

Social Mobility and Competition Law

A Framework for Stand-Alone Labour Market Theories of Harm

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Date of Submission:

27.06.2025

Abstract

This thesis explores the extent to which the EU merger assessment framework allows negative impacts on upstream labour markets – in and of themselves, and without harm to downstream product markets – to constitute a sufficient theory of harm. It argues that social mobility is a legitimising principle of the social contract that underpins the EU competition regime and has a mutually reinforcing relationship with the allocative efficiency of the labour market. It is thus an inherent objective of EU competition law and serves as a rationale for recognising stand-alone labour market theories of harm. Employing conceptual normative analysis, historical-legal doctrinal review, and case-law examination, the study identifies the consumer welfare standard as a key constraint on recognising such harm: it excludes sellers of labour and mandates counterbalancing detrimental labour market effects with downstream consumer benefits. To address this insufficiency in the current merger assessment framework, the thesis develops a normative framework that uses the protection of labour-market competition as a proxy for social mobility. The framework is grounded in a trading partner welfare approach that treats monopoly and monopsony power symmetrically by including workers within its scope of protection. It further offers guidance on the assessment of efficiency defences, establishing the benchmark that workers are not worse off as a result of the merger. Adoption of this framework would mark a substantive shift in EU merger policy, enabling it to tackle stagnating and declining social mobility and acute labour- and skills-shortages across the Union.

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A. Introduction

I. Problem Statement

Across the European Union, the functioning of labour markets is increasingly under strain. Social mobility, in particular occupational mobility, is stagnant or declining in a majority of Member States.¹ And the EU is facing a worsening labour and skills shortage that concerns occupations of all qualification levels.² While competition law has traditionally maintained an arm's-length relationship to social issues, recent developments in policy and scholarship signal a growing awareness of its potential contributions to societal outcomes. In the context of its Merger Guideline Review initiated in May 2025, the European Commission correspondingly acknowledges that vibrant competition may indeed contribute to broader policy objectives, such as labour market outcomes.³

However, whether competition law is regarded as an adequate instrument for tackling such issues largely depends on the given understanding of its general objectives and the consumer welfare standard. Traditionally understood as exclusively concerning allocative efficiency, the consumer welfare standard is considered to mainly prioritise harm to price, output, and innovation.⁴ However, scholarly discussions on a broader understanding of consumer welfare and utilisation of competition law for broader social policy objectives have prompted the Commission to openly raise the question whether harm to upstream labour markets alone – such as wage suppression, reduced mobility, or monopsony power – may constitute a self-sufficient theory of harm under the EU Merger Regulation, without the need to demonstrate additional harm to consumers in downstream product markets.⁵

¹ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 31 <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

² European Commission, 'Labour and Skills Shortages in the EU: An Action Plan' in (Publications Office of the European Union, Brussels, Belgium 2024) 1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52024DC0131>>

³ European Commission, 'Review of the Merger Guidelines – Topic G: Public policy, security and labour market considerations' in (2025), para. 111 et seq <https://competition-policy.ec.europa.eu/review-merger-guidelines_en>

⁴ Robert H. Bork, *The antitrust paradox* (Basic Books, New York 1978) 72–89, 108–109; Rutger J. G. Claassen and Anna Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) ULR 2

⁵ European Commission, 'Review of the Merger Guidelines – Topic G: Public policy, security and labour market considerations' in (2025) <https://competition-policy.ec.europa.eu/review-merger-guidelines_en>, para. 122

This thesis aims to engage with this question by proposing a novel rationale for such considerations of ‘stand-alone labour market harm’ in merger analyses by arguing that social mobility in itself may be regarded as an inherent objective of competition law.

Social mobility describes a condition in which societal positions are fairly accessible based on an individual’s capabilities, irrespective of their socio-economic background.⁶ As natural ability and potential are equally distributed across social classes, such equality of opportunity enables individuals to move upward through those classes.⁷ Two facets underpin this condition: the first facet concerns the *creation* of market-valued capabilities, for instance through fair access to education that allows for the realization of underlying potential;⁸ the second concerns the full *recognition and utilisation* of those realized capabilities by the labour market, for instance by ensuring merit-based hiring or effective competition for talent among employers. These facets form two sides of the same coin that is social mobility, creating open and fair pathways to societal positions. Conversely, a lack of social mobility coincides with obstacles to both creation and allocation of talent.⁹

As such, social mobility can be understood as a precondition for the allocative efficiency of the labour market – i.e. the optimal distribution of human capital that matches where individuals work based on what they are capable of and where they are needed. The EU labour and skills shortage is indicative of an inefficient allocation that is exacerbated by a lack of equal access to the creation of skills. For instance, the Action Plan on the Labour and Skills Shortage cites lack of equal opportunities in accessing education as a main contributing factor.¹⁰

Concurrently, allocative efficiency is also a precondition of social mobility. Individuals from lower socio-economic backgrounds are disproportionately likely to be underemployed, working

⁶ John Rawls, *A Theory of Justice; Revised Edition* (Harvard University Press, 1999) 62 et seqq.
<<http://www.jstor.org/stable/j.ctvkjb25m>>

⁷ *ibid*

⁸ Cf. Miles Corak, 'Income Inequality, Equality of Opportunity, and Intergenerational Mobility' (2013) 27(3) *Journal of Economic Perspectives* 85; Cf. *ibid*

⁹ Carlotta Balestra and Emanuele Ciani, 'Current challenges to social mobility and equality of opportunity' in *OECD Papers on Well-being and Inequalities* (OECD Publishing, Paris, France 2022)
<<https://doi.org/10.1787/a749ffbb-en>>, p. 8

¹⁰ European Commission, 'Labour and Skills Shortages in the EU: An Action Plan' in (Publications Office of the European Union, Brussels, Belgium 2024) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52024DC0131>>, p. 4, 17

in occupations for which they are overqualified.¹¹ This demonstrates the labour market's incapacity to recognize and utilize the available talent pool. Were these mismatches mitigated – by aligning employment of lower socio-economic groups with that of similarly educated higher socio-economic groups – the skills shortage could be addressed by creating 13 million additional workers for high-skill roles.¹²

Thus, allocative efficiency and social mobility are mutually reinforcing preconditions. Understood in this light, the potential role of social mobility in competition law starts to become more tangible.

The primary underlying sub-question to be investigated first in this study is, therefore, whether social mobility as a value may be substantively integrated into the EU merger assessment framework as an objective of competition law. As social mobility itself may not be a viable operative objective, the protection of labour market competition – i.e. competition between employers – will serve as a proxy. Labour market competition contributes in particular to the second side of the social mobility coin: it enables recognition and utilisation of skills by ensuring that employers can access and compete for available talent. Competition for talent also empowers workers to exercise mobility, allowing them to switch into higher-paying jobs in order to capture the full value of their skills and contributions. The final objective is therefore to develop a framework for stand-alone labour market theories of harm rooted in the acknowledgement of social mobility as an objective of competition law. The framework should provide justification and guidance for theories of harm that consider impacts on labour markets in and of themselves, without the need to demonstrate negative impacts on product markets and consumers.

This framework shall serve to answer the research question:

‘To what extent does the EU merger assessment framework allow negative impacts on upstream labour markets – in and of themselves, and without harm to downstream product markets – to constitute a sufficient theory of harm?’

¹¹ McKinsey and others, *Breaking the Standstill: How Social Mobility Can Boost Europe's Economy* (McKinsey & Company, 2025) <<https://www.mckinsey.com/industries/social-sector/our-insights/breaking-the-standstill-how-social-mobility-can-boost-europes-economy>>

¹² *ibid*

The rationale for developing the framework shall be based on the underlying sub-question:

‘To what extent can social mobility be considered an objective of EU competition law?’

II. Literature Review and Methodology

The idea of considering labour market impacts, inter alia, by broadening the understanding of consumer welfare, is widely discussed in the literature.

Nonetheless, *Bork* is often a starting point for understanding consumer welfare. To *Bork*, consumer welfare is exclusively to be understood as allocative efficiency, which he considers the only rational objective of competition law.¹³ This efficiency-based paradigm is characterised by a representative model of consumers that decouples them from other social roles they may take on in society, such as the role of a worker.¹⁴ On the other hand, *Marinescu* and *Hovenkamp* argue that a proper definition of consumer welfare would include the protection of all economic actors that could be considered ‘trading partners’.¹⁵ In the same vein, *Hemphill* and *Rose* speak of a ‘trading partner welfare approach’ that they consider to already be in line with US case law and economic reasoning.¹⁶ *Broulik* presents similar findings for EU case law, where all market counterparties are protected under the umbrella of consumer welfare, proposing for harm to workers to be considered relevant in itself.¹⁷ Likewise, *Daskalova* infers from several rulings of the Court of Justice, an understanding of consumer welfare that also includes harm suffered upstream, rather than only downstream at the level of final consumers.¹⁸

¹³ Robert H. Bork, *The antitrust paradox* (Basic Books, New York 1978) 72–89, 108–109

¹⁴ Ioannis Lianos. 'Polycentric Competition Law' (2018) 71(1) Current Legal Problems 169 et seqq. <<https://academic.oup.com/clp/article/71/1/161/5333118>>; Oliver E. Williamson. 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58(1) Am Econ Rev 23 <<https://www.jstor.org/stable/1831653?sid=primo>>

¹⁵ Ioana Elena Marinescu and Herbert J. Hovenkamp. 'Anticompetitive Mergers in Labor Markets' (2019) 9(5) Indiana Law Journal 1063 <<https://www.repository.law.indiana.edu/ilj/vol94/iss3/5>>

