the implementation of the proposed bid. This duty extends to consideration of the repercussions for the employees, as well as the bidder's strategic plans regarding the company and their likely effects on employment as outlined in the offer document.[63] They must also formulate advice to shareholders on whether to accept the offer.[64] When advising shareholders, the board is not bound to consider the merits

[62] *Re Astec (BSR) plc* [1998] 2 BCLC 556, 583 per Jonathan Parker J.
[63] Takeover Code, rule 25.2(a).
[64] Takeover Code, rule 25.2(c).

of the bid price as the determining factor, nor is it precluded from taking into account any other factor it considers relevant, including the effect on the company's employees.[65] The proposed reform goes beyond the existing takeover laws insofar as it confers a safe harbour on the directors of the target company if they decide to attempt to prevent the takeover on the grounds that it is contrary to the interests of labour because it will result in concentration in the labour market and suppress wages.

At first glance, it may be obvious that the directors are well-equipped to safeguard the interests of the labour market, especially considering that under the current regulatory framework they are already required to consider the impact of takeovers on the target's employees. However, granting directors the right to intervene in takeovers based on public interest grounds could potentially clash with their fiduciary obligations under section 172 of the Companies Act 2006. Although the Takeover Code rather than general company law is the primary framework governing the board's conduct during a takeover bid, the actions of the directors must nonetheless adhere to, and conform with, the statutory statement of general duties. At its core, the directors' primary fiduciary duty is to ensure the success of the company. In pursuit of this overreaching objective, directors are mandated to contemplate the lasting implications of their decisions on the company and to consider the interests of various stakeholders, including employees and the local community. Nevertheless, and despite the express statutory reference to the impact on the employees and employment, the section 172 duty is commonly understood as a duty that is limited to the maximisation of shareholder value, as it refers to the company's success "for the benefit of its members as a whole". As such, in terms of section 172 of the Companies Act 2006, the directors should give due consideration to the employees' interests, but only to the extent that this would ultimately benefit the company and its shareholders. This realisation raises questions about directors' capacity to make judgments in the broader public interest. Similarly, the Takeover Code does not mandate directors to assess the impact of a given takeover on the labour market. Consequently, the existing legal framework may not adequately support directors' intervention in takeovers for broader public interest reasons.

Another issue with conferring authority on the target's board to intervene in takeovers on labour market grounds is the likely lack of understanding that the directors will have about the macroeconomic implications of potential horizontal takeovers on the labour market.

[65] Takeover Code, note on rule 25.2.

Typically, directors' expertise revolves around the management of the affairs of a specific company rather than navigating the complexities of regional, national or international labour markets. While directors of target companies are tasked with assessing the possible impact of a proposed takeover on the employees of the company that they manage, such a task significantly diverges from an evaluation of a takeover's effect on the entire workforce in a particular region or the entire country. This insight raises legitimate concerns about their expertise and competence in this particular area, and thus, the effectiveness of directors as would-be protectors of the labour market. To address this limitation, an option would be to recommend the involvement of independent financial advisors in such a decision-making process, especially since advisors already play a role in the evaluation of the bid's financial terms for the target board.[66] Given their existing involvement, the financial advisors could potentially offer competent advice and valuable insights into the impact of the planned acquisition on the broader economy, including its consequences for the labour market. This approach, however, introduces additional costs into an already resource-intensive and highly disruptive takeover process for the target company and poses the challenge of ensuring the genuine independence of those financial advisors from the board of directors.[67]

The third problem with the proposed corporate law reform concerns the potential self-serving behaviour of directors. This anxiety is frequently raised by proponents of stricter directorial accountability and often forms the basis for arguments in favour of the board neutrality rule and against endowing directors with defensive powers to stop a takeover.[68] Granting directors the authority to intervene in takeover transactions based on enlarged public interest grounds might open the door to the misuse of the power for their own personal gain. In the absence of a clear and measurable benchmark within the context of takeovers, identifying self-serving conduct and maintaining directorial accountability could become considerably challenging. This, in turn, could create opportunities for directors to prevent a takeover solely in order to protect their own interests rather than to safeguard the labour market. Directors might prioritise their job security, personal compensation, or individual reputation over the

