

Considering worker welfare? A capability assessment of antitrust

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Abstract

Conduct of competition law under the consumer welfare standard is under attack. In the United States (US), some have requested considering worker welfare in the day-to-day application of antitrust and merger rules. By contrast, similar calls are weaker in the European Union (EU) in spite of it being a “social market economy” (article 3(3) TEU). This article asks “why?”. To address this question, it compares antitrust’s capabilities to protect worker welfare in both regions. It concludes that while American ones are both structurally and contextually stronger, European capabilities exist. This finding provides insights on how to reform the tools and methods of EU competition law if enforcers decide to step up intervention. Considering social impacts in antitrust could strengthen its legitimacy.

Keywords: antitrust reform, comparative law, institutional capabilities, worker welfare.

JEL Classification: D43, J42, J53, J81, K21, K41, L40, L41, L42

1. Introduction

Antitrust is under attack for its narrow focus on the consumer welfare. A subset of those critiques lies in the neglect for labour markets and workers (Baker, 2019). Puzzlingly, while European Union (EU) competition law is more regulatory than its American counterpart (Fox, 1997), the United States (US) have granted more consideration to worker welfare in recent years. How can such a situation be explained?

For a start, let us clarify what “worker welfare” means in this paper. Despite the intuitive association of the “welfare” terminology with broad social policies (education, health...) and state intervention, the concept shrinks in the antitrust context. Just as consumer welfare synthesizes levels of outputs and levels of prices, worker welfare synthesizes levels of employment and levels of wages. The difference is that workers supply while consumers demand. While seller power and monopolization weaken consumer welfare, it is buyer power and

monopsonization that weaken worker welfare. Restrictive agreements do not fix the price or level of outputs, they do so with inputs. No-hire, non-poaching, wage-fixing, information exchange... these conducts restrict wages and limit the free flow of labour on the labour market (Marinescu and Posner, 2020).

Intuitively, Europe being a social market economy (article 3(3) TEU), one would expect stronger concern about those restrictions on our side of the Atlantic. Why is American antitrust enforcement fiercer then? I hypothesize that antitrust capabilities to protect worker welfare are stronger in the US than in the EU.

The capability of a legal tool corresponds to its potential to achieve a specific outcome. The fittest it is to do so, the more capable. Here, the outcome is to “protect worker welfare”. What does this mean? Let us run the analogy with the more traditional goal of antitrust: protecting consumer welfare. Simply put, it covers two elements. First, preventing or ending restrictive conducts for consumers to benefit from improved products, at lower prices, in maximized quantities. Second, compensating harm. “Protecting worker welfare” thereby clarifies: it includes preventing or ending labour restrictive conducts (thus maximizing wages and employment) and compensating workers’ antitrust injury.

In this paper, I investigate the respective capabilities of American and European antitrust towards worker welfare. I include Federal and State provisions when mentioning American antitrust. When it comes to worker cases, there is little difference. Correspondingly, European competition law covers both the EU level and National Competition Authorities. Enforcement being decentralized, it makes sense to investigate both levels at once.

I leave aside the question of antitrust’s capabilities to *prevent* harm to workers. While they exist (labour markets could be considered *ex ante* in merger reviews (Naidu *et al.*, 2018)), they have never been used so far. On the contrary, restrictive conduct cases exist in both the EU and the US. As this paper seeks to identify whether antitrust capabilities shrink, expand, or stay still when workers – not consumers – are harmed, performing a case study is particularly enlightening and supports narrowing down the focus.

While worker welfare has received attention in antitrust literature (Hemphill and Rose, 2018; Posner, 2021), the comparative approach of this paper is original. By identifying the strengths and weaknesses in each legal regime, it provides European enforcers with a roadmap for improvement if they were to step up on this question.

In Part 2, I present the analytical framework and specify that antitrust capabilities are shaped at the mobilisation, operationalisation, and remediation levels. I then compare antitrust’s capabilities in each forum with respect to each criterion (Parts 3, 4 and 5). I conclude that the American advantage over the European framework mostly builds on private enforcement capabilities and identify how Europe could catch up if it wanted to (Part 6).

