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Monopsony in labour markets: the corporate law contribution*

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ABSTRACT



Labour economists have attributed wage stagnation to employers' monopsony/oligopsony powers, which may be a consequence of corporate mergers. Traditional competition law cannot see the problem because it focuses on the effects of mergers on output markets (goods/services) and not input markets (labour). This article argues that company law (including takeover regulations) is oblivious to the adverse labour market effects of mergers because it narrowly focuses on capital (shareholders) and not labour (workers). These blind spots mean that mergers that lead only to concentrated labour markets remain unregulated, exacerbating wage stagnation. The article examines takeover law reforms that may address this problem, and concludes that the prevailing shareholder-centric DNA of company law is an obstacle to any measure that might favour employees. As long as company law remains fixated on one input (capital), the only viable line of assault on monopsonistic/oligopsonistic labour markets, it seems, is a reorientation of competition law.

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1. Introduction

Orthodox neoclassical economics provides a standard model of the operation of labour markets. According to this conventional 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, ie 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 output 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 demand higher wages, the employer will replace them with new staff who are willing to work for less.

However, there is now growing evidence that labour markets in a number of countries do not operate as efficiently as predicted by neoclassical economic accounts. While both models of monopoly and monopsony are recognised as possibilities by traditional neoclassical economics, the focus on competitive market frameworks tends to overlook the existence and consequences of imbalances in power dynamics in the labour market or particular employment relationships on wage rate outcomes. According to the standard model, it is argued that the higher level of bargaining power that employers wield over their employees has no effect on interactions between supply and demand in the labour market. In perfectly competitive markets, both sides are assumed to have sufficient alternatives, rendering bargaining power irrelevant. And the notion that labour markets are characterised by monopsony is rejected out of hand or simply written off as exceptional at best.⁵ By way of explanation, monopsony is a market condition where a single buyer of a material, such as labour, is able to select from a multitude of labour suppliers. In such circumstances, the buyer has the luxury of a captive labour market and can fix the wages that it pays at a level below what ought to be the competitive market rate. And oligopsony describes the situation where there are a few (rather than a single) buyers of a resource in a market and they have the capacity to set the level of demand for the supply and the wage rate.

However, in reality, labour markets in the US often exhibit monopsonistic or oligopsonistic characteristics, where employers, experiencing low levels of competition for labour – possess disproportionate bargaining power over

¹A Marshall, *Principles of Economics* (Macmillan 1890); RD Blair and JL Harrison, *Monopsony in Law and Economics* (CUP 2002) 1–2.

²ML 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* (Edward Elgar 2012) 20, 21–22.

³J Hicks, *The Theory of Wages* (Macmillan Press 1932); AC Pigou, *The Economics of Welfare* (MacMillan Press 1924); R Ehrenberg and R Smith, *Modern Labor Economics: Theory and Public Policy* (13th edn, Routledge 2017).

⁴RS Taylor, *Exit Left: Markets and Mobility in Republican Thought* (OUP 2017) 52.

⁵Wachter (n 2) 20, 24; Blair and Harrison (n 1) 67; RS Taylor, 'Market Freedom as Antipower' (2013) 107 *American Political Science Review* 593, 596; M Reynolds, *Power and Privilege: Labor Unions in America* (Universe Books 1984) 59 and Taylor (n 4) 51.

employees on the supply-side. This crucial power dynamic is frequently missed in standard competitive market models, but it plays a vital role in understanding the full scope of wage determination. The research of Azar and others has demonstrated that concentration and monopsony is a regular feature of US labour markets, particularly in suburban and non-urban areas.⁶ This phenomenon is not limited to the United States and extends to Europe,⁷ with publications illustrating the existence of monopsonistic or oligopsonistic labour markets in Portugal,⁸ Norway,⁹ Austria¹⁰ and France.¹¹

For the UK, empirical knowledge in this relatively new area of applied microeconomics is comparatively more limited, and there is no methodological consensus on the most appropriate and accurate technique(s) of measuring monopsony or oligopsony. In that way, the position is much more mixed than the US, and it is not possible to make any unequivocal claim that employer power, i.e. monopsony or oligopsony, is ubiquitous, widespread or pervasive in UK labour markets. However, there is evidence of wage mark-downs to competitive equilibrium market rates being as high as 45%. Even more troubling is the fact that the UK's Competition and Markets Authority ('CMA') has confirmed that labour market concentration is endemic in

⁶J Azar and others, *Labour Market Concentration*, NBER Working Paper No. 24147 (2017) <www.nber.org/papers/w24147>; S Naidu and others, 'Antitrust Remedies for Labor Market Power' (2018) 132 *Harvard Law Review* 536, 536–38; C Estlund, 'Rethinking Autocracy at Work' (2018) 131 *Harvard Law Review* 795, 818–19; I Marinescu and H Hovenkamp, 'Anticompetitive Mergers in Labor Markets' (2019) 94 *Indiana Law Journal* 1031, 1032–33; J Azar and others, *Concentration in US Labor Markets: Evidence from Online Vacancy Data* (2020) 66 *Labour Economics* 101886; OECD, *Competition in Labour Markets*, OECD.org (26 February 2020) <www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>; E Posner, *How Antitrust Failed Workers* (OUP 2020) 1–3; Marinescu and EA Posner, 'Why Has Antitrust Law Failed Workers?' (2020) 105 *Cornell Law Review* 1343; E Posner, 'Antitrust and Labor Markets: A Reply to Richard Epstein' (2022) 15 *New York University Journal of Law & Liberty* 389, 392–97; S Naidu and EA Posner, 'Labor Monopsony and the Limits of the Law' (2022) 57 *The Journal of Human Resources* S284; J. Azar and others, 'Labor Market Concentration' (2022) 57 *Journal of Human Resources* S168, S179; 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; A 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; Y Qiu and A Sojourner, 'Labor-Market Concentration and Labor Compensation' (2023) 76 *ILR Review* 475; L Alexander and SC Salop, 'Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers' (2023) 90 *University of Chicago Law Review* 273; H Hafiz, 'The Law of Geographic Labor Market Inequality' (2024) 172 *University of Pennsylvania Law Review* 1183.

⁷Research by Satoshi and others illustrates that 18% of employees in Austria, Belgium, the 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: Satoshi (n 6) 339, 342.

⁸PS Martins, 'Making Their Own Weather? Estimating Employer Labour-Market Power and its Wage Effects' 15 (Ctr. for Globalization Rsch., Working Paper No. 95, 2018).

⁹S Dodini, MF Lovenheim, KG Salvanes and A Willén, 'Monopsony, Skills, and Labor Market Concentration' 14 (Ctr For Econ & Pol'y Rsch, 2020).

¹⁰G Jarosch, JS Nimczik and I Sorkin, 'Granular Search, Market Structure, and Wages' 43 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26239, 2019).

¹¹I Marinescu, I Ouss and L Pape, 'Wages, Hires, and Labor Market Concentration' (2021) 184 *Journal of Economic Behavior & Organization* 506, 510–13.

many economic sectors and industries in the UK, such as education, public administration, information and communication services, professional services, manufacturing, agriculture, utilities, transport and storage, health and social work, mining and quarrying, and financial services.¹² As such, the fundamental empirical premise on which the arguments in this article are based is very much nuanced (and limited to this sectoral and industry-specific context of UK labour markets).

In a state of monopsony/oligopsony, the environment within which labour markets are operating renders them more susceptible to particular vulnerabilities: 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; secondly, an increase in economic and wealth inequality; and finally, after a corporate takeover or merger ('takeover', 'merger', or 'M&A'), the over-inflation of the price paid by consumers or businesses for the products or services of the post-merger monopsonist employer:¹³ more explanation later on the dynamics of this process.

It is obvious that the rules, principles and doctrines of competition law can operate in a way that either constrains or enhances the degree of monopsony/oligopsony in markets, including the labour market.¹⁴ What is less clear is whether corporate laws have any role to play in facilitating, embedding and exacerbating the degree of monopsony/oligopsony in labour markets. The primary contention of this article is that the form, substance and scope of corporate takeover and merger laws in particular, do indeed enable labour market monopsony/oligopsony to function as a wealth-threatening or wealth-minimisation device. And if the content of corporate takeover laws has an impact on monopsony levels, the key question posed by this article is *whether* and *how* their reform might provide a solution – albeit admittedly, partial – to the generation of monopsonistic wage rates. Seen from this angle, this article probes if and how reforms of the UK corporate takeover laws to tighten up the market for corporate control might (or might not) have the capacity to combat excessive

¹²See paras 2.5, 3.13, 4.17 and 4.37–4.38 at pages 7, 15, 22 and 33–34 of CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk) and W Abel, S Tenreyro and G Thwaites, 'Monopsony in the UK' 3–4 (Ctr. for Econ. & Pol'y Rsch., Discussion Paper No. 13265, 2018).

¹³Of course, this is not to claim that monopsony is the sole cause of wage stagnation or the increase in economic and wealth inequality, etc. since there are other causal factors at play, such as the decline of the trade unions: see H Farber and others, 'Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data' (2021) 136 *Quarterly Journal of Economics* 1325, 1326; A Stansbury and LH Summers, 'The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy' (Spring 2020) Brookings Papers on Economic Activity 1; and J Peters, 'Labour Market Deregulation and the Decline of Labour Power in North America and Western Europe' (2008) 27 *Policy and Society* 83.

¹⁴For example, see the various contributions in the edited collection by J Broulik and K Cserecs (eds), *Competition Law and Economic Inequality* (Hart 2022).

concentration in labour markets.¹⁵ And since the empirical premise on which this article is based is limited to the claim that sector and industry-specific monopsony and oligopsony is a feature of UK labour markets, any proposed reforms of UK corporate takeover laws must be sufficiently nuanced and sensitive to that reality.

The article is structured as follows: first, having provided an explanation of the evidence for, and the consequences and causes of, labour market monopsony in section 2, section 3 turns to an exposition of the ways in which corporate takeover laws make a contribution to its emergence, deepening and persistence. Section 4 goes on to assess whether corporate takeover law reforms could tackle labour market monopsony, and what form they might take. Section 5 identifies the central political-economic conundrum lying at the heart of this article: that there are deep-seated obstacles that confront the formulation of corporate takeover laws that will tame monopsony in labour markets. These stem from the shareholder-centric assumptions that underpin corporate law. In this way, inasmuch as corporate takeover law prioritises the enhancement of shareholders' rights and open, free and liberal securities markets, and is indifferent to, or myopic about, the harms it causes to external third parties – such as workers and consumers – its structure and DNA makes it inherently incapable of stepping up to the plate to offer relief. As such, the conclusion is reached that responsibility for the monumental task of tackling labour market monopsony/oligopsony in the affected UK sectors and industries identified by the CMA must be farmed out to competition law and other branches of the legal system. Section 6 draws together the relevant strands of the preceding discussion and concludes by noting how in the absence of reconfiguring corporate law in terms of a holistic 'enterprise' law, there are formidable obstacle to change.

¹⁵It 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 neoclassical economics, i.e. applying marginal calculus, welfare analysis and equilibrium analysis. In this way, its analytical framing suggests reforms nudging labour markets and wage/earning outcomes away from monopsony 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 (see J Vercheran, *Labour – A Heterodox Approach* (Palgrave Macmillan 2014) 53–55) – such as the new institutional economics of Coase, North and Williamson (R Coase, 'The Nature of the Firm' (1937); R Coase, 'The Problem of Social Cost' (1960); DC 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), or the institutionalist economic perspective (JS Commons, *Institutional Economics* (Macmillan 1934), S Deakin, D Gindis, GM Hodgson, K Huang and K Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 *Journal of Comparative Economics* 188) of John R Commons – which alongside the nascent law and political economy scholarship (JS Purdy, D Singh Grewal, A Kapczynski and KS Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 *Yale Law Journal* 1784) interrogates and questions neoclassical perspectives, this paper applies the textbook neoclassical mode of analysis.

2. The evidence for, and implications of, monopsonistic/oligopsonistic labour markets

2.1. Introduction

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 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. In this section, we will focus on recent data on labour market monopsony/oligopsony and what this can mean for wages and product prices charged to consumers where there has been a takeover or merger resulting in a monopsonist/oligopsonist employer.

