
Can the Next Amazon or Facebook Be Controlled Before It Becomes Too Powerful?

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Abstract

Antitrust laws in the United States are at the center of a heated debate. Some scholars argue that antitrust should focus on price and output competition in a single market, with consumer welfare maximization as the criterion for intervention. An emerging opposition, often categorized as the “neo-Brandeisian school,” argues that the original calling of antitrust was to restrain the political influence of corporate “bigness.” The latter criticize consumer-welfare antitrust for failing to capture the influence of concentrated economy-wide power held by individuals and corporations through their holdings in several markets—the most notable examples being multi-market digital platforms

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such as Amazon, Facebook, Google, and Apple. Shifts in the political arena may have given this moment an influential position in the shaping of current U.S. antitrust regulation.

The COVID-19 pandemic is aggravating the problems faced by regulators as small businesses collapse, dominant conglomerates grow stronger, and social-distancing measures diminish the ability of the public to keep governments in check. The tools available to curb excessive economic power include merger control and breaking up large monopolies. While the antitrust toolbox is (mostly) equipped to dismantle concentrated economy-wide entities with potentially detrimental political influence over policymakers, identifying such entities is beyond the capabilities of antitrust laws.

Existing literature offers no comprehensive methodology for identifying the kind of economic “bigness” that threatens not only competition but also the integrity of political systems. The quest for such a methodology is crucial because without it, any intervention in the market will be timid, overly cautious, and probably delegitimized by these entities. This Article documents the incremental emergence of an Israeli methodology for identifying economy-wide power with excessive influence on policymakers. Building on this experience, in itself an experiment based on U.S. scholarship, this Article proposes a pillar for a universal methodology for identifying the accumulation of influence by economic entities, as a first step to curb the kind of economic “bigness” that endangers democracy.

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I. INTRODUCTION

The COVID-19 pandemic exemplifies how private economic power can influence political decision making in a way that has potentially detrimental effects across the entire economy, nationally and in some cases globally. The effects of the pandemic on the global economy may last decades, and the damage it inflicts on the global economy might accumulate to trillions of dollars. In an odd way, the emergence of the virus is related to the regulation of markets. Scientists around

the world have been trying to trace the origin of the virus. Although the final word has not been had, there is some agreement that COVID-19, like SARS in 2003, originated from a virus that infects wild animals and that humans contracted it through some chain of transference yet to be confirmed.

One theory regarding the COVID-19 virus is striking. If it is true, it confirms the argument that economic power can influence policymakers, who in turn design markets in a way that favors private economic interests over public welfare. According to the theory, the COVID-19 outbreak in China is an outcome of the legal structure of the Chinese domestic market for agricultural resources. This market flourished because of the Chinese government's decision in the 1970s to deregulate this activity to enable small farmers to make a living. Although the government decided eventually to regulate the trade of wildlife animals, a group of individuals that controlled the market was able to influence the regulation in a way that enabled the continued marketing in China of wild animals as food. According to some scientists, COVID-19 and SARS probably originated from the otherwise rare interaction of wild animals with farm animals brought to slaughter in "wet markets" in China. According to these scientists, the wildlife agriculture economy has become influential because, among other reasons, these animals were consumed by the elite of the Chinese government who helped maintain the laws that protected the sector from being shut down.¹ The unintended consequences of the influence of powerful

1. Sam Ellis, *Why New Diseases Keep Appearing in China*, VOX (Mar. 6, 2020, 12:30 PM), <https://www.vox.com/videos/2020/3/6/21168006/coronavirus-covid19-china-pandemic> ("Those people who consume these wildlife animals are the rich and the powerful—a small minority."); Jane Cai & Guo Rui, *Game Over for China's Wildlife Food Trade, but Does Ban Go Far Enough?*, S. CHINA MORNING POST (Dec. 29, 2020, 11:00 PM), <https://www.scmp.com/news/china/science/article/3115678/game-over-chinas-wildlife-food-trade-does-ban-go-far-enough>; see also James T. Areddy, *China Rules Out Animal Market and Lab as Coronavirus Origin*, WALL ST. J. (May 26, 2020, 4:51 PM), <https://www.wsj.com/articles/china-rules-out-animal-market-and-lab-as-coronavirus-origin-11590517508> (observing that the Chinese scientists' denial may be linked to U.S. government officials blaming the pandemic on China).

players, that swayed the decisions of policymakers away from the public-welfare-maximizing regulation, are devastating.

The consequences of COVID-19 undermine the argument often brought up that undecided policymakers should always err on the side of maintaining the status quo. In other words, they should refrain from intervention when they are uncertain about the interventions' costs and benefits. This hands-off approach dominated antitrust regulation and enforcement in the United States for decades.² It allowed concentrated economy-wide entities, that wield tremendous influence on politicians and policymakers, to emerge. Digital platforms and tech giants like Amazon, Google, Facebook, Netflix, and Apple are the most prominent examples but Twitter, Alibaba, and others may soon follow.³ Antitrust laws failed to curb their economic growth,⁴ despite the fact that

2. Thierry Kirat & Frédéric Marty, *The Late Emerging Consensus Among American Economists on Antitrust Laws in the Second New Deal (1935–1941)* 3 (Ctr. for Interuniversity Rsch. & Analysis on Org., Working Paper 2020S-46, 2020), <https://cirano.qc.ca/files/publications/2020s-46.pdf> (“[T]he Chicago approach is an antitrust minimalism based on two characteristics: the assumption that certain market practices are efficiency-enhancing per se and the assumption that a false positive decision is more costly in terms of welfare than a false negative.”). The problem often stems from myopia. In the context of dismantling concentrated pyramidal business groups, see for example, Assaf Hamdani, Konstantin Kosenko & Yishay Yafeh, *Regulatory Measures to Dismantle Pyramidal Business Groups: Evidence the United States, Japan, Korea and Israel* 2 (European Corp. Governance Inst., L. Working Paper No. 542/2020, 2020), <https://ssrn.com/abstract=3692970>. Professor Hamdani and his colleagues state “the downsides of business groups persist long after the economic benefits associated with them are gone.” See also *infra* Part III.C.

3. The big four digital platforms were the target of a special investigation by Congress. See STAFF OF COMM. ON THE JUDICIARY & SUBCOMM. ON ANTITRUST, COM., & ADMIN. L., 116TH CONG., INVESTIGATION OF COMPETITION OF DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 39 (Comm. Print 2020) [hereinafter DIGITAL PLATFORMS REPORT].

4. The case of Amazon is particularly well documented and analyzed now. Amazon is far from being merely a retail platform, as some may describe it. It has a staggeringly broad presence in more than one market. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 713 (2017) (“In addition to being a retailer, it is a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading provider of cloud server space and computing power.”). But see Herbert Hovenkamp, *Antitrust's Borderline*

their gigantism translated into dominance across the economy as a whole and thus into impact on market structure and on policymakers.⁵ Against this backdrop, the slow erosion of the minimalist perception of antitrust⁶ is particularly important given two especially concerning, expected implications of the COVID-19 pandemic on the economy and the polity. First, increased social distancing and atomization, alongside the disappearance of local news media and the weakened power of national media, reduce the public's ability to keep politicians and policymakers in check with respect to being overly influenced by big corporate powers. Second, the collapse of small and medium-sized businesses and the expected wave of consolidation and concentration in markets because of the economic blow of the pandemic is likely to increase the influence of corporate America on policymakers.

The maxim that markets should be left alone holds true only if the power of the players in the market to influence and distort the market is kept in check.⁷ The challenge is identifying the players that need to be checked.

Size is often the easiest parameter.⁸ Large corporations—conglomerates—rule our lives, not just our markets but our entire polity.

6 (Univ. Pa., Inst. for L. & Econ. Rsch. Paper No. 20-44 2020), <https://ssrn.com/abstract=3656702> (discussing Amazon as an example of the problem with painting bigness with too broad a brush and arguing that Amazon may have ruined some retail stores, but it enables other retail activity as a broker, making bigness a complex issue; “[b]lowing up Amazon could ruin many small businesses”).

5. DIGITAL PLATFORMS REPORT, *supra* note 3, at 46–47 (introducing evidence that tech giants' excessive market power resulted in a loss of entrepreneurship and innovation and reduced job creation).

6. Discussed in detail in *infra* Part II.

7. The idea that competition in markets erodes the power of corporations to influence policymakers by diverting their decisions away from public welfare goes back to thinkers such as Mancur Olson. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

8. WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 7 (1986) (“[D]ominance may arise simply from disproportionate size.”).

They do so because economic power is translated into political power.⁹ This is a convention by now, accepted by a broad range of scholars and politicians across the ideological spectrum of political views and the media.¹⁰ By now it is accepted that high levels of economic power pose a threat to the free functioning of democracy.¹¹ In the United States, debate is ongoing on the role of antitrust laws in monitoring and curbing this phenomenon and why they either failed or were intentionally applied to sidestep political economy.¹² However, antitrust traditionally focuses on economic dominance and the state of competition in a specific single market. By doing so, antitrust either fails or intentionally avoids addressing the implications of the accumulation of economic power in the hands of a few individuals or entities across two or more markets—the emergence of concentrated, economy-wide power in the hands of few.

The concentration of economic power in a few large corporations, especially conglomerates that operate in more than one market, influences the state of the economy. This concentration also influences the state of regulation in the economy and the state of the political powers that shape both the economy and the regulation. Many scholars describe this threat posed by large corporations in terms that refer to

9. See *id.* at 8 (stating that economic power is “the broad discretion to determine how society’s resources shall be used, the rules by which the economic game shall be played, and the kind of society in which we shall live”).

10. Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75, 85 (2020) (“Corporate size often translates to political power.”); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 9 (2020) (“The democratic nations desperately need to do something about concentrated private power and wealth and their effect on politics.”).

11. WU, *supra* note 10, at 8; Leonard W. Weiss, *The Extent and Effects of Aggregate Concentration*, 26 J.L. & ECON. 429, 437–38 (1983); LUIGI A. ZINGALES, *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* (2012); Adi Ayal, *The Market for Bigness: Economic Power and Competition Agencies’ Duty to Curtail It*, 1 J. ANTITRUST ENF’T 221 (2013); Michal S. Gal & Thomas K. Cheng, *Aggregate Concentration: A Study of Competition Law Solutions*, 4 J. ANTITRUST ENF’T 282, 288 (2016). See generally DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (2001).

12. See the discussion in *infra* Part II.

forms of regulatory capture.¹³ Other scholars point to a spectrum of harms associated with the existence of concentrated economic power.¹⁴ Other politicians and scholars think that big, concentrated economic power poses a direct threat to democracy and to the possibility of governments governing in the public interest rather than in the interests of corporate profit.¹⁵

The use of what we call “concentrated economy-wide power” to influence political decisions is not confined to corporations. In this Article, we refer to “entities” rather than corporations. By “entities” we mean both individual human beings (as shareholders or managers) who control economy-wide powerful corporations or are part of a group of captains of industry that wield such power and corporations that wield concentrated economic power beyond a specific single market.

Antitrust laws refrain from regulating these powerful economy-wide players, as we show in Part II, below. This failure may be the result of antitrust law’s focus on intra-market regulation or its focus on

13. For some of the seminal writing on regulatory capture, see Christopher Cargan & Cary Coglianese, *Capturing Regulatory Reality: Stigler’s The Theory of Economic Regulation* 287 (Univ. Pa. Inst. for L. & Econ., Rsch. Paper No. 16-15, 2016); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983). For literature discussing how concentrated conglomerates mean that lucrative jobs for retired regulators stifle effective regulation, see Yeon-Koo Che, *Revolving Doors and the Optimal Tolerance for Agency Collusion*, 26 RAND J. ECON. 378 (1995); David J. Salant, *Behind the Revolving Door: A New View of Public Utility Regulation*, 26 RAND J. ECON. 362 (1995).

14. Gal & Cheng, *supra* note 11, at 285 (“Aggregate concentration and its resultant market conditions, it is argued, serve in some economies as significant explanatory variables of the high cost of living, reduced regulatory and legislative stamina in regulating conglomerates, and corporate governance agency problems in which a small number of owners control significant parts of the economy through partial holdings in multi-layered pyramidal structures.”).

15. For a political insider’s view, see SHELDON WHITEHOUSE WITH MELANIE W. STINNETT, *CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY* (2017).

market dominance rather than on economy-wide power achieved through operating in several markets as conglomerates often do. This failure may also be due to the scarcity of empirical tools and parameters to identify and quantify how economy-wide concentration of economic power translates into political influence or the lack of motivation to regulate large entities.¹⁶ This is not to say that measures developed within the ambit of antitrust regulation cannot be used to restrict entities from reaching a size that endangers the economy and the democracy. Regulatory measures from the toolbox of antitrust regulation, such as merger control and breaking up monopolies, can be used to address problems of inter-market size and not just intra-market dominance.¹⁷ However, even if there is a consensus that those issues should be tackled in the realm of antitrust laws, those laws lack the methodology to identify the entities that should be regulated. Israel serves as a case study for developing such a methodology.

The case of Israel is unique because its experience over the last few decades is a natural laboratory for distilling the principles of a methodology for identifying concentrated economy-wide power with potentially detrimental political influence.¹⁸ Israel's formation in 1948 as a highly centralized economy enabled a small number of banks and their CEOs to become extremely influential in the political policy making process.¹⁹ Despite this dominance, Israeli governments managed to pass two structural reforms that divested non-financial holdings, then financial holdings, and consequently political power, from the banks.²⁰

16. See discussion *infra* Part II.

17. By inter-market effects, we refer to the impact of corporations that transcend the market within which they operate, whereas intra-market impact refers to the conventional dominance parameters of corporations in the market in which they operate. For example, the dominance of Amazon can easily be identified in the market for retail platforms (intra-market). However, because of its “bigness” Amazon will have an inter-market influence if it decides to become an active player in the market for private space flights.

18. Steven Davidoff, *Dealbook: Overhaul of Israel's Economy Offers Lessons for United States*, N.Y. TIMES (Jan. 7, 2014, 4:54 PM), <https://dealbook.nytimes.com/2014/01/07/overhaul-of-israels-economy-offers-lessons-for-united-states/> (noting that the Israeli reforms are relevant to the United States).

19. See generally MEIR HETH, *BANKING INSTITUTIONS IN ISRAEL* (1966).

20. See *infra* Part III.

After Israel became a full-fledged free market economy, the accumulated experience from these reforms, along with public and media support, helped shape Israel's unprecedented third structural reform. This reform, known as the "Anti-Concentration Law," not only dismantled large corporate entities with economy-wide concentration but also set restrictions on the future development of such economy-wide concentration. And it produced a methodology for identifying economic entities with the potential to influence policymakers against the interests of the public.²¹

Unlike the legal situation in the United States, Israeli law contains a strict restriction on contributions to politicians and political parties.²² This means that economic power cannot be directly translated into political influence through donations. Therefore, economy-wide concentration that seeks to influence policymakers needs to find alternative, sometimes tacit, venues through which influence can be exerted. Consequently, the Israeli experience offers a broad perspective on identifying the avenues used by economic entities in their effort to influence policymakers. The lessons of the ongoing struggle to disperse concentrated control over the economy were translated into a process to identify entities with potential concentrated economy-wide

21. We describe the reforms in detail. *See infra* Part III.

22. Under section 28D of the Israeli Parties Law, 5752-1992, SH 1395 (5752-1992) 190, receiving donations from corporations is forbidden in Israel in primary and general elections. Donations from individuals are capped at a relatively low sum that would normally not exceed the equivalent of more than a thousand U.S. Dollars per person. Israeli Parties Law § 28F—H, 5752-1992. *See generally* Ruth Levush, *Campaign Finance: An Overview*, LIBR. OF CONG. 37–45 (2009), <https://tile.loc.gov/storage-services/service/ll/gldr/2018298980/2018298980.pdf>. *But see* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (claiming that the First Amendment prohibits the government from restricting political donations by corporations); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 193 (2014) (invalidating section 441b of the Federal Election Campaign, which limited the total amount that an individual or group may contribute to candidates or political committees in an election cycle). These two cases together have altered America's campaign-finance landscape and significantly increased the ability of corporations and wealthy individuals to influence the political arena through donations.

power that can influence policymakers, either overtly or tacitly.²³ Building on this experience, we outline a universal methodology to identify this type of power.²⁴

A methodology for identifying concentrated economy-wide power is called for in the United States and globally. The effect of concentrated economy-wide power seems to be especially salient with respect to internet and tech giants. The enduring growth and dominance of these giants is counterintuitive. The classic argument is that when markups are rising, potential actors have an incentive to disrupt the market and undermine the dominant position of incumbents. There is evidence that this may no longer be the case in the United States.²⁵

For example, Amazon's size and economy-wide influence would have been picked up by the universal methodology proposed below. Amazon operates as a platform for commerce,²⁶ but it has expanded to become a dominant provider of cloud computing.²⁷ At the same time, its founder, Jeff Bezos, owns the influential newspaper, the Washington Post, which he acquired in 2013. Further, Bezos recently expanded his entrepreneurial vision into space, which, in his case, will probably not be the final frontier.²⁸ Amazon easily proves the case that large entities often do not need to exert effort to enjoy the spoils of power. Amazon's size is so influential that its mere announcement of

23. See discussion *infra* Part III.D.

24. See *infra* Part IV.

25. James Bessen, Erich Denk, Joowon Kim & Cesare Righi, *Declining Industrial Disruption* 1 (Bos. Univ. Sch. of Law, Law and Economics Series Paper No. 20-28, Feb. 29, 2020), <https://ssrn.com/abstract=3682745> (“While technology is often seen as disrupting industry leaders, it now appears to help suppress disruption.”); Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* (Swiss Fin. Inst., Research Paper Series No. 19-41, Oct. 25, 2018), <https://ssrn.com/abstract=2612047>.

26. Khan, *supra* note 4, at 712.

27. Daniel A. Hanley, *Zoom, Netflix, Slack: Amazon Is Behind All the Services We Use to Work from Home (and That's a Problem)*, PROMARKET (Apr. 9, 2020), <https://promarket.org/2020/04/09/zoom-netflix-slack-amazon-is-behind-all-the-services-we-use-to-work-from-home-and-thats-a-problem/>.

28. Paul Rincon, *Jeff Bezos Launches to Space Aboard New Shepard Rocket Ship*, BBC NEWS (July 20, 2021), <https://www.bbc.com/news/science-environment-57849364>.

a contest related to the location of its new headquarters, involving fifty thousand jobs and \$5 billion in construction, triggered favorable tax cuts, benefits, and grants from more than 200 locations in the United States, Canada, and Mexico.²⁹

Similarly, given the dominance and size of Facebook at the time, a universal methodology would have raised a red flag over the social network's major acquisitions of Instagram in 2012 and WhatsApp in 2014.³⁰ In fact, even if Facebook had not perceived the two platforms as actual or potential competitors in its market,³¹ the mere expansion of a large entity into a new sector in a way that increases its economy-wide power would have merited regulatory attention according to the methodology we propose.