¹⁶ C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) The Yale Law Journal 2092 <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

¹⁷ Jan Broulik, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' in *Amsterdam Center for Law & Economics Working Paper No. 2024-12, Amsterdam Law School Research Paper No. 2024-31, Amsterdam Centre for European Law and Governance Research Paper No. 2024-10, TILEC Discussion Paper No. 2024-12* (2024) <<https://ssrn.com/abstract=4945475>>, p. 19, 30

¹⁸ Victoria Daskalova. 'Consumer Welfare in EU Competition Law: What is It (Not) About?' (2015) 11(1) Competition Law Review 156 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>

An even broader understanding is proposed by *Claassen* and *Gebrandy*, who are in favour of a ‘capability approach’ – a non-welfarist standard that would allow for the consideration of any human or animal right.¹⁹ Rather than broadening the consumer welfare approach, *Lianos* proposes a polycentric model of competition law in its place, which allows for the consideration of equality concerns by integrating institutional logics borrowed from other legal fields and disciplines.²⁰

This study’s proposition to recognise harm to upstream labour markets in itself is therefore not new. However, in contrast to preceding literature, this thesis proposes a novel rationale for the consideration of labour market impacts by offering a new perspective on the objectives of competition law and its potential to address social issues, without straying from its economic foundations or necessarily departing from its efficiency-based paradigm in general.

To that end, this study adopts a multimethod approach, using conceptual normative analysis, historical-legal doctrinal review, case-law examination and concluding with a normative framework development. It opens with a conceptual normative analysis of the objectives of competition law in order to develop the argument that social mobility should not solely be regarded as a social or distributive issue but rather as an issue of efficiency that is naturally integrated into the competition regime. This argument will serve as the foundational justification for considering upstream labour market harm in and of itself, without the need to demonstrate harm to downstream product markets. To assess whether the current merger assessment framework can accommodate such stand-alone labour market harm, the discussion will turn to the boundaries of consumer welfare, utilizing a historical-legal doctrinal analysis to examine its historical development and flexibility of its scope. Subsequently, a doctrinal case-law review will be conducted, to examine how buyer power in upstream markets has more generally been treated in relevant merger decisions. The study concludes with a normative framework development, proposing a framework that justifies theories of harm based on labour market impacts alone, while also offering guidance on how to reconcile these with divergent and potentially positive effects in product markets.

¹⁹ Rutger J. G. Claassen and Anna Gerbrandy. 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) ULR 3

²⁰ Ioannis Lianos. 'Polycentric Competition Law' (2018) 71(1) Current Legal Problems 165, 194 et seqq.
<<https://academic.oup.com/clp/article/71/1/161/5333118>>

B. Social Mobility as an Objective of Competition Law

I. Social Mobility in the EU

There are multiple approaches to express and measure social mobility in the economic literature. Most approaches aim to measure the probability of upward movement through social classes by measuring the degree of association of a specific socio-economic variable between parents and their children (intergenerational mobility) or two points within an individual's lifetime (intragenerational mobility).²¹ The higher the probability for an individual to move upward within these variables, the greater the social mobility. Upward movement may further be qualified by measuring the probability of an individual moving from the lowest to the highest quintile of a socio-economic variable. Social mobility may also be measured by comparing outcomes from similarly skilled or educated peers from lower and higher socio-economic backgrounds to isolate the effects of socio-economic disadvantage.²² Measures of social mobility may vary depending on the specific socio-economic variable referenced. Moreover, future economic outcomes are influenced by a multitude of circumstances, not all of which are empirically accessible.

As regards intergenerational mobility, variables considered most appropriate and common include parental income, education and occupation as these are factors that influence both sides of the social mobility coin.²³ Regarding the first side, parental financial resources may allow for investments into the creation of capabilities valuable in the labour market.²⁴ As regards the

²¹ Carlotta Balestra and Emanuele Ciani, 'Current challenges to social mobility and equality of opportunity' in *OECD Papers on Well-being and Inequalities* (OECD Publishing, Paris, France 2022)

<<https://doi.org/10.1787/a749ffbb-en>>, p. 9; Anders Björklund and Markus Jäntti, 'Intergenerational mobility, intergenerational effects, sibling correlations, and equality of opportunity: A comparison of four approaches' (2020) 70 *Research in Social Stratification and Mobility* 2 <<https://www.sciencedirect.com/science/article/pii/S0276562419301544>>

²² Cf. Chris Clarke and others, 'The economic costs of childhood socio-economic disadvantage in European OECD countries' in *OECD Papers on Well-being and Inequalities* (OECD Publishing, Paris 2022) <<https://doi.org/10.1787/8c0c66b9-en>>, p. 36

²³ Anders Björklund and Markus Jäntti, 'Intergenerational mobility, intergenerational effects, sibling correlations, and equality of opportunity: A comparison of four approaches' (2020) 70 *Research in Social Stratification and Mobility* 8 <<https://www.sciencedirect.com/science/article/pii/S0276562419301544>>; European Commission: Joint Research Centre and others, 'Beyond averages - Fairness in an economy that works for people' in *EUR Volume 29995* (Publications Office, Luxembourg 2020) <<https://data.europa.eu/doi/10.2760/261169>>, p. 46

²⁴ Cf. Anders Björklund and Markus Jäntti, 'Intergenerational mobility, intergenerational effects, sibling correlations, and equality of opportunity: A comparison of four approaches' (2020) 70 *Research in Social Stratification and Mobility* 8 <<https://www.sciencedirect.com/science/article/pii/S0276562419301544>>; Cf.

second side, parental occupational experience and networks may influence the probability of the labour market recognizing and utilizing the created human capital.²⁵ The first side may be best corrected for by way of public policy, inter alia, by directing public resources into the improvement of early childhood education and care.²⁶ As to be shown in the following chapter, the second side may, however, be nearer to the domain of competition law as it more closely concerns the efficient allocation of available human capital.

In a global context, the EU has historically shown strong progress as regards social mobility; however, this development has stalled and even declined in a majority of Member States in the last decade.²⁷ Children with at least one parent having achieved higher education are on average 43 percentage points more likely to reach higher education than children with less educated parents.²⁸ Educational mobility in this regard is lowest in Italy, Portugal and Germany, with differences of more than 50 percentage points.²⁹ Correspondingly, Italy and Germany also exhibit low occupational mobility with likelihoods of 68% and 60% that children of lower-skilled parents end up in low-skilled jobs.³⁰

It is to be noted, however, that macro-observations of social mobility on an EU level come with uncertainties due to significant divergence between and within Member States, as well as

European Commission: Joint Research Centre and others, 'Beyond averages - Fairness in an economy that works for people' in *EUR Volume 29995* (Publications Office, Luxembourg 2020) <<https://data.europa.eu/doi/10.2760/261169>>, p. 46

²⁵ Cf. Miles Corak, 'Income Inequality, Equality of Opportunity, and Intergenerational Mobility' (2013) 27(3) *Journal of Economic Perspectives* 85

²⁶ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 55 <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

²⁷ McKinsey and others, *Breaking the Standstill: How Social Mobility Can Boost Europe's Economy* (McKinsey & Company, 2025) <<https://www.mckinsey.com/industries/social-sector/our-insights/breaking-the-standstill-how-social-mobility-can-boost-europes-economy>>; World Economic Forum and others, *The Global Social Mobility Report 2020 Equality, Opportunity and a New Economic Imperative* (World Economic Forum, Switzerland 2020) 7 <http://www3.weforum.org/docs/Global_Social_Mobility_Report.pdf>

²⁸ Marco Colagrossi, Béatrice d'Hombres and Sylke V. Schnepf, 'Like (Grand)Parent, Like Child? Multigenerational Mobility Across the EU' (2019) (12302) *SSRN Electronic Journal* 16 <<https://docs.iza.org/dp12302.pdf>>; European Commission: Joint Research Centre and others, 'Beyond averages - Fairness in an economy that works for people' in *EUR Volume 29995* (Publications Office, Luxembourg 2020) <<https://data.europa.eu/doi/10.2760/261169>>, p. 46

²⁹ Marco Colagrossi, Béatrice d'Hombres and Sylke V. Schnepf, 'Like (Grand)Parent, Like Child? Multigenerational Mobility Across the EU' (2019) (12302) *SSRN Electronic Journal* 16 <<https://docs.iza.org/dp12302.pdf>>

³⁰ McKinsey and others, *Breaking the Standstill: How Social Mobility Can Boost Europe's Economy* (McKinsey & Company, 2025) <<https://www.mckinsey.com/industries/social-sector/our-insights/breaking-the-standstill-how-social-mobility-can-boost-europes-economy>>

between sexes. For instance, countries like Denmark and the Netherlands often exhibit vastly greater mobility in contrast to countries like Bulgaria or Romania.³¹ And stagnating occupational mobility in Germany is partly explained by decreasing mobility for men and increasing mobility for women, notwithstanding appreciable regional differences between the West and East.³² Nonetheless, stagnating and decreasing trends of occupational social mobility can be observed in a majority of EU countries, with notable exceptions being Belgium, Denmark, Finland, Greece, the Netherlands and Slovakia.³³