2.2. The evidence

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 If the figure of 0 is produced, this is consistent with the absence of any concentration, whereas a value of 10,000 indicates that there is a single firm in

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

¹⁷OECD (2021), *Methodologies to Measure Market Competition*, OECD Competition Committee Issues Paper 11–13 <<https://oe.cd/mmmc>>

¹⁸See 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); S Bishop and M Walker, *The Economics of EC Competition Law* (University edn, Sweet & Maxwell 2010) 67–69 and 363. It should be underscored that many economists have expressed reservations about the robustness of applying the HHI technique of measurement to product markets in general (see N Miller and others, 'On the Misuse of Regressions of Price on the HHI in Merger Review' (2022) 10 *Journal of Antitrust Enforcement* 248).

¹⁹Naidu and others, (n 6) 536, 576 and A Manning, 'Monopsony in Labor Markets: A Review' (2021) 74 *ILR Review* 3, 8.

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 US and European labour markets – to gauge the effect of firms buying from those markets – the results have shown either moderate or high levels of monopsony or oligopsony.²² In the UK, the evidence of monopsony or oligopsony is less clear-cut and more work is undoubtedly necessary, but the use of the HHI demonstrates that (i) labour market concentration rose between 1998 and 2004, (ii) mark-downs to competitive market wage rates (which is the point at which labour supply and demand ought to intersect) can reach as much as 45%, and (iii) according to the CMA, industries such as financial services, information and communication services, professional services, mining and quarrying, utilities, manufacturing, agriculture, transport and storage, health and social work, education and public administration are characterised by oligopsony, enabling employees to exercise their market power to suppress wage rates.²³

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% in the US²⁴ and 2% in the UK.²⁵ As such, the effect on the wage levels of the workers of oligopsonist/monopsonist employers is suppressive. Rather than being paid the value of their marginal product contribution to their employer's overall revenue, instead, workers are receiving less than standard neoclassical 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.²⁶ Over time, wage suppression can give rise to wage stagnation in the economy and heightened levels of inequality.²⁷

²⁰Posner (n 6) 26–27, 69–70 and 36.

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

²²See n 6–11 above. For an assessment of the techniques that economists use to measure monopsony/oligopsony, see M Langella and A Manning, 'The Measure of Monopsony' (2021) 19 *Journal of the European Economic Association* 2929. The soundness of flipping the HHI and applying it to labour markets has been questioned. As such, HHI measurements and the results it produces ought to be approached with some caution.

²³See W Abel, S Tenreyro and G Thwaites, 'Monopsony in the UK' 3–4 (Ctr for Econ & Pol'y Rsch, Discussion Paper No. 13265, 2018); paras 2.5, 3.13, 4.17 and 4.37–4.38 at pages 7, 15, 22 and 33–34 of CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk).

²⁴Naidu and Carr (n 6) 131, 134 and Qiu and Sojourner (n 6) 475.

²⁵Paras 5.2–5.5 and 5.13 at pages 36–40 of CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk).

²⁶Naidu and M Carr (n 6) 131, 134 and 153. Naidu and others (n 19) 536, 538 and 565.

²⁷See also S Deb, J Eeckhout, A Patel and L Warren, 'Market Power and Wage Inequality' (2024) 92 *Econometrica* 603.

2.3. The implications

Imagine a takeover or merger that results in a post-merger monopsonistic/oligopsonistic employer in a labour market in one of the UK industries identified by the CMA as especially concentrated, such as the financial services sector. In such a case, the wages of the workers will be compressed relative to their pre-merger remuneration packages. Economic models have illustrated the potential impact of such wage suppression on the prices charged by that monopsonistic employer to businesses and consumers of their goods and services in the product and services markets. In research carried out by economists focusing on the ex post impact of mergers, it has been shown that mergers do not necessarily result in efficiencies, but instead can have negative consequences for consumers in the form of higher prices.²⁸ In the archetypal case where the effect of a takeover is that the employer becomes both a monopsonist in the labour market *and* a monopolist in the downstream product or services markets,²⁹ the product prices charged to consumers and businesses will be higher than the competitive market rate, since by definition, the employer firm is a monopolist. Post-merger, the outcome is a 'double whammy' with higher prices for consumers and firms acquiring those products or services and lower wages for the workers.³⁰ We can call this example Scenario No. 1. It is a situation where competition law would intervene, since pursuant to the merger, the monopsonist employer has a dominant position in the downstream market and is taking advantage of its monopoly power to distort prices in that market.³¹

But it would be well wide of the mark to claim that Scenario No. 1 is of general application where an employer benefits from post-takeover monopsony power in the labour market.³² Instead, economic modelling suggests

²⁸See JE Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy* (Cambridge, MIT Press 2014); JE Kwoka, 'Does Merger Control Work? A Retrospective on US Enforcement Actions and Merger Outcomes' (2013) 78 *Antitrust Law Journal* 691; A Ashenfelter and D Hosken, 'The Effect of Mergers on Consumer Prices: Evidence from Five Selected Case Studies' (2010) 53 *Journal of Law and Economics* 417; A Ashenfelter, D Hosken and M Weinberg, 'Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers' (2014) 57 *The Journal of Law and Economics* 67.

²⁹This link between monopsony and monopoly stands to reason, since if the employer has a captive market for labour in an industry, then it may also (but not necessarily) be a monopolist when it supplies its products or services (designed, produced or served by those workers) into the downstream commercial market.

³⁰For evidence, see J De Loecker, J Eeckhout and S Mongey, 'Quantifying Market Power and Business Dynamism in the Macroeconomy', NBER Working Paper 28761, 2022, available at QMP.pdf (janeckhout.com) 36 and 42; J De Loecker, J Eeckhout and G Unger, 'The Rise of Market Power and the Macroeconomic Implications' (2020) 135 *The Quarterly Journal of Economics* 561; and M Covarrubias, G Gutierrez and T Philippon, 'From Good to Bad Concentration? US Industries Over the Past 30 Years' (2019) 34 *NBER Macroeconomics Annual* 1.

³¹Section 18(1) of the competition Act 1998. Competition law will not generally apply where there is a natural monopoly and the firm sets monopoly prices. However, where the monopoly pricing is a by-product of a takeover or merger, the situation is different.

³²Alexander and Salop (n 6) 280.

that there are other possibilities. In the second case – which we will refer to as Scenario No. 2 – once again, subsequent to a corporate takeover or merger, the merged entity is both a monopsonist employer and monopolist in the product/services market. But, unlike Scenario No. 1, the dual monopsonist/monopolist passes on the savings it has derived from lower wages to the consumers of its goods and services. Although Scenario No. 2 is rare in practice for the reason that ‘monopsony power raises the effective marginal cost a firm faces and thus should almost always lead to increased prices [for consumers],’³³ there is evidence that the business models of firms such as Amazon and Uber (in its initial phase) do/did precisely that, i.e. lowering input costs by paying exploitative wages to their workers in order to offer the lowest possible prices to their customers.³⁴ As such, although a monopolist in Scenario No. 2, in contrast with Scenario No. 1, the employer does not profit from its post-merger market power to drive up its product or services prices.³⁵ For that reason, competition law will not respond as there is no suggestion of a dominant firm harnessing its monopoly power to raise prices in the downstream market. 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; and secondly, consumers will not be harmed by lower input costs in the labour market 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.³⁶

Finally, we arrive at the third possibility, which we will call Scenario No. 3 and speaks to a link between post-merger labour market monopsony and over-inflation of producer and consumer prices. Here, the market into which the post-merger monopsonist employer sells its products or services is competitive. In this situation, unlike Scenarios No. 1 and 2, the monopsonist employer is *not* a monopoly supplier in the downstream market. Although seemingly contradictory, it is perfectly plausible for uncompetitive labour markets to operate closely alongside competitive product and services markets. For example, the labour market for the book publishing industry is concentrated in the hands of a ‘Big Five’ set of publishers (HarperCollins, Hachette Book Group, Penguin/Random House, MacMillan and Simon & Schuster). This can be contrasted with the retail sales market for books, which is much more diffuse with an abundance of supplier participants, from niche publishing houses to medium-tier firms. As such, this is a classic

³³Posner (n 6) 86.

³⁴LM Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 *Yale Law Journal* 710.

³⁵See Posner (n 6) 85.

³⁶L Alexander and SC 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, 282–83.

case of a concentrated labour market accompanied by a competitive downstream market. Furthermore, consider also the situation where an employer hires its labour from a concentrated geographical area, but the product or services market into which it sells its goods or services is national or international in reach. In these cases, the monopsonist employer will have the capacity to respond to a fall in its input prices (i.e. the cost of labour) by controlling its firm-specific output so that it can increase its profits when selling its products or services into the national or international marketplace.³⁷ They can do so by adjusting their rate of output (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.³⁸ They then sell their own goods or services into the market at that level. And the easiest way for the monopsonist employer to reach the correct rate of product that matches the market price for the goods and services in the competitive downstream market is to restrict how much it hires from the labour market, i.e. by recruiting fewer workers.³⁹ In this way, rather than benefitting from its lower input costs to drive up production and lower the overall market price charged to consumers in the downstream market, the monopsonist instead reduces its output so that prices drift upwards.⁴⁰ Competition law would not apply in the case of Scenario No. 3, since the product price is still being set by the market competitively, albeit that it is set at a level higher than where it would be if the monopsonist had increased its firm-level output or competing sellers had expanded their output to offset the monopsonist's reduction in output.⁴¹ In the final analysis, the position here is prejudicial to both workers – as the employer is exploiting a captive labour market to suppress wages – and consumers and firms acquiring the monopsonist's products/services.

To wind up this part of the discussion, in the case of both Scenario Nos. 1 & 3, the post-merger monopsonist employer is behaving in the product market in a way that suggests it has higher marginal input costs than a firm that does

³⁷SJ 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; Blair and Harrison (n 1) 45–48; Alexander and Salop (n 36) 273, 282–81; C Ye, C Macaluso and B Hershbein, 'Monopsony in the U.S. Labor Market' (2022) 112 *American Economic Review* 2099, 2112.

³⁸JB Kirkwood, 'Powerful Buyers and Merger Enforcement' (2012) 92 *Boston University Law Review* 1485, 1498.

³⁹RG Noll, 'Buyer Power' and Economic Policy' (2005) 72 *Antitrust Law Journal* 589, 599–600; J Eeckhout, *The Profit Paradox* (Princeton University Press 2021) 80–81. Alexander and Salop (n 6) 273, 281. See also paras 2.6 and 5.18–5.22 at pages 8 and 42–44 of CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at [Competition and market power in UK labour markets \(publishing.service.gov.uk\)](https://competitionandmarketpowerinuklabourmarkets.publishing.service.gov.uk).

⁴⁰J Eeckhout, *The Profit Paradox* (Princeton University Press 2021) 75. This example assumes that competing sellers in the downstream market do not expand their output to make up for the monopsonist's reduction in output.

⁴¹Alexander and SC Salop (n 6) 273, 282.

not have monopsony power.⁴² And in both of these cases, the interests of workers and consumers are harmed. However, it is only in the case of Scenario No. 1 that there will be scope for the competition authorities to intervene on the basis of the 'consumer welfare' standard if any of the harmful consequences for consumers are the direct effect of a takeover or merger. This can be contrasted with the legal position in the case of Scenario Nos. 2 & 3 where regulatory intervention would be out of the question, since there are no adverse consequences for consumer welfare in Scenario No. 2 (so competition law is irrelevant) and although there are adverse repercussions for the workers of the merged entity and the latter's consumers in Scenario No. 3, the market from which the consumers are purchasing goods and services is competitive.

The discussion so far speaks to a clear association between suppressed wages and higher consumer prices in the market subsequent to takeovers and mergers, i.e. a direct wage/price link. What is interesting is that economists have suggested Scenario Nos. 1 & 3 are a common, rather than rare, phenomenon and that the most that consumers 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).⁴³ Seen from this perspective, less efficiency stalks *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. And the scenario that poses the greatest challenge for the law is Scenario No. 3. For in the case of Scenario No. 1, competition authorities will become involved to offset the harmful effects of a merger on competition for consumers and in Scenario No. 2, consumers are not harmed. But it is only in the context of Scenario No. 3 that the interests of both consumers and workers are damaged by the merger, yet the competition regulator will have no legal authority to intervene. In that way, the main focus of a broader package of law reforms will be fixed on the situation in Scenario No. 3.

2.4. The causes

Before we can understand how the content and shape of corporate takeover laws 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

⁴²OECD, 'Monopsony and Buyer Power' (DAF/COMP(2008)38) (17 December 2009), available at 44445750.pdf (oecd.org) at 9 and 30–35.