Part II of this Article deals with the debate about the role of antitrust regulation in the United States and how it has not evolved to address corporations and conglomerates that derive their political influence from significant concentrated economy-wide power. Part III turns to the unique Israeli experience with economy-wide concentration. This part surveys the three major structural reforms that involved breaking up the strongest economy-wide actors in the Israeli market, the major banks and dominant holding companies. In all the reforms, the aspiration to improve competitive markets served to justify the regulatory and legislative action, but antitrust laws themselves were inadequate to achieve the structural changes to the economy that were

29. See Matt Day, *Amazon Refuses Arizona's Cactus as Bidders for HQ2 Climb to 118*, SEATTLE TIMES (Sept. 27, 2017, 8:26 PM), <https://www.seattletimes.com/business/amazon/amazon-refuses-arizonas-cactus-as-bidders-for-hq2-climb-to-118/>.

30. *FTC Sues Facebook for Illegal Monopolization*, FED. TRADE COMM'N (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

31. There is evidence that it perceived both acquired corporations as potential direct threats to its core activities, which serves to substantiate antitrust action was taken by the FTC. See Sam Schechner & Parmy Olson, *Facebook Feared WhatsApp Threat Ahead of 2014 Purchase, Documents Show*, WALL STREET J. (Nov. 6, 2019, 6:37 PM) <https://www.wsj.com/articles/facebook-feared-whatsapp-threat-ahead-of-2014-purchase-documents-show-11573075742>.

critical for improving public welfare. Most notably, the Israeli reforms relied on the academic expertise and advice of leading scholars from the United States, all of whom were experts in law, economics, and corporate law but none of whom were antitrust experts. This part offers insights into the unique approach developed in Israel to prevent the future formation of economy-wide concentration of power in a single or small group of entities and the methodology that is employed to identify entities with the potential to acquire this kind of dominance. Building on the existing literature and insights from the Israeli experience,

Part IV draws the pillars for a universal methodology that can be used to identify potentially detrimental economy-wide concentration of power. Because antitrust regulation in the United States and elsewhere has not evolved to address entities with concentrated economy-wide power, a methodology is crucial to keeping such power in check. Part V concludes the discussion.

II. ANTITRUST & THE POLITICAL POWER OF ECONOMIC ENTITIES

A. The Debate on Antitrust's Goal

The laws of antitrust in the United States were drafted with the intention of curbing the political threat encapsulated in concentrated economic power, especially large conglomerates.³² This intent

32. David K. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988); Gal & Cheng, *supra* note 11, at 10 (the U.S. perception was that “[l]iberty therefore depended on the decentralization of economic power.”); *see also* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 37, 60–69 (2014). The U.S. Supreme Court echoed this approach. *See* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945); *accord* *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 164 (D.D.C. 1982) (“The legislators who enacted the Sherman Act voiced concerns beyond the effects of anti-competitive activities on the economy: they also greatly feared the impact of the large trusts, which then dominated the business world, on the nation’s political system, and they regarded the power of these trusts as an evil to be eradicated.”); Wu, *supra* note 10, at 81 (stating that the backdrop of the current anti-monopoly and anti-merger laws in the United States has to do with guaranteeing freedom and rejecting German as well as Soviet styles of controlled economies).

was expressly articulated by senator John Sherman in a frequently quoted speech at the presentation of the Sherman Act in the Congress:

If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.³³

A growing vein of literature concludes that antitrust law has failed to serve this purpose.³⁴ The relationship between antitrust laws and curbing the political power of big economic entities has also had its historical ups and downs.³⁵ President Franklin D. Roosevelt made this observation in the first half of the twentieth century in a letter to Congress in which he noted that:

The existing antitrust laws are inadequate—most importantly because of new financial economic conditions with which they are powerless to cope We have witnessed the merging-out of effective competition in many fields of enterprise. We have learned that the so-

Other countries also based their competition regulation on a similar approach. Gal & Cheng, *supra* note 11, at 11–12 (discussing the German regulation and the EU).

33. 21 CONG. REC. 2455, 2457 (1890).

34. WU, *supra* note 10, at 23–24 (“Yet merger control has wandered so far from these expressed intents as to make a mockery of the laws . . . [and] the bottom line is that, for two decades, the merger laws of the major nations have utterly failed to block a generation of anticompetitive mergers. The United States and Europe are equally guilty of accepting mergers that have undeniably diminished competition and squeezed workers and suppliers without much benefit.”); ADAMS & BROCK, *supra* note 8, at 185.

35. See DIGITAL PLATFORMS REPORT, *supra* note 3, at 73 nn.371–72; see also Kirat & Marty, *supra* note 2 (describing historical shifts in the economic approach to antitrust and the regulation of concentrated economic power within the legal framework of antitrust laws).

called competitive system works differently in an industry where there are many independent units, from the way it works in an industry where a few large producers dominate the market.³⁶

As implied by President Roosevelt, one explanation for the failure of antitrust regulation to curb large economic entities is its focus on economic power in a single market. It is now well-established that focusing on competition and regulation of a single market fails to capture significant detrimental effects that emanate from the concentration of economic power in the hands of a few individuals or a few conglomerates across markets.³⁷

Another growing vein of scholarly work points the finger at the influence of the “Chicago School” on the underpinnings of antitrust regulation in the United States.³⁸ This scholarship criticizes the

36. Franklin D. Roosevelt, President of the United States, Message to Congress on the Concentration of Economic Power (Apr. 29, 1938), <https://publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/roosevelt-speeches/fr042938.htm>.

37. See Gal & Cheng, *supra* note 11, at 3 (“[T]raditional competition law tools—retroactively prohibiting infringements of predetermined anticompetitive types of conduct rather than direct regulation which proactively intervenes in market conditions—may not suffice to deal with many of the issues raised by high aggregate concentration levels.”); Hamdani, Kosenko & Yafeh, *supra* note 2; see also Massimiliano Vatiere, *Dominant Market Position and Ordoliberalism*, 62 INT’L REV. OF ECON., 291, 292 (2015) (“[I]t is still difficult to translate into economic terms both the definition of dominant position and the distinction between the use and the abuse of dominant position.”). Vatiere uses game theory in the European competition law context to show how a wider concept of market dominance can also consider the impact of private economic power on the political sphere. *Id.* at 293.

38. WU, *supra* note 10, at 88 (“The fact is that, around the world, the powerful influence of Chicago-School and neoliberal thinking has been accepted as the baseline, severely weakening the law’s power. Robert Bork’s idea that strict reliance on economic analysis was a mark of good character has become a controlling ideology.”). By “Chicago School,” we refer to the immense influence that economic thinkers from the University of Chicago had on a wide range of fields—economics, political science, regulation, and law, particularly antitrust—during the second half of the twentieth century. In economics and business, this influence is often associated with names like Milton Friedman, Robert Lucas, and

minimalist application of antitrust in recent decades. According to this critique, the prevailing approach of antitrust regulators, courts, and academia in the United States since the middle of the twentieth century was that when there is no clear anti-competitive behavior, corporations are “entitled to the fruits of their labor, including any market power or dominance that they might have gained.”³⁹ This approach, which has come to dominate antitrust regulation, advocates limiting intervention to markets in which rigorous econometric analysis can prove that monopoly power is reducing consumer welfare.⁴⁰ The major result of the

Gary Becker. In the fields of regulation and law, the Chicago School is associated with Ronald Coase, Robert Bork, Richard Posner, and George Stigler. For a historical account of the development of the Chicago School and its influence see generally JOHAN VAN OVERTVELDT, *THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THE THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS* (2009).

39. CHI. BOOTH & STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT 83 (Sept. 2019), [hereinafter STIGLER CENTER REPORT 2019] <https://www.chicago-booth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>; see Gal & Cheng, *supra* note 11, at 27 (stating that modern antitrust focus on concentration in particular markets).

40. See, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). For a discussion of the historical shift toward the Bork-Posner approach, see Teachout & Khan, *supra* note 32, at 66 (attributing the sea change to the work of Richard Posner and Robert Bork based on the teachings of Aaron Director). For a critical perspective on the outcome of this approach, see WU, *supra* note 10, at 81 (“It turns out that many of the things that matter—dynamic competition, destruction of competition, innovation, product quality, and even prices—are often unmeasurable. The quest for rigour just led to inaction.”); ADAMS & BROCK, *supra* note 8, at 14 (“The difficulty may be, in part, methodological. The overemphasis on the mathematical-econometric approach has resulted in a formidable misallocation of intellectual resources. Economists have tended to ask themselves questions that can be analyzed with their new techniques, rather than finding techniques to deal with the questions they ought to ask.”). But see Seth B. Sacher & John M. Yun, *Twelve Fallacies of the “Neo-Antitrust” Movement*, 26 GEO. MASON L. REV. 1491, 1504 (2019) (arguing that Bork had a broader notion of public welfare than the one attributed to him by critics).

approach, promoted effectively by influential scholars such as Robert Bork and Judge Richard Posner, is that it created a complete separation between antitrust regulation on one hand and political power discourse on the other.⁴¹ The influence of economics and the consumer welfare efficiency criterion on antitrust meant that judging an antitrust case must rely on rigorous economic data as a method, with consumer welfare maximization as a goal. The U.S. Supreme Court adopted this approach in a series of cases in the 1970s, with the starting point often being attributed to *GTE Sylvania*.⁴²

The debate is often framed as a political debate between right-wing economists who view antitrust as a vehicle for promoting consumer welfare in terms of price competition and left-wing economists who believe that antitrust laws' broad language justifies the promotion of political and social goals.⁴³ Seven decades later, the presidency of Donald J. Trump was characterized by an approach entirely different than the one depicted in Roosevelt's quote. The Trump administration was skeptical, to say the least, about the claims that big economic power poses a potential danger to markets and to democracy.⁴⁴ In

41. Teachout & Khan, *supra* note 32, at 68 ("We see political problems in isolation from economic ones, diminishing our capacity to analyze either arena accurately."). For a different view, see Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare and the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861 (2020) (arguing that claims against the use of the consumer welfare criterion are faulty, that the data does not support the claim that competition in the United States is decreasing and that "populist" antitrust will result in more politicized antitrust and excessive enforcement errors).

42. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (preferring the effects-based doctrine to assess the impact of certain practices in the market over the per se rule).

43. Hovenkamp, *supra* note 4, at 1–2.

44. CHAIRMAN OF THE COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT (Feb. 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf> ("Calls for changing the goals of the antitrust laws are based on empirical research that misinterprets high concentration as necessarily harmful to consumers and reflective of underenforcement In contrast, the methods that the Agencies use to analyze competition are rooted in microeconomic, empirical evidence and involve detailed analyses of competitive conditions in specific industries. Any

contrast, a growing number of experts question, if not undermine, the approach that markets facing anti-competitive conditions eventually self-correct without regulatory intervention.⁴⁵

The Biden presidency marked a dramatic departure from the previous administration's view on competition policy. Upon the signing of an Executive Order revamping antitrust policy, President Biden said:

Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition. We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And where—what have we gotten from it? Less growth, weakened investment, fewer small businesses.⁴⁶

The actions of the Biden administration are already viewed as a major shift in U.S. antitrust regulation.⁴⁷

conclusions about the state of competition should be made on the basis of this type of careful research.”).

45. STIGLER CENTER REPORT 2019, *supra* note 39, at 81 (“[T]he findings of this report suggest that rapid self-correction in markets dominated by large digital platforms is unlikely, and that harms to economic welfare from the exercise of market power in such markets are substantial.”). For example, the existence of large economic entities leads to the so-called entrenchment problem of management. See Randall Morck, Daniel Wolfenzon & Bernard Yeung, *Corporate Governance, Economic Entrenchment, and Growth*, 43 J. ECON. LITERATURE 655 (2005).

46. Joe Biden, President of the United States, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

47. William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (2021) (describing the processes leading up to the “major realignment” of U.S. competition policy).

This Article takes a step away from the debate by looking beyond and above antitrust law, which gives an incomplete answer, at least, to the problem of economic power of bigness.⁴⁸ The extant literature has so far failed to develop a comprehensive framework for identifying entities that possess potentially harmful concentrated economy-wide influence. In fact, antitrust, as it has come to be, is ill-suited to understanding the nature of the phenomenon, much being its panacea.⁴⁹ A frequent manifestation of the problem occurs when antitrust enforcement is required to prove the potential consumer welfare losses generated by an economy-wide concentrated entity acquiring what Scott Hemphill and Tim Wu define as “nascent competitors.”⁵⁰ For example, Facebook argued that its acquisition of Instagram was not meant to stifle a competitor in the social network market but rather to nurture Instagram’s capabilities.⁵¹ Preventing such an acquisition ex-ante requires a methodology that operates outside the scope of current antitrust laws so that it can identify the potentially harmful consequences of any expansion by a large economic entity.

B. No Measurements, No Common Definition

Current antitrust regulation bases action and enforcement on measurements. Monopoly power is measured by the dominant position

48. Hamdani, Kosenko & Yafeh, *supra* note 2, at 6 (“Standard antitrust enforcement is unlikely to be adequate in restraining business groups whose activities span many industries. Minority protection and governance reforms cannot be a remedy for extreme monopoly power and political clout either. Importantly, reform measures should address the economic power of financial institutions; otherwise, dismantling business groups might result in the power shifting from families to banks and other financial institutions, as in the case of Japan.”).

49. Khan, *supra* note 4, at 710 (arguing that antitrust law focus on “consumer welfare” defined as short-term price effects, is ill-equipped to capture the architecture of market power in the modern economy); Hovenkamp, *supra* note 4, at 5 (explaining what is not included in antitrust laws)(“First, bigness itself is not an antitrust issue unless it leads to reduced output in some markets.”).

50. C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1880 (2020).

51. *Id.* at 1902–03.

of a particular player in a single market.⁵² The effects of intra-market mergers are measured by the potential decline in competition, and consequently in consumer welfare, in the relevant market. However, issues of concentration of economic power, e.g., a situation in which a firm operates through subsidiaries in several different markets, have not been looked upon as creating serious problems for the economy.⁵³

Furthermore, even if one wanted to measure the political influence of economic power, accurate systematic measurements of such influence do not exist. Scholars have measured corporate donations,⁵⁴ lobbying by corporations,⁵⁵ or political connectedness of

52. Generally, market concentration is measured by looking at the existence of substitutes for a product and the prices in the market. See Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44 (2019). Note that some recent research casts doubt on the accuracy of market concentration data and argues that current measurements do not capture the full intensity of market concentration. See Pauline Affeldt, Tomaso Duso, Klaus Gugler & Joanna Piechucka, *Market Concentration in Europe: Evidence from Antitrust Markets* (DIW Berlin Discussion Paper No. 1930, 2021), <https://ssrn.com/abstract=3775524>.

53. See ADAMS & BROCK, *supra* note 8, at 9 (pointing to “the failure of modern mainstream economics to incorporate power as a significant consideration in its grandiose mathematical model building”).

54. This has been the case particularly in the wake of *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (ruling that a corporation’s political spending is a form of protected speech). See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (calling for the development of rules that will align the decisions on political spending by corporations with the interests of shareholders); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) (calling for more detailed mandated disclosure of corporate political contribution considering empirical evidence that voluntary disclosure is insufficient).

55. Anup Agrawal & Charles R. Knoeber, *Do Some Outside Directors Play a Political Role?*, 44 J.L. ECON. 179 (2001) (showing that politically experienced directors are more prevalent in firms where sales to government, exports, and lobbying are greater); Hui Chen, David Parsley & Ya-Wen Yang, *Corporate Lobbying and Firm Performance*, 42 J. BUS. FIN. & ACCT. 444 (2015) (noting that public firms that invest in political donations outperform other firms in the market after a three-year period); Anwer S. Ahmed, Scott Duellman & Megan Grady, *Corporate Lobbying, Political Protection, and Earnings Management* (Mays Bus. Sch. Research Paper No. 3219428, 2018) (finding that corporate lobbying increases the political insulation of firms from

management.⁵⁶ Although these are possible indicators of political influence, they are far from accurate. In fact, they may be misleading. Corporations may use the services of lobbyists or donate to political causes exactly because their standing in the economy is insufficient to influence political decisions that have an impact on their business. Measuring parameters like monetary contributions fail to capture more tacit manifestations of pure economy-wide power. One must thus concede the existence of a measurement problem in imposing the rules of antitrust with respect to political influence.⁵⁷ Measuring detrimental consumer welfare implications of political power and, consequently, the implications of regulating it is challenging with classic market measurements.

A survey of thirty-six countries found that some of them do try to tackle the problem of big economic power.⁵⁸ In the context of measurements, the authors of the survey emphasized that:

[A]most none of the jurisdictions surveyed dealt with the measurement problems involved in aggregate concentration. Aggregate concentration raises significant and not easily surmountable measurement issues, such as when the economic and political costs of a conglomerate outweigh its benefits so that

regulatory scrutiny and legal enforcement), <https://ssrn.com/abstract=3219428> ; *see also* DIGITAL PLATFORMS REPORT, *supra* note 3, at 75–76 (revealing that the data show that digital platforms increased their expenditures on lobbying as they grew and consolidated; Amazon and Google also contribute to academic institutions and research institutions that focus on regulation and antitrust).

56. *See, e.g.*, Alma Cohen, Moshe Hazan, Roberto Tallarita & David Weiss, *The Politics of CEOs 2–5* (11 J. Legal Analysis, Working Paper No. 450, 2019) (discussing empirical research showing that CEOs tend to donate to Republican candidates, that donations are industry-related, and that corporations led by CEOs who donated to Republican candidates tend to be less transparent about their political spending).

57. Gal & Cheng, *supra* note 11, at 5 (“[G]iven that the externalities created by the control of such industries are often hard to measure, they generally do not come into play in aggregate concentration measurements”); STIGLER CENTER REPORT 2019, *supra* note 39, at 45–46 (discussing the problem in the context of the digital economy).