II. Social Mobility as an Inherent Objective of Competition Law

1. *The Relationship Between Social Mobility and Allocative Efficiency*

These stagnating and decreasing trends in occupational mobility, in particular, signal that socio-economic disadvantage is a key barrier to the labour market's ability to match abilities with appropriate roles. This is more clearly demonstrated by the fact that a quarter of workers report being over- or underqualified for their current jobs,³⁴ – figures that are among the highest in Italy, which also reports the lowest levels of occupational mobility.³⁵ Moreover, individuals from lower socio-economic backgrounds are 1.4 times more likely to be in occupations for which they are overqualified.³⁶ They are also 1.6 times more likely to consider themselves to have a low chance of securing a given position.³⁷ Estimates project an additional 13 million available employees for high-skill jobs that could close the skills shortage in the EU by 2030 if

³¹ Chris Clarke and others, 'The economic costs of childhood socio-economic disadvantage in European OECD countries' in *OECD Papers on Well-being and Inequalities* (OECD Publishing, Paris 2022)

<<https://doi.org/10.1787/8c0c66b9-en>>, p. 31; Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 30

<<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

³² Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 32 <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>; McKinsey and others, *Breaking the Standstill: How Social Mobility Can Boost Europe's Economy* (McKinsey & Company, 2025)

<<https://www.mckinsey.com/industries/social-sector/our-insights/breaking-the-standstill-how-social-mobility-can-boost-europes-economy>>

³³ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 30 <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

³⁴ OECD, 'The Productivity-Inclusiveness Nexus' OECD Publishing (Paris) 136

<<https://doi.org/10.1787/9789264292932-en>>

³⁵ *ibid*

³⁶ McKinsey and others, *Breaking the Standstill: How Social Mobility Can Boost Europe's Economy* (McKinsey & Company, 2025) <<https://www.mckinsey.com/industries/social-sector/our-insights/breaking-the-standstill-how-social-mobility-can-boost-europes-economy>>

³⁷ *ibid*

the proportion of individuals from lower socio-economic backgrounds in high-skilled jobs matched the proportions of similarly educated individuals from higher socio-economic backgrounds.³⁸ The value lost – or rather the deadweight loss – due to the underemployment and underpayment of individuals from lower socio-economic backgrounds across 24 European OECD countries, is estimated to be around 1.6% of GDP annually.³⁹

Furthermore, insufficient social mobility is considered to undermine allocative efficiency not only through such misallocation of human capital, but also by reducing aggregate productivity in general across the economy.⁴⁰ Social mobility and the allocative efficiency of the labour market are therefore in a closely interwoven, mutually reinforcing relationship in which one cannot be strengthened without the other. If allocative efficiency is considered an objective of competition law, then so should social mobility.

2. Social Mobility as a Legitimising Principle of Competition Law

The legitimacy of competition law rests on the assumption that a well-functioning market economy is an environment where everyone, based on their capabilities, can take advantage of market opportunities.⁴¹ To *Rawls*, the principle of efficiency could not be regarded as just if it was not married to the notion of having offices and positions open to all under conditions of fair equality of opportunity.⁴² If desirable positions were only granted to those who are already socio-economically privileged, the labour market would be failing to efficiently utilize the potential talents and contributions at its disposal.⁴³ It is also for this reason that competition law

³⁸ *ibid*

³⁹ Chris Clarke and others, 'The economic costs of childhood socio-economic disadvantage in European OECD countries' in *OECD Papers on Well-being and Inequalities* (OECD Publishing, Paris 2022) <<https://doi.org/10.1787/8c0c66b9-en>>, p. 33

⁴⁰ OECD, 'The Productivity-Inclusiveness Nexus' OECD Publishing (Paris) 92 <<https://doi.org/10.1787/9789264292932-en>>

⁴¹ Michal S. Gal, 'The Social Contract at the Basis of Competition Law' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity* (Cambridge University Press, 2019) 99 <<http://dx.doi.org/10.1017/9781108628105.006>>

⁴² John Rawls, *A Theory of Justice; Revised Edition* (Harvard University Press, 1999) 62, 72 <<http://www.jstor.org/stable/j.ctvkjb25m>>

⁴³ Michal S. Gal, 'The Social Contract at the Basis of Competition Law' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity* (Cambridge University Press, 2019) 98 <<http://dx.doi.org/10.1017/9781108628105.006>>

focuses on open and merit-based access to ensure equality of opportunity.⁴⁴ Fox therefore summarises the objective of competition law as ‘*building a ladder of mobility from the lowest rung up to enable mobility, incentivise entrepreneurship, and stimulate invention*’.⁴⁵

There are, however, large discrepancies between the objectives ascribed to competition law throughout various jurisdictions and schools of thought. Distinctions between viewpoints can be made between the emphasis put on efficiency, equitable outcomes, the competitive process and functioning of the market itself, or economic freedom as a value marked by ordoliberal ideas, with varying degrees of proposed interventionism.⁴⁶ Yet, the notion of equality of opportunity underlies most of these views, with the early Chicago School being a notable exception,⁴⁷ differing mainly in the degree it is assumed to already be present. Gal argues that equality of opportunity is a legitimising principle of the social contract that, despite its divergence, lies at the heart of all Western competition law frameworks.⁴⁸ This notion, encapsulated by Rawls, considers that any free market outcome, as a cumulative effect of an arbitrary initial distribution and realisation of assets, inter alia natural talents and abilities, can only be considered just if social circumstances and chance are mitigated.⁴⁹ Ultimately, as regards the EU specifically, Fox and Baschenhof, as well as Deutscher, regard equality of opportunity to be integrated into its competition law framework as a function of its goals of market integration and Treaty-based equality values.⁵⁰ For instance, Article 3(3) TEU

⁴⁴ Fox and Baschenhof, 'Antitrust and Inequality: The History of (In)Equality in Competition Law and Its Guide to the Future' in *Competition Law and Economic Inequality* (Hart Publishing, 2022) 139; Michal S. Gal, 'The Social Contract at the Basis of Competition Law' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity* (Cambridge University Press, 2019) 89 <<http://dx.doi.org/10.1017/9781108628105.006>>

⁴⁵ Eleanor M. Fox and others, 'Economic Development, Poverty and Antitrust: The Other Path' in (NYU Law School,) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002637>, p. 110

⁴⁶ Niamh Dunne, 'Introduction' in Niamh Dunne (ed), *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press, Cambridge 2015) 27 et seqq <<https://www.cambridge.org/core/product/E2248E0AFC3EC7AEDBFBC754C61A397A>>

⁴⁷ Elias Deutscher, 'Competition and Equality:

A Republican Account' in *Competition Law and Economic Inequality* (Hart Publishing, 2022) 44

⁴⁸ Michal S. Gal, 'The Social Contract at the Basis of Competition Law' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity* (Cambridge University Press, 2019) 94 <<http://dx.doi.org/10.1017/9781108628105.006>>

⁴⁹ John Rawls, *A Theory of Justice; Revised Edition* (Harvard University Press, 1999) 63 <<http://www.jstor.org/stable/j.ctvkjb25m>>

⁵⁰ Elias Deutscher, 'Competition and Equality:

A Republican Account' in *Competition Law and Economic Inequality* (Hart Publishing, 2022) 41; Fox and Baschenhof, 'Antitrust and Inequality: The History of (In)Equality in Competition Law and Its Guide to the Future' in *Competition Law and Economic Inequality* (Hart Publishing, 2022) 118

establishes 'a highly competitive social market economy, aiming at full employment and social progress' as an objective of the Union.

Advancing social mobility is therefore an inherent objective of EU competition law: it not only mutually reinforces the allocative-efficiency objective, but it also underpins the very social contract that legitimizes the EU competition regime.

III. The Suitability of Competition Law to Advance Social Mobility

1. Competition Law versus Regulation and Public Policy

An apparent counterargument to employing competition law as an instrument to further social mobility is that regulation and public policy are better-suited instruments. Public policy that mitigates socio-economic factors that influence the creation of skills valuable in the labour market is rather widespread in the EU, with strong overall awareness of effective policies such as early childhood and care.⁵¹ In 2021, 91.8% of children aged 3 and above participated in early childhood care.⁵² This, however, mainly concerns the first side of the social mobility coin. Outside of non-discrimination measures, policies that improve the second side, namely the labour market's ability to recognize and utilize created human capital, are somewhat less universally applied.⁵³ Effective policies would need to focus on reducing non-merit-based recruiting requirements to even out the proportions of similarly educated individuals from both lower and higher socioeconomic backgrounds in high-skill occupations. In this regard, the *OECD* recommends that employers not solely rely on educational qualifications as a proxy for actual levels of skill but find more accurate ways to measure them.⁵⁴ Other differentiating factors disadvantaging individuals from lower socio-economic backgrounds include recruiting requirements for extracurricular activities and geographical mobility.⁵⁵ Lower socio-economic

⁵¹ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 55 et seq <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

⁵² Daniele Checchi and Alice Bertolotti, 'Monitoring educational choices in Europe: An analysis of EU-SILC data' (2024) 3186511 <<http://www.econis.eu/PPNSET?PPN=1890187925>>

⁵³ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 65 et seq <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

⁵⁴ OECD, 'The Productivity-Inclusiveness Nexus' OECD Publishing (Paris) 137 <<https://doi.org/10.1787/9789264292932-en>>

⁵⁵ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 65 <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

backgrounds are associated with a lack of funds to afford unpaid internships,⁵⁶ a lack of time for extracurricular activity due to a combination of education with paid jobs, and a lower likelihood of moving away to study.⁵⁷

However, public policy in this area faces several challenges. It is not always possible to categorise these differentiating factors as entirely unrelated to capability for a given position. Moreover, interference with recruiting processes could not only be considered strong public intervention into the economic freedom of businesses, but they are also susceptible to missing the objective of efficiency in favour of otherwise possibly socially desirable corrections of demographic underrepresentation. Furthermore, respective policies predominantly transpire on a national level, with the EU often limiting its activity to incentive measures under Article 149 TFEU.