2. Evaluative framework

The capabilities of a tool hinge upon three core aspects. First, how accessible is it, how can it be mobilized? Second, how is it concretely enforced? How difficult is it for a litigant to win a case and for an enforcer to characterize an infringement? Last, how does remediation work? Is it effective, generous, or rather restricted? I rapidly present elements that influence capabilities at each level.

2.1 Mobilisation capabilities

A tool's accessibility depends on both its theoretical and practical availability. Theoretically speaking, what is the scope of its legal capacity and who can action it? Besides, concretely, is its use facilitated or inhibited by procedural and practical characteristics (cost, time, proof thresholds...)? The level of public interest for an issue can also boost mobilisation capabilities. First, as public enforcers generally set their priorities, a topic becoming notorious can incentivize finding and prioritizing cases. It may also spur private litigants to come forward.

2.2 Operationalisation capabilities

Operationalisation capabilities depend on the level of requirements at trial (burdens of proof, strictness of standards of review), the clarity of theories and tools and the degree of outcomes' predictability. When antitrust can expand coherently to encompass new considerations, legal certainty increases. Antitrust capabilities improve when judges clarify what they require from litigants to be convinced. Legal certainty is also shaped by a purely quantitative dimension: the more cases, the more incremental knowledge arises from repetitive adjudication.

2.3 Remediation capabilities

Remediation is the last component of antitrust capabilities. What are its means and conditions? Is it effective to put infringements to an end? Is compensation generous? Can litigation stop effectively and fast? The nature and effectivity of available remedies, the existence of alternative modes of conflict resolution and the levels of compensation are all relevant.

Let us move on to the comparative case study: it enables to identify the core elements restraining European enforcement.

3. A structural and contextual combo: American antitrust is more easily mobilised to protect workers

At the mobilisation level, the strengths of a framework depend on what it is legally allowed to deal with, the range of actors who can seize it, and the practical ease with which it can be set into motion: time, costs, strictness of admissibility requirements. We analyse in turn the labour exemption, public and private

enforcement capacities, and the degree of interest for worker welfare cases in both regions. Overall, Americans are more likely than Europeans to turn to antitrust for both structural and contextual reasons.

3.1 *The labour exemption is irrelevant to worker welfare.*

In both the US and the EU, the labour exemption is irrelevant to worker welfare cases. It leaves antitrust mobilisation capabilities unaffected.

By its very nature, workers' collective action restricts competition. First, collective bargaining skirts the competitive process by which wage settle to their market price. Second, unions' boycotts and strikes impact production, reduce output, and impede the natural flow of commerce (*Loewe v. Lowlor*, 1908). To prevent antitrust enforcement in such contexts, both regions adopted a labour exemption. In the US, statutory (Clayton Act, 1914 and Norris-La Guardia Act, 1932) and non-statutory (*Meat Cutters v. Jewel Tea*, 1965) provisions shield negotiated collective decisions on terms and conditions of employment from antitrust scrutiny. In the EU, despite different legal basis in national frameworks, member states converge in this exemption. It is sometimes understood *a contrario*, based on workers' Constitutional rights (Articles 39 and 40 of the Italian Constitution). It can also be stated in case law (*Département de la Marne*, 2004) or be included in competition acts themselves (Article 16 of the *Dutch Competition Act*). At the EU level, the shield arose when judges refused to assimilate "workers" to "undertakings", sole subjects of competition law (*Becu*, 1999) and refused to make collective agreements illegal under antitrust, for this would prevent the EU from pursuing its social policy objectives (*Albany*, 1999).