58. Gal & Cheng, *supra* note 11, at 5.

economic power negatively affects social welfare; and what weight should be given in the analysis to its control over financial, infrastructure or media markets.⁵⁹

Given the regulatory void and the lack of regulatory measurement tools, most developed countries try to use the existing body of antitrust law and extend it to regulate big economic power. Most of them use traditional competition regulation to regulate the aggregate power of a few large conglomerates across markets. In the absence of a clear methodology for doing so, they observed that “since competition laws were not designed to deal with aggregate concentration issues, they generally do not provide efficient solutions.”⁶⁰ Based on their survey, Michal Gal and Thomas Cheng share the view that anti-trust law is ill-equipped to tackle the problems of aggregate concentration.⁶¹

One manifestation of the difficulties in measuring the effect of big concentrated economic power is the lack of clear terminology. Justice Louis Brandeis referred to the problem as a problem of “bigness.”⁶² However, bigness is relative, and it is unclear against which criteria

59. *Id.* at 39.

60. *Id.* at 37–38.

61. *Id.* at 41.

62. Louis D. Brandeis, *A Curse of Bigness*, HARPER’S WKLY., Jan. 10, 1914, at 18. Brandeis expressed this opinion in a few judicial cases, the most noteworthy of which seems to be *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933). In that opinion, Justice Brandeis writes:

[S]ize alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state.

Id.

bigness should be measured.⁶³ Gal and Cheng tried to solve this difficulty by proposing, as criteria, the ownership or control of assets in a given economy. They proposed defining concentrated bigness as occurring when “a small group of economic entities controls a large part of the economic assets (or equity) in the economy through holdings in many markets.”⁶⁴

The challenge remains.⁶⁵ Despite the difficulties in measuring the political impact of economic size, it is now fairly well accepted that, in the words of Teachout and Khan, “size coupled with concentration intensifies the force and reach of” corporations to wield political power⁶⁶ and “the more concentrated the market, the greater the governing power.”⁶⁷

C. Why Simple Rules of Thumb Are Insufficient

There are proposals to tackle the problem of economy-wide power. Most of them try to offer an initial taxonomy of the phenomenon but lack a structured methodology that can be used as a practical regulatory tool. Others propose to solve the problem with simple rules of thumb that increase certainty and decrease many enforcement challenges.

For example, Wu suggests using stricter merger control in two ways. First, he suggests a threshold for “mega mergers” that shifts the burden of proof for permitting them to the parties rather than require regulators to prove that the merger is harmful to consumer welfare.⁶⁸

63. For a critical view arguing that the fear of bigness, absolute or relative, is misguided and unjustified in terms of antitrust law, see Barak Orbach, *The Antitrust Curse of Business*, 85 S. CAL. L. REV. 605 (2012).

64. Gal & Cheng, *supra* note 11, at 2.

65. ADAMS & BROCK, *supra* note 8, at 183 (stating that “conglomerate power is not an optical illusion. It is, instead, a matter of public concern and a challenge for public policy.”).

66. Teachout & Khan, *supra* note 32, at 42–43.

67. *Id.* at 54.

68. WU, *supra* note 10, at 129 (suggesting setting the threshold at mergers “over \$10 billion in size—that reshape industries”). It is particularly noteworthy that Wu’s proposal emerges despite age-old criticism of this type of intervention. For an account of the criticism, based on arguments such as harm to operational

Second, Wu suggests that questionable mergers be put “on parole” and their effects on the market be checked after five years.⁶⁹

Similarly, Walter Adams and James Brock suggested imposing an outright ban on mergers and acquisitions by any Fortune 500 firm unless special conditions occurred. Their proposal was that unless the company could show—with the burden of proof being on the firm, and not on the Antitrust authority—that the merger would not substantially lessen competition or tend to create a monopoly in any line of commerce and would enhance the operating efficiency of the acquiring and acquired firms and promote technological progress in ways not otherwise obtainable, it should not be approved.⁷⁰

Alternatively, Adams and Brock proposed imposing a “cap-and-spin” restraint on large firms. Under this approach, firms larger than a specified size would be prohibited from making any acquisition unless the acquiring firm spun off competitively viable assets equal in value to those it sought to acquire.⁷¹

Gal and Cheng offered “observations” to assist in differentiating economy-wide concentration from other economic phenomena.⁷² Their observations included a situation in which one conglomerate controls a significant part of the national economy or a small number of conglomerates maintain this position together. They did not observe diversification across industries as a prerequisite for power, but they did note that sometimes economic control in a limited number of major

efficiency and innovation or undermining natural social Darwinism, see generally ADAMS & BROCK, *supra* note 8, at 23–76.

69. WU, *supra* note 10, at 102. The problem is that corporations may refrain from merging their activities so they can separate them if the mergers are reversed, and this will increase the probability of failure. On the other hand, if a corporation executes a merger and then faces a decision to reverse it, it may not be able to do so after employees have been fired, production lines have been consolidated, and the result of a reversal might be harmful to the economy.

70. See generally ADAMS & BROCK, *supra* note 8, at 198.

71. *Id.*

72. Gal & Cheng, *supra* note 11, at 5.

and economically important industries is a characteristic of this type of power.⁷³

A recent vein in literature that focuses on digital platforms proposes to capture the economic power accumulated because of the multi-market presence of platforms—for example, the market for social networking and the market for advertising. This scholarship focuses on broadening the definition of platform markets to include interconnected effects of multi-market platforms in each of the markets in which a platform operates.⁷⁴ The economic power derived from multi-market platforms is undeniable, in our view. However, focusing only on digital markets or on the phenomenon of multi-sided market platforms⁷⁵ does not capture the broader set of concentrated economy-wide power manifestations.

Using rules of thumb often provokes criticism for having an unmeasurable cost and potential loss in efficiency because of an intervention. Soon, more nuanced economic models will probably advance the ability to identify or even measure inter-market power of the sort that

73. *Id.*

74. See Jens-Uwe Franck & Martin Peitz, *Market Definition in the Platform Economy*, 23 CAMBRIDGE Y.B. EUROPEAN LEGAL STUD. 91 (2021) (advocating a multi-markets approach that takes account of cross-market linkages, acknowledges the existence of zero-price markets, and accounts for the homing behavior of market participants). In addition, it seems that the EU competition authorities recognized that the current methodology of market definition fails to capture the economic power of digital platforms. On April 3, 2020, the European Commission published an evaluation roadmap regarding its intent to reevaluate its notice on market definition to accommodate the unique characteristics of digital platforms. See *Evaluation of the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law of 9 December 1997*, SEC (2021) 295 final (Dec. 7, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-EU-competition-law-market-definition-notice-evaluation-_en. The evaluation process is expected to be concluded in 2022.

75. This is a situation in which more users on one side (market) of the platform create a positive externality on their own side of the platform and on the other side of the platform. For example, if more retail sellers join an online platform, they are likely to increase the traffic of buyers and therefore benefit existing sellers. On the buyers' side, the existence of more sellers would mean more price competition and a greater diversity of products. This would attract more buyers and then more sellers, creating a general positive network effect.

is not captured by the existing market definitions. However, the cost of non-intervention will probably remain hard to anticipate, let alone measure.⁷⁶ To the best of our knowledge, none of the existing methodological proposals takes into consideration the ability of economic entities to exert power over policymakers. The ability to identify this power, the existence of incentives for exerting it, and the potential benefits from its mere existence is a void waiting to be filled. Given the deficiencies and inadequacies of using rules of thumb, as discussed in this section, a different and more nuanced methodology is required.

D. Intermediate Conclusion: The Methodology Challenge

To bring antitrust regulation into the third millennium we need a structured methodology for identifying entities that have achieved a position of economic power that can be translated into political influence or that are approaching such a position.⁷⁷ Such a methodology would help regulators gain the legitimacy needed to initiate actions aimed at curbing the power of these entities in a way that surgically

76. The global outage of the services of Facebook, Instagram, and WhatsApp on October 5, 2021, serves as a good example. The failure of regulators to block the merger of Facebook, WhatsApp, and Instagram, let alone the operational merger of the three platforms, created a giant that is too big to fail. However, it did fail for six hours, and the failure was felt across all three social networks because of their operational merger, caused by regulatory failure to intervene. Regulators could not have foreseen the cost of their failure. To date, the cost of the failure is difficult to measure but the loss for shareholders of Facebook alone was a stunning amount of \$50 billion. See Sheila Dang, *Maintenance Error Caused Facebook's 6-hour Outage, Company Says*, REUTERS (Oct. 5, 2021, 7:49PM), <https://www.reuters.com/technology/facebook-says-maintenance-error-caused-mondays-6-hour-outage-2021-10-05/>; Tom Huddleston Jr., *Facebook Probably Lost Millions of Dollars This Week — and the Pain Might Not Be Over Yet, Experts Say*, MAKE IT (Oct. 6, 2021, 9:48AM), <https://www.cnbc.com/2021/10/06/facebook-outage-lost-ad-revenue-advertisers-could-see-refunds.html>.

77. Teachout & Khan, *supra* note 32, at 72 (stating they hope their paper “starts the process of looking for” ways “to identify the political tools and mechanisms for harnessing it, scaling it back, or whatever we, as citizens, decide” to do with the economic power of large corporations).

limits their particular powers and eliminates their harmful effects on the economy and on politics. The legal action used could be either the enforcement measures of antitrust laws or special legislation.⁷⁸

One of the few attempts—perhaps the only one—to develop and implement a methodology to identify aggregate economy-wide power that can influence political agenda took place in Israel in 2014 as part of a larger reform aimed at dealing with economy-wide economic concentration.⁷⁹ Next, this Article reviews the development of Israeli reforms designed to curb economic power that has political effects and show how they culminated in the development of a methodology based on which we can construct the pillars of a wider methodology.

III. MARKET DECENTRALIZING REFORMS IN ISRAEL

Over a period of several decades, Israel adopted incremental measures designed to tackle, and eventually curb, the power of concentrated economy-wide entities such as banks and significant conglomerates. This Part provides an overview of the evolution of these measures. Taken together, they serve as the basis for an adaptable methodology.

A. *The Decentralization of the Power of Banks*

Over the years following its inception in 1948, Israel's banks became concentrated economy-wide entities. This economic position gave the banks a powerful political hold over policymakers. It was not

78. As we discuss below, in Israel the problems of concentrated economic power were addressed by *sui generis* legislation. See *infra* Part III. It might be a good idea to avoid using antitrust laws for the purpose of regulating issues of concentrated power. Bargaining power vis-à-vis policymakers and other market players outside a single market might otherwise be conflated and confused with antitrust. Anti-bigness laws and antitrust laws are often conflated and confused. See Richard Adelstein, *The Last Autonomist*, in LOUIS D. BRANDEIS 100 THEN & NOW 23, 27 (Daniel Terris & Davis J. Weinstein eds., 2016) (“[A]nti-bigness laws don’t attack monopoly, and anti-monopoly laws don’t attack bigness.”). Adding the regulation of economy-wide concentration into antitrust may only increase this unwarranted confusion.

79. Hamdani, Kosenko & Yafeh, *supra* note 2, at 6, 21.

until a 1995 report from a specially formed committee that power began to shift away from Israel's banks.

Some knowledge of the Israeli banking sector is necessary to understand the impact of the special committee's ultimate report.

1. A Primer on the Israeli Banking Sector

From its inception in 1948, Israel was characterized by a high degree of government involvement in the economy, and most economic power was concentrated in the hands of either the government or the controlling political parties.⁸⁰

The controlling Labor Party, in power until 1977, was supported by the largest workers' labor organization, the Histadrut, which owned a significant portion of the Israeli economy, including Bank Hapoalim, the biggest bank in the country.⁸¹ This bank, in turn, owned large blocks of shares—a de facto controlling position in two major corporate conglomerates that held a dominant position in various markets.⁸² Their importance to the Israeli economy was immense.

Two other very large and influential banks at the time were Bank Leumi, controlled by a company belonging to the World Zionist Movement, and Discount Bank, owned by the Recanati family.⁸³ All of those major banks controlled a large portion of the Israeli economy through their holdings in major conglomerates and corporations having

80. THE ISRAELI ECONOMY, 1985-1998: FROM GOVERNMENT INTERVENTION TO MARKET ECONOMICS (Avi Ben-Bassat ed., 2002) [hereinafter Ben-Bassat, THE ISRAELI ECONOMY]; THE ISRAELI ECONOMY: MATURING THROUGH CRISES (Yoram Ben-Porath ed., 1986); NADAV HALEVI & RUTH KLINOV-MALUL, THE ECONOMIC DEVELOPMENT OF ISRAEL (1968).

81. See Ben Bassat, THE ISRAELI ECONOMY, *supra* note 80.

82. *Id.*

83. This was the only private bank within the concentrated group of major banks in Israel at the time. The fourth-largest bank, Bank Ha-Mizrahi, belonged to a religious political party. The remainder of the banks were small and relatively insignificant in terms of market share.

dominant positions in various parts of the economy. Consequently, the directors and managers of those banks were extremely influential figures in the economy, in the political arena, and in society at large.⁸⁴

The major banks were engaged for years in a practice of trading, mostly buying, their own shares in the Israeli Stock Exchange and, thus, controlling the share price.⁸⁵ This practice came to a grinding halt in 1983 when the inflated prices of the banks' shares made it impossible for the banks to continue their massive acquisitions. This led to a crash of their shares and, along with them, the entire stock market.⁸⁶

As was later revealed,⁸⁷ the banks' practice of buying their own shares with the intent of artificially supporting their price was well known by the Bank of Israel, the Treasury, and the government. In what seems to be a classic manifestation of captured regulators, none of them dared to stop the manipulation.

A national inquiry committee commissioned to investigate this event concluded that major Israeli banks were manipulating the price of bank shares over a long period and called for the resignation or

84. The connections involved often-revolving doors between influential positions in the banking sector and influential positions in the government. The revolving doors between government and big business are far from being a uniquely Israeli phenomenon. In the United States, two recent examples of leading figures in the financial sector moving to the government are Secretary of the Treasury Steven Mnuchin during the Donald Trump presidency and Henry Paulsen, who held that position during the critical days of the 2008 financial crisis that struck during the presidency of George W. Bush. For a discussion and examples of the revolving doors phenomenon and regulatory capture, see Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 214 (2006); Jeffrey E. Cohen, *The Dynamics of the "Revolving Door" on the FCC*, 30 AM. J. POL. SCI. 689 (1986); Haris Tabakovich & Thomas A. Wollmann, *From Revolving Doors to Regulatory Capture? Evidence from Patent Examiners* (Nat'l. Bureau of Econ. Rsch., Working Paper No. 24638, 2018), www.nber.org/papers/w24638.

85. REPORT OF THE COMMISSION OF INQUIRY INTO THE MANIPULATION OF THE BANKING SHARES 5 (1986) (Isr.) (Jerusalem: Gov't Printing Off.). This is the report presented by the National Commission for the Inquiry into the Crash of Banks' Shares, which was headed by Supreme Court of Israel Justice Moshe Bejski.

86. *Id.*; Leonard Silk, *Economic Scene; Overhauling Israeli Banking*, N.Y. TIMES (May 30, 1986), <https://www.nytimes.com/1986/05/30/business/economic-scene-overhauling-israeli-banking.html>.

87. See *supra*, notes 85–86.

dismissal of most of the leaders of the Israeli banking system. Moshe Mendelbaum, then governor of the Bank of Israel, resigned after the publication of the report.⁸⁸

Arguably, the government's complicit role in the manipulation of the share prices of the major banks was the first major regulatory capture event in the economic history of Israel. The outcome of this event was a financial catastrophe: the crash of the banks' stock triggered an immediate collapse of the rest of the stock market. The government was compelled to intervene and force a rescue plan on the banks to prevent the total collapse of the economy.⁸⁹ The rescue plan effectively transferred the shares of the major banks to the government.⁹⁰ It took the government many years to sell the banks' shares back to private owners.⁹¹ In the meantime, the leaders of each of the failed banks were replaced and new directors and managers were appointed.⁹² The banks and their new leaders quickly regained influence. This reincarnation of the banks' power in the hands of the new leaders is not surprising because no real structural reform occurred, and the

88. Silk, *supra* note 86.

89. *Id.*

90. At first, the government bailed the banks out by extending huge loans for which the banks gave their stock as collateral. The loans were not repaid, and the government had to exercise its right and take the stock, reluctantly becoming the owner of the banks. Special legislation followed this situation. See Ben-Bassat, *THE ISRAELI ECONOMY*, *supra* note 80. For a detailed account, see *THE STATE COMPTROLLER REPORT ON THE PREPARATION OF THE GOVERNMENT FOR THE SALE OF THE BANKS' SHARES (1993)* (Isr.), www.mevaker.gov.il/Reports/Report_517.

91. For details on the long privatization process, see *ORG. FOR ECON. COOP. & DEV., ISRAEL: REVIEW OF THE FINANCIAL SYSTEM 22 (2011)*, <https://www.oecd.org/finance/financial-markets/49497958.pdf>. Bank Leumi's last stake of government shares were sold to the public, like the previous stakes, in 2018. See *Israel's Leumi Stake Sale Wraps Up Bank Privatisations*, *REUTERS* (Sept. 8, 2018, 2:24 AM), <https://www.reuters.com/article/israel-privatisation-bank-leumi/israels-leumi-stake-sale-wraps-up-bank-privatisations-idUSL5N1VR0V6>.

92. The former managers of the banking industry eventually faced criminal prosecution, and most of them were found guilty. *CrimA 2910/94 Yefet v. Israel*, 50(3) PD 353 (1996) (Isr.); see also Itamar Levin, *Supreme Court Annuls Bankers' Prison Terms, Convicts on Most Charges*, *GLOBES*, July 24, 1996.

banks continued to hold the same major conglomerates with dominant positions in the Israeli Economy.

The opportunity for reform came in 1985.⁹³ Obviously, the size of the Israeli economy made it difficult for the government to control its stability. At the same time, free-market notions, and with them the understanding that the government should refrain from controlling the market through its holdings in major corporations that monopolize the economy, came to dominate the public discourse.⁹⁴

A factor that enabled change was the political shift in the country. In 1977, after nearly thirty years of left-wing Labor party domination, the right-wing Likud party took over the government. In 1984, with an economic crisis looming, the Likud and the Labor party formed a rare grand coalition government.⁹⁵ The grand coalition's centerpiece reform was the ushering in of an era of privatization. A process of privatizing a series of government-owned corporations, including the major banks, began. The decision to privatize control of the banks triggered concerns about the concentrated power held by those banks that now could pass to the acquiring private entities, companies, and individuals. The State Comptroller⁹⁶ urged the government to prevent the transference of excessive economic power to private acquirers. The State Comptroller anticipated that this would be the result of selling a controlling stake in the major banks without first separating the banks from their dominant holdings in non-financial corporations.⁹⁷ The

93. That year, Israel experienced a financial crisis due to triple-digit hyperinflation. The government took massive intervention measures in what was termed the "stabilization program." See Zvi Eckstein & Tamar Ramot-Nyska, *Twenty Years of Financial Liberalization in Israel: 1987–2007*, CORE 294 (2008), <https://core.ac.uk/download/pdf/7354146.pdf>.