Effective EU competition policy could, therefore, be a less intrusive and less politically charged mechanism for restoring efficiency in the internal market – not to replace public policy in its efforts to advance social mobility but to complement it. Competition policy’s capacity to ensure optimal resource allocation makes it particularly suitable for serving the second side of the social mobility coin, safeguarding the efficient recognition and utilisation of available talent.

2. The Protection of Labour Market Competition as Proxy for Social Mobility

While it has been established that social mobility is an inherent objective, it remains to be shown how competition law can advance it in practice. Focussing on the second side of the social mobility coin, it is first to be identified, which restrictions – outside of discriminatory or non-merit-based recruiting requirements – prevent the labour market from recognizing and utilizing available talent; and second, determine which tools competition law has at its disposal to eliminate those.

Given that an applicant meets the skill-related hiring requirements of a vacancy, the labour market’s matching technology is governed by two main probabilities: first, the probability that

⁵⁶ McKinsey and others, *Breaking the Standstill: How Social Mobility Can Boost Europe’s Economy* (McKinsey & Company, 2025) <<https://www.mckinsey.com/industries/social-sector/our-insights/breaking-the-standstill-how-social-mobility-can-boost-europes-economy>>

⁵⁷ Eurofund and others, *Social mobility in the EU* (Publications Office of the European Union, Luxembourg 2017) 65 <<http://library.fes.de/emonos/2018.02/7834072/ef1664en.pdf>>

contact between an employer and a potential employee is made; and second, that the wage offered matches the applicant's minimum acceptable wage.⁵⁸ Malfunctioning of this matching process could be induced by the artificial reduction of applicants, vacancies, or available relevant information.⁵⁹ For instance, an artificial reduction in available vacancies, by way of no-poach agreements among employers, may lead an applicant to reduce their minimum acceptable wage, risking a match with a job for which they are overqualified.⁶⁰ Similarly, an artificial reduction in available applicants, by way of non-compete agreements between employers and workers, reduces contact probability and may lead to labour shortages. Contact probability is also reduced if information on higher wages paid by competitors is suppressed, to which lower-paid jobs are particularly vulnerable.⁶¹

However, the capacity to artificially manipulate the matching process often requires significant labour market power or is underpinned by anticompetitive intent. For instance, the conclusion of no-poach agreements is only feasible if firms outside the arrangement are small enough to be unable to undermine them.⁶² Overly restrictive non-compete agreements between employers and lower-skilled workers who are not privy to trade secrets or training create situations that mirror monopsony, and hint at an anticompetitive motivation.⁶³

The artificial distortion of the matching process aims at reducing worker's labour mobility and enables the exercise of employer power.⁶⁴ It may cause qualification mismatches, labour shortages, and underpayment that prevents workers from capturing the full value of their

⁵⁸ Cf. Wolfgang Franz, 'Match and Mismatch on the German Labour Market' in Fiorella Padoa Schioppa and La Sapienza and the Libera Università Internazionale Degli Studi Sociale (eds), *Mismatch and Labour Mobility* (Cambridge University Press, 2010) 108

⁵⁹ Cf. Julian Alves and others. 'Labour market power: New evidence on Non-Compete Agreements and the effects of M&A in the UK' (2024) (1976) Discussion Paper 9 <<https://cep.lse.ac.uk/pubs/download/dp1976.pdf>>

⁶⁰ Cf. Wolfgang Franz, 'Match and Mismatch on the German Labour Market' in Fiorella Padoa Schioppa and La Sapienza and the Libera Università Internazionale Degli Studi Sociale (eds), *Mismatch and Labour Mobility* (Cambridge University Press, 2010) 108

⁶¹ Julian Alves and others. 'Labour market power: New evidence on Non-Compete Agreements and the effects of M&A in the UK' (2024) (1976) Discussion Paper 9 <<https://cep.lse.ac.uk/pubs/download/dp1976.pdf>>

⁶² Ioana Elena Marinescu and Herbert J. Hovenkamp. 'Anticompetitive Mergers in Labor Markets' (2019) 9(5) *Indiana Law Journal* 1035 <<https://www.repository.law.indiana.edu/ilj/vol94/iss3/5>>

⁶³ OECD. 'Competition Issues in Labour Markets' (2020) 31 <<https://doi.org/10.1787/66980788-en>>; Evan P. Starr, J. J. Prescott and Norman D. Bishara. 'Noncompete Agreements in the US Labor Force' (2021) 64(1) *The Journal of law & economics* 81 <<https://www.journals.uchicago.edu/doi/abs/10.1086/712206>>

⁶⁴ Julian Alves and others. 'Labour market power: New evidence on Non-Compete Agreements and the effects of M&A in the UK' (2024) (1976) Discussion Paper 9 <<https://cep.lse.ac.uk/pubs/download/dp1976.pdf>>

contributions.⁶⁵ As an illustrative example, a 2008 ban on non-compete agreements for hourly, low wage workers in Oregon, led to an increase in within-industry mobility of 12 – 18%, with an average increase of hourly wages of 2 – 3%.⁶⁶ The positive impact of labour mobility is further confirmed by the finding that workers who changed jobs consistently between 2011 and 2023 saw greater earnings growth than those who remained in the same position.

An overall lack of labour market competition is also indicated by the present skill and labour shortage, as well-paying occupations are also affected by it. This points to a low elasticity of labour supply, meaning that an increase in wages offered doesn't necessarily increase the number of employees that are attracted to a position. In perfectly competitive labour markets, however, the elasticity of labour supply would tend towards the infinite.⁶⁷

Therefore, the main restriction to the recognition and utilisation of available talent is labour market concentration, i.e. concentration among employers.⁶⁸ It enables the exercise of employer power to reduce workers' labour mobility, preventing switches into higher-paying jobs in order to capture the full value of their skills and contributions. Concurrently, it prevents less-powerful employers from accessing and competing for the available talent pool.

The way competition law may advance this facet of social mobility is therefore to use the protection of labour market competition as a proxy. Effective protection of labour market competition would require competition policy to treat monopoly power and monopsony power in a symmetrical fashion. This includes the consideration of harm to upstream labour markets, in and of themselves, without the need to additionally demonstrate harm to downstream product markets.

⁶⁵ *ibid*

⁶⁶ Michael Lipsitz and Evan Starr. 'Low-Wage Workers and the Enforceability of Noncompete Agreements' (2022) 68(1) *Management science* 143

⁶⁷ Ioana Elena Marinescu and Herbert J. Hovenkamp. 'Anticompetitive Mergers in Labor Markets' (2019) 9(5) *Indiana Law Journal* 1042 <<https://www.repository.law.indiana.edu/ilj/vol94/iss3/5>>

⁶⁸ Cf. *ibid*

C. Constraints to Recognising Stand-Alone Labour Market Harm

I. Insufficiency of the Current Merger Assessment Framework

While social mobility may serve as a justification for the recognition of such stand-alone labour market harm, it remains to be examined whether the current assessment framework poses any constraints on such recognition. The fact that such harm is not already recognized calls into question the sufficiency of the current substantive assessment framework and the enforcement priorities of EU competition policy.

Indeed, the European Commission has never explicitly considered potential negative effects on upstream labour markets in its merger control assessments.⁶⁹ While the current Horizontal Merger Guidelines do provide guidance on the assessment of mergers that may strengthen upstream buyer power,⁷⁰ any explicit mention of labour market impacts or harm to workers is absent. Moreover, the detriment of upstream buyer power is primarily explained by its negative effects on consumers downstream: the guidelines describe the negative effects of input purchase reduction – analogous to the suppression of employment – by highlighting their capability to, in turn, reduce output on downstream markets, which would harm consumers.⁷¹ For a mere textual interpretation of the guidelines, the phrasing is therefore too ambiguous to conclude whether final harm to consumers is considered necessary to conclude a significant impediment to competition in the internal market. Furthermore, the guidelines describe potential positive effects that upstream buyer power may have on downstream markets. Lower input costs – analogous to lower wages – are considered, as long as they do not reduce downstream output or competition, to likely be passed on to consumers.⁷² Merger assessments are therefore not only to analyse upstream competitive conditions but also to evaluate possible positive and

⁶⁹ European Commission, 'Review of the Merger Guidelines – Topic G: Public policy, security and labour market considerations' in (2025) <https://competition-policy.ec.europa.eu/review-merger-guidelines_en>, para. 121

⁷⁰ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004a OJ C31/5, paras. 61–63 <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0205\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0205(02))>

⁷¹ *ibid*, 61.

⁷² *ibid*, 62.

negative downstream effects.⁷³ This implies, whether deliberate or not, that positive effects for consumers could potentially outweigh detrimental effects to workers upstream.

This guidance in the Horizontal Merger Guidelines references the 1999 merger decision *Rewe/Meinl*.⁷⁴ In that case, the Commission did not view the exercise of upstream buyer power as inherently detrimental – particularly where the upstream seller market was itself highly concentrated and where effective competition on the downstream market ensured that benefits were passed on to consumers.⁷⁵ This reasoning was informed by the specific characteristics of the retail sector and the interdependence between distribution and procurement markets, particularly with respect to procurement volumes, buying conditions, and the range of products offered to final consumers.⁷⁶ It is therefore questionable whether these considerations can be reasonably extrapolated to upstream labour markets, where the labour input purchased is not materially identical to the output offered to consumers, unlike in retail markets, where the goods procured are typically the very same goods sold downstream.