The restriction is thus narrow: antitrust cannot be enforced on collective bargaining agreements. This is basically it. *A contrario*, everything else can be tackled with antitrust, even when dealing with labour and conditions of employment. Courts have repeatedly refused to exempt agreements when they were concluded solely among employers (not employers and employees (*Hockeyligan*, 2012), or when they were wrongly presented as extending collective bargaining negotiations (*Anesthesiemedewerkers*, 2010). Put simply, the labour exemption is concerned with "the right to strike, not with the right of employers to band together for joint action in fixing the wages to be paid by each employer" (*Cordova v. Bache Co.*, 1970).

3.2 *European citizens can trigger public enforcement procedures more easily*

Systems of public enforcement differ in both regions. European citizens can more easily constrain enforcers to initiate a case, which improves mobilisation capabilities.

In the US, private parties can whistle blow, but they can't lodge formal complaints. Agencies have discretionary power to start an investigation.

On the contrary, in the EU, a natural or legal person with legitimate interest can lodge a formal complaint. The Commission must rule on it and its decision can be appealed before the General Court (Notice on the handling of complaints, 2004). At national levels as well, agencies are generally compelled to investigate the complaints lodged by interested parties. This increases victims' possibilities to turn to antitrust, but we still lack judicial precedents on workers' standing. Do they have a legitimate interest to act? They should, but we can't conclude definitively on this question. This slightly impedes mobilisation capabilities.

3.3 The American private enforcement system facilitates mobilisation

3.3.1 Structural and contextual elements benefit American mobilisation capabilities

European workers have little incentive to mobilize antitrust. First, private enforcement is still in its early days in the EU: only recently did Directive 2014/104/EU facilitate private action. While rising, it remains proportionally weaker and less common than in the US (Jones, 2016). Second, this structural imbalance is heightened in worker welfare cases: the status of harmed workers and the conditions of claims' admissibility under article 101 lack clarity. From a theoretical perspective, Articles 1 and 3 of Directive 2014/104/EU seem to grant workers a right of action. Yet cases are scarce and unclear. In the old *Bosman* case (1995), the plaintiff complained that regulation of players' transfers violated competition law. Besides restricting competition among clubs, he argued that the rule kept "players' wage at a lower level than would otherwise be the case". The advocate general had "great doubts as to whether the considerations [were] relevant" to enforce article 101, players being workers, not service providers (Conclusions of the Advocate General in *Bosman*, 1995). Does this imply that as workers, individuals cannot suffer from antitrust harm? The Court never ruled on this issue. Focusing on freedom of movement, it did not reach the antitrust investigation. Despite this dissuasive analysis, the case is older than the directive and at least one counter example exists. Dutch hospitals had concluded no-poach and price-fixing agreements (*Anesthesiemedewerkers*, 2010). The suit was brought by labour unions – private litigants – and judges accepted the case. They granted standing to workers under 101 and corresponding national provisions. The situation thus remains blurry, and the CJEU is yet to clarify it.

In the US, the position is clearer. Case law explicitly recognizes that harm to worker welfare is an antitrust injury for which workers have standing. This was not originally the case. In *Radovich v. National Football League* (1956), the Court of Appeals considered that the litigant had failed to state a claim on which relief could be granted: the "no-switching" clause preventing football players to change teams were not "*calculated to prejudice the public or unreasonably restrain interstate*

commerce". The Supreme Court disagreed (*Radovich v. National Football League*, 1957), albeit with an unclear reply: the claim was not entirely frivolous and could be tested under the general prohibition on restraint of trade. While Justices clearly affirm the right to private action, the reason for standing seems to lie in the restriction of outputs rather than in players' harm as such. Case after case however, the reasoning has clarified. Courts now recognize antitrust injury (*Jacobi v. Bache & Co.*, 1974; *Nichols v. Spencer International Press, Inc.*, 1967) and antitrust standing (*In re High-tech employee antitrust litigation*, 2012; *Roman v. Cessna Aircraft Co.*, 1995) on the sole basis of labour market restrictions' harm. A European worker is less certain than an American one that her claim will be admissible absent a restriction on outputs. Yet the imbalance is more contextual than structural: standing has already been granted in the past. It is the scarcity of case law that makes it difficult to predict legal outcomes, thereby impeding antitrust mobilisation capabilities. Besides, European litigants have little procedural facilitators to initiate cases.