94. Ben-Bassat, *THE ISRAELI ECONOMY*, *supra* note 80, at 6.

95. Although the Labor party was founded on the social-democratic ideology of economic governance, and the Likud was characterized by a free-market approach, the bipartisan coalition was able to achieve a consensus that pushed through important structural market reforms.

96. The State Comptroller of Israel inspects, reviews, and audits the policies and operations of the government of the State of Israel. The State Comptroller answers only to the Knesset, Israel's unicameral legislature.

97. A report published by the State Comptroller in 1993 pointed out that the sale of control in the major banks, especially of the controlling shares of Bank

response of the government and the Bank of Israel to these concerns was the formation in 1995 of a special committee, “The Committee for the Examination of Bank Holdings in Non-Banking Corporations,”⁹⁸ better known as the “Brodet Committee.”⁹⁹

2. The Brodet Committee

What strikes the reader most about the Brodet Committee’s report¹⁰⁰ is that the implications of economy-wide power in the hands of a few players clearly go beyond specific markets, competition, or even the stability of financial markets. Relying on Justice Douglas’s dissent, echoing Brandeis and the dangers of the “Curse of Bigness” in the Columbia Steel case,¹⁰¹ the Brodet Committee emphasized the harmful influence of the large banks on both markets and society as a whole.

Hapoalim, would result in handing over to the buyers the ownership of all the non-commercial corporations held by the bank, including the control of the two biggest conglomerates in Israel at that time, Kur and Clal. The State Comptroller observed that the buyers would thus acquire private control of substantial assets that dominated huge parts of the Israeli economy. The State Controller urged the government in his report to take significant steps to address the concentrated structure of the banking system. See THE STATE COMPTROLLER REPORT ON THE PREPARATION OF THE GOVERNMENT FOR THE SALE OF THE BANKS’ SHARES (1993) [hereinafter STATE COMPTROLLER REPORT] (Isr.), www.mevaker.gov.il/Reports/Report_517.

98. See Ben-Bassat, THE ISRAELI ECONOMY, *supra* note 80, at 17.

99. *Id.* at 225–26. The general director of the Ministry of Finance at the time, David Brodet, chaired the committee. *Id.* at 225. Other members of the committee were prominent economists from the Bank of Israel (BOI) and other branches of the government. The committee also included a representative of the private sector, the influential industrialist Dov Lautman.

100. The Brodet Committee Report and recommendations were presented to the government in December 1995. *Report of the Committee for the Examination of Bank Holdings in Non-Banking Corporations*, 34 Q. BANKING REV. 7 (1996) [hereinafter *Brodet Committee Report*], <http://www.jstor.org/stable/24076780>.

101. *Id.* at 38; *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting) (“In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign, or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself.”).

The committee pointed out in its introduction that when great power is concentrated in the hands of a few, such power poses a threat to democracy per se.¹⁰²

The Brodet report based this innovative assertion on the understanding that economic concentration of power can be leveraged to influence decision makers and weaken regulatory and political oversight of major banks and their management. The report concludes that this power would be detrimental to public interests and to the healthy functioning of a democratic system. The main concern of the committee was that the two major banks dominated a wide portion of the economy through their holdings and control of the two biggest conglomerates, which owned a vast number of commercial corporations across various markets.¹⁰³ Those holdings gave rise to conflicts of interest between the role of the banks as major credit providers to individuals and firms operating in various markets and the banks' interest as controlling shareholders in corporations operating in the same markets.¹⁰⁴ They were both creditors of firms and owners of the same firms' competitors.

The innovative aspect of the committee's analysis was that it went beyond the sectoral competition. The Brodet report determined that the banks' indirect but dominant position in various markets was detrimental not only to market competition or financial stability but to democracy itself due to the implications of such economic power for the ability of the government to exercise supervision over the banks.¹⁰⁵

102. The *Brodet Committee Report*, *supra* note 100, at 1 (“[T]he Israeli economy is characterized by a high degree of concentration both absolutely and relatively . . . [and] significant parts of the economic activity are concentrated in the hands of a few.”) (Isr.).

103. The Committee also points out in its report that the two major banks held dominant positions in all the financial activities involving short- and long-term investments. *Id.* at 8–9. This was also part of the expert opinion prepared for the committee. See Lucian Arye Bebchuk, Louis Kaplow & Jessie M. Fried, *Concentration in the Israeli Economy and Bank Investment in Non-financial Companies* 6 (Harv. L. Sch., Online Discussion Paper No. 209, 1996), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Bebchuk_209.pdf.

104. The *Brodet Committee Report*, *supra* note 100, at 51–60.

105. *Id.* at 15 (“[A] concentration of power in the hands of a few decision makers can give them influence over the decisions of government policymakers . . . and harm the functioning of a democratic government.”) (Isr.).

The committee's recommendations focused, therefore, on dissipating the banks' economy-wide power.

As a first step, the committee recommended divestiture of the controlling position of the banks in their various conglomeratic holdings. As a corollary, it recommended forbidding banks from holding more than 20% of the shares of a non-financial commercial corporation and restricting their investments in such corporations to financial holdings without a controlling position or any other attributes of control. Another size-related limitation suggested by the committee was that bank holdings in all commercial companies be limited to 15% of the bank's capital. The members of the committee were unanimous in making these recommendations. They based their conclusions on research conducted mostly by United States-based scholars who provided research services to the committee.¹⁰⁶

The Brodet committee's most important contribution, for the purpose of our discussion, was its realization and explicit statement that antitrust laws are incapable of providing answers about the type of regulation required to deal with the issue of economy-wide concentration of power held by banks. The committee reasoned that antitrust laws were not suitable for the task because regulations needed to address the fact that the banks operated across several markets and sectors—financial, commercial, and industrial. This was the reason the committee proposed special legislation and did not amend existing antitrust law.¹⁰⁷

Unsurprisingly, the main opposition to these dramatic recommendations came from captains of banking. Most notably, Amiram Sivan, CEO of Bank Hapoalim, argued that keeping the banks large and

106. The Brodet Committee based its recommendations also on a report prepared by Lucian Bebchuk, Louis Kaplow, and Jesse Fried regarding possible detrimental consequences of such holdings on the economy and financial markets in Israel. *See* Bebchuk, Kaplow & Fried, *supra* note 103.

107. This conclusion was supported not just by the committee but also by all the members of parliament who discussed the legislation proposed by the committee's report. In fact, it was the then-commissioner of the antitrust authority who explained during parliamentary hearings of the Finance Committee that special and explicit legislation was required. *See* DK, 13th Knesset, Session No. 636 (1996) (Isr.), https://www.nevo.co.il/law_html/law103/13_ptv_470910.pdf.

powerful was a matter of national interest.¹⁰⁸ This resistance was ineffective, mainly because the government managed to legislate the Committee's recommendations through parliament within a few months. The special legislation that was enacted, still in force today, resulted in a forced sale by the banks of their controlling shares in conglomerates and other companies operating in commercial and industrial markets.¹⁰⁹

3. Intermediate Observations

In retrospect, the Brodet Committee can be seen as the first manifestation of decentralization of economy-wide concentrated power in Israel. The purpose of the committee's recommendations was to reduce the concentrated economic power and dominant position of the major banks. The process of reforming the regulation of the banking sector in Israel, initiated because of the Brodet Committee report has several important universal characteristics pertinent to our discussion. First, the report was the product of a committee of experts, not political figures. Second, the academic foundation provided by the research of internationally recognized experts made it easier for the government and parliament to accept the committee's recommendation,¹¹⁰ extreme

108. Amiram Sivan argued that "the matter of concentration is very deceiving. Concentration is not a profanity." Sivan rejected the comparison of the Israeli banking system to the German system and argued that "we are a small country and they are a large country. This means that we must have a higher degree of concentration in order to be able to seriously compete in the world." In response to the argument that the banks have excessive power in the commercial market, Sivan said, "I asked for one example in which we abused our position in the market to prevent competition and created conflicts of interest. No one provided a single example. We never did that. Without us these companies would have crumbled. You know that." See MINUTES OF THE PARLIAMENTARY FINANCE COMMITTEE NO. 633 2/4/1996, http://fs.knesset.gov.il/13/Committees/13_ptv_470901.PDF.

109. The special legislation resulted in an amendment to the existing Banking Licensing law of 1981 (Amendment no. 11) approved in the Knesset on May 1, 1996, only five months after the committee handed the report to the Government. Some members openly stated that the power of the banks in the country was immense and should be limited. See DK, 13th Knesset, Session No. 633 (1996) (Isr.), <https://main.knesset.gov.il/Activity/plenum/Pages/SesionItem.aspx?itemID=160928>.

110. We refer here to the important contributions in the work of Bebchuk, Kaplow & Fried. See Bebchuk, Kaplow & Fried, *supra* note 103.

though they were. Third, the reform was pushed through against the backdrop of a financial crisis that was perceived by the public to be the result of unchecked power of the banks. This gave the reformers strong legitimacy for effecting structural changes in the market. Fourth, the importance of this example is that sometimes the obvious effects and consequences of great economic power speak for themselves and require immediate action.

B. The Separation of Banks and Long Term Savings

The impact of the Brodet Committee was to restrain the large banks in some markets, but it did not entirely dissipate their influence on the economy. The banks still held significant influence in the corridors of the government and on the economy through their dominant position in the financial sector as a whole. The two largest banks, Bank Hapoalim and Bank Leumi, were again the main concern in terms of their dominance in the economy. Together they held more than 60% of the deposits and credit markets, and at the same time they also held more than 60% of the provident and mutual funds markets as well as 50% of the underwriting market.¹¹¹ Nine years elapsed from the enactment of the recommendations of the Brodet committee as part of the legislative framework of Israeli banking regulation until, in April 2004, then-Finance Minister Benjamin Netanyahu appointed an inter-ministerial committee chaired by the General Director of the Ministry of Finance, Yossef (Yossi) Bachar. Netanyahu formed the committee to propose actions necessary to establish an efficient and competitive capital market in Israel.¹¹²

As a precursor to the Bachar Committee, a report by the State Comptroller found that the attempt to regulate potential conflicts of interest by erecting Chinese walls within banks to separate their various

111. ISR. INTERMINISTERIAL COMM., MINISTRY OF FIN., STRUCTURAL REFORM IN THE CAPITAL MARKET 3 (Sept. 2004) [hereinafter BACHAR COMMITTEE REPORT] https://www.gov.il/BlobFolder/unit/bachar_reforma_committee/he/Vaadot_ahchud_BacharReformaCommittee_Bachar_Report_Eng.pdf.

112. *Id.* at 2.

activities had failed.¹¹³ The Chinese walls were the initial solution adopted by the government to restrict the influence of the banks over provident and mutual funds under their control. These restrictions were mostly based on corporate governance measures, such as a limitation on banks appointing their internal directors to the boards of provident and mutual funds in their possession.¹¹⁴ According to the State Comptroller's Report for 2004, those Chinese walls were ineffective, and the three major funds were held by one of the three major banks that invested between 12% and 19% of the funds under their management in related parties.¹¹⁵

1. The Bachar Committee

The goal of the Bachar Committee was to recommend appropriate measures to reduce the concentrated power of the major banks in financial markets¹¹⁶ and boost competition in those markets. The

113. STATE COMPTROLLER REPORT, *supra* note 97, at 230–40. The State Comptroller's report provides:

[A] large proportion of the investments of provident funds are channeled to institutions and companies, either owned by or related to, the parent bank. In addition, all of the funds' financial transactions (brokerage fees, custodian, etc.) are carried out, for a fee, via the parent bank that controls or manages the funds" and "the Chinese walls erected by the Ministry of Finance and Bank of Israel are not strong enough to overcome the conflicts of interest and entail regulatory costs.

Id.

114. These restrictions were part of the Tax Regulations (Rules for the Permission and Management of Provident Funds), 5724-1964, KT 1583 (Isr.).

115. According to the State Comptroller's Report, a total of 4.9 billion new Israeli shekel (NIS) out of 33.3 billion NIS, managed by the three major funds, were invested in related parties. *See* OFF. OF THE STATE COMPTROLLER, STATE COMPTROLLER REPORT 230–32 n.87 (2004).

116. The three major Israeli banks owned all aspects of short- and long-term investments, mutual funds as well as pension funds, broker firms, and all other activities that existed in those markets.

committee comprised representatives from all the regulatory and supervisory authorities dealing with Israel's capital markets.¹¹⁷

The Bachar Committee found no need to conduct extensive empirical research to support its basic hypothesis that measures should be taken to reduce the economy-wide concentrated power that the banks exercised across several different financial markets. Instead, the committee relied on the work of the comptroller general, on previous committees, the accumulated experience of the organizations from which its members were drawn, and numerous meetings and discussions with academics and practitioners with expertise in capital markets from Israel and abroad.¹¹⁸ Fusing the collective independent understanding of experts from different branches of government and academia created the synergy the committee required as a foundation for its conclusions and recommendations.

The Bachar Committee's starting point was to assume that the major banks had acquired such a dominant position that they were dangerous on an economy-wide scale. In the words of the committee's preamble:

The existing market structure, with the banks dominant in all aspects of financial intermediation and with no other significant financial intermediates, creates the following problems that adversely affect and preclude the development of an efficient competitive capital market: . . . the high level of concentration, and the dependency that it creates, constitutes a significant risk to the country's financial stability.¹¹⁹

117. The committee included representatives of the bank supervisory authority within the Bank of Israel, the head of the Israeli Securities and Exchange Commission, the Ministry of Justice, and the Capital Market and Insurance Authority in the Ministry of Finance. One of the authors of this Article, Lachman Messer, was a member of the committee.

118. BACHAR COMMITTEE REPORT, *supra* note 111, at 2.

119. *Id.* at 4.

According to the Bachar Committee Report, the combination of a high degree of concentration in the banking sector and extreme conflicts of interest among financial intermediaries in Israel's capital market created a perpetual "vicious cycle" that preserved the status quo.¹²⁰ The Committee concluded that deliberate government intervention in the structure of ownership and the activities of the banks as financial intermediaries was required. It therefore proposed structural changes to eliminate the conflicts of interest and simultaneous stringent action to reduce concentration.¹²¹

2. Breaking Up Bank Power: Take 2¹²²

The most drastic recommendation of the Bachar Committee was a complete split of the short and long-term investment such as provident, pension and mutual funds companies held by the banks such that banks would not be permitted to hold any interest at all in any of them; they would not be allowed to hold any interest in a company managing a provident or mutual fund, nor would they be permitted to hold more than 5% in any firm or institution that holds more than 5% interest in a company that manages such funds.¹²³ Furthermore, the committee proposed that a controlling shareholder of a bank and all entities subject to their control would not be allowed to hold an interest of 5% or more in a provident or mutual fund or in any firm or institution holding more than a 5% interest in a company that manages such funds.¹²⁴ The implication of this recommendation was a de facto structural divestiture

120. *Id.* at 7 (observing that concentration "together with involvement in a wide variety of activities creates structural conflicts of interest, and the exploitation of these conflicts serves to preserve the concentration").

121. *Id.* ("In order to break the above-mentioned 'vicious cycle' deliberate government intervention in the structure of ownership and the activities of financial intermediaries is required. Only if the 'vicious circle' is broken, can the capital market be effectively opened to additional financial institutions, thereby helping to create, in the course of time, a truly competitive climate.").

122. See Meir Sokoler, *Changes in the Israeli Banking System*, 28 BIS PAPERS 249 (2006), <https://www.bis.org/publ/bppdf/bispap28p.pdf>.

123. BACHAR COMMITTEE REPORT, *supra* note 111, at 9.

124. *Id.*

of all assets that involved the management of other people's money from the banks.¹²⁵

One of the important insights of the Bachar Committee was that the sheer size of an entity that controls financial institutions such as provident and mutual funds can pose a systemic economy-wide risk. Therefore, the committee recommended restricting the licensing required to acquire control of these financial institutions and insurance companies using a market share cap. The proposal, later enacted into law, stated that no permit for the acquisition of a provident fund should be given if, after the acquisition, the market share of the purchaser or its group of companies in the long-term savings industry would exceed 15% of the market, and no permit should be given for the acquisition of a mutual fund if, after the acquisition, the market share of the purchaser or its group of companies in the mutual fund sector would exceed 20%.¹²⁶

Naturally, the committee's recommendations provoked fierce opposition from the banks, who hired lobbyists and law professors to convince the government and the members of the Israeli parliament to overturn or mitigate the bill that embodied the committee's recommendations.¹²⁷ The effectiveness of the opposition can be seen by the fact

125. The only segment left out of the recommendations was the control of credit card companies. *See id.* More than two decades later, the government, following the recommendations of another special committee, intervened again to force the major banks to sell the credit card companies they held.

126. The recommendations were legislated in a series of laws, including the Law for Increasing Competition and Reducing Concentration and Conflicts of Interest in the Israeli Capital Market 2005 and amendments to the banking law, the mutual funds' law, and the insurance law.

127. Nitzan Cohen, *The Government Approved Bachar Committee Recommendations*, THE MARKER (Nov. 14, 2004) (Isr.), <https://www.themarker.com/markets/1.247733> (discussing the arguments in the government over the recommendations); Diana Guy-Nir, *The Government Approved Bachar Committee Recommendations*, YNET-ECONOMY (Nov. 14, 2004) (Isr.), <https://www.ynet.co.il/articles/0,7340,L-3003996,00.html>; *see also* Zvi Zarchia, *Lachman Messer: We Should "Go Down" with an Ax and Take the Provident Funds and Mutual Funds from the Banks*, HAARETZ (June 15, 2005) (Isr.), <https://www.haaretz.co.il/misc/1.1019023>.

that at least one main recommendation was changed by the government and not enacted.¹²⁸

The bill passed in 2005. Shortly afterward,¹²⁹ the banks sold their mutual and provident companies to various investment houses and insurance companies. The sale of the bank-owned funds significantly reduced structural conflicts of interest in the banks' activities, helped decentralize financial management, and opened these markets to competition. In fact, this reform changed the structure of the banking and financial sectors dramatically and curtailed the power of the banks.¹³⁰ As a result, their influence in the political and economic spheres

128. That recommendation dealt with the banks' commissions for selling mutual funds to their clients as distributors of financial products that would then be owned, as a result of the reform, by newcomers, not by the banks themselves. According to some Knesset members, the Prime Minister and the Minister of Finance were involved personally in changing this prohibition so that the banks were permitted to receive commissions for distributing financial products to their customers. *See* DK, 16th Knesset, Session No. 274, 109, 113–14 (2005) (Isr.).

129. This phenomenon was surprising because the law included, after many arguments, special sections that set out interim periods for such sales and gave the banks a few years to sell those entities.