⁴³RG Noll, "'Buyer Power" and Economic Policy' (2005) 72 *Antitrust Law Journal* 589, 606–12; Posner (n 6) 86; Eeckhout (n 40) 79–80; 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.

monopsony.⁴⁴ By doing this, we can 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,⁴⁵ with each present to varying degrees. 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’. We leave the second and third causes to one side,⁴⁶ and focus on the first, namely, *pure* concentration. This will subsist in a labour market where too many workers are chasing too few jobs from a single firm (monopsonist), or too few firms (oligopsonists). The existence of concentration and a lack of competition in labour markets is symptomatic of the fact that many of them are geographically limited in size.⁴⁷ 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 downwards the wages and contractual terms and conditions that they offer to their staff.

There are a number of ways in which we can think of the category of labour market concentration subsequent to a corporate takeover or merger as offering incentives to employers to pay their existing staff a wage package that is less than the competitive wage rate. First, an employer in a

⁴⁴Arguably, there is something of a ‘feedback loop’ dynamic in play between the causes and implications of monopsony, ie that sometimes the causes discussed in this section manifest as consequences and vice versa.

⁴⁵There is arguably a fourth category (which may be embedded in one or another of the other three): monopoly/oligopoly power in the product market, but with the monopoly/oligopoly profits then being shared with labour inputs, i.e. higher input wages as a result of the sharing of the monopolist’s/oligopolist’s surplus. This category may be more relevant for the US (for some industries, and in some epochs) than for Europe, e.g. the automobile industry in the US until the 1970s/1980s had substantial product market power, but the wages of auto-workers were not depressed, but high (or at least materially higher than wages in other basic manufacturing industries). Admittedly, other explanations for these higher wages could be (i) unionization, (ii) the need for labour peace for the oligopoly to make their product market profits, or (iii) the need to have political support (or at least the oligopolists’ need for their industry not to be a total political pariah), which strong exertion of monopsony power on wages could/would affect. There’s a case that from the moment of Ford’s \$5/day in the 1920s through to the heyday of the US auto industry (ending a few decades ago), the fourth category is the best fit: see MJ Roe, ‘Corporate Purpose and Corporate Competition’ (2021) 99 *Washington University Law Review* 223. We are grateful to Mark Roe for this very valuable insight.

⁴⁶For discussion, see T. Ransom, ‘Seniority and Monopsony in the Academic Labor Market’ (1993) 83 *American Economic Review* 221; BE Kaufman, ‘Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives’ in K Dau-Schmidt, SD Harris, and O Lobel (eds), *Labor and Employment Law and Economics* (Cheltenham, Edward Elgar 2009) 3, 15–16 and 30–33; J Fox, ‘Estimating the Employer Switching Costs and Wage Responses of Forward-Looking Engineers’ (2010) 28 *Journal of Labor Economics* 357; Schwab (n 37) 115, 140; Naidu (n 19) 536, 553–556; Marinescu and Posner (n 6) 1343, 1349–52; T Ransom, ‘Labor Market Frictions and Moving Costs of the Employed and Unemployed’ (2022) 57 *Journal of Human Resources* S137; Naidu and Posner (n 6) 1183.

⁴⁷Azar and others (n 6) S168, S179; Hafiz (n 6) 1183; Paras 4.29 and 4.33 at pages 29 and 31 of CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk).

monopsonistic/oligopsonistic labour market might ensure that its staff earn less by entering into collusive wage agreements with its remaining competitors to suppress wages. Alternatively, the same effect can be achieved by an employer (operating in one of the UK industries identified by the CMA as especially concentrated, such as the manufacturing, mining or financial services sector) acquiring its direct competitors or suppliers, i.e. in the context of a horizontal or vertical takeover or merger.⁴⁸ In that case, the removal of a competitor or supplier will have an impact on the external labour market, compressing the number of acquirers of skills in the relevant sector. It is at this juncture in the discussion that the palpable connection between corporate takeover laws and job market concentration is thrown into sharp relief and assumes obvious significance.

3. The corporate law contribution to monopsonistic/oligopsonistic labour markets

3.1. The market for corporate control and labour market concentration

The point of departure for this section is twofold: first, the argument that although it is accepted that the empirical evidence of monopsony or oligopsony in the UK labour market is mixed (and more research is needed to verify how widespread it may be), there is nevertheless strong circumstantial evidence to justify proceeding with policy design and law reform measures to address the phenomenon on a sector and industry-specific basis,⁴⁹ albeit cautiously: as noted above, the latter is the exact nature of the limited empirical premise on which the arguments and claims in this article are rooted;⁵⁰ and secondly, the claim that there is evidence that the shape and span of corporate takeover laws feeds into the first factor that is contributory towards monopsony/oligopsony, i.e. the tightening of concentration in the labour market of the aforementioned sectors/industries of the UK economy. With regard to the contribution of corporate takeover laws, there are a number of mechanisms by which their shape, content and scope enable a greater level of imperfection in competition to be brought to bear on labour markets in the highlighted specific sectors of the UK economy. First, where the applicable legal measures shackle key actors from intervening to prevent horizontal or vertical takeovers from proceeding that are likely to be anticompetitive from the perspective of labour (rather than product or services) market outcomes, higher concentration is

⁴⁸Eeckhout (n 40) 94.

⁴⁹To be specific, the industries identified in the CMA Report: financial services, information and communication services, professional services, mining and quarrying, utilities, manufacturing, agriculture, transport and storage, health and social work, education and public administration.

⁵⁰See n 12 and 23 above.

the result.⁵¹ Evidence that mergers can have negative consequences for the staff of both the target and the bidder and on employment in general abounds. For example, multiple studies have charted the adverse effects of takeovers and mergers on staff numbers via mass lay-offs and redundancies.⁵² There are also accounts of downward pay rate adjustments subsequent to horizontal takeovers, as well as drops in productivity levels and the dilution of employment terms and conditions.⁵³ But secondly, and more importantly, if the inevitable result of the horizontal takeover is that there are fewer hirers of labour in the relevant industry in which the takeover or merger occurred, the consequence will be less competition. And if competition levels fall, this signals more concentration and an increased capacity for lower wages. Research has noted the connection between laissez-faire regulation of corporate takeover and merger law and concentrated labour markets.⁵⁴ For this reason, one of the causes of

⁵¹There is also a second mechanism in play whereby corporate law and governance norms serve to deepen labour market concentration. Consider the changes in the pattern of shareholder ownership and governance structures of the largest listed public companies over the past fifty years, with the emergence of institutional shareholders. These developments – ushering in an age of strong governance providing shareholders with extended rights and control measures over decisions taken by managers and directors – that have been promoted by corporate laws and governance standards have had indirect (and unintended) consequences on labour markets. For example, (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-general financial crisis promotion of shareholder stewardship codes and activism policies, are far from benign when it comes to their impact on labour markets, on which see Z Goshen and 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; M Steinbaum, 'Common Ownership and the Corporate Governance Channel for Employer Power in Labor Markets' (2021) XX(X) *The Antitrust Bulletin* 1; and MJ Roe and M Vatiello, 'Corporate Governance and its Political Economy' in JN Gordon and W Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP 2015) 56.

⁵²B Black, H Gospel, and A Pendleton, 'Finance, Corporate Governance and the Employment Relationship' (2007) 46 *Industrial Relations: A Journal of Economy and Society* 643, 644–8; J Cremers and S Vitols, *Takeovers with or Without Worker Voice: Workers' Rights under the EU Takeover Bids Directive* (European Trade Union Institute-2016) 11; and E Lehto and P Bockerman, 'Analysing the Employment Effects of Mergers and Acquisitions' (2008) 68 *Journal of Economic Behavior & Organization* 112.

⁵³M 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* (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* (European Trade Union Institute 2016) 71; J Cremers and S Vitols, *Takeovers with or without Worker Voice: Workers' Rights under the EU Takeover Bids 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 HF Gospel, 'Markets and Relationships: Finance, Governance, and Labour in the United Kingdom' in A Pendleton and HF Gospel (eds), *Corporate Governance and Labour Management: An International Comparison* (OUP 2004) 59–60.

⁵⁴D Hosken, M Larson-Koester and C Taragin, 'Labor and Product Market Effects of Mergers' (2023), available at Labor and Product Market Effects of Mergers – Google Scholar, available at Labor and Product Market Effects on Mergers; D Arnold, 'Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes' (2025) *American Economic Review* (forthcoming); H Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (Monthly Review Press 1974) 179–87.

oligopsony or monopsony in labour markets – concentration and less competition – is a logical consequence of the promotion of an active market for corporate control. In particular, it is once the impact of the behaviour of monopsonistic employers on the consumers of their products and services is added to the analysis that the adverse harms and outcomes are thrown into even more sharp relief. As noted in section 2c, it is common for the post-merger entity to conduct itself in a manner consistent with Scenario No. 3 (lowering its wage bill and reducing its output so that it can charge higher prices in a competitive downstream market) to the detriment of both workers and consumers.

3.2. Takeover regulation in the UK and US and the market for corporate control

Ironically, during the 1950s and 1960s, the architects of the City Code on Takeovers and Mergers ('Takeover Code' or 'Code')⁵⁵ regime and the UK government actively promoted mergers not only as a tool to increase industrial efficiency and competitiveness, but also to enhance the prospects of the UK workforce.⁵⁶ The political and economic environment at the time was shaped by the need to increase the scale of operations and make British firms globally competitive. The government believed that fostering the growth of larger, more competitive businesses through mergers and acquisitions ('M&A') would benefit the national economy and ultimately improve employment prospects across the country.⁵⁷ Any short-term unemployment following mergers was viewed as a transitional phrase necessary for long-term industrial growth.⁵⁸ Central to this strategy was the establishment of the Industrial Reorganisation Corporation, which played a crucial role in facilitating mergers across key industries employing large numbers of workers, such as electronics, cars manufacturing, and shipbuilding. This approach to industrial consolidation received bipartisan backing,⁵⁹ with the Labour government particularly endorsing these policies, seeing them as aligned with its goals of job preservation and employment security.⁶⁰

In this political and economic context, the City of London's culture of self-regulation was a significant factor in shaping the governance of takeovers. The Notes on Amalgamation of British Businesses, followed by the Takeover Code – developed largely by the City of London institutions – established key principles, including shareholder primacy and the non-frustration rule,

⁵⁵See The Takeover Code – Takeover Code (thetakeoverpanel.org.uk).

⁵⁶William Davis, *Merger Mania* (Constable 1970).

⁵⁷Leslie Hannah, *The Rise of the Corporate Economy* (Routledge 1976) 171–72.

⁵⁸*ibid* 171–172.

⁵⁹*ibid* 172–173.

⁶⁰See, e.g. Industrial Reorganisation Corporation Bill, HL Deb 1 December 1966, vol 278, cols 828–74, <<https://api.parliament.uk/historic-hansard/lords/1966/dec/01/industrial-reorganisation-corporation-1>> accessed 3 September 2024.

whereby directors would leave shareholders with sole responsibility for deciding on the merits of takeover bids. This regulatory approach can be seen as the financial sector taking proactive steps to preserve market order to prevent excesses that might have prompted state intervention.⁶¹ Thus, while contemporary evidence suggests that M&A activities can have adverse effects on labour, the original intent behind existing merger/takeover policies was to strengthen both businesses and labour, fostering a more resilient UK economy in a period of significant industrial transformation.

Unlike the UK, where mergers were seen as a way to create more competitive national businesses, the US historically adopted a more defensive stance. With M&A activities primarily regulated by state law, the cautious approach in the US – particularly during the climate in the 1980s of highly debt leveraged ‘bust-up’ takeovers involving asset stripping and reorganisations – reflected the need to protect non-shareholder stakeholders like workers and local communities from their harmful effects⁶² amid concerns over the concentration of economic power in the hands of large corporations.⁶³ However, it has been argued that the anti-takeover laws were primarily influenced by local businesses seeking to avoid unwanted acquisitions.⁶⁴ Moreover, proponents of the ‘race to the bottom’ theory, which posits that states compete to attract incorporations, have suggested that the anti-takeover statutes of the 1980s, which granted directors the powers to block takeovers, were often driven by managerial interests⁶⁵ rather than a genuine concern to protect broader stakeholders.