The lack of prioritization of labour markets may also have practical reasons. Assessing labour markets often proves difficult because they can be quite small and local. Including them in merger analyses could therefore lead to a much larger number of small markets requiring evaluation.⁷⁷ Moreover, defining labour markets tends to be more complex than defining product markets. Functionally, it requires determining the range of skills and training that employers view as substitutable.⁷⁸ Geographically, it concerns the location and mobility of workers, which depend on a variety of factors such as time, convenience and costs of commuting⁷⁹ or the availability of remote work.

⁷³ European Commission, 'Review of the Merger Guidelines – Topic G: Public policy, security and labour market considerations' in (2025) <https://competition-policy.ec.europa.eu/review-merger-guidelines_en>, para. 63

⁷⁴ *Commission Decision 1999/674/EC in Case M.1221 - Rewe/Meinl*, (OJ L 274) 1999 23 October (European Commission) <<https://eur-lex.europa.eu/eli/dec/1999/674/oj/eng>>

⁷⁵ *ibid*, 71.

⁷⁶ *ibid*, 72–74.

⁷⁷ Cf. European Commission, 'Review of the Merger Guidelines – Topic G: Public policy, security and labour market considerations' in (2025) <https://competition-policy.ec.europa.eu/review-merger-guidelines_en>, para. 122

⁷⁸ Ioana Elena Marinescu and Herbert J. Hovenkamp, 'Anticompetitive Mergers in Labor Markets' (2019) 9(5) *Indiana Law Journal* 1048 <<https://www.repository.law.indiana.edu/ilj/vol94/iss3/5>>

⁷⁹ Cf. *ibid*

Nevertheless, complexity alone may not justify disregarding the legal mandate of the EU Merger Regulation: Article 2(3) states that any significant impediment to effective competition in the internal market or a substantial part of it constitutes a valid basis for intervention. The provision makes no distinction as to whether competition on labour markets is more or less important than competition on product markets. Recognition of stand-alone labour market harm is also particularly important in the context of the cross-sector digital transition. Companies from different industries, while not competing in their respective product markets, may nonetheless require the same technical skills and personnel, such as computer scientists or data analysts, to digitise their operations and offerings.⁸⁰ As a result, they compete on the labour market despite operating in distinct product markets. This assumption is corroborated by the prevalent use of no-poach agreements between multiple major U.S. technology firms in the mid-2000s.⁸¹ Although these companies were not necessarily competitors in their respective product markets, their mutual interest in limiting labour mobility suggests that the affected employees were part of a shared labour market.⁸²

The current merger assessment framework should therefore be regarded as insufficient for effectively addressing negative upstream labour market impacts. Similar shortcomings in the U.S. merger assessment framework have also been recognised and were addressed in the 2023 Merger Guidelines issued by the Department of Justice and the Federal Trade Commission, which now include a dedicated section on harm to labour markets.⁸³ In this context, it is congruous that the European Commission, two decades after the initial release of its Merger Guidelines, launched a review in May 2025. Attention is therefore now to be directed to other potential doctrinal constraints that may limit the recognition of stand-alone labour market harm. These potential constraints will inform the proposal of an adjusted merger assessment framework.

⁸⁰ Cf. C. Scott Hemphill and Nancy L. Rose, 'Mergers that Harm Sellers' (2018) 127(7) *The Yale Law Journal* 2087 <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

⁸¹ US Department of Justice, 'Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements' in (2010) <<https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>>

⁸² Cf. Ioana Elena Marinescu and Herbert J. Hovenkamp, 'Anticompetitive Mergers in Labor Markets' (2019) 9(5) *Indiana Law Journal* 1035 <<https://www.repository.law.indiana.edu/ilj/vol94/iss3/5>>

⁸³ U.S. Department of Justice and Federal Trade Commission, 'Merger Guidelines' in (2023) <https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf>, sec. 2.10

II. Constraints Imposed by the Consumer Welfare Standard

1. *Historical Development*

A potential doctrinal restraint on the recognition of stand-alone labour market harm may be an understanding of consumer welfare that requires consumer harm in order to justify intervention. The prevalent understanding of ‘consumer welfare’, however, has undergone drastic historical changes.

In coining the term in 1978, *Bork* did not refer to the welfare of the group of consumers as such, but rather to a sum of welfare, or ‘wealth of nations’, that benefits both consumers and producers.⁸⁴ His use of the term is better understood as borrowed from economics, intended to rationalise competition law policy and to establish allocative efficiency and welfare maximisation as exclusive objectives.⁸⁵ More specifically, *Bork* therefore defines the objective of competition law as ‘the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare’.⁸⁶ However, even if one were to adopt an exclusively economic understanding of consumer welfare, it would still deviate significantly from the understanding that *Bork* laid down. This is because, despite its misleading designation, his description rather refers to a total welfare standard.⁸⁷

An economic understanding of consumer welfare rather refers to ‘consumer surplus’, which is the positive difference between the value ascribed and the actual price paid by consumers.⁸⁸ Notwithstanding this misconception, the consumer welfare standard was adopted by the U.S.

⁸⁴ Robert H. Bork, *The antitrust paradox* (Basic Books, New York 1978) 66, 97; Herbert Hovenkamp. ‘Is Antitrust’s Consumer Welfare Principle Imperiled?’ (2020) 45(1) *The Journal of corporation law* 1

⁸⁵ Victoria Daskalova. ‘Consumer Welfare in EU Competition Law: What is It (Not) About?’ (2015) 11(1) *Competition Law Review* 134 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>; Elias Deutscher, ‘Competition and Equality:

A Republican Account’ in *Competition Law and Economic Inequality* (Hart Publishing, 2022) 44

⁸⁶ Robert H. Bork, *The antitrust paradox* (Basic Books, New York 1978) 91

⁸⁷ 442 *Reiter v. Sonotone Corp.* 1979 April 12 <<https://supreme.justia.com/cases/federal/us/442/330/>>, p. 343; Victoria Daskalova. ‘Consumer Welfare in EU Competition Law: What is It (Not) About?’ (2015) 11(1) *Competition Law Review* 143 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>; Thomas J. Rosch. ‘Monopsony and The Meaning of ‘Consumer Welfare,’ A Closer Look at Weyerhaeuser’ (2006) 2006 *Milton Handler Annual Antitrust Review* 3 <<https://www.ftc.gov/news-events/news/speeches/monopsony-meaning-consumer-welfare-closer-look-weyerhaeuser>>

⁸⁸ Oliver E. Williamson. ‘Economies as an Antitrust Defense: The Welfare Tradeoffs’ (1968) 58(1) *Am Econ Rev* 27 <<https://www.jstor.org/stable/1831653?sid=primo>>

Supreme Court in 1979, despite never being fully explained when mentioned.⁸⁹ A historical analysis of the term's usage in the U.S. therefore only adds to the ambiguity of its meaning.

With the initial adoption of the consumer welfare standard in its 1997 'Green Paper on Vertical Restraints in EC Competition Policy', the European Commission argued that the protection of effective competition implied the protection of the interests of final consumers, primarily through the assurance of low prices – a stark contrast to the term's original usage by *Bork*.⁹⁰ In its 2004 'Guidelines on the application of Article 81(3) of the Treaty', the Commission explicitly referenced both consumer welfare and the efficient allocation of resources as objectives of Article 101 TFEU.⁹¹ However, in contrast to earlier references, the term 'consumers' is here explicitly defined as encompassing all direct or indirect buyers, whether natural or legal persons, such as wholesalers, retailers or final consumers.⁹² In the same year, consumer welfare was also mentioned in the Horizontal Merger Guidelines, though notably only once in the context of the assessment framework for upstream buyer power outlined above. The consumer welfare standard therefore no longer protected only 'consumers' in its literal sense, but more broadly any direct or indirect buyers. The Commission also provided a non-exhaustive list of parameters relevant to the content of consumer welfare, including price, output, product quality, variety, and innovation.⁹³

Daskalova has since observed a shift in the Commission's communication beginning in the 2010s, marked by a reduced emphasis on consumer welfare as the objective of competition law and a growing focus on goals such as supporting growth, employment, and competitiveness.⁹⁴ From this shift in language, a possible departure from a narrow consumer surplus standard is

⁸⁹ Victoria Daskalova. 'Consumer Welfare in EU Competition Law: What is It (Not) About?' (2015) 11(1) Competition Law Review 144 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>

⁹⁰ Victoria Daskalova. 'Consumer Welfare in EU Competition Law: What is It (Not) About?' (2015) 11(1) Competition Law Review 145 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>; European Commission, "Green Paper on Vertical Restraints in EC Competition Policy" in (1997) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:51996DC0721>>, p. 17

⁹¹ European Commission, 'Notice: Guidelines on the application of Article 81(3) of the Treaty' in *OJ C 101/97*. (2004b) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(07\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07))>, para. 13

⁹² *ibid*, 84.

⁹³ *ibid*, 16.