130. *See* BANK OF ISR., *The Financial System*, in ANNUAL REPORT 133, 134 (2006), https://www.boi.org.il/en/NewsAndPublications/RegularPublications/Documents/Doch2006/pe_4.pdf (“The structural reforms in recent years—mainly the Bachar reform, the pension reform, the tax reform, liberalization of regulations pertaining to institutional investors, and the bond-market reform—have transformed the domestic financial system. Pursuant to the reforms, the dominance of the banks in financing the business sector and their control of the public's savings by means of provident funds, mutual funds, and management of deposits has been declining gradually but steadily.”).

diminished,¹³¹ opening the market to alternative suppliers of credit, such as institutional investors.¹³²

3. Intermediate Observations

As a final note to this discussion, it is interesting to observe that not even once did the members of the Bachar Committee, including the antitrust commissioner at the time, think that the solution could be found in existing Israeli antitrust legislation. The Committee did not envisage to examine market definitions or single-market data regarding the banking or the financial sector. Although the purpose of the Committee was to find a definitive and effective program to create a more competitive credit market, antitrust played no role in the process. Clearly, the dominance of the banks had to be reduced and their power had to be tamed through special legislation that mandated the breakup of their groups holdings in all mutual pension and provident funds.

*C. The Anti-Concentration Law*¹³³

During the years following the publication of the reforms initiated by the Brodet Committee and the Bachar Committee, major changes occurred in the Israeli economy. The most important change

131. After the legislative enactment of the Bachar Committee recommendations, banks were no longer untouchable. On the contrary, the prevailing political climate was that banks and other financial sector players should be heavily regulated. Perhaps the most extreme manifestation of this was the special legislation passed in 2016 that capped the salaries, bonuses, and other types of remuneration of directors and managers in banks and all financial institutions, to an amount equal to one million U.S. dollars per annum. *See* The Law on Remuneration of Officers in Financial Corporations (special Approval and Restriction on Tax Deductions of Exceptional Remuneration), 5775–2016, SH 2552 (Isr.).

132. SHELLY GOTTFRIED, CONTEMPORARY OLIGARCHIES IN DEVELOPED DEMOCRACIES 108 (2019) (“The dominance of the banks in managing public savings was thus curtailed.”).

133. The Law for Promoting Competition and Reducing Concentration, 5774–2013, SH 2420 (Isr.) [hereinafter Anti-Concentration Law].

was the emergence of multi-market business groups.¹³⁴ A new kind of concentration of economic power took center stage. At the heart of this change was a significant increase in the number of large corporate groups, most of them composed of several companies that issued stocks and debts in the capital markets but whose ultimate control was held by a single entity, a person, or a family. The entity that controlled these business groups was in many cases simultaneously the controlling shareholder of a financial institution and major non-financial “real” corporations.¹³⁵ This situation developed as a direct result of loopholes in the legislation following the recommendations of the Brodet and Bachar committees and a massive wave of privatization.

1. From Loopholes to New Economy-Wide Concentration

The Brodet recommendations did not propose to regulate the entity that was the ultimate shareholder in control of the banks, as opposed to the banks and the entities controlled by them. Only the latter were the focus of the Brodet Committee Report. This loophole, intentionally left for future evaluation by regulators,¹³⁶ was exploited immediately. As the government started selling off its holdings in the banks, most of the buyers came bearing conflicts of interest. Most of them were already in control of substantial real corporations in the economy. For example, the controlling shares of the Poalim Bank were acquired by U.S. billionaire Ted Arison through his holding company Arison Holdings.¹³⁷ A few years before that, this company had acquired Shikun u-Binuy, one of the largest public construction corporations. Similarly, the Wertheim family acquired control of the Mizrachi bank. The Wertheims, moreover, already controlled the Israeli Company for

134. See generally Konstantin Kosenko, *Evolution of Business Groups in Israel: Their Impact at the Level of the Firm and the Economy*, 5 ISR. ECON. REV. 55 (2007); Hamdani, Kosenko & Yafeh, *supra* note 2.

135. Kosenko, *supra* note 134, at 89; see also Hamdani, Kosenko & Yafeh., *supra* note 2, at 19–23.

136. See *Brodet Committee Report*, *supra* note 100, at 11 (recommending that this issue be considered by the regulators).

137. Bloomberg News, *Arison Group Buys into Israeli Bank*, S. FLA. SUN SENTINEL (Sept. 5, 1997, 12:00AM), <https://www.sun-sentinel.com/news/fl-xpm-1997-09-06-9709050377-story.html>.

the Distribution of Soft Drinks (better known as “Coca Cola Israel”), a monopoly in the soft drink sector, as well as 24% of the commercial television broadcaster Keshet (a major commercial television broadcaster that co-owned the most popular news corporation). The Canadian American Bronfman family acquired the controlling shares of Discount Bank. This family also controlled the extremely lucrative concession for the operation of IKEA in Israel and the controlling shares in a major food chain.¹³⁸ The Recanati family, who owned the Discount Bank in 1983, remained in control of the IDB conglomerate, one of the biggest conglomerates in Israel, and sold it in 2003 to Nochi Dankner.¹³⁹ This conglomerate also controlled one of the largest insurance companies in Israel, Clal, and other major industrial corporations.

Similar loopholes were left during legislative enactment of the Bachar Committee recommendations. The Bachar Committee also failed to impose limitations on the possibility that an owner of non-financial entities, including conglomerates, would acquire control over institutional financial entities, such as mutual funds, pension funds, and long-term savings funds. Ownership and control of these institutions were indeed divested from the banks following the recommendation of the Bachar Committee, but some of them were acquired by persons and entities that held control of commercial non-financial holdings. In a particularly noteworthy example, Yitzchak Tshuva, the controlling shareholder of the Israeli petroleum company Delek, became the controlling shareholder of a major insurance company, The Phoenix.

From 1996 to 2000, the state of Israel privatized and sold off control of a number of major government corporations to private entities, many of which already had significant holdings in the Israeli economy.¹⁴⁰ The wave of privatization occurred with the complete

138. Navit Zomer, *Bronfman Buys IKEA Israel*, YNET NEWS (Mar. 3, 2005, 1:14PM), <https://www.ynetnews.com/articles/0,7340,L-3053578,00.html>.

139. Ora Coren, *An Era Ends: Dankner Buys Control over IDB Holding Corporation*, THE MARKER (May 24, 2002), <https://www.themarker.com/misc/1.142131>.

140. For example, the Israeli national shipping company ZIM and major refineries were acquired by “Hachevra Le Israel” (the Company for Israel), which already controlled the Israeli Chemicals Company, a monopoly over the extraction of dead sea minerals and phosphates. And Hachevra Le Israel, under the control of the Ofer

knowledge and sometimes the encouragement of the state,¹⁴¹ but without taking into consideration the results of such accumulation of economic power in the hands of few, and that antitrust laws were insufficient or inadequate to govern the implications of this process with respect to economy-wide concentration of power. As a result of these processes, the Israeli economy became dominated by a relatively small number of large business groups, all controlled and held as ultimate shareholders, by private individuals. Most of these groups were developed as pyramidal corporate structures that raised capital and debt through public offerings. Hence, while all the corporations were controlled by the individuals at the top, they were funded by the public. Also, and quite often, the contribution of the controlling individuals was based on a comparatively large amount of credit from the major banks. The latter therefore had an interest in guaranteeing that the controllers of the newly owned dominant groups would maintain their control and repay their private loans. The pyramidal structure of multiple publicly funded companies largely served the individual controlling shareholders, who could appoint the directors in all the companies composing the group and induce all the companies to distribute large sums in dividends to enable repayment of the debts by the controlling shareholder.¹⁴²

The first regulator to identify the problem was the Bank of Israel (BOI). In the aftermath of the global financial crisis of 2008, the BOI's annual report for the year 2009 pointed out that Israel suffered from a

family, became one of the dominant corporations in Israel. *See also* GOTTFRIED, *supra* note 132, at 98–99.

141. *See* Hamdani, Kosenko & Yafeh, *supra* note 2, at 19–20.

142. This phenomenon of serving the controlling shareholder's debts through the distribution of dividends along the pyramidal structure was particularly extreme in the case of IDB Group, one of the largest conglomerates in Israel in the first decade of the millennium. The controlling shareholder, Nochi Dankner, once one of the most prominent businessmen in Israeli society, went bankrupt after the flow of dividends stopped and he was no longer able to repay the debt used to obtain control over the group or his personal debts. The control of the pyramid passed to a new owner, Eduardo Ellstein, who lost control over the group at the end of 2020 as dividend streams stopped during the COVID-19 pandemic.

problem of multi-market concentration.¹⁴³ The BOI report further explained that a small number of large business groups holding major significant economic power received most of the credit from the banking sector, which created a potential detrimental cross-sector failure and a potential systemic risk to the national economy.¹⁴⁴ The BOI emphasized that this situation was extreme in comparison with other developed economies.¹⁴⁵

143. BANK OF ISR., ANNUAL REPORT (2009), https://www.boi.org.il/en/NewsAndPublications/RegularPublications/Pages/eng_doch09e.aspx.

144. *Id.*

145. The BOI Annual Report stated that:

Israel is one of the most concentrated developed countries and even resembles a developing country in this respect. Israel's business groups are typified by broad sectoral dispersion, a significant tendency to focus on the financial sector, strong maturity of affiliated firms in terms of both age and size, slow growth, and higher levels of financial leverage—and therefore also of risk—among affiliated than among stand-alone companies.

Id. at 171. The report concludes by stating:

On the basis of the totality of findings about their activities, one may include Israel's business groups among the entities that have the latent potential of systemic risk. This is because their activity satisfies two main criteria in the test of systemic risk: both their economic size and their complexity—in terms of concentration of control, ownership structure, and sectoral interrelations with financial and real institutions—create the probability of a spillover effect in the event of their failure, make it difficult to analyze information about their activity, and, in turn, make it hard to assess the risks of this activity and its relation with overall system stability.

Id. at 173.

Two years later, because of a combination of public dissatisfaction with the high cost of living and criticism by some media outlets,¹⁴⁶ the small group of individuals leading the conglomerates were tagged “Tycoons,” a term that took on negative sentiment in Israeli public discourse.¹⁴⁷ This sentiment was the backdrop against which the government finally¹⁴⁸ decided to set up the “Committee to promote competition and reduce concentration,” known simply as “the Concentration Committee.”¹⁴⁹

2. The Concentration Committee Identifies Three Problems

The Concentration Committee’s mandate was signed by Professor Stanley Fischer, then the BOI chancellor, the Prime Minister, and the Minister of Finance. It noted explicitly that a market structure that places significant economic power in the hands of a few “encourages inappropriate relations between the business sector and the government,” thereby acknowledging the political implications and dominance of economic power.¹⁵⁰ The most important product of the Concentration Committee was its interim report. The final report of the committee is a short reiteration of the interim report adopting most of

146. Israel’s financial daily newspaper, *The Marker*, published an entire supplement dedicated to the issue in October 2010. See Meirav Arlosoroff et al., *Ben-Best: Dismantle Pyramids; Strum: The Corporations are Stifling Entrepreneurship and Small businesses; Dankner: There Is No Problem of Centralization*, THE MARKER (Oct. 12, 2010), <https://www.themarker.com/markets/1.59201> (Isr.).

147. See Matt Stoller, *How Israel’s Antimonopolists Helped Take Down Benjamin Netanyahu*, PROMARKET (Nov. 13, 2019), <https://promarket.org/2019/11/13/how-israels-antimonopolists-helped-take-down-benjamin-netanyahu/>.

148. The Government was also urged to do so by the Finance Committee of Parliament. See Tomer Avital, *Government Finance Committee: A Public Committee Should be Established to Examine Centralization in the Economy*, CALCALIST (July 5, 2010), <https://www.calcalist.co.il/local/articles/0,7340,L-3410404,00.html> (Isr.).

149. Moti Bassok & Zvi Zrahiya, *PM Orders Panel to Attack Economic Concentration*, HAARETZ (Oct. 14, 2010) (Isr.), www.haaretz.com/1.5125265.

150. See COMM. TO PROMOTE COMPETITION & REDUCE CONCENTRATION, THE MANDATE IN THE INTERIM REPORT 13 (2012) (Isr.) [hereinafter THE INTERIM REPORT], [Vaadot_ahchud_CompetitivenessCommittee_TyuyatRec_Report.pdf](#).

its recommendations, with the notable exception of a proposal to dismantle corporate pyramids, discussed further below.¹⁵¹

The Concentration Committee identified three main problems stemming from the accumulation of economic power in the hands of a few coupled with political power over the government, regulators, and parliament.¹⁵² The first was the prevalence of individuals or entities that controlled both major financial institutions in the banking and insurance sector and major and essential “real”—industrial or commercial—corporations. Relying on the work of Rajah and Zingales,¹⁵³ the report concluded that the identity of those who control major financial institutions matters both to the integrity of the financial system and to economy-wide competitiveness.¹⁵⁴ The dangers posed by this cross-

151. The Concentration Committee’s Interim Report was also based on the committee’s chief advisor, Harvard University Professor Lucian A. Bebchuk, who submitted three special reports: *Control of Financial Firms in the Israeli Economy: Problems and Policies*, *Corporate Pyramids in the Israeli Economy: Problems and Policies*, and *Concentration of Investments and Systemic Risks in Israel’s Long-term Savings Funds: Problems and Policies*. See Lucian A. Bebchuk, CONTROL OF FINANCIAL FIRMS IN THE ISRAELI ECONOMY: PROBLEMS AND POLICIES 2 n.3 (2012), https://www.gov.il/BlobFolder/unit/competitiveness-committee/he/Vaadot_ahchud_CompetitivenessCommittee_FinalReport_ExpertOpinion1.pdf. Bebchuk’s analysis was generally accepted by the members of the committee. However, his initial recommendations for dealing with the corporate pyramidal structure were changed in the final report after being strongly opposed in the committee’s hearings. The committee adopted a different approach detailed below. The Committee’s final report is available only in Hebrew. COMM. TO PROMOTE COMPETITION & REDUCE CONCENTRATION, FINAL RECOMMENDATIONS AND COMPLETION OF THE INTERIM REPORT (2012) (Isr.) [hereinafter THE FINAL REPORT], [Vaadot_ahchud_CompetitivenessCommittee_FinalReport_FinalRec.pdf](https://www.gov.il/BlobFolder/unit/competitiveness-committee/he/Vaadot_ahchud_CompetitivenessCommittee_FinalReport_FinalRec.pdf).

152. THE INTERIM REPORT, *supra* note 150, at 3 (determining that harm to the economy is directly related to the level of concentrated economy-wide power and includes lack of competition, the potential for financial instability, ineffective allocation of resources, negative incentives for innovation, etc).

153. Raghuram G. Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5, 5 (2003).

154. For example, the owner of a major bank or financial institution that holds a stake in a real corporation may be less likely to promote measures that protect minority shareholders in other corporations if such measures will harm its investment.

ownership include, inter alia, harm to competition, distorted allocation of credit and resources in the economy, anti-competitive behavior driven by the fact that the financial institution can obtain and pass financial information about competitors of the owners' "real" corporation potential cross-financing within the group, and the withholding of financing from competitors.¹⁵⁵

The second problem is also a result of a problematic structure of corporate groups: the prevalence of "corporate pyramids."¹⁵⁶ Between 1995 and 2005, the twenty largest conglomeratic groups in the country were mostly controlled by wealthy families; they controlled 230 public corporations representing almost half of the valuation of the entire population of public corporations at the time. Twenty percent of the corporations were part of pyramidal holding structures.¹⁵⁷

The Concentration Committee's Interim Report determined that the Israeli stock market was characterized by a small number of very large groups, highly leveraged and mostly controlled by a small group of individuals, families, or entities who thus controlled a vast portion of the economy using other people's money.¹⁵⁸ For instance, it was observed that 51% of nonbank public issued debt in Israel was issued

155. THE INTERIM REPORT, *supra* note 150, at 27. In a correlated recommendation, the committee also suggested forbidding cross-ownership between banks and other financial institutions. This recommendation was missing from the BACHAR COMMITTEE REPORT, *supra* note 111.

156. This corporate structure creates a significant gap between the controlling rights and the capital investment of the controlling shareholder, giving rise to a concentrated power that embodies potential moral hazard and other perverse incentives. See THE INTERIM REPORT, *supra* note 150, at 76–77. On corporate pyramidal structures and their detrimental consequences, see generally Morck, Wolfenzon & Yeung, *supra* note 45 (stating that pyramidal groups can entrench themselves against competition and regulatory control). Professor Bebchuk, the expert advisor of the Concentration Committee, wrote extensively on the implications of corporate pyramids. See, e.g., Lucian A. Bebchuk, Reinier Kraakman & George G. Triantis, *Stock Pyramids, Cross Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, in CONCENTRATED CORPORATE OWNERSHIP 295 (Randall K. Morck ed., 2000); LUCIAN A. BEBCHUK, CONTROL OF FINANCIAL FIRMS IN THE ISRAELI ECONOMY: PROBLEMS AND POLICIES (2012).

157. The Concentration Committee also relied in its Interim Report on Kosenko's work for the BOI. Kosenko, *supra* note 134.

158. THE INTERIM REPORT, *supra* note 150, at 9.

by eleven large corporate groups. In addition, the Interim Report found that Israel's stock market was characterized by corporate pyramids that have the highest number of levels of subsidiaries in the world, second only to Colombia.¹⁵⁹

Pyramidal holding structures enabled individuals to control large portions of the national economic activity. The committee emphasized that the gap between control rights and capital investment in the corporate pyramids posed a danger "to investors, to competition and to economy-wide stability."¹⁶⁰ The committee explained that the pyramidal structures created a potential for "multi market contacts" that would harm competition at large.¹⁶¹

The third problem that the committee identified was that the government's process for the allocation of assets, rights, licenses, and concessions—especially those that have to do with essential national infrastructure—tended to end up awarding rights to corporate groups that had already accumulated significant economic power.¹⁶²

The Concentration Committee's Interim Report determined that the current structure of the Israeli economy had the potential to hamper sectoral competition and that the concentration of supra-sectoral and financial economic power in the hands of a few entities harmed the economy as a whole and exposed consumers and investors to systemic risks and failures.¹⁶³

The Concentration Committee's explanation of the underlying basis for its recommendations is the long-term implications of entrusting too much economic power in the same hands. The Interim Report stated:

159. *Id.* at 9.

160. *Id.* at 74 (citing James Bullard, Christopher J. Neely & David C. Wheelock, *Systemic Risk and the Financial Crisis: A Primer*, 91 FED. RSRV. BANK ST. LOUIS REV. 403 (2009)).