3.3.2 Procedural mobilisation boosters: a structural asset for American workers

Two procedural mechanisms structurally boost American antitrust's mobilisation capabilities.

First, antitrust suits often resort to the contingent fee device. The plaintiff pays only if the case is won or settled. On the contrary, litigation costs can disincentive action in the EU (McCarthy *et al.*, 2007). The losing party generally pays the costs of trial, which represents an enormous threat for an individual worker suing her employer. It may prevent the procedure from ever starting at all.

What's more, worker welfare cases make class-actions procedures particularly valuable. First, restrictive agreements are used against many employees at once. Second, workers typically share a position where litigating alone against their employer is costly, time consuming, and extremely risky. Class-actions' availability thus fosters antitrust enforcement. On our side of the Atlantic, collective redress mechanisms only sporadically exist and vary from Member State to Member State (Heaton and Holt, 2019). Those devices are not specific to workers' cases but the context makes them particularly relevant. Both financial incentives and collective redress mechanisms unlock antitrust's potential to address workers' harm.

This advantage slightly pales considering how difficult certifying a class becomes in worker welfare cases. Litigants might stumble twice upon formal requirements made factually similar by the context: showing that antitrust injury and damage can be predominantly proven by common evidence (art. 23(b)(3), Fed. R. Civ. P.). To prove an antitrust injury requires to show an antitrust violation. To that end, workers may need to delineate a relevant market and thus identify interchangeable employers. This assessment must be common to

the class, which is challenging. Despite being all affected by a unique restrictive provision, each worker has a specific set of skills making her singular as compared to others. This impacts employers' interchangeability from workers' perspective, and Courts regularly refused to characterize a common relevant market (*Deslandes v. McDonald's U.S., LLC*, 2021; *In re Compensation of Managerial, Professional, and Technical Employees Antitrust Litig.*, 2003). If workers surmount this difficulty, their intrinsic heterogeneity strikes again shortly after: they need to prove class-wide damage. Again, damage hinges upon their respective wages, job positions, and experience. Courts have already ruled out predominance of common damage (*Fleischman v. Albany Medical Center*, 2008; *Fleischman v. Albany Medical Center*, 2010; *Weisfeld v. Sun Chemical Corp*, 2004),

The outcome is paradoxical. On the one hand, class-actions boost antitrust mobilisation capabilities for workers because of their broadly shared situation and lack of incentive to come forward alone. On the other hand, since workers intrinsically present unique sets of skills and occupy specific job positions, classes are difficult to certify.

3.4 American capability booster: public awareness and enforcers' determination

More anecdotal, but no less real, American capabilities currently benefit from a contextual capability booster: enforcers repeatedly denounce labour-restrictive conducts and largely advertise their will to intervene. The topic is high in the public debate. Enforcers face time and budget constraints and need to prioritise infringements. They have discretionary power to investigate and must leave aside certain cases. As a result, how "hot" a topic is shapes prioritisation strategies.

In the US, labour restrictive conducts are top of the list. This increases public enforcement and incentivizes private enforcement. When enforcers repeatedly clarify that certain conducts are illegal (Department of Justice Antitrust Division and Federal Trade Commission, 2016), litigants can mobilise antitrust more easily. Such a phenomenon is weaker in the EU. Despite increasing discussion of the issue (Vestager, 2021), the topic is less central. This is a self-sustaining process: the more a topic is discussed, the more likely enforcers will prioritise it, thereby increasing again the conversation's intensity. While the EU may reach this point soon, public interest is not yet a capability booster.

Overall, it is easier to mobilize antitrust in the US, mostly because of structurally stronger private enforcement capabilities. Clarity of case law and the degree of public interest also grant a contextual advantage to American antitrust. The latter could disappear if levels of enforcement increased in the EU. Current scarcity of cases also impacts operationalisation capabilities.