However, in contrast with the narrative above, if we probe the relevant legal regulations in the UK on the operation of the market for corporate control (in the same or different economic sectors, i.e. horizontal or vertical takeovers), we find that they unashamedly extoll the virtues of mergers as routinely beneficial. The law is set out in the Code, which is enforced by the Takeover Panel (‘Panel’) and placed on a statutory footing by the Companies Act 2006 (‘CA 2006’).⁶⁶ Although the Code explicitly states that its purpose is neither to facilitate nor impede takeovers,⁶⁷ the takeover rules clearly promote and facilitate M&A transactions, propelling the UK into one of the world’s most active takeover markets, trailing only behind the US and China.⁶⁸ The standard prescription for takeover regulation in

⁶¹David Kershaw, *Principles of Takeover Regulation* (OUP 2016) 65–111.

⁶²L Johnson and D Millon, ‘Missing the Point About State Takeover Statutes’ (1989) 87 *Michigan Law Review* 846.

⁶³DK Millon, ‘State Takeover Laws: A Rebirth of Corporation Law?’ (1988) 45 *Washington and Lee Law Review* 903.

⁶⁴R Romano, ‘The Political Economy of Takeover Statutes’ (1987) 73 *Virginia Law Review* 111; WT Allen, ‘Our Schizophrenic Conception of the Business Corporation’ (1992) 14 *Cardozo Law Review* 261.

⁶⁵See, e.g. LA Bebchuk and A Cohen, ‘Firms’ Decisions Where to Incorporate’ (2003) 46 *The Journal of Law and Economics* 383; LA Bebchuk and A Ferrell, ‘Federalism and Corporate Law: The Race to Protect Managers from Takeovers’ (1999) *Columbia Law Review* 1168; WE Cary, ‘Federalism and Corporate Law: Reflections Upon Delaware’ (1974) 83 *Yale Law Journal* 663.

⁶⁶Sections 942 to 965 of the Companies Act 2006.

⁶⁷The City Code on Takeovers and Mergers (Takeover Code), Introduction to the Code, section 2(a).

⁶⁸See Mergers and acquisitions (M&As) worldwide – statistics & facts | Statista.

the Code is that it ought to be encouraged on the ground that the synergies produced by integration – that is to say, the acquisition by one corporation of another in the same or a different sector of the economy – will result in greater efficiencies via ‘value creation’.⁶⁹ 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.⁷⁰ Furthermore, a horizontal or vertical takeover will also cut out duplication of efforts, lowering the wage bill of the resultant post-merger entity.⁷¹ And as all corporate lawyers understand very well, the existence of the market for corporate control has a disciplinary effect on managers and directors of corporations, 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.⁷² It also feeds into tackling the much wider principal-agent problem that exists in large public corporations,⁷³ which it has been argued is an issue that the modern incarnation of company law has largely been moulded to address.⁷⁴ Once all of these cost savings and efficiencies are aggregated, the input costs of the post-takeover business are lower, which it then purportedly passes on to the consumers of its products and services at lower prices.⁷⁵ The contrast with the narrative above could not be starker.

3.3. The UK Takeover Code and directors’ duties

The key to understanding the dissonance between the competing positions discussed in the preceding paragraphs is rooted in the terms of the Code and how it is primarily designed to safeguard shareholders’ interests⁷⁶ and

⁶⁹D Kershaw, *Principles of Takeover Regulation* (OUP 2016) 3.

⁷⁰*ibid* 3.

⁷¹*ibid* 3–4. For example, two employees of the new merged entity may be able to carry out the work of three employees, which means that one employee out of three will be laid off.

⁷²H 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; FH Easterbrook and DR Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 112.

⁷³See MC Jensen and W Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure’ (1976) 3 *J Fin Econ* 305; EF Fama, ‘Agency Problems and the Theory of the Firm’ (1980) 88 *J Pol Econ* 288; EF Fama and MC Jensen, ‘Separation of Ownership and Control’ (1983) 26 *JLE* 301; FH Easterbrook and DR Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991); SM Bainbridge, ‘The Board of Directors as Nexus of Contracts’ (2002) 88 *Iowa L Rev* 1; JR Macey, ‘Fiduciary Duties as Residual Claims: Obligations to Non-shareholder Constituencies from a Theory of the Firm Perspective’ (1999) 84 *Cornell L J* 1266; W Bratton, ‘The Nexus of Contracts Corporation: A Critical Appraisal’ (1989) 74 *Cornell L Rev* 407.

⁷⁴R Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 2.

⁷⁵However, as noted above when discussing the three possible responses of a monopsonist employer in the case of Scenario Nos 1, 2 & 3, it is by no means certain that those lower input costs will be channelled through.

⁷⁶Takeover Code, Introduction to the Code, section 2(a).

overlook the broader impact of M&A on other stakeholders, including the target's employees. In that way, the benefits of mergers to shareholders and society are equiparated, whereas any potential adverse implications for other constituencies are played down. This shareholder-oriented ideology of the Code finds its primary expression in the stipulation that the outcome of the takeover offers lies in the hands of the shareholders of the target company, who are granted exclusive decision-making authority on whether to sell their shares to the prospective bidder. This is fortified by the board neutrality/non-frustration rule stipulated in Rule 21.1 of the Code, which becomes operational when there is a prospect of the emergence of an 'imminent bona fide offer':⁷⁷ this rule temporarily restricts the powers of the target company's directors by prohibiting them from engaging in activities that could result in the frustration of a takeover offer. While the Code does not require directors to treat the offer price as the determining factor in formulating their opinion on the merits of a takeover bid,⁷⁸ section 172 of CA 2006 explicitly directs directors to have regard to the wider implications of their corporate decisions on employees and other stakeholders of the company. The statutory provision, thus, goes beyond permitting directors to factor in employee interests alongside those of shareholders to one that actively enjoins them to do so. However, section 172 demands simultaneously that directors must act in a manner that maximises the company's success, with the 'interests of the company' being narrowly equiparated with the interests of shareholders, both current and future.⁷⁹ Consequently, although section 172 ostensibly requires directors to weigh the implications of their decisions for all relevant stakeholders, the narrow understanding of the 'company' curtails the board's ability to prioritise broader concerns such as those of the employees, particularly when the latter's interests conflict with those of shareholders. As such, in a scenario where a takeover may adversely affect a target company's employees in a sector or industry of the UK economy that the CMA has noted is blighted by a heightened level of labour market concentration, the board would be expected to recommend the offer if it is deemed beneficial for the shareholders.

⁷⁷Takeover Code, rule 21.1(a).

⁷⁸Takeover Code, note 1 on rule 25.2. Cf. the Takeover Panel Code Committee, Review of Certain Aspects of the Regulation of Takeover Bids, Public Consultation Paper (PCP 2010/2), para 5.16.

⁷⁹In *Brady v Brady* [1988] BCLC 20 (CA) at 40, the Court of Appeal remarked that '[t]he interests of a company, an artificial person, cannot be distinguished from the interests of the persons who are interested in it. Who are those persons? Where a company is both going and solvent, first and foremost come the shareholders, present and no doubt future as well'. It is noteworthy that the decision of the Court of Appeal was later reversed by the House of Lords ([1989] AC 755); however, this reversal did not affect the validity of the dictum. In *Sharp v Blank* [2015] EWHC 3220 (Ch) [13], the court acknowledged that while directors do not owe any fiduciary duty directly to shareholders, the interests of the company typically align with those of the shareholders.

3.4. Existing employee protections in the UK Takeover Code

This shareholder-centric approach inherent in the UK takeover regime has been the subject of extensive criticism in academic circles and the media, and amongst market participants and broader society. The claim has been made that the prevailing UK rules unduly favour the short-term interests of shareholders at the expense of broader stakeholder welfare, including the workforce.⁸⁰ In particular, the public outcry following Cadbury's acquisition by Kraft gave rise to great controversy and extensive public consultation. This episode highlighted the lack of recognition of non-shareholder constituencies in the takeover rules.⁸¹ The Panel responded to the public concerns by improving the flow of disclosure of information related to the workforce. This included a requirement for the bidder to explain the long-term commercial justifications for the takeover and its intentions regarding the future business of the target company and its employees, as well as intimation of the likely repercussions of its strategic plans on employment.⁸² The board of the target company must also articulate its position on the likely effects of the implementation of the offer on employment⁸³ and the anticipated repercussions of the bidder's strategic plans on employment.⁸⁴

Employees have additional protections by virtue of the Code. For example, employees must be informed about the proposed takeover⁸⁵ and have the right to express their opinion on the impact of the impending bid on employment, which must be relayed⁸⁶ to the shareholders.⁸⁷ Although the Code falls short of offering employees any meaningful and effective involvement in the deal negotiation process, or any right of veto, the entitlement to articulate

⁸⁰See, for example, MR Patrone, 'Sour Chocolate: The U.K. Takeover Panel's Improper Reaction to Kraft's Acquisition of Cadbury' (2011) 8 *Brigham Young University International Law and Management Review* 63; M Hiscock and H Williams, 'Cadbury Takeover: What People Think', *The Guardian* (25 September 2009) <www.theguardian.com/business/2009/sep/25/cadburys-kraft-vox-pop> accessed 2 February 2024; Dan Roberts, 'Cadbury's Board Agrees £12bn Sale to Kraft', *The Guardian* (19 January 2010) <www.theguardian.com/business/2010/jan/19/cadbury-board-agrees-kraft-sale> accessed 3 February 2024; G Cox, 'Overcoming Short-termism within British Business. The Key to Sustained Economic Growth', Labour Policy Review (February 2013) <www.policyforum.labour.org.uk/uploads/editor/files/Overcoming_Short-termism.pdf> accessed 5 September 2024; A Bowdren, 'Contextualising Short-Termism: Does the Corporate Legal Landscape Facilitate Managerial Myopia?' (2016) 5 *University College London Journal of Law and Jurisprudence* 285; A Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' (2017) 74 *Washington and Lee Law Review* 1001; KM Willey, *Stock Market Short-Termism – Law, Regulation, and Reform* (Palgrave MacMillan 2019).

⁸¹The Takeover Panel Code Committee, Review of Certain Aspects of the Regulation of Takeover Bids, Response Statement (RS 2010/22), para 2.7.

⁸²The Takeover Panel Code Committee, Amendments Following the Code Committee's Review of the Regulation of Takeover Bids, Instrument 2011/2.

⁸³Takeover Code, rule 25.2(a)(i).

⁸⁴Takeover Code, rule 25.2(a)(ii).

⁸⁵See, for example, Takeover Code, rule 2.11(a)(ii), 24.1(b)(i), 25.1(b).

⁸⁶The 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 target board of directors when responding to the bid. See Takeover Code, rule 25.9.

⁸⁷Takeover Code, rule 25.9. The target company is responsible for any costs incurred by the employees in obtaining advice to provide their opinion: Takeover Code, note 1 on rule 25.9.

their opinion and have it circulated increases awareness of employment-related issues amongst the ultimate decision-makers. Yet, the expression of the workforce will be limited in its scope and influence: regardless of the content of such a statement, any shareholder with a short-term investment horizon is unlikely to voluntarily consider the views of the workforce if it runs contrary to their own interests. As emphasised in the decision in *Re Astec (BSR) plc*,⁸⁸ shareholders are free to exercise the voting rights that attach to their shares as a property right and in their own perceived best interests.⁸⁹ Shareholders' primary concern in takeovers revolves around the offer price and the prospect of short-term capital gains.⁹⁰ Consequently, takeover offers with a price that exceed the pre-bid share market value are often successful,⁹¹ which is unsurprising given that such bids represent the best opportunity for shareholders to realise the value of their investment. Although this short-term horizon often conflicts with the longer-term interests of employees,⁹² shareholders are legally permitted to prioritise their own personal gain and maximise the return on their investment. In the absence of any deep-seated structural reform of the UK's corporate takeover regime, any document written from the viewpoint of the workforce will simply fail to gain any traction with shareholders who will pursue their own interests in the context of a merger.

The limited effectiveness of the entitlements of employees to information about a merger is further compromised by the content of the Code and the CA 2006. Even if the board recognises the adverse impact of a takeover on the target's employees or the labour market, as a result of the application of the board neutrality rule in Rule 21.1 of the Code and the principle of enlightened shareholder value enshrined in section 172 of CA 2006, the directors are constrained in their ability to act effectively to prevent such harm. This is something much more than a mere procedural oversight; it reflects the inherent inadequacies of the existing company law framework

⁸⁸[1998] 2 BCLC 556.