161. *Id.* at 76.

162. Those results happened although the allocation was through a competitive process, including the privatization. But because no consideration had been given to the issue of preventing the concentration of economic power in the hands of a few, those conglomerates could not be denied in the bidding process.

163. THE INTERIM REPORT, *supra* note 150, at 13.

The fact that few private entities hold a significant part of the critical infrastructure in the economy can under certain circumstances give these entities bargaining power and excessive influence vis a vis the state. Even if such power is not based on the specific asset or allocation, it may occur afterwards. Such a significant position can be used later as leverage to acquire significant power in other markets, including power that is not necessarily economic power by nature.¹⁶⁴

The Concentration Committee went on to point out that allocating assets and rights to entities that are already a significant part of the national economy's GDP increases the risk that these entities will be perceived as "too big to fail."¹⁶⁵

3. Three Structural Solutions

The Concentration Committee's recommendations were based on the aggregate accumulated knowledge and understanding of its members—regulators and civil servants—alongside an independent expert from academia.¹⁶⁶ In that sense, the process that yielded the Concentration Committee's recommendations may be softer than if it were basing intervention on rigorous analysis of empirical data.¹⁶⁷

164. *Id.* at 215.

165. *Id.* at 213 ("[I]t is possible that the size of these entities after the allocation of state assets will create a distortion of the decision making process by regulators and the financial systems as a result of the perceived risk created by these entities on an economy-wide scale.").

166. The Concentration Committee based its conclusions on extensive public hearings involving interested parties as well as leading scholars. For empirical research, it relied mainly on data gathered and analyzed by the BOI and the Israeli Securities Commission. The report states that the Committee did not conduct their own empirical research. THE INTERIM REPORT, *supra* note 150, at 4–5. The Committee's interim report relied on expert opinions from Professor Bebchuk. *See supra* note 150.

167. For example, the Interim Report admits that the recommendations are not based on specific empirical evidence about the harm caused by the detrimental situations that were identified by the committee. The report then adds that "despite this,

However, given the difficulties in measuring some of the issues addressed by the Concentration Committee, its inclusive process provided a legitimate foundation for structural intervention.¹⁶⁸

After identifying the main problems, the committee set out to develop solutions. Its proposals focused on dismantling existing detrimental structures and preventing future accumulation of economy-wide concentrated power.

i. Separating Bigness Across Financial and Real Markets

The structural market reform driven by the Concentration Committee focused on breaking up entities and economic groups that were excessively powerful not only because of their bigness as such in one market, but also as a result of their multiple-market holdings. These entities achieved bigness through controlling or holding substantial stakes in “significant”¹⁶⁹ financial institutions and also in significant, “real” corporations. The Concentration Committee’s interim report recommended forbidding an entity as well as an ultimate shareholder from controlling both holdings. This was the missing piece in the puzzle put together by the Brodet committee.¹⁷⁰

the mere fact that the major credit borrowers in the economy are also controlling the financial institutions raises a significant concern for the materialization of conflicts of interests.” THE INTERIM REPORT, *supra* note 150, at 18.

168. The Concentration Committee’s protocols include the testimony of the chairpersons of the previous committees discussed here, David Brodet, and Yossi Bachar. In their testimony on February 7, 2010, they were asked about the empirical evidence underlying the recommendations of their committee. Bachar responded by saying, “We did not go into scientifically proving the existence of conflicts of interests. You need to develop common sense. We arrived at the unequivocal conclusion that there is a huge potential for a conflict of interest, and we did not wait for proof of its materialization.”

169. Significance is defined in accordance with thresholds and parameters of bigness specified in sections 29, 30 and 31 of the Anti-Concentration Law. §§ 29–31, Anti-Concentration Law 5774–2013, SH 2420 (Isr.).

170. To complete the separation, the committee also recommended forbidding directors in either financial or non-financial entities, or their relatives, from serving as

The Concentration Committee recommended using parameters of size to identify significant financial and non-financial entities. This approach did not change throughout the legislative process, although the proposed thresholds changed from the interim report to the final report. The final report of the Concentration Committee proposed a lower threshold, which meant that more economic groups with cross-holdings in the financial and real sectors were required to sell off either of those holdings.¹⁷¹ The final legislation embodied that threshold.¹⁷²

The Concentration Law defined “significant financial entity” as an entity with total financial assets, including its subsidiaries—as well as deposits and funds managed by such entities—valued at more than 40 billion shekels.¹⁷³ A “significant real entity” was defined by either the scope of its sales within a given market or by the scope of its credit.¹⁷⁴ The law embodies the committee’s recommendations, prohibits controlling both entities, and limits situation in which there is a holding of control in a substantial “real” entity, and holding at the same time a stake of more than 10% in a financial entity (or 5% if the financial entity does not have a controlling shareholder). Similar restrictions were imposed on an entity holding control of a substantial financial corporation and other holdings in a non-financial entity.¹⁷⁵

members of the board in a “real” corporation and vice versa. THE INTERIM REPORT, *supra* note 150, at 24.

171. *Id.* at 6, 15.

172. A fierce battle was waged between members of parliament who wanted to lower the threshold and lobbyists for big conglomerates who tried to convince them to push the threshold upward. The result was that the threshold for both financial and non-financial entities remained as recommended by the committee and was lowered only in markets where there was a monopoly. *See* §§ 29–30, Anti-Concentration Law.

173. Section 29 of the Anti-Concentration Law stipulates that the assessment will be carried out by three regulators: the Bank Supervision Authority, the Capital Markets Saving and Insurance regulator, and the Israeli Securities Authority.

174. *See* §30, Anti-Concentration Law.

175. Holding thresholds are used here as well. A person or entity that holds control rights in a significant real entity cannot hold more than 10% in a significant financial entity that has a controlling shareholder. If the significant financial entity does not have a controlling shareholder, the crossholding is restricted to 5%. The same restriction goes the other way, such that an entity that controls a significant financial corporation cannot control or hold more than 10% in an essential non-financial entity. §§ 39–40, Anti-Concentration Law.

The forced separation of significant cross-holdings eliminated some of the biggest and important conglomerates in the Israeli economy.¹⁷⁶

ii. Breaking Up Corporate Pyramids¹⁷⁷

The second reform proposed by the Concentration Committee also involved structural breakups. This time the target was the corporate pyramidal structures that enabled individual shareholders (known as "tycoons") with relatively small initial capital contributions to control large conglomerates.¹⁷⁸

The Concentration Committee's innovative and unprecedented proposal addressed existing and future corporate groups shaped as pyramids. Regarding future corporate groups, the final report recommended a restriction of a group of companies shaped as a pyramid composed of no more than two levels of publicly held subsidiaries. With regard to existing pyramids, the report recommended that they will be given four years to restructure the group either by selling off or "folding" public subsidiaries so that eventually they would include no more than three levels of publicly held corporations.¹⁷⁹ Based on the

176. KNESSET RSCH. DEPT., DESCRIPTION AND ANALYSIS OF THE APPLICATION OF THE LAW OF CENTRALIZATION AND ITS ECONOMIC EFFECTS ON THE ECONOMY (Feb. 25, 2020), [hereinafter KNESSET RSCH. DEPT. REPORT 2020] https://fs.knesset.gov.il/globaldocs/MMM/ff9220ea-086f-e911-80ec-00155d0a9536/2_ff9220ea-086f-e911-80ec-00155d0a9536_11_13761.pdf.

177. See also Hamdani, Kosenko & Yafeh, *supra* note 2.

178. The Concentration Committee initially proposed the adoption of incentive-based measures to address the problem in the hope that they would reduce the structural conflicts of interests within corporate groups and incentivize the dissolution of the pyramids. Based on the approach suggested by the Concentration Committee's advisor, Professor Bebchuk, the recommendations of the Concentration Committee in the interim stage about corporate pyramids included elaborate corporate governance proposals designed to curtail the perverse incentives of controlling shareholders, especially when a significant gap existed between the control rights held by the controlling shareholder and the capital investment of the controlling shareholder. This approach was abandoned in the final report. See *supra* note 150 and accompanying text; THE FINAL REPORT, *supra* note 151.

recommendations of the Concentration Committee's final report, the Anti-Concentration Law stipulates that a company that issued shares or bonds traded in the stock exchange (a "public funded company") cannot control more than one subsidiary public funded corporation.¹⁸⁰ This restriction was stricter than the maximum of three layers proposed by the Concentration Committee.¹⁸¹ The chairman of the Knesset subcommittee concluded the discussions on this chapter of the law and clarified that the strict rule adopted by the subcommittee was driven by the parliamentary desire to "restrict the creation of entities that can influence the government in a non-democratic way."¹⁸²

iii. Regulating Future Allocation of Public Assets and Rights

In its most innovative recommendation, the Concentration Committee suggested measures to prevent the future emergence of economy-wide concentrated power with political influence.¹⁸³ It proposed

180. § 21, Anti-Concentration Law.

181. Sections 25 and 26 of the Anti-Concentration Law also stipulate that the chancellor of the BOI and the Minister of the Treasury will impose a restriction on the scope of credit that can be granted to pyramid groups. There are also other restrictions on the composition of the board of directors.

182. Chairman of the Fin. Comm. of the Knesset, *Minutes of the Finance Committee* 197, 5 (Oct. 30, 2013) (Isr.).

183. The most telling recognition of the connection between private economic power and political power can be found in the opinions of the political actors that promoted the legislation of the Concentration Law. The Minister of Treasury, Professor Yuval Steinitz, introduced the bill in the Knesset by pointing out:

[W]hen certain entities acquire huge concentrated power, this has a negative effect on democracy therefore an economy that has competition and more decentralization, and that does not have a huge concentration of economic power in the hands of one or few hands not only has a healthy economy it also enables a democratic society to be healthier.

DK, 17th Knesset, Session No. 371, 118 (2012) (Isr.). When the final version of the bill was brought to a vote, almost all the members of the Knesset who spoke recognized that the bill was designed to curtail the ability of entities with economy-wide power to exert their influence over political and regulatory decisions making. DK,

restricting the state's future allocation of public assets, licenses, or rights in essential infrastructures if the acquiring entity possessed a high degree of concentrated economic power.¹⁸⁴ Therefore, the Committee recommended that future allocation of certain assets and rights by any branch of the government, including in the process of privatization, should be governed by two central considerations. The first was diffusing and dispersing concentrated economic power. In particular, the Committee recommended diffusing and dispersing economic power that controls critical infrastructure because such power easily translates to political influence. The second consideration was the desire to increase competition in specific markets.¹⁸⁵ The Committee explicitly used the phrase "competition and consumer welfare" when it recommended that the future allocation of state assets in a privatization process awarding special licenses and other rights that have importance to the economy at large would consider these two considerations.¹⁸⁶

To achieve these goals, the committee recommended a whole new process of allocating state assets, licenses, or rights. The recommendations of the Concentration Committee in this chapter of its report

19th Knesset, Session No. 88, 7, 82, 101 (2013) (Isr.). One Knesset member, Dov Chanin, cited Justice Brandeis in arguing that a concentration of economic power in the hands of a few is detrimental to democracy.

184. The explanatory note of the legislation clarifies:

The aim of the arrangements suggested in Chapter B, as also suggested by the Committee for Examining Concentration in the Economy, and adopted by the government, is to reduce the expansion of these entities into additional infrastructure areas, to prevent interrelations and influence between various industries and regulators, and to promote the increase of the number of players in the area of essential infrastructures.

Draft Bill to Promote Competition and Reduce Centralization, 5772–2012, HH (Gov.) 706 1084, 1089 (Isr.), https://fs.knesset.gov.il/18/law/18_ls1_216293.pdf.

185. THE INTERIM REPORT, *supra* note 150, at 211.

186. THE INTERIM REPORT, *supra* note 150, at 213. The Concentration Committee emphasized that future allocations should consider these recommendations even at the cost of lowering the state's income from these allocations.

set the stage for the adoption of a methodology for the identification of potential economy-wide concentration of power with political influence.

D. Identifying Economy-Wide Power with Political Influence

Identifying entities that possess or are likely to obtain economy-wide concentration of power is a crucial element in executing a policy of dissipating economic concentration.¹⁸⁷ The Concentration Committee recommended that a new regulatory body be set up and tasked with advising the relevant authorities and regulators, who are required as results of bids or privatization, to approve or deny a specific allocation of government assets or rights, before their decision has been finalized. The new advisory body was named the “Committee for the Reduction of Concentration” (CRC).¹⁸⁸ This section outlines the structure of the policy drawn for implementation by the CRC in broad, stylized strokes.

The first building block of the identification process is the definition of “essential infrastructure.” This term includes public infrastructure and utilities pertaining to all or a significant part of the population and providing critical services that must be supplied in a timely manner for the national economy—infrastructures whose owners may have influence on decision makers, like television and broadcasts are also included.¹⁸⁹ A non-exhaustive list of such infrastructures in the interim report and the Anti-Concentration Law includes: energy,

187. This process is detailed in the Anti-Concentration Law, its appendix, and a Methodology published by the Competition Authority. COMM. FOR REDUCING CONCENTRATION & INCREASING COMPETITION, *METHODOLOGY FOR EVALUATING ECONOMY-WIDE CONCENTRATION* (Jan. 17, 2017), [hereinafter *METHODOLOGY FOR EVALUATING CONCENTRATION*], <https://www.gov.il/en/departments/legalInfo/methodologyconcentration>.

188. § 40, Anti-Concentration Law 5774–2013, SH 2420 (Isr.). The Committee for the Reduction of Concentration (CRC), not to be confused with the Concentration Committee, is chaired by the Director of the Antitrust Authority and includes the Director of the Ministry of Finance and the Chairman of the National Economic Council.

189. THE INTERIM REPORT, *supra* note 150, at 214.

transportation, electricity, water supply, telecommunications and licensed broadcasting channels, financial services, and the defense industry.¹⁹⁰

The second building block is the key definition of a “concentrated entity,” discussed below. The third block is the decision-making process regarding allocating rights relating to an “essential infrastructure” to a “concentrated entity” by the appropriate governmental body. Such an allocation, if considered, is “suspected” and therefore should be reviewed first by the CRC¹⁹¹ and could be denied based on unique considerations such as reducing or preventing accumulation of economy-wide power. Such considerations should consider the impact of an allocation on the cumulative economic power of the acquiring entity. The Anti-Concentration Law explicitly recalibrates a process of re-consideration of all government allocation decisions, including all sales of government assets in a privatization process, to include tackling the prevention of economy-wide concentration as an overarching interest. It empowers every regulator to consider and refuse an allocation of assets, licenses, or rights to a concentrated entity based on economy-wide concentration considerations. To do that, the regulator must be convinced that such allocation will increase the concentration entity’s power, have reasonable grounds to believe that withholding the allocation will cause no great harm to competition in the specific market, and believe that “consumer welfare is not significantly undermined.”¹⁹²

190. *Id.* at 221–25. The CRC must also evaluate the list of essential infrastructures every two years according to Section 16 of the Anti-Concentration law and propose the addition or deletion of items from the list.

191. According to Section 3 of the Anti-Concentration Law, an allocation of rights is defined as any allocation to a *concentrated entity* of a right in an *essential infrastructure* that is included in the appendix to the law, or an allocation of a substantial holding in a government corporation to a concentration entity.

192. METHODOLOGY FOR EVALUATING CONCENTRATION, *supra* note 186, at 2. Section 5(b) of the Anti-Concentration Law specifies that a regulator wishing to allocate rights to a corporation listed as a concentrated entity—whether by license or contract or significant holding in an essential infrastructure—shall be required to consider economy-wide concentration considerations in consultation with the Committee for

The definition of “concentrated entities” is, of course, a key feature. The Anti-Concentration Law uses parameters that include bigness thresholds, single-market economic dominance limitations, thresholds in essential markets, and multi-market contacts limitations. The Law also includes parameters regarding interactions with regulatory and government agencies even when the entity does not dominate any particular essential market, and the Law pinpoints ownership and control of the media as a *sui generis* case. The Law deals with predictability and potential uncertainty by stipulating that the CRC will publish and regularly update the list of concentrated entities in the market.¹⁹³ The Law then goes on to set the criteria for determining which entities will be included on the list. They include “significant real entities,”¹⁹⁴

the Reduction of Concentration. In addition, Section 5(e) specifies that that requirement applies provided there is no significant harm to the welfare of consumers.

193. § 4, Anti-Concentration Law 5774–2013, SH 2420 (Isr.); METHODOLOGY FOR EVALUATING CONCENTRATION, *supra* note 186, at 3. The CRC expressly underlined the importance of certainty in the business arena in its methodological guidelines. In the preamble of its guidelines, the CRC outlines two main goals. The first is “to reduce economy-wide concentration and its negative market effects, while allowing the allocation of rights to concentrated entities when such allocation may benefit the industry and the economy,” and the second is “to increase certainty and transparency regarding the considerations of the Committee, as required by the principles of administrative law.” The list was amended in February 2020. *See* CRC, LIST OF CENTRALIZATION FACTORS UNDER THE LAW TO PROMOTE COMPETITION AND REDUCE CENTRALIZATION (Feb. 13, 2020) (Isr.), https://www.gov.il/BlobFolder/unit/centralization_decrease_committee/he/Vaadot_ahchud_CentralizationDecreaseCommittee_GormimRikuzim_List-new.pdf.

194. Section 30 of the Anti-Concentration Law uses a combination of quantitative size thresholds. Significance is triggered when an entity has a sales turnover of above 6 billion NIS or 2 billion NIS if it is a monopoly. In addition, the entity’s debt must be above a 6 billion NIS threshold. The thresholds in the Anti-Concentration Law differ from the thresholds initially proposed by the Concentration Committee, but they are based on its recommendation. The committee derived its definition of significance by looking at quantitative macroeconomic data and thresholds in Israel and the United States. The committee defined a “significant real entity” as a non-financial entity with a sales turnover of at least 8 billion NIS (approximately 2.5 billion U.S. dollars) or a balance sheet of more than 25 billion NIS in assets and obligations with more than 5% of the assets located in Israel. *See* THE INTERIM REPORT, *supra* note 150, at 22.