4. Rules guiding enforcement are clearer in the US

Operationalisation capabilities of antitrust are stronger in the US, mostly because they are clearer. The possibility to focus exclusively on labour markets is explicit, and standards of reviews are almost stabilized. However, just as in the EU, worker welfare is not protected against all odds: it is balanced with consumer welfare. While this reduces antitrust capabilities, it does so equally in both fora.

4.1 American explicit focus on the labour market

Operationalisation capabilities are stronger when there is no need to show downstream harm to characterize an infringement. Proving an impact on the labour market only is easier than showing an impact on both the labour and the downstream output market. Harming workers thus becomes illegal as such, even absent effects on end-consumers.

American judges used to require outputs' restraints to characterize an antitrust violation (*Anderson v. Shipowners Assn.*, 1926; *Union Circulation Company v. Fed. Trade Com'n*, 1957), but litigants now only need to prove the labour market restriction, even absent downstream harm (*US v. eBay, Inc.*, 2013). This sharpens antitrust capabilities. Recently, in *National Collegiate Athletic Association v. Alston* (2021), the Supreme Court characterized a horizontal price fixing scheme in a monopsonized market without searching for a restraint “in the seller-side” or “consumer facing” market. Defendants had not argued this should be done so Justices did not explicitly address this question. Yet, they did not require such a showing.

In the EU, case law is confusing. It is hard to say whether labour market restrictions suffice in and by themselves to characterize antitrust infringements. Different elements blur the framework. First, most cases present both input and output restrictive dimensions. While infringements are characterized, it is hard to say whether wage-fixing conducts only would have led to similar outcomes. The reasoning is global: labour restrictive elements are mentioned as part of the overall restrictive scheme, they are not characterized as illegal as such (*Pratiques mises en œuvre dans le secteur des revêtements de sols résilients*, 2017). Second, even in “labour-restrictive only” cases, enforcers often consider output markets to characterize the infringement. In *Travail temporaire de l'Isère et de la Savoie* (1997), a wage-fixing case, parties to the agreement were promoted to end-consumers. The authority only considered the output market: since competitors compete on price, pricing strategies must be determined freely. Besides, non-participants to the scheme were excluded from the market. Thus, competition was restricted. Impacts on the labour market and workers are not even mentioned. Elsewhere, the no-hire agreement of hockey players was held illegal because it eventually affected clubs' product, thereby affecting consumers, sponsors and media companies (*Hockeyligan*, 2012). Equally, the

lifetime ban of athletes participating in unauthorized competitions, clear labour market restriction, was only investigated under the product market lenses. The Commission (*International Skating Union's Eligibility rules*, 2017) and the Court (*International Skating Union v Commission*, 2020) considered how organizers were prevented from entering the market of sporting events, and ice-skaters' harm is not mentioned.

Yet the problem is mostly one of clarification and concrete implementation: European antitrust could be fit to protect workers. First, the Commission has already hold input restrictions to be illegal by object, without considering downstream effects to characterize the infringement (*Car battery recycling*, 2017; *Ethylene*, 2020). It also stated that no-poach agreements "are likely to fall under the prohibition of article 81 as hard-core restrictions" and "could amount to a market-sharing agreement regarding the supply of the workforce" (Spidla, 2007). The CJEU also strengthened antitrust's potential for workers' harm: in *T-Mobile Netherlands BV* (2009), it denied that article 81 only prohibited "practices which have a direct effect on the prices paid by end users". And at national levels, authorities have sometimes characterized an infringement based only on the labour market restriction (*Anesthesiemedewerkers*, 2010). In *SZTMSZ* (2021), hiring agencies had concluded non-poaching and no-hires. They also regularly exchanged wage information. The Court characterized labour market restrictions to be illegal as such, whatever their consequences on the downstream market. Such agreements allocate markets, impede working conditions, restrict information flow for workers, suppress wages and reduce job opportunities. The angle is explicit: what matters here is that "on the labour market, [employers] compete".