⁸⁹*Re Astec (BSR) plc* [1998] 2 BCLC 556 at 583 ('The starting point is the proposition that in general the right of a shareholder to vote his shares is a right of property which the shareholder is free to exercise in what he regards as his own best interests. He is not obliged to cast his vote in what others may regard as the best interests of the company as an entity in its own right').

⁹⁰The trend in the UK is towards short-term investment strategies, which is evident in the average stock-holding period of less than a year (See Bank of England, Staff Working Paper No 571, December 2015, Chart D2.A). Additionally, takeover bids often give rise to substantial changes in the ownership structure of target companies, (See PCP 2010/2) as observed in the Cadbury/Kraft takeover battle. This case highlights the significant surge in the percentage of short-term investors in Cadbury's shareholding, increasing from five to approximately 31 per cent (See M Peetz, 'Protecting Shareholders from Themselves: How the United Kingdom's 2011 Takeover Code Amendments Hit their Mark' (2013) 2 *Penn State Journal of Law & International Affairs* 409).

⁹¹SCY Wong, 'Long-Term versus Short-Term Distinction in UK Takeover Review Misses the Point', *The Financial Times* (23 August 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662610>

⁹²B Clarke, 'The Role of Employees in the Takeover Bids Directive' in Cremers and Vitols (eds), *Takeovers with or without Worker Voice: Workers' Rights Under the EU Takeover Bids Directive*, ETUI series – Workers' Rights in Company Law (ETUI 2016).

in affording labour a genuine say and any consideration in the merger and takeover process.

3.5. Scope for intervention by the panel or competition law authorities to address anti-competitive effects of takeovers on labour markets

While the board of directors lacks substantial powers of intervention, in theory, it can draw the attention of the relevant regulatory authorities to the adverse impact of any merger on the labour market. However, in practice, no authority is equipped to intervene in takeovers on the basis of the labour market concentration factor in any of the sectors or industries that the CMA has indicated are subject to such a condition. The Panel's responsibility in regulating the takeover process in the UK is to ensure the orderly conclusion of transactions and the safeguarding of shareholders' interests. The Panel has clearly stated that the interests of the wider public, including the effect of mergers on the labour market 'rightfully remain[s], the responsibility of government and other bodies which are better placed than the Panel to consider those matters'.⁹³

As for the ability of competition authorities to intervene, the potential negative post-merger consequences for labour markets might suggest that they would be best suited to examine proposed takeover transactions. However, the role of the CMA⁹⁴ is primarily to focus on the protection of consumer welfare.⁹⁵ The merger review regime outlined in the Enterprise Act 2002 (EA 2002) envisages limited intervention in takeovers,⁹⁶ contingent on the impact on competition in the downstream market: the key mission is to consider whether the merger will cause a substantial lessening of competition within any market in the UK *for goods or services*.⁹⁷ Notably, the default review does not consider the anti-competitive effect of a proposed takeover *on the relevant labour market*, i.e. whether there is any lessening in competition or the formation of monopsony in the labour market, particularly in

⁹³The Takeover Panel Code Committee, Review of Certain Aspects of the Regulation of Takeover Bids, Response Statement (RS 2010/22), para 2.4.

⁹⁴The UK merger control process is independent of political influence and the UK Government does not play any formal role in any CMA merger control investigations.

⁹⁵Merger Assessment Guidelines, Competition and Markets Authority, 2021, paras 1.2–1.3.

⁹⁶This applies when a given transaction qualifies as a 'relevant merger situation', 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 and meet a certain jurisdictional turnover threshold or the share of supply test (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 (Enterprise Act 2002, section 59).

⁹⁷Enterprise Act 2002, sections 22 and 35 for completed mergers and sections 33 and 36 for anticipated mergers; Merger Assessment Guidelines, Competition and Markets Authority, 2021, paras 1.3 and 8.21–8.27.

those industries and sectors of the UK economy that the CMA has noted are susceptible to concentration. If the post-merger effect on the labour market in one of those industries or sectors is detrimental, that is irrelevant since higher concentration levels *in the labour market* following a successful takeover has *never* been a ground for intervention in competition law. This is a crucial omission given how common Scenario No. 3 is after a horizontal or vertical merger.⁹⁸

Finally, it is important to note that the law provides that a takeover raising public interest concerns may attract additional scrutiny from the British Government. In such a case, the Secretary of State for Business & Trade (Secretary of State) may take the decision-making role over from the CMA⁹⁹ by issuing an ‘intervention notice’.¹⁰⁰ If a proposed merger can be shown to operate contrary to the public interest, the Secretary of State can impose additional conditions on a proposed deal to address these concerns or decide to prohibit it altogether.¹⁰¹ However, the scope of intervention is deliberately restricted to media concerns, the stability of the UK financial system, and the UK’s capability to combat public health emergencies.¹⁰² Any potential adverse impact on the labour market does not fall within the existing grounds for intervention.

3.6. Summary of existing position

In conclusion, the shareholder-oriented approach of the Code, coupled with the prevailing principle of enlightened shareholder value in UK company law means that any post-merger externalities that result in harm being done to employees, are ignored. Advocates of shareholder-centric company law often argue that externalities created by company law, including those affecting labour, will be appropriately addressed by other branches of the law, such as labour law and competition law.¹⁰³ However, absent any

⁹⁸It would only be in the case of Scenario No. 1 that the CMA would have grounds to prevent a merger, i.e. where the post-merger entity is a dual monopsonist/monopolist and profits from paying lower wages and charging monopoly prices.

⁹⁹Upon issuing an intervention notice, the Secretary of State assumes the role of the decision-maker on whether the merger operates or may be expected to operate against the public interest (Enterprise Act 2002, section 54) based on the reports of the CMA’s findings, as the CMA remains responsible for investigating the impact of the merger on both the public interest and competition issues (Enterprise Act 2002, section 44).

¹⁰⁰Enterprise Act 2002, section 42(2).

¹⁰¹Enterprise Act 2002, sections 54 and 55.

¹⁰²Enterprise 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’).

¹⁰³This calls to mind the incantation of M Klain and L Strine Jnr, when they remarked: ‘corporate law scholars [respond] that these [externalities] are not corporate law’s problems... Corporate law accepts that corporations must follow the law, so if the consequences of corporate activity are not socially optimal, then it is not corporate law itself – which simply allocates power between



Figure 1. Correlation between factors.

anticipated anti-competitive effects affecting consumers in product or services markets – such as in the case of Scenario No. 1 considered in section 2.3 above – or public interest concerns relating to the UK’s media, financial or public health systems, there is no scope for the competition authorities or the government to intervene in takeovers in those industries and sectors of the UK economy that the CMA has noted are currently adversely affected by concentration. The existing legal framework falls short in recognising and addressing the potential systemic and long-lasting negative effects of mergers on the labour market. This omission is significant, extending beyond a mere oversight, since the net effect of this process is a vast transfer of wealth from labour and the middle classes to capital. The correlation between each of the discussed factors is illustrated in [Figure 1](#).

In light of this discussion, in the next section, consideration will be given to whether there is any bandwidth available in the existing corporate takeover regime and company law for reforms that would enable labour market concentration generated by horizontal and vertical mergers to be tackled in the specific sectors and industries of the UK economy that the CMA noted are particularly adversely affected by such a condition.

4. The corporate law contribution to monopsonistic labour markets: potential regulatory responses

4.1. Introduction

Having considered the influence of the content and structure of corporate takeover regulations on labour markets within the context of mergers, the

stockholders and corporate management and allows for the creation of artificial citizens – but other bodies of law that bear responsibility’: see Stakeholder Capitalism’s Greatest Challenge: Reshaping a Public Consensus to Govern a Global Economy by Leo E. Strine, Jr., Michael Klain: SSRN

focus now turns to an evaluation of *whether and how* any legal changes might assist in achieving a more balanced and competitive labour market equilibrium. In doing so, the point made above should be borne in mind;¹⁰⁴ namely that it is accepted any suggested law reforms will only serve to nudge the labour markets and wage/earning outcomes in the aforementioned CMA-identified UK industries and sectors away from monopsony in the direction of a competitive equilibrium, without necessarily achieving such a state of affairs. Nevertheless, it is submitted that this in itself is a worthwhile endeavour. With that caveat in mind, the suggested solution presented in this article is two-fold. First, it proposes assigning authority to a well-placed person or entity capable of intervening, and if necessary, halting, a change of control transaction if the latter has, or is expected to, substantially lessen(ed) competition or generate higher levels of concentration in, the labour market of the specific sectors and industries of the UK economy that the CMA has noted are particularly liable to such conditions. The alternative proposed reform would take the form of empowering the Government or the CMA to intervene to investigate and potentially prevent a takeover in such sectors/industries, if the merger's anticipated or realised consequences include a suppression in the wages of workers employed by the post-merger employer, or a reduction in the quality of their employment.

4.2. Entrusting directors with an entitlement to intervene

If it is accepted that the current loose incarnation of takeover regulation in the UK can give rise to post-merger labour market concentration, the key issue becomes identifying the most suitable actor(s) or entity(ies) to exercise powers of intervention in any reformed regulatory regime and the criterion/ia on which such intervention should be permissible. One of the internal constituencies of the target company would be a possible choice for this role, namely its directors. Empowering directors with reformed authority could be rooted in a new statutory provision that explicitly enables them to take into account the post-merger potential for a substantial lessening of competition in the labour market or the creation of monopsony or oligopsony. In this way, the power to challenge a proposed takeover in one of the aforementioned industries or sectors in the UK economy would be vested in the target directors on the ground of labour market pressures. This would also necessitate the insertion of an exception to, or suspension of, the board neutrality rule contained in Rule 21.1 of the Code. On that basis, directors would be afforded the ability to engage in defensive conduct – to ward off a takeover without shareholder consent –

¹⁰⁴See n 15.

if they had reasonable grounds for suspecting that it is likely that there would be a post-merger significant diminution in labour market competition. Of course, in the US, directors are entitled to mount takeover defences without prior shareholder approval, e.g. by adopting 'poison pills'. And theory would indicate that the considerable discretion afforded to directors to interfere with, and ultimately prevent, hostile bids via powerful takeover defences ought to have a discernible impact on labour market monopsony or oligopsony in US labour markets, i.e. by resulting in lower levels of labour market concentration in the US. However, the authors were unable to find any evidence of research having been undertaken to either prove or disprove this thesis.¹⁰⁵ This is unfortunate, as a finding that substantiates this would provide empirical support for the reform proposal that we suggest in the subsequent paragraphs.

At the heart of the suggested reform proposal is the recognition that target shareholders – who currently hold decision-making powers in respect of mergers under the board neutrality rule – cannot realistically be expected to safeguard the interests of labour in the context of change of control transactions.¹⁰⁶ And in particular, the proposed reforms go beyond existing takeover laws insofar as they would explicitly provide a safe harbour for directors if they decide to intervene to prevent a takeover on labour market grounds. At first glance, such a proposal may seem promising. However, there are a number of catches. If takeover laws were modified in this way, it would not be long before concerns were raised about the new scheme's compatibility and likely conflict with directors' fiduciary obligations under section 172 of CA 2006. Although the Code, rather than general law, is the primary framework governing the board's conduct during a takeover bid, directors' actions must nonetheless conform with the statutory statement of their general duties. If corporate takeover laws are adjusted to expressly mandate directors to have regard to employees' interests, any managerial decision taken in line with that direction will clash with their section 172 duty which is generally interpreted as a duty primarily to maximise shareholder value.¹⁰⁷ Consequently, this overarching objective will clearly inhibit the ability of directors to intervene in takeovers, raising questions about

¹⁰⁵Perhaps the absence of any research on this issue is attributable to the fact that it would be challenging to design an empirical model establishing that (i) the objective of the directors in mounting a takeover defence to prevent a takeover bid was to protect non-shareholder constituency groups such as the target's employees or the labour market in which the target is operating, and (ii) had the takeover proceeded, the level of labour market concentration would be higher.

¹⁰⁶The reasons for this claim were discussed in sections 3.3 and 3.4 above.

¹⁰⁷BR Cheffins and R Williams, 'Team Production Theory Across the Waves' (2021) 74 *Vanderbilt Law Review* 1583, 1607–10; A Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' (2017) 74 *Washington and Lee Law Review* 1001, 1032; L Talbot, 'Trying to Save the World with Company Law?: Some Problems' (2016) 36 *Legal Studies* 513, 515.

the potential of company law to support directors' role as protectors of the labour market.