“significant financial entities,”¹⁹⁵ “influential media or press entity,”¹⁹⁶ any entity that dominates at least half of the market of an essential infrastructure,¹⁹⁷ and any entity that has controlling rights in four essential infrastructures by holding, in total, at least ten licenses, concessions, or contracts granted by the state.¹⁹⁸

The Concentration Committee included in the list of concentrated entities, bodies with influence in the press and the media including broadcasters, owners, and publishers of daily national newspapers, although the state does not grant rights or licenses to publish newspapers.¹⁹⁹ This decision reflects the perception that allocating a right in essential infrastructures to an entity with influence on the media creates the potential for the accumulation of excessive power and the potential

The sales threshold was based on the aggregate estimated annual sales turnover in the Israeli economy in 2011, when the report was written. At the time, the committee noted that the annual national sales turnover was 1.5 trillion NIS, and the threshold was set at approximately 0.5% of that number. As a comparison, the Concentration Committee noted that Walmart, ranked by *Forbes* magazine as the seventeenth-largest corporation in the world in 2007, had a sales turnover of 268 billion U.S. dollars, which was approximately 1% of the aggregate U.S. sales turnover. *Id.* at 23.

195. Section 29 of the Anti-Concentration Law uses numerical size thresholds. Significance starts at 40 billion NIS (approximately 12.5 billion U.S. dollars) in private or managed assets. The Concentration Committee measured financial nonbank entities according to the financial assets under their management. The Concentration Committee believed that any financial nonbank entity managing more than 2.5% of the total assets managed in the financial nonbank sector, estimated at 2 trillion NIS, was a significant financial entity. The committee compared this threshold to the United States and noted that the assets of the largest bank in the United States at the time, Citigroup, represented 1.4% of the aggregate financial assets in the market. *Id.* The Concentration Committee allowed for organic growth of the real and financial entities but capped this growth. For example, according to the recommendation of the committee, a financial entity could grow up to a limit of 75 billion NIS in managed assets. Any additional growth would be subject to a de facto cap-and-spin regime. *Id.* at 24.

196. Section 4 of the Anti-Concentration Law defines influential media entities as all licensed broadcasters and the publishers of daily national newspapers.

197. § 4, Anti-Concentration Law.

198. *Id.*

199. *Id.*

to influence policymakers. Altogether, the media received special attention in the Anti-Concentration Law, in both the definition of “essential infrastructure” and the definition of a “concentrated entity.”²⁰⁰ This was an innovative addition to the existing Israeli media cross-ownership regulation. The existing regulation restricted cross-ownership of media to prevent the concentration of media outlets in the hands of a few owners.²⁰¹ For example, the owner of a major newspaper was barred from owning broadcast media or even holding a stake of less than 8%. However, whereas the latter regulation was meant to prevent the concentration of ownership in media to increase democratic pluralism, the Anti-Concentration Law focused on dissipating the influence of media owners on policymakers. This was particularly relevant when the media owners could benefit from policy decisions regarding their nonmedia holdings.²⁰²

Implementing the Anti-Concentration Law required the development of a methodology that evaluates allocation of assets and rights to economic entities from a “panoramic view.”²⁰³ Although the Anti-Concentration Law laid out some thresholds and emphasized sectors and infrastructures that should be noted, it did not provide a full-fledged methodology for the government actors required to consider an impending allocation.²⁰⁴ The CRC was formally established in 2014, but it only released a draft methodological guidelines document after three years of accumulating practical experience. The final document was published in 2019.²⁰⁵

200. *Id.*

201. IDO BAUM, MEDIA LAW IN ISRAEL 119–21 (2014); *see also* KNESSET RSCH. DEPT., ANALYSIS OF THE ECONOMIC IMPLICATIONS OF CENTRALIZATION AND CROSS-COSTS ON THE MEDIA (Nov. 2, 2011) (Isr.), https://fs.knesset.gov.il/globaldocs/MMM/6ebf8d55-f7f7-e411-80c8-00155d010977/2_6ebf8d55-f7f7-e411-80c8-00155d010977_11_8253.pdf.

202. *Minutes of the Finance Committee of the Knesset* (Oct. 28, 2013) (Isr.).

203. METHODOLOGY FOR EVALUATING CONCENTRATION, *supra* note 186, at 1.

204. For a general survey of regulatory solutions provided by antitrust laws for various problems of aggregated concentration in the economy in foreign law systems, and a discussion of these solutions, see Gal & Cheng, *supra* note 11.

205. The draft was published in 2017. The final guidelines, published in 2019, are only in Hebrew, so we mainly will refer to the English draft version. *See* THE CONCENTRATION COMM., AN EXAMINATION OF ECONOMY-WIDE CONCENTRATION

One important principle of the guidelines is the realization that short-term gains from allocation of rights to concentrated economic entities are often visible, whereas the long-term costs to the economy are often hard to quantify.²⁰⁶ The key notion for assessing the potential political influence that a business can acquire is its “bargaining power” vis-à-vis the political system. Due to the comparatively strict restriction of political contributions by individuals and corporations in Israel, bargaining power becomes an important feature for businesses in markets that are shaped by man-made laws and regulations.²⁰⁷

The methodology guidelines, to which we refer here simply as the “Methodology,” developed parameters for assessing the bargaining power of concentrated entities and guidelines for evaluating the effect of allocating an essential infrastructure to a concentration entity and identifying allocations that may be justifiably prevented.

According to this approach, bigness matters, but political influence is not dependent on bigness per se. In fact, the Methodology underscores the fact that the source of the power of the entities that it is seeking to identify, is not derived from the usual perception of market power in the sense dealt with in antitrust law. The new perception embodied in this document is that market power derives “from the bargaining power of a player towards decision makers.” This power can

(Jan. 17, 2017), https://www.gov.il/BlobFolder/news/concentrationcommittee/en/englishsite_pressreleases_Examination%20of%20economy%200117.pdf; see also *METHODOLOGY FOR EVALUATING CONCENTRATION*, *supra* note 186, at 3.

206. *METHODOLOGY FOR EVALUATING CONCENTRATION*, *supra* note 186, at 3 (“[The] benefits of allocating rights to a concentrated entity may be visible in the short-term and accurately measured, while future damages due to increasing economy-wide concentration may be visible only in the long-term and far more obscured.”).

207. The methodology defines “economy-wide concentration” in terms of “the acquisition of bargaining power towards policymakers . . . [T]he central concern regarding economy-wide concentration is the assertion of bargaining power towards decision makers, both on the regulatory level (professional regulators) and on the political level (Knesset and government members). For the sake of convenience, both shall be referred to in this document as ‘policy makers.’” *Id.* at 4–5.

be used to the detriment of the public interest at large and not necessarily to harm competition alone.²⁰⁸

What are the makings of bargaining power vis-à-vis policymakers? “Regulatory capture” is a well-documented phenomenon of exerting influence on policymakers.²⁰⁹ Holding or controlling essential infrastructure is another. Being or at least being perceived as “too big to fail” due to adverse macroeconomic effects that a concentration of economic power in central junctions of the economy may have also enabled the exertion of power over policymakers.²¹⁰ Yet another leverage is the ability to influence public opinion through the control of media outlets.²¹¹

208. *Id.*

209. The Methodology relies heavily on the economic literature on regulatory capture. See, e.g., Daniel Carpenter, *Detecting and Measuring Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 57, 58–60 (Daniel Carpenter & David Moss eds., 2014); Luigi Zingales, *Preventing Economists’ Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 124, 124–25 (Daniel Carpenter & David Moss eds., 2014); Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 204 (2006); Rolnik Guy & Shapira Roy, *Regulatory Capture Dynamics—the Israeli Case Study*, SAMUEL NEAMAN INST. (2019), <https://www.neaman.org.il/EN/Regulatory-Capture-Dynamics-the-Israeli-Case-Study>.

210. The Methodology drafters acknowledge that this mechanism is founded on the literature concerning financial institutions. See, e.g., Robert L. Hetzel, *What Caused the Great Recession in the Eurozone?*, (The Fed. Rsrv. Bank of Richmond, Working Paper No. 16-10, 2016); Ben S. Bernanke, *Causes of the Recent Financial and Economic Crisis Before the Financial Crisis Inquiry Commission*, FED. RSRV. SYS. (Sept. 2, 2010), <https://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.htm>. However, the Methodology does not restrict this factor exclusively to the financial sector.

211. The Methodology stresses the concern that “captured media” suppresses information that is important to the public or promotes the interests of its controllers. The Methodology relies on the survey by Andrea Prat & David Stromberg, *The Political Economy of Mass Media*, in ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS, PROCEEDINGS OF THE TENTH WORLD CONGRESS OF THE ECONOMETRIC SOCIETY 27, 31 (Mathias Dewatripont, Lars Peter Hansen & Stephen J. Turnovsky eds., 2013), especially sections 5.2.2 and 5.2.3. Also cited are Timothy Besley & Andrea Prat, *Handcuffs for the Grabbing Hand? Media Capture and Government Accountability*, 96 AM. ECON. REV. 720, 722 (2006); Martin Gilens & Craig Hertzman, *Corporate Ownership and News Bias: Newspaper Coverage of the 1996*

The following parameters can be extracted from the Methodology:

(a) Bigness

When is an entity too big? Bigness is the only parameter specified in the Anti-Concentration Law as a threshold.²¹² However, bigness is not an exhaustive measure. For example, a corporation need not be the largest in its market nor must it hold multiple essential infrastructures if it controls public opinion through the ownership of a media outlet.²¹³

(b) Essential Areas of Activity

The ability to cease or disrupt the supply or provision of essential goods or services provides an entity with special bargaining power vis-à-vis policymakers. The more essential the supply of a good or services is, the more bargaining power is held by the corporation, its owner, or its employees.²¹⁴ Holding or controlling a combination of essential infrastructures creates an even greater power. In the Israeli context, an appendix to the Anti-Concentration Law includes a list of

Telecommunications Act, 62 J. POL. 369 (2000); and BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (5th ed. 1997).

212. § 4, *The Law for Promotion of Competition and Reduction of Concentration*, 5774–2013, (Isr.), www.gov.il/en/departments/legalinfo/concentrationlaw.

213. *Id.*

214. The drafters of the Methodology also conceded that “not all the areas specified are equally essential; owning a quarry is not the same as operating a seaport, and therefore areas should be differentiated depending on how essential they are.” *METHODOLOGY FOR EVALUATING CONCENTRATION*, *supra* note 186, at 12.

essential infrastructures.²¹⁵ It is based in part on the services with employees whose right to strike is limited by law.²¹⁶

(c) Macroeconomic Characteristics of the Entity

Size matters in macroeconomic terms. Size in this case does not mean bigness, but rather the relative size of the analyzed entity and the bargaining advantages that it can derive from this relative size. Even when the size of an entity does not reach “significance” in the financial or non-financial markets, it may yield excessive bargaining power over policymakers. Size matters in terms of the entity’s contribution to economic activity and the potential impact of external detrimental changes affecting the entity. Size also creates an advantage over other players in the market based on noneconomic parameters, such as lobbying. Size can be measured in various ways that are not mutually exclusive, either in comparison with national economy data or within a specific market.²¹⁷

Some parameters of size can turn out to be important even when the entity is not significant and does not control essential infrastructure. For example, the direct or indirect employment of a very large number of employees can create significant bargaining power.²¹⁸

215. The list includes: the production, transmission, distribution and supply of electricity; supply of drinking water and sewerage services; refining, storage, transmission, and supply of fuel products; production, transmission, and distribution of natural gas; landline telephone services (including internet); mobile telephone services; transit infrastructures at the entry and exit points to and from Israel (international airports and international seaports); and public transportation services, including trains and busses, in and between cities.

216. A detailed survey of essential services in which the right to strike is limited in various countries can be found in the survey by Knesset’s legal department, *Limiting the Right to Strike in Essential Services—Comparative Survey* (Sept. 9, 2013) (Isr.), main.knesset.gov.il/Activity/Info/LegalDepartmentSurveys/Survey090913.pdf.

217. Examples are absolute size in terms of revenue or credit, relative size in comparison with other business groups in the market, the share of the total product or total export in the economy and share in the capital market. *METHODOLOGY FOR EVALUATING CONCENTRATION*, *supra* note 186, at 14.

218. *Id.* at 15 (suggesting that the number of employees out of the total number of employees in the industry, the number of employees in a geographical area, and the distribution of employees by occupation should be considered).

(d) The Nature of the Relationship with Regulators

The type and nature of the relationship between the regulated entity and regulators may increase the influence of an entity on policymakers. Frequent regulatory interface is a cause for concern. The potential for regulatory capture increases when an entity is interfacing with an increasing number of policymakers. Experience and knowledge acquired in the interface with one regulator enhance an entity's ability to bargain with other regulators and play one policymaker against another.²¹⁹ In some cases, policymakers depend on the entity for information or for the execution of the regulatory policy. This puts the entity in a strong bargaining position. Furthermore, entities with strong bargaining power are likely to avoid transparency so that their influence remains hidden.²²⁰

(e) Dynamic Evaluation

Analyzing the current economy-wide concentration of power of an entity before an allocation of rights is not sufficient. The allocation itself can change an entity's power. According to the Methodology, this can happen in two ways. A new allocation of rights allows the entity to exert new bargaining power in favor of existing operations in

219. For an example of empirical measurement of this variable, see Jean-Philippe Bonardi, Guy L.F. Holburn & Richard G. Vanden Bergh, *Nonmarket Strategy Performance: Evidence from U.S. Electric Utilities*, 49 ACAD. MGMT. J. 1209 (2006). The article examines the changes in controlled profit rates of electricity companies in various U.S. states. One of the significant variables found was the appeal of a company to the regulator in the previous three years. The authors attributed the increase in the controlled prices to the accumulated expertise of companies in interfacing with regulators.

220. Nathan M. Jensen & Calvin Thrall, *Who's Afraid of Sunlight? Explaining Opposition to Transparency in Economic Development*, 23 BUS. & POL. 474 (2021), <https://www.cambridge.org/core/journals/business-and-politics/article/abs/whos-afraid-of-sunlight-explaining-opposition-to-transparency-in-economic-development/BFCB764229B4C5869D1DEE7C0BAFC987#article>.

221. METHODOLOGY FOR EVALUATING CONCENTRATION, *supra* note 186, at 19. The Methodology, which is driven by the goal of decentralizing power, states that in both cases alternative candidates for the allocation should be considered, favoring actors holding less bargaining power due to their concentrated position.

other markets. Conversely, a new allocation can enable an entity with bargaining power in other markets to use its bargaining power in the market where the allocation of rights is considered.²²¹

Another dynamic consideration is the maturity of the market. In a nascent market, a firstcomer will be able to capture significant bargaining power. On the other hand, in a competitive market, capturing more bargaining power is less likely.

(f) What About Consumer Welfare?

The main criticism of the Anti-Concentration Law is that it intervenes in the natural state of the economy, thereby reducing consumer welfare. The Concentration Committee and the drafters of the ensuing legislation were conscious of the possibility that consumer welfare would be affected. The Law and the Methodology require government decision makers to consider consumer welfare alongside considerations of economy-wide concentration. The Law specifically acknowledges that some harm may be inflicted on consumer welfare. The Law strikes the balance at the level of “significant harm to the welfare of consumers.”²²²

The Methodology identifies two major negative implications caused by the restriction of allocations to certain entities and therefore suggests careful balancing of the CRC recommendations when these situations occur.

The first is harm to the competitive process of allocating public assets and rights. The reduced competition resulting from the removal of strong competitors may reduce consumer welfare because the participants’ offers will be suboptimal. The impact of the reduction depends on the number of remaining participants and on the identities of the entities. Arguably, the more entities that participate in a bidding process and the more experienced and efficient they are, the less damage to the competitive process is expected.

222. Section 5(e) of the Anti-Concentration Law states, “The instructions of this paragraph will apply . . . provided that the exercise of authority according to them will be in a manner that will ensure that there is no significant harm to the welfare of consumers.” § 5(e), Anti-Concentration Law 5774–2013, SH 2420 (Isr.)

The response to concerns about the competitive allocation process needs to consider the dynamic effect of economy-wide entities. Large influential entities can make competitive offers precisely because after winning the allocated asset or right they can exert sufficient influence over policymakers to enable them to change conditions of the allocation ex-post, at the expense of consumers.

The second detrimental effect of the restrictive allocation approach of the Anti-Concentration Law, according to the Methodology, is that the public is denied the benefits that can be derived from the entry of a concentrated entity into an industry. Arguably, in some cases the entrance of a large economic entity into a market can benefit consumers' welfare. The argument is that in an industry controlled by dominant players, a new player that is a concentration entity in the economy-wide sense may have a better chance to encourage competition in such industry.

We beg to differ. The fact that a large and powerful entity is entering a market controlled by other large entities may very well be due to a desire to ensure cooperative anticompetitive equilibrium among large entities in a highly concentrated market. Given that the market is already controlled by such entities and that the new entrant is already an influential entity experienced in the process of guaranteeing anticompetitive markets structures, we think that a more likely scenario is that such an allocation will discourage competition in the particular market and in the economy-wide level.

A similar argument would be that a consumer welfare benefit could be gained when a large entity enters a market that requires extensive entry investments and advanced technological knowledge or international experience. Similarly, it could be argued that experienced entities should be allowed to develop such a market even if they are concentrated entities. We think this would be self-defeating. If there are private benefits to entry, then there is no reason to believe that these benefits can only be collected by economy-wide concentration entities. In a decentralized market there should be enough large entities that can take on the investments required to enter and develop new markets. In fact, the more decentralized the market, the more likely it is that such entities will exist.

In our view, these considerations reduce the ability of the CRC to curtail the accumulation of economy-wide concentration of power. One reason for this concern is that the CRC is an administrative body subject to principles of administrative law such as proportionality, so it may be required to recommend that an allocation be allowed under specific conditions rather than banning the allocation altogether.²²³ This concern is aggravated by the fact that powerful entities can try to influence the conditions prescribed by the CRC, diminish its recommendations, or simply make sure they are ignored over time. The fact that the CRC is only a recommending body and that regulators can choose not to accept its recommendations may undermine its ability to diffuse the political influence of large economy-wide concentrated entities in the market.

Nevertheless, evidence is growing that the reforms succeeded in increasing competitiveness and dispersion of economic concentration of power in Israel.²²⁴

E. An Unfinished Story: Intermediate Evaluation of the Anti-Concentration Law

There can be no doubt that the Anti-Concentration Law has had a significant impact on the Israeli economy and its markets. A report by the Research Center of the Knesset found that an overview of the Israeli economy in 2019 indicated that the objectives of the Anti-Concentration Law were, by and large, achieved.²²⁵

The number of conglomeratic business groups has been reduced by 33%, from forty-two in 2013 to twenty-eight in 2019. Their cumulative share in the aggregate markets in which they operated diminished

223. In that sense, the CRC is like the Federal Trade Commission (FTC) in the United States or any other governmental regulatory authority. Being subject to the principle of proportionality means that the CRC must weigh alternatives that may remove the concerns related to the allocation, and better preserve its possible benefits and the rights of the concentrated entity.