[66] Takeover Code, rule 3.1 (target board must obtain competent advice from an independent financial advisor whether the financial terms of the offer are fair and reasonable).
[67] In order to ensure that the advice given is objective, Rule 3.3 of the Takeover Code outlines the independence standard. If one division within the corporate group of a financial advisor is engaged by the acquirer, then no other division is permitted to act for the target. The advisors with a recent advisory relationship with the acquirer may not advise the target See Takeover Code, note 1 on rule 3.3.
[68] See, for example, L.A. Bebchuk, "The Case Against Board Veto in Corporate Takeovers" (2002) 69 U Chi L Rev 973; F.H. Easterbrook and D.R. Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer" (1981) 94 Harv L Rev 1161.

genuine public interest. Since the potential future impact of the horizontal merger on the labour market may not be as easily measurable as traditional financial metrics predicting changes in the share price or anticipated returns, the newly introduced director power is vulnerable to manipulation as a defensive mechanism against an unwanted change of control transaction.

In the final analysis, although the notion of reforming corporate and takeover law to enable directors of target companies to intervene in takeovers in the broader public interest is intriguing, it is riddled with legal, practical and ethical complications. Striking a balance between directors' corporate fiduciary duties and a healthy labour market must thus be approached with caution. While directors play a pivotal role in change of control transactions, entrusting them with the responsibility to protect the labour market within the context of horizontal takeovers carries inherent risks. Their motivations for intervening in a merger may not necessarily align with broader societal welfare concerns, potentially introducing biases that could lead to suboptimal and distorted economic outcomes. Directors could exploit this newfound authority to preclude a potentially value-enhancing transaction purely in order to protect their own position and job security, even if such action would not be in the best interests of the company or the labour market. These concerns underscore the need for checks and balances when contemplating a significant departure from the established takeover rules. Consequently, on balance, it is arguably inadvisable to grant a takeover target's board of directors the power to intervene in horizontal takeovers on the grounds of public interest protection which would run counter to the board neutrality rule outlined in Rule 21.1 of the Takeover Code. Instead, a more comprehensive and impartial mechanism should be devised to address the labour market concerns that stem from Possibilities No. 1, 2 and 3 while minimising undue risks and conflicts of interest.

5.2.2 Broadening Public Interest Considerations in the Existing Merger Review

The article proposes an alternative mechanism that places the emphasis on regulatory oversight and intervention. Such an approach could offer a more practical avenue to mitigate the expected damaging impacts of takeovers on the labour market in the case of Possibilities No. 1, 2 and 3, all while preserving the established provisions of company law. For example, the labour market may be protected by the introduction of an extended public interest test, allowing the UK Government or the CMA to intervene if a transaction may be expected to operate against the public interest by significantly adversely affecting the labour market. Although the existing merger control regime in the UK primarily focuses on competition concerns as regards the consequences for consumers and firms buying from product and services markets, there is no logical impediment to it being reformed so that it is broadened in its scope to encompass employment considerations. This would involve the enlargement of the public interest test outlined in section 58 of the EA 2002 to include an assessment of the impact of transactions on the labour market in the case of either Possibilities No. 1, 2 or 3. The EA 2002 provides a robust foundation for this expansion, since the framework of the regime allows for the list of public interest considerations to be supplemented.[69]

Such an expansion would align with the UK's commitment to promote sustainable development and social wellbeing.[70] Additionally, it would send a strong signal to target companies and takeover bidders, encouraging them to embrace their social responsibilities. The modified approach would also be in line with the standards of ESG reporting and the stewardship practices included in the UK's Stewardship Code.[71] Moreover, the proposed public interest test would align with the values of Enlighted Shareholder Value as articulated by the legislature in section 172 of the Companies Act 2006. Seen from this perspective, it would coincide with the direction of travel of UK corporate governance with its desire to inorporate more stakeholder-friendly rules.