Another concern with the proposed reform is that directors are likely to lack the requisite grasp of economics that is needed to evaluate the broader labour market implications of takeovers. Their expertise is typically focused on the management of firm-specific affairs rather than the complexities of labour market dynamics at a regional, national, or international level. Although the Code already tasks target directors with an assessment of the possible impact of a proposed merger on the employees of the company they manage,¹⁰⁸ such an exercise diverges significantly from an evaluation of its effect on the workforce in a particular industry, sector, region or the entire country. This insight raises legitimate concerns about their expertise and competence in this area, and the likely effectiveness of directors as would-be protectors of the labour market. On the basis that financial advisors are already involved in counselling the target board on the effects of a bid's financial terms, one suggestion to address this limitation would be to compel them to offer directors competent insights into the impact of the planned acquisition on the labour market in particular.¹⁰⁹ This approach, however, would introduce additional expense into an already resource-intensive takeover process. It would also pose challenges in ensuring the genuine independence of financial advisors from the board of directors¹¹⁰ who hire them to perform these services.¹¹¹

Entrusting directors with the power to intervene in takeovers based on the perceived threats to labour market competition raises another concern related to the potential for self-serving behaviour, a risk frequently highlighted by the proponents of the board neutrality rule and stricter directorial accountability.¹¹² Directors whose motivations arguably do not align with broader societal welfare, could exploit their newfound authority to obstruct value-enhancing mergers under the pretext of protecting labour interests, when their primary intention may be to protect their own position and job

¹⁰⁸Takeover Code, rule 25.2.

¹⁰⁹Takeover Code, rule 3.1.

¹¹⁰To 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. Any advisors having a relationship with the acquirer may not advise the target. See Takeover Code, note 1 on rule 3.3.

¹¹¹One alternative proposal would be to enjoin trade unions to offer support and advice to the directors in their reformed role. Trade unions are well-positioned to offer advice on the potential consequences of a merger on future wage settlements and employment conditions and they often have access to experts and researchers who hold information about the broader impact of takeovers on labour markets at regional, national or industry levels. Their expertise can complement the knowledge of directors and help balance competing perspectives, providing a comprehensive understanding of the takeover's implications for the labour market without incurring additional costs for the target company.

¹¹²See, for example, LA Bebchuk, 'The Case Against Board Veto in Corporate Takeovers' (2002) 69 *U Chi L Rev* 973; FH Easterbrook and DR Fischel, 'The Proper Role of a Target's Management in Responding to a Tender Offer' (1981) 94 *Harv L Rev* 1161.

security. The experience in the United States, where directors have substantial discretion to resist takeovers, provides a cautionary example. Delaware, under whose state law most of the largest US companies are incorporated,¹¹³ grants boards considerable flexibility to deploy anti-takeover defences to protect the company and shareholders from opportunistic bids. This discretion carries the risk of directors misusing such measures to block beneficial takeovers to serve their own interests.

However, the advent of takeover defences in the US arguably reflects not only managerial self-interest, but also the political dynamics of alignment with employee interests.¹¹⁴ Through a coalitional lens, the use of anti-takeover measures could be interpreted as a response to pressure from non-stakeholders, including employees, who fear the destabilising effects of hostile transactions and share an interest in preserving the stability of the company. Nevertheless, this alignment does not eliminate the challenges associated with managerial discretion, as directors can still misuse defences under the pretence of protecting employees, potentially undermining economic efficiency.

Delaware courts have attempted to balance these risks by developing standards to review the board's defensive decisions in the context of takeovers. For example, in *Unocal Corp. v Mesa Petroleum Co.*,¹¹⁵ the Delaware Supreme Court established a two-part 'enhanced scrutiny' test, which requires directors to demonstrate reasonable grounds for believing that a takeover poses a legitimate threat to corporate policy,¹¹⁶ and that the defensive measures taken are proportionate to that threat.¹¹⁷ This test was refined in *Unitrin, Inc. v American General Corp.*,¹¹⁸ where the court ruled that if the boards' actions are neither coercive nor preclusive, its decisions will be assessed within a 'range of reasonableness' standard.¹¹⁹ Despite well-established standards like those in *Unocal* or *Unitrin* which were developed to lead to objective review,¹²⁰ the subjective nature of these assessments makes it challenging to consistently evaluate whether directors are genuinely serving the company and shareholders or simply entrenching themselves in their corporate positions. Critics argue that Delaware boards can effectively

¹¹³R Romano, *The Genius of American Corporate Law* (AEI Press 1993); LA Bebchuk and A Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters' (2002) 112 *Yale Law Journal* 553.

¹¹⁴See, for example, A Shleifer and LH Summers, 'Breach of Trust in Hostile Takeovers' in AJ Auerbach (ed), *Corporate Takeovers: Causes and Consequences* (University of Chicago Press 1988) (the paper discusses how hostile takeovers disrupt implicit contracts between shareholders and stakeholders. Takeover defences can thus be seen as preserving these implicit agreements).

¹¹⁵493A.2d 946 (Del. 1985).

¹¹⁶*Unocal Corp. v Mesa Petroleum Co.*, 493A.2d 946 (Del. 1985) 955.

¹¹⁷*Unocal Corp. v Mesa Petroleum Co.* 493A.2d 946 (Del. 1985) 955–6.

¹¹⁸651 A.2d 1361 (Del. 1995).

¹¹⁹*Unitrin, Inc. v American General Corp.*, 651 A.2d 1361 (Del. 1995) 1388.

¹²⁰M Lipton, 'Pills, Polls, and Professors Redux' (2002) 69 *The University of Chicago Law Review* 1037, 1045–6.

block a takeover for almost any reason and thereby hinder economic efficiency,¹²¹ even if proceeding with the transaction would enhance company and shareholder value.

It is also important to note, however, that Delaware's defensive mechanisms are not granted for the purpose of protecting non-shareholder stakeholders, and therefore the system is not directly comparable to the proposed conferred authority to intervene that is focused on the labour market. In contrast, constituency statutes adopted in many US states allow or enjoin directors to consider the interests of other stakeholders, such as employees and local communities, when responding to takeover bids.¹²² While these statutes provide a framework for the interests of employees to be considered, they have also attracted criticism for being overly broad and for creating opportunities for directorial entrenchment under the guise of stakeholder protection. The lack of clear benchmarks and objective criteria for assessing the broader social impacts of takeovers, such as the effects on employment, makes it difficult to detect abuses of this authority.¹²³ Furthermore, since workers have no right to challenge board decisions for failing to consider their interests,¹²⁴ directors' accountability for their decisions is further diminished.

Incorporating similar discretion for directors in the UK that are focused on labour market concerns, could lead to similar issues of managerial entrenchment, undermining the efficiency of the corporate control regime. Unlike financial metrics that are easier to quantify, such as share prices or anticipated returns, the impact of a merger on labour markets is more difficult to measure. This makes directorial discretion in takeovers vulnerable to manipulation and self-interest. Thus, the implementation of well-defined, measurable criteria for directors' decision-making in takeovers is essential. For example, the proposed small but significant and non-transitory decrease in wages test ('SSNDW'), or the other detrimental changes in employment terms standard ('SSNIPT') that are both discussed in Section 4.4 could serve as useful benchmarks to evaluate the post-merger impact on labour markets, helping to remove subjectivity from the process. This framework would require a sophisticated economic analysis and access to relevant data, which directors may not possess. Without such objective criteria, the board's decisions could easily be swayed by personal interests rather than labour market concerns.

¹²¹See, for example, JN Gordon, 'Just Say Never? Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett' (1997) 19 *Cardozo Law Review* 511, 525; R Thompson and G Smith, 'Toward a New Theory of the Shareholder Role: 'Sacred Space' in Corporate Takeovers' (2001) 80 *Texas Law Review* 261; JJ Johnson and M Siegel, 'Corporate Mergers: Redefining the Role of Target Directors' (1987) 136 *University of Pennsylvania Law Review* 315.

¹²²R Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation' (1992) 9 *The Yale Journal on Regulation* 119, 171.

¹²³*ibid* 172.

¹²⁴*ibid* 171.

The expansion of directors' rights and the modification of their duties to include consideration of labour markets is also unsuitable because not all sectors of the UK economy will be equally affected by concerns about labour market competition that may arise from takeovers, making it disproportionate to impose such a sweeping change across the board. Enabling directors to decide on takeover interventions based on the possibility of labour market monopsony would introduce the significant risks discussed above, including self-serving behaviour, while the potential benefits for the economy as a whole might not justify these risks.

In theory, the ability to intervene could be limited to directors of companies operating in the affected sectors or industries of the UK identified by the CMA. While more research is needed, it may be assumed that the sectors affected by monopsony/oligopsony in UK labour markets may fluctuate from year to year, depending on economic trends, technological advancements, and industry-specific dynamics. Thus, this approach would be highly impractical, and such variability would require constant adjustments to the framework of directors' duties, creating uncertainty for directors who would need to navigate ever-evolving obligations tied to their sector's changing status. Moreover, this approach could lead to a dual system of directors' duties, fragmenting the corporate governance landscape and undermining the uniformity and consistency that is needed to maintain legal certainty and clarity. The lack of predictability inherent in such a framework would not only disrupt decision-making for directors in takeover markets, but also for investors and potential acquirers, each of whom depend on stable and transparent rules to evaluate opportunities and risks. This could discourage transactions, hinder market confidence, and ultimately weaken the effectiveness of takeover markets in driving economic growth and efficiency.

In the final analysis, while the proposal to enable target directors to intervene in takeovers in accordance with a post-merger diminution in labour market competition standard is intriguing, it is riddled with legal, practical, and ethical complications which underscore the need for caution in reforming corporate takeover laws. And the US experience hardly amounts to a ringing endorsement of the proposal. It would represent a significant departure from the established takeover rules and face challenges related to directors' fiduciary duties, limitations on expertise, and the incentivisation of self-serving behaviour. Consequently, on balance, it is arguably inadvisable to grant a target's board the floated power to intervene in takeovers. Tackling labour market concentration and monopsony in the industries or sectors in the UK economy most exposed to post-takeover concentration demands a much more nuanced approach to ensure optimal economic outcomes while minimising undue risk and conflicts of interest and addressing the concerns stemming from circumstances such as those presented by Scenario No. 3.

4.3. Broadening public interest considerations in the existing competition merger review

Another possible option for reform would be to build on existing regulatory oversight and intervention mechanisms in competition law. Such an approach could offer a more practical avenue to mitigate the damaging impact of takeovers on the labour markets of the relevant CMA-recognised industries or sectors of the UK economy – such as in Scenario No. 3 – while leaving the existing provisions of the corporate takeover law regime intact. For example, it would be possible to simply extend the public interest test in section 58 of the EA 2002 which confers a power in favour of the Secretary of State to intervene if the merger may be expected to significantly and adversely affect competition in the labour market in one of those sectors or industries. The current merger control regime in the UK primarily focuses on consumer welfare, but there is no impediment to it being adjusted to encompass employment considerations. In fact, the existing statutory framework already permits the list of public interest considerations to be extended, so such a reform would not involve considerable amendment.¹²⁵

The aforementioned suggested reform could be supplemented by the addition of a statutory right conferred on the target board of directors to request the Secretary of State to issue a public interest intervention notice in cases where they hold credible concerns that the proposed merger may substantially adversely impact the labour market, potentially leading to the exacerbation of monopsony in one of the relevant sectors or industries. This power would be distinct from the one floated in section 4.2 which would have enabled the target's directors to unilaterally prevent a takeover and as such, would mitigate the risk of decisions being driven by self-interest. Instead, directors would serve as stewards of the company, including its stakeholders, entrusted with a duty to flag potential labour market concerns to the authority vested with the ultimate decision-making power. Crucially, their role in the merger review process would primarily be limited to highlighting and conveying informed concerns to the Secretary of State, who would be armed with a broader perspective and access to relevant expertise.