All in all, European competition could deal with labour market restrictions. Tools exist and can be used – some institutions have acknowledged that. Yet such recognition is so sporadic and inconsistent that antitrust operationalisation is unpredictable. This situation may also impede follow-on actions. In this context, infringement decisions either bind courts or constitute prima facie evidence (art 9, Directive 2014/104/EU)). But what if the infringement is characterized on the output market and not on the labour market? Will a worker need to prove, again, the restriction on the market she acts on? If the conduct is illegal mostly (only?) because effects eventually reached the output market, then the legitimacy of workers' claim could be questioned. This is speculative, but it would highly diminish private enforcement capabilities.

4.2 A clearer approach to standards of review in the US

While the issue of standards of review is almost stabilized in the US, most cases are settled or dismissed at an early stage. Decisions on the merits are thus scarce. Initially, when downstream effects still mattered, judges used the rule of reason

(*Union Circulation Company v. Fed. Trade Com'n*, 1957). The existence of effects on the downstream market required investigation. Today, the theoretical setting can be summarized this way: a naked horizontal market restriction (such as wage-fixing or non-poaching) is illegal *per se*. On the contrary, the rule of reason is adequate when the restraint is ancillary (necessary to pursue a procompetitive activity), in specific contexts such as regulated activities (*Jacobi v. Bache & Co.*, 1975) or sport activities (*Mackey v. NFL*, 1976), or when the conduct was information exchange (*Todd v. Exxon Corp.*, 2001). The real remaining puzzle lies in the treatment of franchises: first, are they not a single entity, making it impossible for them to collude? This hinges upon a factual assessment and has led to divergent outcomes (*Arrington v. Burger King Worldwide, Inc.*, 2020; *Yi v. SK Bakeries, LLC*, 2018). If antitrust is considered enforceable, the issue of the standard of review jumps in. The question is controversial (AAI, 2019; DOJ, 2019; Slaughter, 2019) but case law seems to dismiss a *per se* approach (*Deslandes v. McDonald's U.S., LLC*, 2021). In *Conrad v. Jimmy John's Franchise, LLC* (2021), judges mentioned the *NCAA v. Alston* case. A “fuller review” is appropriate in industries in which “some horizontal restraints on competition are essential if the product is to be available at all” (typically, franchise agreements). Case law is not yet entirely consistent, but most questions have been tackled.

In the EU, the question is framed under the by object/by effect dichotomy. Three main situations can be characterized. First, when both inputs and outputs are restricted, enforcers generally characterize by object restrictions (*Agenzie di modelle*, 2016; *Conduct in the modelling sector*, 2016; *Pratiques mises en oeuvre dans le secteur des prestations réalisées par les agences de mannequins*, 2016; *Transitarios*, 2010) and tend to mention the possibility to also characterize effects. Yet, once again, it is hard to say what the outcome would have been absent a traditional output prices' fixing scheme. Second and third, when the restriction affects inputs most directly, the position of judges is unsettled. They have sometimes rejected a by object approach: in *Hockeyligan* (2012), litigants argued that the agreement aimed at ensuring fair proceeding of competitions, which precluded a by object approach. The Authority doubts it in passing, does not rule on the issue, and moves on to the by effect analysis (ran on the output market). Equally, in *Anesthesiemederwerkers*, both first instance and appellate judges preferred an effect approach: hospitals were trying to guarantee the quality and continuity of care, not restrict competition. Still, the agreement eventually limited “anaesthetists and surgery workers [possibilities] on labour markets”. This by effect approach may be explained by the context: the specificity of sports where fair progress of competition depends on teams' stability and the importance of continuity of care in the health sector. On the contrary, enforcers have accepted the by object characterization in other cases. This is true for inputs that are not labour (*Car*

battery recycling, 2017) but the Hungarian authority has extended this analysis to labour cases specifically. While defendants argued that “novelty” precluded the by object approach, the authority disagrees. The infringement is certainly not new: price fixing, input restriction, market supply and client allocation are illegal. The object of the conspiracy is anticompetitive.