In adherence to the principles of developing a more inclusive and balanced economy, the authorities assessing the merger such as the UK Government or the CMA should be mandated to engage with stakeholders, and in particular trade unions, industry associations and employees' representatives of the target company. The latter already play some, albeit a limited, role in the existing takeover process. In terms of the Takeover Code, employees or employees' representatives have particular information and consultation rights. These rules are designed to ensure that employees are informed about the proposed horizontal takeover[72] and that their opinion on the merger is known to the ultimate decision-makers. The opinion of employees' representatives on the effects of the transaction on employment, if received in "good time", must be sent to the shareholders together with the documents prepared by the

[69] While the Secretary of State may insert an additional consideration into section 58 of the EA 2002 by means of an order in council, the proposal of a new public interest ground must be scrutinised and approved by Parliament: see the Enterprise Act 2002, sections 42 and 58.
[70] See, e.g., Mainstreaming Sustainable Development: the Government's Vision and what this means in practice, 1 February 2011, https://www.gov.uk/government/publications/mainstreaming-sustainable-development-the-government-s-vision-and-what-this-means-in-practice, accessed 28 September 2023.
[71] The UK Stewardship Code 2020, available at mainstreaming-sustainable-development.pdf (publishing.service.gov.uk).
[72] See, for example, Takeover Code, rule 2.11(a)(ii), 24.1(b)(i), 25.1(b).

target board of directors when responding to the bid.[73] This collaborative approach is essential to gather diverse insights and valuable input regarding the potential consequences of the merger on the labour market.

Furthermore, it would be advisable to grant the directors of the target company the authority to request the Secretary of State to consider issuing a public interest intervention notice in cases where they hold credible concerns that the proposed transaction may substantially adversely impact the labour market, potentially leading to the creation of monopsony, e.g. in either of the Possibilities No. 1, 2 or 3. This power would be distinct from the one versed above which would enable directors to unilaterally halt a takeover, effectively mitigating the risk of decisions being driven solely by self-interest. Instead, directors would serve the role of stewards of the company, including its stakeholders, who identify and flag potential labour marker concerns to the authority vested with the ultimate decision-making power. Directors possess access to sensitive and proprietary company data, including financial and operational information, which can be instrumental in substantiating concerns related to labour market impacts. While they hold specialised knowledge about the company, its workforce, and the relevant industry, their expertise may not extend to the intricacies of the labour market. Thus, their role in the merger review process would primarily be limited to highlighting and conveying informed concerns to the Secretary of State or the CMA, who would be armed with a broader perspective and access to relevant expertise. Importantly, granting this authority to the board of directors of the target company reinforces its obligation to act in the best interests of the company, which includes consideration of the post-takeover welfare of its workforce. While directors have a duty to act in the interests of the company for the benefit of shareholders, this approach would allow them to conscientiously discharge their duty under section 172 of the Companies Act 2006, striving for an equitable outcome that takes into account the welfare of relevant stakeholders.

The proposed expansion in public interest considerations is not a new idea. In the past, the UK's public interest test included the protection of employment amongst the wide range of factors to be considered in the assessment of a merger. The original public interest test contained in the Fair Trading Act 1973 (FTA 1973) provided that in taking decisions about the desirability of mergers, the authorities should take into account all matters which appeared to be relevant in the particular case, including the desirability of a 'balanced distribution of

[73] Takeover Code, rule 25.9.

industry and employment in the UK.'[74] However, in 1984, the then Secretary of State Norman Tebbit announced in Parliament that in practice, references to the competition authority would be made mainly, albeit not exclusively, on competition grounds relative to product and services markets.[75] Following the announcement, only a small proportion of proposed horizontal takeovers were assessed on non-competition grounds. Nevertheless, it remained difficult for market participants to predict the outcome of the assessment which increased uncertainty for businesses considering investments.[76] As such, the Enterprise Act 2002 established a fully independent and competition-based regime, which initially included the protection of national security as the only public interest consideration.[77] However, this was gradually extended to include other considerations.