⁹⁴ Victoria Daskalova. 'Consumer Welfare in EU Competition Law: What is It (Not) About?' (2015) 11(1) Competition Law Review 149 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>

inferred.⁹⁵ A similarly reduced emphasis on consumer welfare as the sole objective of competition law was evident in *GlaxoSmithKline* (2009), where the ECJ held that Article 101 TFEU aims not only to protect the interests of competitors and consumers, but also includes preserving the structure of the market and competition as such.⁹⁶ This position was echoed by the General Court in *Intel* (2014), where it again recognised these broader goals underlying EU competition law.⁹⁷

However, this trend was reversed by the ECJ in its *Servizio Elettrico Nazionale SpA* (2022) ruling, where the welfare of intermediary and final consumers was again considered the ‘ultimate objective warranting the intervention of competition law’.⁹⁸

The historical development of the consumer welfare standard reveals that the lack of consensus surrounding its meaning has endowed it with a high degree of flexibility. Any attempt to impose an interpretation grounded in *Bork*’s original conception fails to recognise that the term initially referred to a different conceptual welfare standard altogether. Its definitional ambiguity in legislation and case law across various jurisdictions has inadvertently opened the door to broader interpretations.

2. Necessity of Harm to Direct or Indirect Buyers

However, despite its flexibility and scope beyond the literal group of ‘consumers’, its historical development does tend to reveal a consumer welfare standard that solely focuses on direct and indirect buyers. This may in fact be regarded as the crucial factor that distinguishes it from other welfare approaches, such as ‘trading partner welfare’,⁹⁹ which is later to be discussed, or the total welfare standard that includes producer surplus. As employees are not direct or indirect buyers but rather sellers of labour, it is to be examined, first, whether the consumer welfare

⁹⁵ *ibid*

⁹⁶ *Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission of the European Communities* (ECR I-9291) 2009, para. 63

⁹⁷ *Case T-286/09 Intel Corporation v Commission* (ECLI:EU:T:2014:547) 2014, para. 105

⁹⁸ *Case C-377/20 Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (ECLI:EU:C:2022:379) 2022 12 May <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62020CJ0377>>, para. 46

⁹⁹ Laura Alexander and Steven C. Salop. 'Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits' (2023) 90(2) *The University of Chicago Law Review* 273 <<https://www.jstor.org/stable/27222244>>; C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) *The Yale Law Journal* 2078 <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

standard is flexible enough to accommodate sellers; and second, whether, in any case, it necessitates additional harm to direct or indirect buyers.

The recognition of harm to sellers is argued for with reference to the Court's rulings in *T-Mobile*¹⁰⁰ (2009) on Article 101 TFEU and *British Airways*¹⁰¹ (2007) on Article 102 TFEU.¹⁰² The *T-Mobile* case concerned a conspiracy among telecom operators to lower the commission for dealers of postpaid subscriptions that may have led to reduced costs for consumers. As regards the lack of consumer harm, the Court ruled that nothing in the wording of Article 101 TFEU suggested that only conduct which had a *direct* effect on consumer prices was prohibited.¹⁰³ However, the Court then acknowledged that the commissions paid to the dealers could – despite a lack of a direct effect – nevertheless be considered a decisive factor for consumer prices.¹⁰⁴ The ruling therefore left open the question whether *indirect* effects on consumer prices were nevertheless necessary under the consumer welfare standard.¹⁰⁵ The *British Airways* case concerned its implementation of a performance-based commission system for its travel agents, which had an exclusionary effect on its competitors and distorted competition in the travel agents' market. Yet again, the Court merely ruled out that *direct* harm to consumers was necessary under Article 102 TFEU.¹⁰⁶

What the *T-Mobile* and the *British Airways* ruling moreover have in common is that they both again emphasise that consumer welfare is only one of the objectives of competition law,

¹⁰⁰ *Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (ECLI:EU:C:2009:343) 2009 4 June <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2009:343>>

¹⁰¹ *Case C-95/04 P British Airways plc v Commission* (ECLI:EU:C:2007:166) 2007 15 March <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0095>>; *ibid*

¹⁰² Victoria Daskalova. 'Consumer Welfare in EU Competition Law: What is It (Not) About?' (2015) 11(1) *Competition Law Review* 156 <<http://clasf.org/2016/03/02/vol-11-issue-1-of-the-competition-law-review-published/>>

¹⁰³ *Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (ECLI:EU:C:2009:343) 2009 4 June <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2009:343>>, para. 36

¹⁰⁴ *ibid*, 37.

¹⁰⁵ Jan Broulík, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' in *Amsterdam Center for Law & Economics Working Paper No. 2024-12*, *Amsterdam Law School Research Paper No. 2024-31*, *Amsterdam Centre for European Law and Governance Research Paper No. 2024-10*, *TILEC Discussion Paper No. 2024-12* (2024) <<https://ssrn.com/abstract=4945475>>, p. 23

¹⁰⁶ *Case C-95/04 P British Airways plc v Commission* (ECLI:EU:C:2007:166) 2007 15 March <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0095>>, para. 106

alongside the preservation of the structure of the market and competition as such.¹⁰⁷ Therefore, neither ruling offers guidance on whether the consumer welfare standard includes harm to sellers, as their reasoning could equally have been based on the protection of an effective competition structure. The same applies to other rulings in the ‘restriction by object’ category under Article 101 TFEU, which do not require demonstration of harm, as well as rulings on exclusionary abuse, such as predatory pricing under Article 102 TFEU, which do not have instant negative effects on consumers.

The Court’s case law is therefore not conclusive on the question, whether the consumer welfare standard may also accommodate sellers of labour.¹⁰⁸ In the absence of definitive judicial or legislative findings, the scope of the consumer welfare standard is in the following considered not to go beyond the group of direct or indirect buyers.

However, the *T-Mobile* and *British Airways* rulings emphasized that competition law has more than a single objective – namely, the protection of an effective competition structure. This raises the question of whether other recognised objectives of competition law, beyond consumer welfare, may justify intervention irrespective of harm to direct or indirect buyers. It could thus allow recognition of harm to employees, even though the consumer welfare standard does not encompass sellers of labour.

As regards Article 102 TFEU, this particular question was posed and answered in the aforementioned preliminary ruling *Servizio Elettrico Nazionale SpA* (2022).¹⁰⁹ In essence, the

¹⁰⁷ *Case C-95/04 P British Airways plc v Commission* (ECLI:EU:C:2007:166) 2007 15 March <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0095>>, para. 107; *Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (ECLI:EU:C:2009:343) 2009 4 June <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2009:343>>, para. 38

¹⁰⁸ There are, however, more recent indications in informal communication of the European Commission, that may suggest that seller harm could matter in itself, cf. Jan Broulík, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' in *Amsterdam Center for Law & Economics Working Paper No. 2024-12*, *Amsterdam Law School Research Paper No. 2024-31*, *Amsterdam Centre for European Law and Governance Research Paper No. 2024-10*, *TILEC Discussion Paper No. 2024-12* (2024) <<https://ssrn.com/abstract=4945475>>, p. 25

¹⁰⁹ *Case C-377/20 Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (ECLI:EU:C:2022:379) 2022 12 May <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62020CJ0377>>, para. 40; Cf. Jan Broulík, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' in *Amsterdam Center for Law & Economics Working Paper No. 2024-12*, *Amsterdam Law School Research Paper No. 2024-31*, *Amsterdam Centre for European Law and*

Court ruled that the prohibition of a dominant undertaking's conduct may in fact solely be based on its harm to an effective competition structure.¹¹⁰ Nonetheless, the Court also lays the groundwork for an efficiency defence, allowing for such a harm to be counterbalanced or even outweighed by positive effects for consumers.¹¹¹ As the Court also established consumer welfare as the 'ultimate objective warranting intervention of competition law',¹¹² it is moreover argued that the objective of an effective competition structure is a weak basis for intervention as it merely serves as a proxy for the well-being of intermediary and final consumers.¹¹³

Nevertheless, the questions raised in this section can be answered: Despite the consumer welfare standard being exclusively concerned with protecting direct and indirect buyers, it does not preclude intervention based on other recognised objectives of competition law, namely the protection of an effective competition structure. Although the Court regards consumer welfare as the ultimate objective of competition law, it does not portray it as the sole objective, even if other objectives may play a subsidiary or complementary role. The consumer welfare standard therefore does not preclude intervention in the absence of consumer harm.

In the context of merger assessments, this implies that the consumer welfare standard, in principle, does not preclude the consideration of independent harm to other objectives as a sufficient theory of harm. It may, however, impose constraints on the effectiveness of stand-alone labour market theories of harm by allowing efficiency defences that counterbalance harm with positive effects for direct and indirect buyers.

Notably, the Court's reasoning in *Servizio Elettrico Nazionale SpA* largely rested on the *raison d'être* of Article 102 TFEU.¹¹⁴ Consequently, it raises the question whether the established

Governance Research Paper No. 2024-10, TILEC Discussion Paper No. 2024-12 (2024)
<<https://ssrn.com/abstract=4945475>>, p. 5

¹¹⁰ *Case C-377/20 Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (ECLI:EU:C:2022:379) 2022 12 May <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62020CJ0377>>, para. 48

¹¹¹ *ibid*, 48.

¹¹² *ibid*, 46.

¹¹³ Jan Broulík, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' in *Amsterdam Center for Law & Economics Working Paper No. 2024-12, Amsterdam Law School Research Paper No. 2024-31, Amsterdam Centre for European Law and Governance Research Paper No. 2024-10, TILEC Discussion Paper No. 2024-12 (2024)* <<https://ssrn.com/abstract=4945475>>, p. 5

¹¹⁴ *Case C-377/20 Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (ECLI:EU:C:2022:379) 2022 12 May <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62020CJ0377>>, paras. 44–46

efficiency defence that allows for counterbalancing with positive downstream consumer effects applies to merger assessments, given the EU Merger Regulation's distinct mandate to protect effective competition. The next section examines this issue in light of relevant merger decisions.