In adherence to the principles of developing a more inclusive and balanced economy, in deciding whether to intervene under the proposed extended public interest test, the Secretary of State should be mandated to engage with stakeholders, and in particular trade unions, industry associations and employees' representatives of the target company. As noted

¹²⁵The Secretary of State may insert an additional consideration into section 58 of the EA 2002 by means of an order in council, but the proposal to consider the potential for concentration in the labour market would be a new public interest ground. As such, it would have to be scrutinised and approved by Parliament: see the Enterprise Act 2002, sections 42 and 58.

above, the latter already play some, albeit a limited, role in the existing takeover process through their statutory rights to information and consultation and having their opinion circulated to shareholders.¹²⁶

The proposed expansion in the public interest test would not be a new idea. In the past, the test included the protection of employment amongst a wide range of factors to be considered in the assessment of takeovers. The original public interest test contained in the Fair Trading Act 1973 (FTA 1973) mandated the Monopolies and Mergers Commission (as the then authority responsible for merger control) to consider all, rather than simply competition-related, matters relevant in a given case, including the desirability of a 'balanced distribution of industry and employment in the UK'.¹²⁷ However, in 1984, the then Secretary of State Norman Tebbit announced in Parliament that, in practice, references to the competition authority would focus primarily, albeit not exclusively, on competition grounds related to product and services markets.¹²⁸ Subsequently, only a small proportion of proposed takeovers underwent assessment based on non-product/service market competition grounds. Notwithstanding this change in policy, market participants continued to grapple with uncertainty in applying the relevant criteria.¹²⁹ In response, the EA 2002 established a fully independent regime restricted to competition-related criteria for intervention. This initially included the protection of national security as the only public interest consideration.¹³⁰ But 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.¹³¹ Such an expansion would align with the UK's commitment to promote sustainable development and social wellbeing.¹³² 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, current stewardship practices included in the UK's Stewardship Code,¹³³ and align with the values of

¹²⁶See section 4.2 above and the Information and Consultation of Employees Regulations 2004 (SI 2004/3426).

¹²⁷Fair Trading Act 1973, section 84(d) (as originally enacted).

¹²⁸HC Deb 05 July 1984 vol 63 cc213-4W.

¹²⁹Speech given by CMA Chief Executive, Alex Chisholm, at the Fordham Competition Law Institute Annual Conference (11 September 2014) <www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control> accessed 30 September 2023.

¹³⁰Enterprise Act 2002, section 58 (as originally enacted).

¹³¹See, for example, F Mor and S Browning, 'Contested Mergers and Takeovers' Briefing Paper No 5374, 17 October 2018, House of Commons Library.

¹³²See, eg Mainstreaming Sustainable Development: the Government's Vision and what this means in practice (1 February 2011) <www.gov.uk/government/publications/mainstreaming-sustainable-development-the-government-s-vision-and-what-this-means-in-practice> accessed 28 September 2023.

¹³³The UK Stewardship Code 2020, [mainstreaming-sustainable-development.pdf](https://publishing.service.gov.uk) (publishing.service.gov.uk).

enlightened shareholder value articulated by the legislature in section 172 of CA 2006. Seen from this perspective, it would coincide with the current direction of travel of UK corporate governance standards whose focus is to incorporate more stakeholder-friendly rules.

While there is a myriad of advantages to the suggested reforms, some legitimate concerns remain. Although the current economics-based approach in the UK merger control regime has increased the certainty and predictability of the system, improving confidence among enterprises,¹³⁴ there is an anxiety that the introduction of additional criteria may simply increase uncertainty and result in a loss of predictability and delays in the merger review process, making the regulatory environment less attractive to investors.¹³⁵ 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 a multiplicity of disparate factors and the resulting uncertainty may have a chilling effect on the market for corporate control, ultimately discouraging companies from pursuing mergers,¹³⁶ including those which are value-enhancing. This possibility is particularly problematic if one considers change of control transactions to be of general benefit to the economy as a whole.¹³⁷ Greater government involvement in the assessment of proposed mergers may also raise concerns about political influence. Decisions could be swayed by short-term political considerations and economic protectionism, potentially undermining the credibility of the UK's regulatory regime.¹³⁸ As such, the legislative imposition of a more open-ended public interest test presents possible dangers since the Government's position on intervention could be exposed to extensive political lobbying, sectional interests and populist pressures.¹³⁹

So far, opposition to an expansion in the public interest test to include the effect of a horizontal takeover on employment, or economic development or corporate R&D spending has been rooted in the argument that the public interest does not diverge from the interests of merging companies in any of these matters. It has always been maintained that it would be unwarranted

¹³⁴Office of Fair Trading, 'The Deterrent Effect of Competition Enforcement by the OFT' (2007) OFT 963, <<https://webarchive.nationalarchives.gov.uk/>> accessed 30 September 2023.

¹³⁵Organisation for Economic Cooperation and Development, 'Policy Roundtables: Standard for Merger Review' (2009) <<https://www.oecd.org/competition/mergers/45247537.pdf>> accessed 30 September 2023.

¹³⁶*ibid*

¹³⁷See the discussion in section 3 above.

¹³⁸See, 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').

¹³⁹The 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.

to engage in regular interventions to block companies from pursuing their business plans on the grounds that they may have immediate adverse effects on matters such as employment or labour markets. However, the growing evidence of the adverse impacts of mergers on the labour market, consumers (such as in the case of Scenario No. 3 above) and the potential generation or deepening of monopsony in one of the sectors and industries of the UK economy identified by the CMA (considered in section 2) should not be dismissed too readily on the basis of spurious arguments that these are merely short-lived complications. Instead, while some of the negative merger-related employment effects may indeed be short-term or reversible, the potential generation of monopsony in the labour market in such industries or sectors has far-reaching and lasting consequences, as analysed above. Monopsony power suppresses wages on a sustained basis, curtails labour mobility, and stifles competition for labour in the long run. Large-scale takeovers and mergers can disrupt entire industries or sectors, leading to ongoing 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, as well as confronting the systemic harms that can result from unchecked monopsony power.

The incorporation of labour market considerations into the enlarged public interest merger review would need to be done in a way that enhances clarity and certainty. The relevant test should entail a comprehensive economic-oriented examination of the overall impact of a merger on local or regional labour markets in one of the relevant industries or sectors. While proposing the most appropriate labour market test is beyond the scope of this paper, the SSNDW standard suggested by Naidu, Posner and Weyl¹⁴⁰ and raised above, is analogous to the hypothetical monopolist test that is used in product markets. The SSNDW test can be used to determine whether the merger will have detrimental consequences on 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 of such sorts into the merger control regime would undoubtedly face challenges, such as the definition of the relevant labour market,¹⁴¹ the relevant skills, and the overall price of labour and

¹⁴⁰S Naidu, EA Posner and G Weyl, 'Antitrust Remedies for Labor Market Power' (2018) *Harvard Law Review* 132, 536.

¹⁴¹One option that can be used to define the labour market would be to combine the Office of National Statistics' 3-digit Standard Occupational Classification ('SOC') measure (which defines different categories of occupation) with the Travel to Work Area to fix the appropriate geographical extent of the labour market in respect of that occupation (for an explanation, see ONS at SOC 2020 – Office for National Statistics (ons.gov.uk) and para 57 of Appendix D at page 87 of CMA Report, *Competition*

worker preferences.¹⁴² However, although it may not be necessary to explore in granular detail certain factors such as the impact of the merger on pension schemes, employment standards or non-monetary benefits, an evaluation of the broader labour market effects is essential in order to grasp the lasting implications of the merger. A thoughtful and measured approach such as the use of the SSNDW test can protect employees, promote economic efficiency, and address systemic risks in the modern economy.

4.4. Broadening the CMA's remit in the existing merger review

There is a more radical alternative to the reforms floated in section 4.3. This would necessitate the reconfiguration of the structure of the competition-based merger control regime overseen by the CMA to specifically treat labour markets (in the sectors and industries of the UK economy identified by the CMA as concentrated) in the same way as product and services markets.¹⁴³ The scheme would take sector-specific labour market competition seriously by operating in a similar way in which competition is currently safeguarded in product or services markets, namely in terms of the application of the 'substantial lessening of competition' test. 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 in accordance with an aligned approach when evaluating the desirability of a merger.

This proposal would appear to be pushing at an open door. For example, recent developments in the US, demonstrated by the US District Court for the District of Columbia's decision to block Penguin Random House's acquisition of Simon & Schuster,¹⁴⁴ reflect the trend towards growing scrutiny of the competitive effects of mergers on input markets. In this particular case, the prospect of the creation of a 'publishing behemoth' raised concerns about monopsony in the market for best-selling manuscripts and so, the merger was found to have the potential to substantially lessen competition in publishing rights and authors' returns. Moreover, the updated Merger Guidelines (2023 Merger Guidelines)¹⁴⁵ recently published by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have

and Market Power in UK Labour Markets, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk).

¹⁴²P Dechamps, 'Labour Markets: A Blind Spot for Merger Control?' (2009) *Agenda Oxera* 1.

¹⁴³*ibid.*

¹⁴⁴See Department of Justice, 'Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster', Press Release (2 November 2021) <www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>; Department of Justice, 'Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster', Press Release (31 October 2022) <www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed>

¹⁴⁵Department of Justice and the Federal Trade Commission, Merger Guidelines, 18 December 2023.

emphasised that the Clayton Act safeguards competition in *any* market, including output *and* input markets. Here, it is explicitly provided that the impact of a merger on labour markets will be scrutinised in a similar way to the effect on competition in downstream markets.¹⁴⁶ The DOJ and FTC will examine whether the hypothetical monopsonist would likely impose a small but significant¹⁴⁷ and non-transitory decrease in price paid for labour, or other worsening of terms ('SSNIPT'), including diluted working conditions or the degradation of workplace quality.¹⁴⁸ Any evidence indicating that a merger may result in any one or more of the above-mentioned effects can demonstrate substantial lessening of competition for labour. Consequently, the 2023 Merger Guidelines illustrate a discernible shift in priorities in US competition policy, compelling the authorities to scrutinise the impact of takeovers on labour markets more closely.

Like the DOJ and FTC, the CMA has also recently explicitly acknowledged the relevance of labour market competitiveness to its work, identifying labour market monopsony as a topic that has been actively debated in academic scholarship.¹⁴⁹ In particular, the CMA has indicated that it is receptive to broadening its focus beyond the traditional emphasis on consumer welfare and output markets.¹⁵⁰ Recognising its potential implications for the types of cases likely to be pursued by the CMA in the future, its research strategy now includes labour market power, which entails an assessment of the extent to which employers may impact wages or working conditions, and the potential for distortion of levels of competition.¹⁵¹ In addition, the CMA has recognised that though competition authorities have traditionally

¹⁴⁶Department of Justice and the Federal Trade Commission, Merger Guidelines, 18 December 2023, Guideline 10 and section 4.3.D.8.

¹⁴⁷The extent of what is considered a 'small but significant' worsening depends on several factors including the nature of the industry and the merging firms' positions in it. In terms of pricing, the Agencies often apply a SSNIP of five percent of the price charged by firms for relevant products or services. See Department of Justice and the Federal Trade Commission, Merger Guidelines, 18 December 2023, sections 4.3.A and 4.3.B.

¹⁴⁸Department of Justice and the Federal Trade Commission, Merger Guidelines, 18 December 2023, section 4.3.

¹⁴⁹Competition and Markets Authority, Economic Research Strategy, 8 March 2023, para 2.2.

¹⁵⁰This departure is not yet widely observed in many merger control jurisdictions (see Dechamps in his article 'Labour Markets: A Blind Spot for Merger Control?' (2009) *Agenda Oxera* 1) but has been garnering increasing attention worldwide. The trend is noticeable in Europe, with Commissioner Vestager's discussion of the anticompetitive effects of non-poaching agreements reflecting a growing appetite for intervention in respect of practices affecting competitiveness in labour markets. Furthermore, towards the end of 2022, Portugal's competition authority, the Autoridade da Concorrência identified competitiveness in labour markets as one of its policy priorities: see J Perkins, C Campillo and G Corbetta, 'Monopsony in Labour Markets: a New Enforcement Priority for Competition Authorities', *The Analysis*, (28 September 2023) <www.compasslexecon.com/the-analysis/monopsony-in-labour-markets-a-new-enforcement-priority-for-competition-authorities/09-28-2023/> accessed 3 February 2024.