The reintroduction of a broader public interest test in the UK merger review has been a matter of significant debate in recent years.[78] While there are advantages in terms of protecting the national and public interest and fostering responsible business conduct, some legitimate concerns remain. The current economics-based approach in the UK merger control regime has increased the certainty and predictability of the system, improving confidence among enterprises and lawyers involved in providing legal advice.[79] The concern is that the introduction of additional public interest criteria may result in increased uncertainty, loss of predictability and delays in the merger review process, making the regulatory environment less attractive to investors.[80] The perception of possible regulatory and political scrutiny could damage the UK's reputation internationally as an open, competitive place to do business, deterring inward investment from overseas. Furthermore, the complexity of assessing various factors and the resulting uncertainty may have a chilling effect on the market for corporate control, ultimately discouraging companies from pursuing mergers,[81] including value-

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[74] Fair Trading Act 1973, section 84(d) (as originally enacted).
[75] HC Deb 05 July 1984 vol 63 cc213-4W.
[76] Speech given by CMA Chief Executive, Alex Chisholm, at the Fordham Competition Law Institute Annual Conference, 11 September 2014, https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control, accessed 30 September 2023.
[77] Enterprise Act 2002, section 58 (as originally enacted).
[78] See, for example, F. Mor and S. Browning, "Contested Mergers and Takeovers" Briefing Paper No 5374, 17 October 2018, House of Commons Library.
[79] Office of Fair Trading, "The Deterrent Effect of Competition Enforcement by the OFT" (2007) OFT 963, available at https://webarchive.nationalarchives.gov.uk/, accessed 30 September 2023.
[80] Organisation for Economic Cooperation and Development, "Policy Roundtables: Standard for Merger Review" (2009), available at https://www.oecd.org/competition/mergers/45247537.pdf, accessed 30 September 2023.
[81] Organisation for Economic Cooperation and Development, "Policy Roundtables: Standard for Merger Review" (2009), available at https://www.oecd.org/competition/mergers/45247537.pdf, accessed 30 September 2023.

enhancing transactions. This possibility is particularly problematic if one considers change of control transactions to be of general benefit to the economy as a whole. Greater government involvement in the assessment of takeovers and mergers may also raise concerns about political influence. Decisions could be swayed by political considerations and economic protectionism, potentially undermining the credibility of the UK's regulatory regime.[82] Moreover, while it may take several years for stakeholders to feel or realise the full effect of a merger, the prevalent focus in political circles is considerably more oriented towards the short-term, especially if a transaction attracts significant media attention. As such, the legislative imposition of a more open-ended public interest test presents possible dangers, since a government's or the CMA's position on intervention could be exposed to extensive political lobbying and short-term populist pressures.[83]

The UK government's opposition to the expansion of the public interest test to include economic development, corporate R&D spending, or the effect of a horizontal takeover on employment has been rooted in the argument that in none of these matters does the public interest diverge from the interests of merging companies. Consequently, the UK government has consistently maintained that it would be unwarranted to engage in regular interventions to block companies from pursuing their business plans on the grounds that those plans may have adverse immediate effects on matters such as employment or labour markets. However, the mergers' impact on the broader labour market and its potential to generate monopsony in the context of Possibilities No. 1, 2 or 3 should not be dismissed solely on the grounds of immediate or short-term effects. Instead, there are several counterarguments that justify the inclusion of labour market consideration in a merger review. While it is true that some of the damaging merger-related employment effects may be short-term and reversible, the potential generation of monopsony in the labour market has far-reaching and lasting consequences, as analysed above. Monopsony power can depress wages, limit job mobility, and stifle competition for labour in the long run. Large-scale takeovers and mergers can disrupt entire industries, leading to systemic issues in the labour market. Therefore, assessing the labour market impact of a merger is not merely about addressing immediate concerns, but also about safeguarding the long-term interests of the national or regional workforce and the overall economy. Discounting

[82] See, for example, Dept for Business, Innovation & Skills press notice, Lord Mandelson, Secretary of State: Mansion House Speech, 1 March 2010, accessed 30 September 2023 ("Britain benefits from inward investment and an open market for corporate control internationally. A political test for policing foreign ownership runs the risk of becoming protectionist, and protectionism is not in our interests").

[83] The work of the Department for Business, Innovation and Skills: Evidence given by Rt Hon Lord Mandelson, First Secretary of State, 19 January 2010, HC 299-i.

labour market considerations from consideration in merger reviews based on immediate employment effects overlooks the potential long-term and systemic harm that can result from unchecked monopsony power.