Once again, the conclusion is mixed. Case law is inconsistent, but capabilities do exist. As the Hungarian competition authority puts it, those agreements are not new and their impacts on markets are well-understood. The problem is one of inexperience and lack of coherence.

4.3 Consumers v. workers: a lost cause for workers?

In both regions, litigants mention downstream effects (*i.e.* consumer welfare benefits) to justify restrictions on labour markets. This may be legitimate, but it certainly impedes antitrust capabilities to protect workers. Such protection is not done against all odds and workers rarely win the consumer/worker battle.

In the US, brokerage firms had collectively set the commission paid to agents (*Jacobi v. Bache & Co.*, 1974). The Court validated the provision for it enabled “financial stability” (the banking sector was facing a crisis at the time). Put differently, the agreement guaranteed output supply. In *NCAA v. Alston* (2021) again, the agreement was found to improve consumer choice by creating a unique product: amateur sports, in contrast to professional sports. The same approach is adopted for franchise agreements: they increase the quantity of outputs (*Deslandes v. McDonald’s U.S., LLC*, 2021).

The situation is comparable in the EU. In an ancillary restriction case, enforcers investigated the legitimacy and proportionality of the clause. It considered that overall, it enabled providing programming services (output) more efficiently (*Koios*, 2018). In *Anesthesiemedewerkers* (2009), worker welfare is also balanced with quality of care (consumer welfare). The divergence between workers and consumers’ interests is sometimes even more explicit. In *Travail temporaire de l’Isère et de la Savoie* (1997), defendants argued that the wage-fixing scheme benefitted end-consumers by lowering prices. For the Authority, “*supposing even*” that this favoured economic progress, litigants had not proven the passing-on reduction nor the impossibility to achieve it through alternative means. But what if it had? If workers’ loss is a direct gain for consumers, does a restriction to worker welfare become legitimate? This would be surprising, and the Hungarian authority seems to have ruled against such an approach. To characterize a 101(3) exemption, litigants claimed that mobility-restrictive clauses lowered their labour-costs by preventing them from losing investments in human capital. This improved output quality and reduced costs. The Authority is clear: only objective gains matter. When companies agree to fix prices and allocate markets, cost

reduction is the direct result of a reduction of production's volume and value. This certainly does not have procompetitive effects on the market and cannot qualify as a gain.

Since enforcers balance worker welfare with output considerations, antitrust capabilities slightly pale. Intuitively, even if passed-on to consumers, restrictive conducts towards workers seem illegitimate. On the other hand, some restrictions seem to pursue the public interest (as in the hospital case, but does this fall within the ambit of competition law?) or to facilitate the existence of a product (sports cases). Where should we draw the line? This is still an open question, and a crucial one if labour markets were to enter merger reviews.

Overall, American antitrust is easier to operationalise for workers. Let us now turn to remedies.

5. Structurally stronger American remediation capabilities

Two elements particularly benefit American remediation capabilities: the efficiency of alternative dispute resolutions and the generous level of compensation.

5.1 *Alternative dispute resolution is widely used in worker cases*

Settling disputes is common in the US, and most worker cases have ended this way. Their benefits are clear: they reduce uncertainty, expenses, time, and guarantee some remediation. They also have weaknesses: first, companies never admit to having violated the law (*Final Judgment US v. Knorr and Wabtech*, 2018; *U.S. v. Adobe*, 2011). Follow-on procedures therefore require a fully-fledged investigation all over again. Besides, certain settlements can be very lenient towards companies (Chopra, 2019). Still, I believe that settlements improve antitrust capabilities for workers. First, they can lighten the procedure not just once, but twice. Often, not only is the public enforcement part settled, but so is the private enforcement one (*Final Judgment US v. Knorr and Wabtech* (2018) followed by *Order granting final approval of class action settlements In re Railway* (2020)). Moreover, classes are easier to certify for settlement purposes. In *Re Railway*, Courts refused to certify the class at the litigation phase (*In re Railway Industry Employee No-Poach Antitrust Litigation*, 2019) but later agreed to do so “for settlement purposes only” (*Order granting final approval of class action settlements In re Railway* (2020)). A ruling on the merits appeared unpromising for workers but they still got compensation as a group, capitalizing on the collective action facilitator and the benefits of a settlement. This boosts the remediation capabilities of antitrust. Third, the DOJ has sometimes joined a private action to be able to enforce injunctive reliefs (*Order granting the United States of America's unopposed motion to intervene in Seaman v. Duke University*, 2019). This benefits workers: they get compensation, litigation ends and enforcers monitor compliance with the settlement.