III. Considerations of Upstream Buyer Power in Merger Assessments

Having examined the constraints imposed by the consumer welfare standard, it is now to be assessed whether there are relevant merger decisions that reveal any additional limitations concerning the recognition of stand-alone labour market harm in merger assessments. Due to the absence of cases directly addressing upstream labour market effects, this analysis will instead focus on considerations of upstream buyer power that may offer analogous insights relevant to labour market dynamics.

One of the few decisions in which the Commission considered the effects of increased upstream buyer power is the *Aurubis/Metallo* case (2020),¹¹⁵ concerning Aurubis AG's acquisition of Metallo Group Holding N.V. Metallo was a Belgian firm specialising in the recycling and refining of complex, low-grade metal scrap, while the German company Aurubis operated in copper production and recycling. The transaction resulted in an increase in the merged entity's upstream buyer power concerning the purchase of copper scrap for refining.¹¹⁶ Yet, the merger was not likely to result in a reduction of purchases and therefore neither likely to result in a reduction of downstream output or increase in downstream prices.¹¹⁷

In its decision, the Commission noted that the EU Merger Regulation and the Horizontal Merger Guidelines did not necessitate a demonstration of direct downstream harm in order to intervene in buyer power cases.¹¹⁸ The legal mandate under Article 2(3) EU Merger Regulation was interpreted as including the protection of the competitive process, regardless of any demonstrable effect on consumers.¹¹⁹

¹¹⁵ *Commission Decision in Case M.9409 – Aurubis / Metallo Group Holding* (OJ C 164/1) 2020 (European Commission) <https://ec.europa.eu/competition/mergers/cases/decisions/m9409_3908_3.pdf>

¹¹⁶ *ibid*, 361.

¹¹⁷ *ibid*, 830, 867.

¹¹⁸ *ibid*, 376.

¹¹⁹ *ibid*, 376.

Parallels again emerge with the *T-Mobile* and *British Airways* rulings, as once more the *direct* demonstration of consumer harm is ruled out as a requirement, therefore theoretically allowing for indirect effects on consumers to be required.¹²⁰ But in contrast to these rulings, the Commission here makes no mention of any indirect downstream effects it might have considered. Furthermore, when the protection of the competitive process is presented as an independent objective of the EU Merger Regulation the qualifier '*direct*' is omitted:

“In this regard, the Commission notes that the Merger Regulation and the Horizontal Merger Guidelines do not preclude the Commission from intervening in buyer power cases where direct harm to consumers cannot be demonstrated. The legal test of the Merger Regulation is whether the merger can significantly impede 'competition', which includes the protection of the competitive process, even if it cannot be demonstrated that such reduction of competition affects consumer welfare.”¹²¹

This confirms that intervention under the EU Merger Regulation's legal mandate may rest solely on preserving an effective competition structure. The use of the word '*direct*' in the first sentence may, therefore, have exclusively referred to the Horizontal Merger Guidelines, which are, as outlined above, in fact too ambiguous to claim that they do not at least necessitate indirect effects on consumers downstream.

Moreover, the ultimately accepted efficiency defence did not concern potential positive effects for the downstream market, but rather potential benefits for the suppliers upstream that may offset adverse effects they may concurrently experience.¹²² The merger-related technological improvements in extraction and processing of copper scrap were likely to lead to increased payments of certain metal components contained in the copper scrap that could at least partly offset potential negative price effects.¹²³ Nonetheless, an efficiency defence based on positive effects for downstream consumers was theoretically considered possible.¹²⁴ While this decision

¹²⁰ Cf. Jan Broulík, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' in *Amsterdam Center for Law & Economics Working Paper No. 2024-12*, *Amsterdam Law School Research Paper No. 2024-31*, *Amsterdam Centre for European Law and Governance Research Paper No. 2024-10*, *TILEC Discussion Paper No. 2024-12* (2024) <<https://ssrn.com/abstract=4945475>>, p. 23

¹²¹ *Commission Decision in Case M.9409 – Aurubis / Metallo Group Holding* (OJ C 164/1) 2020 (European Commission) <https://ec.europa.eu/competition/mergers/cases/decisions/m9409_3908_3.pdf>, para. 376

¹²² *ibid*, 835.

¹²³ *ibid*, 854.

¹²⁴ *ibid*, 834.

predates *Servizio Elettrico Nazionale SpA*, this indicates that similar counterbalancing with positive downstream consumer effects does apply to merger assessments.

In a more recent ruling, the Commission assessed in detail the effects on buyer power of the furniture retail merger *XXXLUTZ/HOME24* (2023)¹²⁵ between Austrian brick-and-mortar furniture retailer XXXLUTZ and German online furniture retailer HOME24. The transaction gave rise to an increase in buyer power in the procurement market for low- and medium-priced furniture.¹²⁶ However, after a detailed assessment of the effects on the upstream procurement market, no adverse effects on competition could be determined.¹²⁷ The decision therefore offers no additional insights into further potential constraints to the recognition of stand-alone labour market theories of harm.

IV. Necessity of a Different Welfare Approach

In summary, the consumer welfare approach offers a broad scope that protects all direct and indirect buyers. Moreover, it does not preclude intervention based on harm to other objectives of competition law. Nonetheless, the consumer welfare standard does not appear flexible enough to accommodate sellers of labour. Furthermore, *Servizio Elettrico Nazionale SpA* establishes an efficiency defence, which allows any negative impact on other objectives to be counterbalanced or even outweighed by positive effects for consumers. The positioning of the consumer welfare standard as the ultimate objective may also, per se, attribute more weight to potential consumer benefits vis-à-vis other objectives. This could significantly impair the aim of establishing stand-alone labour market theories of harm.

Mitigating monopsony power is central to any stand-alone labour market theory of harm and to the protection of labour competition. Allowing negative effects on workers to be offset by positive effects for consumers would entirely undermine this objective. As illustrated by

¹²⁵ *Commission Decision in Case M.10969 – XXXLutz / Home24* (OJ C 96/5) 2023 (European Commission) <<https://competition-cases.ec.europa.eu/cases/M.10969>>

¹²⁶ *ibid*, 120.

¹²⁷ *ibid*, 114–190.

Alexander and Salop, there are three economic concepts of monopsony that entail different impacts for consumers in the downstream market.¹²⁸

The first concept describes a classical monopsony that is characterised by an environment in which the hiring of new workers would typically require the offering of higher wages to attract additional people.¹²⁹ Any additional hire would significantly increase overall labour costs, as it would raise the wages for all existing workers. The classical monopsonist would therefore restrict the number of employees in order to pay even less to the few who remain. This would typically lead to less output on the downstream market and higher prices for consumers.

The second concept describes a classical monopsony characterised by an environment of low labour supply elasticity, where workers would be willing to work regardless of the wage.¹³⁰ This could be due to the fact that the investment in a specialised skill was so high that working another job would be unfeasible. In this scenario, the suppression of wages would typically neither lead to lower employment nor to lower output on the downstream market, with no effect on prices paid by consumers.

The third concept describes a monopsony with bargaining leverage characterised by an environment in which remunerations are negotiated between the monopsonist and workers.¹³¹ Bargaining leverage allows the monopsonist to negotiate lower remunerations while increasing employment and output in the downstream market. Such a situation would, in fact, be beneficial for consumers.

Were these labour market impacts allowed to be counterbalanced with impacts on consumers, intervention would only be possible for the first two concepts of monopsony, as they entail either negative or neutral impacts on downstream consumers. Moreover, if one were to favour

¹²⁸ Laura Alexander and Steven C. Salop. 'Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits' (2023) 90(2) *The University of Chicago Law Review* 280 et seqq <<https://www.jstor.org/stable/27222244>>

¹²⁹ For the discussion in this paragraph: *ibid*; C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) *The Yale Law Journal* 2082 <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

¹³⁰ For the discussion in this paragraph: Laura Alexander and Steven C. Salop. 'Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits' (2023) 90(2) *The University of Chicago Law Review* 282 <<https://www.jstor.org/stable/27222244>>

¹³¹ For the discussion in this paragraph: *ibid*; C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) *The Yale Law Journal* 2093 <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

a reading of *Servizio Elettrico Nazionale SpA* that considers consumer welfare to be the primary objective with all other objectives taking on a subsidiary role, merely the first concept of monopsony could be recognised as harm.¹³² This defeats the main purpose of recognising stand-alone labour market harm, which is supposed to be independent of additional harm to consumers.

Two things may therefore be concluded: First, any recognition of stand-alone labour market harm must preclude balancing with downstream benefits. Second, stand-alone labour market harm is not compatible with the consumer welfare standard as it is currently interpreted by the Court. A corresponding framework therefore requires a different welfare approach that is broad enough to include sellers of labour and is capable of symmetrically treating both monopoly and monopsony power.¹³³ Attention therefore now turns to the proposal of a coherent framework that provides guidance for stand-alone labour market theories of harm.

D. Framework for Stand-Alone Labour Market Theories of Harm

I. Rationale: Social Mobility

Social mobility is a legitimising principle of the social contract that underlies the EU competition regime. It has a mutually reinforcing relationship with allocative efficiency in the labour market, as factors related to socio-economic disadvantage impede an optimal allocation of human capital. Moreover, as a dynamic dimension of equality of opportunity, it is a substantial facet of the EU's goals of market integration and its Treaty-based social and equality values. Social mobility is, therefore, an inherent objective of competition law and a rationale for the independent recognition of labour market harm.