As a means of incorporating the new labour market consideration into the public interest merger review most effectively, it is imperative to provide clarity and certainty by delineating specific employment-related factors that should be considered during the assessment. This should entail a comprehensive economic-based examination of the overall impact on local or regional labour markets. While proposing the exact labour market test is beyond the scope of this paper, the "Small but Significant and Non-Transitory Decrease in Wages" ("SSNDW") test that has been suggested by Naidu, Posner and Weyl[84] is analogous to the hypothetical monopolist test that is used in product markets. The SSNDW test would help to define the relevant labour market by considering whether a hypothetical monopsonist employer would have an incentive to cut wages by 5% following the merger. Incorporating labour market considerations into the merger control regime would face challenges, such as the definition of the relevant labour market, considering skills, the overall price of labour and worker preferences.[85] While it may not be necessary to delve into granular details such as the impact of a particular transaction on pension schemes, employment standards or non-monetary benefits, evaluating the broader labour market effects is essential for understanding the lasting implications of the merger. A thoughtful and measured approach to evaluating labour market impact in merger control can help protect employees, promote economic efficiency, and address systemic risks in the modern economy.

An alternative possibility would be to reorient the structure of the competition-based merger control process to specifically treat labour markets in the same way as relevant product and services markets.[86] This proposal entails a system preserving competition in labour markets in a manner similar to the way in which competition is currently safeguarded in product or services market, namely under the current test of 'substantial lessening of competition'. By viewing labour as an input factor for companies and workers as labour suppliers, this approach would enable the simultaneous assessment of both product and labour market outcomes when

[84] S. Naidu, E.A. Posner and G. Weyl, "Antitrust Remedies for Labor Market Power" (2018) *Harvard Law Review* 132, 536.
[85] Pascale Dechamps, "Labour Markets: A Blind Spot for Merger Control?" (2009) *Agenda Oxera* 1.
[86] Pascale Dechamps, "Labour Markets: A Blind Spot for Merger Control?" (2009) *Agenda Oxera* 1.

evaluating a merger. Notably, however, this approach has not yet been introduced in any merger control jurisdiction to date.[87]

6. Conclusion

Contrary to standard economic models, recent research has shown how labour markets are not efficient, diffuse or competitive, but instead far more concentrated than had previously been understood. This results in labour market monopsony and the payment of monopsonistic wage rates to employees below the competitive market rate. The resultant wage stagnation contributes to growing inequality. This article has demonstrated how the shape of corporate laws and corporate governance norms undoubtedly makes a contribution of sorts to the generation of such negative outcomes in labour markets, particularly in terms of the existing content and form of takeover market regulation. Since company law and corporate governance are partially responsible for the current stage of affairs, it is argued that tackling monopsony-generated wage suppression/stagnation and the harms produced by labour market concentration should not be left solely to competition law. As such, consideration of potential company law and corporate governance reform to address these problems is therefore necessary. By facilitating horizontal mergers which remove players from the labour market, the current company law regulation of the market for corporate control is ripe for reconsideration in light of the theme advanced in this article.

In this vein, the discussion turned to consider the merits of introducing a statutory suspension on the embargo on managerial takeover defences in Rule 21 of the Takeover Code and section 172 of the Companies Act in order to enable directors of target companies to ward off takeovers where the they have reasonable grounds for their belief that the resultant merged entity will give rise to adverse labour market concentration and/or outcomes for workers. However, after detailed consideration, this option was dismissed. That was on the basis that it would be unworkable and could generate more harms than it addressed. To that extent, company law alone cannot be relied on as the exclusive prophylactic insofar as directors and shareholders are not the most appropriate constituencies to effect change. Nevertheless, the point was made that although an adequate solution to damaging post-merger labour market

87 Pascale Dechamps, "Labour Markets: A Blind Spot for Merger Control?" (2009) *Agenda Oxera* 1.

effects may not be available via company law (in the absence of wholesale structural reform of the field), reform of competition law in the guise of the public interest test has the potential to make a difference. This conclusion reinforces the veracity of what is an age-old story and claim, namely how the structure of company law often creates problems and harms for third parties, but its DNA is incapable of solving these problems, which are then farmed out to other areas of the law to resolve.