In the EU, such procedures are more recent. Their functioning differs from one Member State to the next but they generally imply admitting liability. This helps victims in follow-on actions but can disincentivize companies from entering the agreement at all. Besides, settlements are generally less negotiated, and companies can mostly hope for a fine reduction. Settling is thus less attractive for a European employer than for an American one. To the best of my knowledge, no worker case was ever settled in the EU (neither in private nor public enforcement).

5.2 More profitable remedial outcomes for American workers

In both systems, private actions can grant victims compensation and injunctive relief. When it comes to putting the conduct to an end, capabilities are equal in both fora. This is also true for public enforcement: enforcers can equally stop infringements and monitor compliance.

A core difference lies in the availability of treble damages in the US. This increases antitrust capabilities by creating a strong incentive for victims. The EU rather follows a full-compensation rule: no-more/no-less than the harm (art 3, Directive 2014/104/EU). This difference, to which can be added the already mentioned absence of collective redress mechanism, grants American private enforcement a strong advantage over its European counterpart.

Overall, the US benefit from structurally stronger remediation capabilities. They facilitate dispute resolution and increase compensations' probability and levels.

6. Conclusive take-aways: a roadmap to boost European enforcement

I must first clarify that the weak level of antitrust enforcement in the EU does not imply that workers are neglected. First, those questions are approached from other angles: labour or commercial courts have ruled on non-poaching agreements based on non-antitrust legal basis (*Reuters Financial Software*, 2011; *Société Somado*, 2021). Second, in the EU, the competition-labour nexus is currently reversed and rather focuses on how to *shield* gig-workers from antitrust enforcement (Schmidt-Kessen *et al.*, 2020). Yet, given the rising interest for worker welfare, it is worth asking how Europeans should proceed if they were to step-up on antitrust enforcement.

The case study illustrates that European private enforcement is structurally behind. Workers have little incentives to litigate because mobilisation and remediation capabilities are weak. Absent deep reforms, antitrust enforcement in worker welfare cases thus requires public intervention. Mobilisation and remediation capabilities exist. The Commission, alongside competition authorities, need to look for cases, prioritize them, clarify their reasonings and communicate about their decisions. Enforcers must also clarify whether workers have standing to stimulate the

lodging of complaints. To that end, they should confirm the legitimate interest of workers.

As for operationalisation capabilities, they exist despite being blurry. Legal uncertainty, caused by the inconsistency and unclarity of case law, is what impedes antitrust capabilities the most. To strengthen them, enforcers need to clarify three elements. First, they must recognize that workers can be harmed by labour market's restrictions as such, even absent downstream effects. This may unlock private enforcement's potential: naming workers as direct victims of the infringement could facilitate follow-on actions. When the focus remains on consumers, the benefits of an existing binding decision pale. Second, they should decide when and why labour restrictions are anticompetitive by object or by effect. Third, they should identify the market(s?) on which effects and exemptions will be assessed.

To wrap up, European competition law could meet the worker welfare challenge. While private enforcement capabilities are limited, public enforcers have leeway to step-up intervention. Interest for the question is rising, and European competition law is probably at the dawn of clarification and evolutions. For enforcers, the goal is clear: their decisions must be affirmative and clear-cut. Litigants need clarity and predictability.

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