¹⁵¹Competition and Markets Authority, Annual Plan 2023/24, 23 March 2023, (CMA/2023/01), para 6.13. For a more recent example, see the CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk).

concentrated on horizontal product markets, market power can also manifest as monopsony in labour or other input markets, leading to damages to employment and investment choices, and ultimately affecting consumer welfare, e.g. as in the case of Scenario No. 3.¹⁵² This new broader perspective is reflected in the CMA's 12-month reporting period that began in April 2023,¹⁵³ its new Annual Strategy Plan¹⁵⁴ and its recent fact-finding report on market power in UK labour markets.¹⁵⁵ This evidence of proactive engagement suggests CMA's readiness to foster equitable and competitive labour practices and an expansion of its regulatory purview beyond the conventional focus on consumer welfare. And this makes the proposed broadening of the scope of merger control to include labour market considerations more feasible than ever before.

And in light of the empirical premises on which the claims and arguments for law reform are predicated in this article, a more targeted approach to addressing labour market concerns in merger control would focus on sector-specific interventions. Given that labour market concentrations and the risk of monopsony power and its adverse effects are not uniform across all sectors, but vary depending on economic trends, technological developments, and industry-specific dynamics, it is essential to tailor regulatory measures to sectors where such risks are most prevalent. This proposal, thus, emphasises the need for a focused framework that treats labour markets in specific sectors with the same scrutiny as product and services markets, ensuring that interventions are both effective and proportionate. Such a proposal, however, would necessitate an ongoing commitment to the identification of the sectors that have highly concentrated labour markets and which are at risk of monopsony at any given time; which is a complex and resource-intensive process prone to delays and disputes. To address this, it is suggested that the CMA prepare and maintain a list of affected sectors, based on economic trends and ongoing market analysis. This list could be periodically updated to reflect changes in industry dynamics, ensuring the approach remains targeted and responsive while minimising administrative burdens and uncertainties.

The pre-merger review of takeovers to include labour market concerns would be limited to sectors included in the list, creating a structured and predictable framework for directors, investors, and potential acquirers. As

¹⁵²Competition and Markets Authority, Economic Research Strategy, 8 March 2023, para 4.11.

¹⁵³Competition and Markets Authority, Annual Plan 2023/24, 23 March 2023 (CMA/2023/01), paras 6.1–6.5.

¹⁵⁴Competition and Markets Authority, Annual Plan 2023/24, 23 March 2023 (CMA/2023/01).

¹⁵⁵See the CMA Report, *Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk). See also Competition and Markets Authority, 'Avoid breaking competition law: Advice for employers', 9 February 2023, <www.gov.uk/government/publications/avoid-breaking-competition-law-advice-for-employers> accessed 3 February 2024.

discussed above, the CMA is already well-positioned to implement such a solution, having identified and acknowledged a range of sectors potentially affected by monopsony power.¹⁵⁶ This proactive approach utilises the CMA's capacity to monitor, evaluate and regulate sector-specific labour markets effectively. By ensuring the interventions are tailored to the sectors most at risk, this approach would address systemic risks while maintaining the efficiency of merger control processes. The framework would not only address labour market concerns but also preserve clarity and predictability in takeover markets, reducing uncertainties for all stakeholders. Such limitation in the scope of labour market evaluations would align with the CMA's commitment to fostering equitable and competitive markets without imposing unnecessary burdens on unaffected sectors.

5. A political-economic perspective

There is an ancillary, albeit highly significant, point that can be drawn from the discussion in this article. By shining a light on corporate takeover laws and regulation, what has also been revealed is the extent to which company law is wholly unequipped to offer solutions to harms and problems that it generates when it is applied in practice. Even with a measure of adjustment of existing takeover laws, it is entirely incapable of addressing the externalities or detriments that legally approved mergers cause to third parties, such as employees. This point speaks to a much broader political-economic point in play. And that is how the social, political and economic choices that have been made over the course of generations by those in power in politics and the market – prioritising shareholder rights, laissez-faire capitalism, open securities markets, the limited liability of shareholders of corporations and the separate legal personality of corporations, etc. – render it inevitable that any proposed reforms to corporate takeover laws to address labour market concentration are guaranteed to be arbitrary and unfocused, as well as tending to mire such reform efforts in thorny ideological debates. Rather than respond directly to the social and economic ills sustained by workers as a result of mergers, the footprint of the shareholder primacy¹⁵⁷ and

¹⁵⁶To recap, a full list of the sectors/industries noted by the CMA are shown in sections 1 and 2.2 above and see n 12 and 23 above.

¹⁵⁷Interestingly, pursuing non-shareholder purpose becomes more feasible when a company has significant market power. Such discretion does not necessarily translate to the benefit of non-shareholder stakeholders, such as employees, but rather creates the capacity for companies to act in ways that extend beyond shareholder considerations (see MJ Roe, 'Corporate Purpose and Corporate Competition' (2021) 99 *Washington University Law Review* 223). The latitude afforded by market power thus serves as a double-edged sword, potentially enabling companies to promote either wider public welfare or private advantage.

ownership norm is found all over corporate takeover law to deny corporate liability.

It is important to note that the UK and US stand out in their shareholder-centric governance approach as global outliers, contrasting with many other jurisdictions that have traditionally better balanced the interests of shareholders and non-shareholder constituencies more effectively (including employees).¹⁵⁸ As Roe argues, political cultures emphasising social peace, stability and pro-labour state policies – common in continental Europe and Japan – tend to constrain shareholder value maximisation by protecting workers and imposing limits on financial interests.¹⁵⁹ Historically, corporate regimes in these jurisdictions pressured managers to stabilise employment and prioritise broader social welfare alongside profits, largely due to strong social democratic and labour influences. While these regimes have evolved,¹⁶⁰ this legacy of balancing the interests of all stakeholders continues to distinguish them from more shareholder-focused models like those in the UK and the US. For instance, in Germany, corporate governance and takeover laws reflect more of a stakeholder approach, which integrates employee interests directly into the decision-making process through board co-determination,¹⁶¹ thus reducing the need for external legal interventions.

In particular, the broader political-economic backgrounding of corporate law haunts the entire discussion in sections 3.3, 3.4 and 4.2. The DNA of corporate takeover law in the UK is so rigid that changes favouring employees that attempt to work within the grain of the current regulatory system must be rejected because they come at the expense of the shareholders and simply cannot be tolerated. In that way, corporate law treats its principles and rules as so sacrosanct that it is unable to directly target the source of labour problems created by mergers. Instead, it can only indirectly touch on the symptoms and relies on other branches of the law to fill the void by offering redress to those it has harmed. Seen from that perspective, this is the principal reason why it has been proposed that any responsibility for offering redress to employees should be farmed out of company law to competition law.

There is also a palpable failure on the part of the law to see the economy as a holistic framework whereby all inputs (including labour, goods and services)

¹⁵⁸P Gourevitch and J Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton University Press 2005) 2–8; J Cioffi, *Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism* (Cornell University Press 2010); P Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP 2001) 8–9 and 15–17; G Hayden and M Bodie, *Reconstructing the Corporation: From Shareholder Primacy to Shared Governance* (CUP 2020) 172–75.

¹⁵⁹MJ Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (OUP 2006).

¹⁶⁰P Gourevitch and J Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton University Press 2005) 2–8.

¹⁶¹MJ Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (OUP 2006) 18.

in the productive process are treated equally and regulated fairly to remove external harms caused by commercial trade. Arguably, this is partially attributable to the absence of a legal concept of the 'enterprise' and a distinctive 'enterprise law', which are both missing from our legal vocabulary. If we are serious about the role of the enterprise in securing efficiency in the wider economy, the development of regulations and laws that address the holistic firm is a necessary step. The myopia of the existing regime of corporate takeover regulation is such that it is far too narrow a framework to offer a sustainable solution to the adverse labour market outcomes of mergers. Instead, corporate law will continue to be structured in a way so as to prevent redress for workers. We are left spitting in the wind if we decide to place any faith in assurances that company law can put its own house in order. Instead, it will continue to leave redress to competition law and other areas of law such as tort law,¹⁶² which betrays a poverty of imagination and an abdication of responsibility.

A key question is how an 'enterprise' concept might help overcome this blind spot in company law? For reasons of space, this article is unable to comprehensively sketch out the variety of theoretical elements and steps involved. But the answer lies in the claim that takeover regulations recognising the existence of the 'enterprise' would be very different. For example, the 'business' or 'enterprise' on the one hand, and the 'firm' or 'corporation' on the other, are not necessarily aligned: the latter may be broader or narrower than the former, e.g. where a company as a legal entity is engaged in more than one line of business or a single business activity is pursued by a group of companies. Hence, by looking beyond the target firm and bidder firm as two separate individual legal entities to the markets that the collective economic activity of the post-merger enterprise (as a collection of inputs and outputs) will be engaged in or with, the true position is thrown into sharp relief. This enables a post-merger analysis of those respective inputs and outputs, i.e. the likely shape of the post-takeover 'enterprise' and any potential adverse effects on the relevant markets. The implicit point here is that an enterprise-based takeover law would be more attuned to the prevention of labour market concentration in the relevant sectors and industries of the UK economy blighted by monopsony, since the respective roles and interactions of the various corporate stakeholders would be more exposed, such that it would no longer be necessary to appeal to competition law.

¹⁶²For example, see the recent extension of tort law to address the problems generated by the company law doctrine of piercing the corporate veil: *Chandler v Cape plc* [2012] 1 WLR 3111, *Vedanta Resources plc v Lungowe* [2019] (UKSC) 20; [2019] 2 WLR 1051 and *HRH Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 1 WLR 1294.

6. Conclusion

Contrary to standard neoclassical economic models, recent research has shown how labour markets in particular sectors and industries of the UK economy are not efficient, diffuse or competitive. Instead, they are far more concentrated than had previously been understood. The condition of labour market monopsony or oligopsony in those contexts generates an environment where there is the potential for uncompetitive wage rates to be paid to employees on a sustained basis. The resultant wage stagnation contributes to growing inequality and adverse outcomes for consumers of the products or services supplied by monopsonistic employers (see Scenario No. 3 in section 2.3 above).

In this article, the case is made that the shape and content of corporate takeover laws undoubtedly make a contribution of sorts to the generation of such adverse labour market outcomes. For example, by facilitating horizontal mergers which remove competing players from the labour market and strengthen barriers to entry for new firms, the current suite of takeover and merger laws regulating the market for corporate control deepens the degree of concentration in the labour markets of those sectors and industries of the UK economy identified by the CMA in its 2024 report. And since company laws are partially responsible for this state of affairs pertaining in those sectors/industries, it is argued that they should be the one of the (many) line(s) of attack that confront the harms produced by post-merger labour market concentration.¹⁶³ To that end, the article considered potential reforms to corporate takeover laws to address these problems on the basis that they were ripe for reconsideration in light of the themes advanced in this article.

In this vein, the discussion centred on the merits of introducing a statutory exception to, or suspension of, the embargo on managerial takeover defences in Rule 21 of the Code. This would enable directors of target companies (operating in the labour markets of those sectors and industries of the UK economy identified by the CMA in its report) to challenge takeovers without shareholder consent where 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 on the basis that it would be unworkable and could generate more harm than it addressed. For example, such a reform would increase the risk of self-serving conduct on the part of directors desperate to keep their jobs after the merger, and would be inconsistent with their obligation to promote the success of the target in terms of section 172 of the CA 2006. Furthermore, it is highly

¹⁶³Labour Law, tax law and insolvency law reform also have roles to play.

implausible that any legislature would decide that it was justifiable to create a sector or industry-dependent suite of directors' duties. To that extent, the conclusion was reached that company law reform could not be relied on as the exclusive prophylactic.

Nevertheless, the point was made that although an adequate solution to damaging post-merger labour market 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 an expansion of the public interest test had the potential to make a difference. Alternatively, it was noted how the modification of competition policy on the part of the CMA that is geared towards greater intervention in relation to anti-labour mergers in sectors and industries of the UK economy identified by the CMA in its 2024 report, holds a large degree of promise. Although both of the suggested reforms are positive insofar as they promote an effective dialogue between the two fields of corporate law and competition law (particularly in the M&A context), this conclusion is profoundly disappointing for those of us who hold faith in company law bearing the resources to put right the adverse consequences of its own application. Instead, it reinforces the veracity of what is an age-old story and claim; namely how the application of company law rules can harm the interests of third parties, but its internal structure is simply incapable of resolving these problems, which it then hives out to other areas of the law to resolve. In the absence of reforms designed to recognise the holistic 'enterprise', the political-economic backgrounding of corporate law presents a formidable obstacle to change, rendering it incapable of putting its own house in order.

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