¹³² Cf. Laura Alexander and Steven C. Salop. 'Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits' (2023) 90(2) *The University of Chicago Law Review* 286 <<https://www.jstor.org/stable/27222244>>

¹³³ C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) *The Yale Law Journal* 2078 <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

II. Proxy: Protection of Labour Market Competition

Competition law is particularly suited to advance the facet of social mobility that is concerned with the recognition and utilisation of the available talent pool in the labour market. As labour concentration is a main constraint on this facet, the protection of labour competition, referring to the competition between employers, may serve as a proxy. This preserves labour mobility, allowing workers to capture the full value of their skills and contributions, and enables employers to access and compete for the available talent pool. Such substantive integration of social mobility requires symmetrical treatment of monopoly power and monopsony power. This includes the independent recognition of negative impacts on labour markets as capable of constituting a sufficient theory of harm without the additional need to demonstrate negative effects in downstream markets. Such negative impacts are referred to as ‘stand-alone labour market theories of harm’.

III. Welfare Standard: Trading Partner Welfare Approach

While the prevalent consumer welfare approach does not per se preclude intervention based on other objectives of competition law, it is nonetheless a constraint on the effective protection of labour competition. Its scope protects all direct and indirect buyers but does not provide enough flexibility to accommodate sellers of labour. Moreover, it requires negative labour market impacts to be balanced with downstream consumer benefits. Such balancing is economically incompatible with the effective mitigation of monopsony power and, therefore, the protection of labour competition.

Consequently, this framework proposes the adoption of a ‘trading partner welfare approach’ as conceptualised by *Hemphill* and *Rose* for U.S. antitrust law.¹³⁴ It presumes that competition law protects the competitive process to safeguard the welfare of the merging entities’ trading partners, irrespective of whether they are on the buying or selling side.¹³⁵ It thereby allows for the independent recognition of harm to input markets, i.e. labour markets.¹³⁶ Trading partner welfare thus enables equal treatment of monopoly and monopsony,¹³⁷ which allows for an

¹³⁴ *ibid*, 2078.

¹³⁵ *ibid*, 2091.

¹³⁶ *ibid*

¹³⁷ *ibid*

adequate substantive integration of social mobility as an objective. It would include sellers of labour, affording them protections comparable to those granted to consumers. Moreover, it would cover small- and medium-sized firms on the selling side, redressing the disparity in protections under the consumer welfare standard relative to those enjoyed by large buyers.

The trading partner welfare may be considered an economically more reasonable approach as it recognises harm in all economic concepts of monopsony. This welfare approach also differs from the total welfare standard in that it excludes the welfare of the merging entities that harm competition.¹³⁸

As regards U.S. antitrust law, trading partner welfare may be considered descriptive of the welfare approach that is used in practice, despite being referred to as ‘consumer welfare’.¹³⁹ The U.S. Supreme Court has explicitly recognised anticompetitive conduct that exclusively harms upstream markets.¹⁴⁰ However, similarly clear findings by the CJEU could not be confirmed in this study. The Court’s conception of consumer welfare recognises harm to sellers in the absence of *direct* effects on consumers, leaving open the question of whether *indirect* effects may still be required.¹⁴¹ And whenever independent harm to sellers was indeed recognised by the Court, the reasoning may as well have been based on the objective of protecting an effective competition structure¹⁴² – an objective considered distinct from consumer welfare.¹⁴³ Trading partner welfare could therefore be considered descriptive of the

¹³⁸ *ibid*

¹³⁹ Cf. Ioana Elena Marinescu and Herbert J. Hovenkamp. 'Anticompetitive Mergers in Labor Markets' (2019) 9(5) *Indiana Law Journal* , 1062. <<https://www.repository.law.indiana.edu/ilj/vol94/iss3/5>>

¹⁴⁰ 334 *Mandeville Island Farms v. American Crystal Sugar* (No. 75) 1948 10 May <<https://supreme.justia.com/cases/federal/us/334/219/>>; 549 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (No. 05–381) 2007 20 February <<https://supreme.justia.com/cases/federal/us/549/312/>>; C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) *The Yale Law Journal* , 2088. <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

¹⁴¹ *Case C-95/04 P British Airways plc v Commission* (ECLI:EU:C:2007:166) 2007 15 March <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0095>>, para. 106; *Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (ECLI:EU:C:2009:343) 2009 4 June <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2009:343>>, para. 36

¹⁴² *ibid*, 106.; *Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (ECLI:EU:C:2009:343) 2009 4 June <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2009:343>>, para. 38

¹⁴³ *Case C-377/20 Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (ECLI:EU:C:2022:379) 2022 12 May <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62020CJ0377>>, para. 48

CJEU's general assessment framework, but not necessarily of its understanding and application of consumer welfare specifically. The trading partner welfare approach would therefore require an explicit adoption of EU Competition Law, rather than a redesignation of an already prevalent welfare approach.

IV. Efficiency Defence

Efficiency defences for stand-alone labour market theories of harm would have to preclude balancing with downstream benefits. Balancing of labour market harm with consumer benefits would effectively exclude from their scope of protection certain economic concepts of monopsony. Such theories of harm therefore require different parameters on which to ground an efficiency defence. An effective efficiency defence would have to present evidence that reductions in input price or labour mobility are not due to an exercise of monopsony power.¹⁴⁴

The assessment framework for efficiency defences laid down in the current Horizontal Merger Guidelines is grounded in the consumer welfare approach, concerning mainly potential benefits to consumers.¹⁴⁵ However, considering this proposed framework's objective of achieving a symmetrical treatment of upstream and downstream markets, the guidance may be analogously extrapolated to workers:

- The **relevant benchmark** in assessing efficiency claims in the current Guidelines is that consumers will not be worse off as a result of the merger.¹⁴⁶ The analogous benchmark for this proposed framework would therefore be that workers will not be worse off as a result of the merger.
- As regards **cost efficiencies** that may lead to lower prices, the Guidelines distinguish that reductions in variable or marginal costs are more likely to benefit consumers than reductions in fixed costs.¹⁴⁷ Extrapolated to the labour markets, this would make efficiencies that reduce marginal costs for workers more relevant than reductions in

¹⁴⁴ C. Scott Hemphill and Nancy L. Rose. 'Mergers that Harm Sellers' (2018) 127(7) The Yale Law Journal , 2106. <https://www.yalelawjournal.org/pdf/HemphillRose_m2dfkbhr.pdf>

¹⁴⁵ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004a OJ C31/5 <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0205\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0205(02))>, paras. 76–88

¹⁴⁶ *ibid*, 79.

¹⁴⁷ *ibid*, 80.

fixed costs. Marginal cost reductions could include reductions in hiring costs and shorter job placement times, due to streamlined recruitment systems or reductions in training and upskilling costs. However, similar to how cost reductions stemming from anticompetitive reductions of output cannot be considered beneficial to consumers, cost reductions stemming from lower employment cannot be grounds for an efficiency defence in this proposed framework.

- **Dynamic efficiency gains** for consumers mainly concern product innovation.¹⁴⁸ For workers, however, such efficiencies could concern training and education that provide long-term positive effects on their human capital.
- Efficiencies in the context of **coordinated effects** in product markets concern the merged entity's incentive to increase production and reduce prices, thereby reducing its incentive to coordinate its market behaviour with other firms.¹⁴⁹ In labour markets, this would require reductions in marginal hiring costs, that incentivise increased employment and disincentivise collusion with other firms that suppresses wages or reduces labour mobility.
- Reductions in wages or labour mobility could be offset by other benefits akin to stock vesting schemes, where employees gradually earn equity in their employer's firm. One could also consider pension schemes with contributions by the merged entity tied to low-risk assets in the capital market, allowing the interest to outweigh the loss of salary compensation.

In any case, a potential efficiency defence would have to prove that it is passed through to workers, either in wages or working conditions. This will largely depend on the degree of competitive pressure from other remaining employers. Efficiencies would, furthermore, have to be merger-specific and verifiable. The later the expected efficiencies materialise, the less weight they should be assigned. The options outlined above could, moreover, be tied to binding commitments in connection with a merger decision.

¹⁴⁸ *ibid*, 81.

¹⁴⁹ *ibid*, 82.

E. Conclusion

This thesis proposes a framework for stand-alone labour market theories of harm that offers both legal and economic grounds for revising the current EU merger assessment framework. By recognising social mobility as an objective of competition law – using the protection of labour competition as a proxy – it demonstrates that negative impacts on upstream labour markets should be capable of constituting independent theories of harm.

However, the current merger assessment framework constrains the recognition of stand-alone labour market theories of harm. The prevalent consumer welfare standard requires the counterbalancing of detrimental labour market effects with benefits to downstream consumers. Such balancing effectively excludes certain economic concepts of monopsony from the scope of protection and undermines the independent recognition of labour market harm. The proposed assessment framework is therefore based on a trading partner welfare approach that allows symmetrical treatment of monopoly and monopsony power by protecting all trading partners of a merging entity, including sellers of labour. The relevant benchmark for efficiency defences correspondingly requires that workers will not be worse off as a result of a merger.

Adoption of this framework will enable EU competition law to tackle stagnating and declining social mobility and acute labour and skills shortages across the Union.

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