224. See Konstantin Kosenko, *Aggregate Concentration in Israel, 1995–2015*, in *THE ISRAELI ECONOMY, 1995–2017*, at 272, 299–300 (Avi Ben-Bassat, Reuben Gronau & Asaf Zussman eds., 2021) (discussing the effects of the Israeli reforms).

225. KNESSET RSCH. DEPT. REPORT 2020, *supra* note 176.

from 87% to 69%.²²⁶ According to the mandatory obligations set forth in the Anti-Concentration Law, sixty-nine pyramidal groups were compelled to eliminate at least one public “layer” in their corporate pyramidal structure. They have done so by either selling the public corporation or acquiring the share of the public in one or more of the public corporations. In comparison with the situation in the United States, Israel experienced a dramatic change in the presence of pyramidal groups and their externalities.²²⁷

In 2019, there were seventy-five entities that were deemed by the CRC to be “concentrated entities.” It is interesting to note that thirty of those corporate groups have holdings in the media.²²⁸ In our view, the reform’s litmus test is its impact on the most powerful economy-wide entities. A particularly interesting example is the case of the Idan Ofer group—arguably the largest real business group in Israel and one with extensive international business activities as well. One of the group’s subsidiaries in the electricity market applied in 2016 for a license granted by the National Electricity Authority to become a major private supplier of electricity. The CRC determined the Idan Ofer group was a “significant real concentrated entity,” that it controlled more than half of the market in essential infrastructures such as mining, oil refineries, and dead sea minerals extraction, that the group already possessed more than twenty rights and licenses in essential infrastructures, and that it had holdings in a major commercial broadcaster, Reshet.²²⁹ Accordingly, the CRC recommended against granting the

226. *Id.* at 39.

227. Hamdani, Kosenko & Yafeh, *supra* note 2, at 23. (“In conclusion, Israel has experienced a significant decline in the prevalence of the business group structure. Surviving groups are smaller than in the past, with much less economic power . . .”).

228. CRC, *About Key Issues*, MINISTRY OF FIN. (last visited Aug. 17, 2022) (Isr.) (listing the corporate groups only in Hebrew), https://www.gov.il/he/departments/PublicBodies/centralization_decrease_committee.

229. Press Release, Israel Competition Authority, Idan Ofer Is Selling All His Holdings in Reshet and Undertakes Not to Operate in the Communications Field in Israel for 25 Years as a Condition to Obtaining Electricity Generation Licences (Jan. 1, 2019), <https://www.gov.il/en/departments/news/press-ofer> (“Reshet is one of the largest and most influential communication bodies in the economy—the Reshet 13

license to the group based on its concern about the economy-wide concentrated power already held by the group.²³⁰

After prolonged negotiations, the CRC agreed to change its recommendation after the Idan Ofer Group's undertook to sell off its media holdings and agreed to refrain from any holding in the media and telecommunications market in Israel for twenty-five years.²³¹ The CRC's recommendation stated that "the positive impact of the Group's departure from the communications field on concentration is immeasurably greater than the increase in concentration resulting from the expansion allowed to the Group in the electricity field." The CRC explained the balancing of considerations by noting that the group was not a newcomer to the electricity generation market and did not significantly alter that market, whereas it was a newcomer to the media market.²³² The latter fact had special importance because the media "is an exceptional sector in the degree of potential influence that it has in creating bargaining power vis-à-vis the policymakers and in easing the exercise of bargaining power by use of media reporting. This influence is intensified when the holding of such a key media outlet is involved."²³³

Since the Anti-Concentration law was enacted at the end of 2013 and the Methodology was published in 2019, the CRC reviewed and published approximately thirty requests for a recommendation. Ten of these reviews were rendered after the publication of the draft of the Methodology in 2017. In nine cases, the CRC recommended approving the requested allocation.

One possible explanation for the extremely low rate of intervention by the CRC is that the publication of the Methodology created

channel is one of the two leading channels in Israel and the news broadcasts that it transmits are the most viewed.").

230 *Id.*

231. *Id.*

232. *Id.*

233. *Id.* (adding that "the holding of media outlets has a lateral impact that increases the bargaining power that concentrated entities might exercise through holdings in essential infrastructure fields and in general, and it is intensified insofar as the entity is more concentrated, let alone when exercised by the most concentrated group in the economy").

more certainty and had a chilling effect on the participation of concentrated entities in the allocation of government rights. Another possible explanation is that regulators screened allocations or structured allocation processes in advance in a way that incorporated the Methodology guidelines.

IV. TOWARD A UNIVERSAL METHODOLOGY

The political influence that emerges because of aggregate economic power accumulated from positions in several markets should be checked and tamed. This kind of power poses a problem not only to the economy but also to the democratic process. It can often be translated into influence over policy decisions in a way that benefits the private interests of a powerful entity at the expense of public welfare.

Building on the Israeli experience, we suggest a set of universal indicators and parameters that, taken together, can be used to identify entities with concentrated economy-wide power that can be translated into political influence, with potentially detrimental effects on public welfare. This methodology sets aside the exertion of influence through donations or by retaining the services of lobbyists. To the extent that economic entities attempt to influence policymakers by these means, the methodology proposed here can serve to identify additional—sometimes tacit—*influence enhancements*.²³⁴

234. A firsthand account of direct tacit influence on policymakers without the use of political contributions was given in an op-ed written by Zehava Galon, the former head of Meretz, a left-wing party that supported banking law reforms and enhanced public scrutiny of the banking sector in Israel. Given the restriction on political contributions, parties were dependent on bank loans to finance election campaigns. After the elections, the parties were granted funding from the state according to their relative size in the parliament (the Knesset), and this funding would be used to repay the loans. Galon recounted that during the legislation of banking law reforms, Meretz's financial team was called to a meeting with credit officers of Bank Hapoalim, the main credit provider for all the parties at the time. Galon wrote that the bank officers threatened to withhold credit from Meretz because it was a "risky loan." Galon confided in the Deputy Minister of the Treasury from the right-wing Orthodox party Shas, Itzik Cohen, and found out that he had a similar experience across the political aisle, having held similar views regarding the need for banking law reforms.

The stylized methodology proposed here requires a dynamic examination of the regulated entities from multiple angles. One can group these angles into three distinct groups. The first group of indicators takes into consideration the particular entity that is being examined or acquired. The second group focuses on the market in which the examined entity is operating or considering entering. The last group focuses on the bargaining power of the entity, which is not necessarily dependent on the market in which it operates.

Sometimes one indicator can be sufficient to raise a red flag, signaling the emergence of a concentrated economy-wide influential power. For example, the mere acquisition of a major national daily news media outlet by a conglomerate can create or significantly enhance potential influence on policymakers that did not exist before such an acquisition. In other cases, a combination of indicators is required for the potentially harmful influence on policymakers to emerge. For example, an acquisition by a holding corporation of a corporation in a new market is not suspect per se. However, if the acquiring entity is significant in size and the new market is an essential infrastructure that the public depends on and that is highly regulated, then the potential for influence on policymakers is greater.

A dynamic assessment is required because markets change rapidly and because concentrated entities adapt and find new and innovative avenues of influence.²³⁵ The significance of pharmaceutical corporations, like Pfizer, has undoubtedly changed over the course of the last year with the development of a vaccine for COVID-19. Governments have become dependent on Pfizer's corporate decision makers

Their mutual understanding eventually led to the passing of reformed elections funding law in which the lands taken by the parties were guaranteed by the state. This reform freed the political parties from one type of influence of economic power. See Zehava Galon, *Itzik Cohen from Shas Party, That's the Kind of Knesset Members We Need*, HAARETZ (Feb. 4, 2021), <https://www.haaretz.co.il/opinions/premium-1.9507269> (Isr.).

235. See Teachout & Khan, *supra* note 32, at 58 ("Our taxonomy is not exhaustive, and never could be, precisely because power exerts itself in infinite discreet guises.").

and may change their present policies and even future policies in response to demands by the corporation.²³⁶

In this Part, we propose a non-exhaustive set of parameters and indicators that constitute an initial universal methodology for identifying concentrated economy-wide power with potential influence on policymakers.

A. Size

Size can be measured as the value of an entity relative to the market or the economy as a whole. Still, this is not the only relevant measurement. Other relevant parameters are: (1) the relative scope of debt taken on by the entity or its controllers and to whom this debt is owed; (2) the relative scope of managed assets; and (3) the number of employees, sales, imports or exports, etc.²³⁷ These parameters should be measured against the market as a whole, in comparison to other entities in the market where a market for comparable entities exist, in comparison with aggregate economic indices, and the like. For instance, a corporation may not be dominant or significant in its sales in a national market but still be a significant and important exporter. When size is significant relative to the entire economy, the “too-big-to-fail” problem emerges along with the ability to influence policymakers to guarantee the perpetual bigness of the entity and its stream of revenue, for example.

Unlike the classic laissez-faire approach, even when the size of an entity in the economy is entirely driven by its innovative and

236. For example, the Israeli government has been criticized for making some national population health data available to Pfizer in return for a preferential supply of the company’s COVID-19 vaccines, possibly in violation of privacy protection laws. See Agence France-Presse, *Israel-Pfizer Vaccine Deal Points to ‘Data for Doses’ Swap*, FR. 24 (Jan. 18, 2021), <https://www.france24.com/en/live-news/20210118-israel-pfizer-vaccine-deal-points-to-data-for-doses-swap>.

237. To avoid loopholes, the parameters should apply also when corporations set up a partnership or a joint venture without the direct control of a concentrated economy-wide entity. In such a case, the parameters of the partners should be considered together.

efficient activity, such a corporation may deserve the attention of regulators for the underlying potential influence on policymakers. There is often a point in time at which the growth engines of a giant entity shift from internal combustion to external mergers and acquisitions. When these mergers and acquisitions take place in other markets while using the entity's size and position to ease its entry, this merits the attention of policymakers and regulators. For example, bigness in one market can make access to credit much easier than the possibilities available to other competitors in a new market. Although this kind of entry is not bad or harmful per se, the potential of accumulated economy-wide power needs to be considered when it occurs.

It is often argued that antitrust laws do not make size an offense unto itself. This perception of antitrust law is embedded in important cases of the U.S. Supreme Court, emphasizing not only that bigness is not a competition issue but also that the existence of power generated as a result of bigness is not an antitrust problem if this power is not exerted.²³⁸ Although this perception may be true sometimes within the regulation of competition in a single market, things may differ when economy-wide considerations are at stake. While large corporations may not be exerting their power to dominate a single market if there are other similar competitors, they may be exerting it in other markets, or they may be exerting it vis-à-vis policymakers and regulators.

In fact, one of the most important traits of bigness is untouchability. Large corporations need not overtly exert their political power to influence policymakers and competitors, because they are simply "too big to mess with." Indeed, an eight-hundred-pound gorilla need not exert power to maintain its dominance and deter potential rivals.²³⁹ It just must sit there and eat bananas.

238. *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offense or the existence of unexerted power an offense."); *United States v. Int'l Harvester Co.*, 274 U.S. 693, 708 (1927) (stating the law "does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power").

239. Recalling the image in *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002) (containing Vice Chancellor Leo Strine's characterization of controlling shareholders as 800-pound gorillas). In a similar vein Justice Louis Brandeis wrote that "power may arise merely out of position. Wherever a dominant position

B. Debt

Excessive financial leveraging or excessive debt, private or public, taken by the entity itself or by the controlling shareholder, can create perverse incentives to influence the structure of the market. This can also influence the regulatory climate in which an economic entity is operating to guarantee a bigger stream of revenue or a higher valuation of conglomerate assets that are used as collateral for existing or future debt. Debt is not detrimental per se, but when it is excessive, combined with bigness, and combined with the potential to influence policymakers, it creates an incentive to apply political power to secure the repayment of the debt at the expense of the general public welfare.

C. Essential Infrastructure—Controlling the On/Off Switch

Control of essential infrastructure either entirely or even controlling part of the production chain of an essential product or service such as energy, telecommunications, media, broadcast platforms, and the like, generates the potential to influence policymakers. Broadly speaking, the ability of an entity to shut down all or some of the activity in the economy or in a market that is essential to the economy or society can be translated into political influence.

One could easily look at some digital platforms or networks as controllers of such essential infrastructure. However, we emphasize the role of independent news media. The capture of media by economic interests is in and of itself a reason to sound an alert.²⁴⁰

has been attained, restraint necessarily arises.” *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting). On the fear, paralysis, and resulting suppression of information from policymakers as a result of bigness, see DIGITAL PLATFORMS REPORT, *supra* note 3, at 74 (“[T]he Subcommittee encountered a prevalence of fear among market participants who depend on the dominant platforms.”).

240. Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSPS. 113, 125–26 (2017) (restraining political power of corporations requires institutional factors such as strong media, independent prosecution and judiciary, and a political system that favors competition); *see also* Lande & Vaheesan, *supra* note 10, at 13.

D. Multimarket Activity

In the past, economists rejected the notion that a conglomerate with a non-dominant position in different markets poses a problem in terms of competitiveness.²⁴¹ Although this perception may have changed,²⁴² antitrust laws still lack the tools to identify the problem. The presence of a large economic entity in several markets can harm competition in those markets through cross-subsidies,²⁴³

241. ADAMS & BROCK, *supra* note 8, at 175. Criticizing the logic behind this ignorance, Adams & Brock write:

If ExxonMobil were to acquire a yogurt company, this would create no competitive threat since ExxonMobil was not even remotely involved in the production of yogurt prior to the merger. The yogurt company's market share would be the same the day after the merger as the day before; therefore, the yogurt market presumably would be unaffected by the acquisition. They dismiss, as irrelevant, concerns about conglomerate bigness and aggregate concentration of control in the economy generally (the share of all economic activity *controlled* by the largest firms).

Id.

242. See, e.g., Kosenko, *supra* note 134; Tarun Khanna & Yishay Yafeh, *Business Groups in Emerging Markets: Paragons or Parasites?*, 45 J. ECON. LITERATURE 331 (2007).

243. ADAMS & BROCK, *supra* note 8, at 176 (“[B]ecause the operations of huge diversified firms span a diversity of individual markets and industries, they may be able to cross-subsidize their operations in one field with resources drawn from other fields—an option not available to the firm’s nonconglomerate, specialized rivals.”).

interdependencies,²⁴⁴ reciprocal trading,²⁴⁵ and cross-financing.²⁴⁶ In addition, diversified economic activities enable more sophisticated regulatory capture. For example, a government official or politician may be barred from retiring and taking a position in a company that was under his regulatory purview but permitted to take a position in a company in a different market altogether even if that company is part of the same conglomerate.²⁴⁷

Multimarket activity becomes particularly concerning when one of the sectors in which an entity is active is the financial sector. If the availability of financial resources to competitors and potential newcomers is dampened by the cross-ownership of financial and non-financial economic activities, both consumer welfare and public welfare are at risk. The attention that should be given to this kind of multimarket activity depends on the intensity of the competition in the

244. ADAMS & BROCK, *supra* note 8, at 181 (“Large conglomerate firms come into contact with each other as buyers, sellers, rivals, or potential competitors at numerous places throughout the economy. As a result, competitive vigor may erode as conglomerate giants come to recognize their mutual interdependence and community of interest across the diverse markets and industries in which they operate.”).

245. *Id.* at 178 (“[T]he essence of reciprocal dealing is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases.”).

246. For example, a financial institution owned by Conglomerate A extends credit to an energy company owned by Conglomerate B while a bank owned by the latter extends a loan to an oil refinery owned by Conglomerate A.

247. There are probably countless examples of this kind of revolving door. One particularly famous case is that of former Vice President and Secretary of Defense, Dick Cheney. Cheney served as Secretary of Defense from 1989 until 1993 under the administration of President George H. W. Bush. In 1995, he was appointed chairman and CEO of Halliburton, a giant global holding company with subsidiaries that had government contracts, including with the Pentagon. In 2000, Cheney left the firm to become George W. Bush’s influential Vice President. See John Burnett, *Cheney’s Role in Halliburton Contracts Debated*, NPR (Dec. 23, 2003), <https://www.npr.org/templates/story/story.php?storyId=1567430>; Robert Bryce, *Cheney’s Multi-Million Dollar Revolving Door*, MOTHER JONES (Aug. 2, 2000), <https://www.motherjones.com/politics/2000/08/cheney-multi-million-dollar-revolving-door/>.

financial market and the relative size of the economy-wide concentrated entity in each of the markets in which it operates.

E. Heavily Regulated Sectors

Looking at the market itself is important to understand the potential political influence of the entities taking part in it. Borrowing from the famous example of Adam Smith, it seems that dominance of a corporation in the market for the production of needles that acquires a dominant position in the market for nails does not raise immediate concern regarding the creation of potential influence on policymakers.²⁴⁸ More elements would have to be added to the mix—e.g., a substantial number of employees or being a major exporter—for the needle-and-nail conglomerate to turn into an influential economy-wide entity.

An important indicator of the ability to exert potential influence on policymakers is the intensity of regulation in the sector. This could be measured by the number of regulators that supervise the activity in the sector, the number of licenses required for this activity, or the frequency and complexity of regulatory approvals required in the market. The heavier the regulation in a certain sector and the larger the entity that is considering entering the sector, the more likely it is that the entity will eventually use its economic power to influence the policymakers in that sector.

Even when a sector is not regulated by licensing requirements, permits, allocation of assets or rights, and the like, the ability to receive government grants, tax relief or even special tax regimes, or deferrals of statutory obligations, all indicate the existence of influence over policymakers whose job is to guarantee equal treatment.

248. There's a caveat. If the merging entities are large and the merger is intended to signal a warning to potential entrants or to create a threat against, say, a producer of staples and nails to deter the latter from branching out into the needle market, then the merger should be flagged under the potential concentrated economy-wide power methodology advanced here.

F. Regulatory Capture

The ability to influence policymakers is a well-documented phenomenon that takes various forms. For example, through the revolving doors between branches of government, including the appointment of industry veterans to key government positions and the appointment of retired government officials to lucrative senior corporate positions, a firm can signal to existing regulators that undesirable regulatory action may harm their prospects of getting a job in the future in that firm or in the market at large. Frequent contacts with regulators are also a concern, as is contact with multiple regulators, which gives the regulated entity a superior bargaining position because of its broader perspective and accumulation of knowledge vis-à-vis each single regulator. Special relations with regulators and policymakers can yield better treatment than other firms enjoy or softer treatment compared to tougher actions against the rest of the players in the market.

Where allowed, spending on contributions to political causes and on lobbying activity can also be an indicator of an economic entity's political influence, but this indicator should be observed with caution. The use of contributions and lobbyists may indicate that an entity lacks other types of influence and needs to send funds directly to safeguard its private interests. Spending on lobbyists can also be an indicator that an entity is being scrutinized for its dominant position and resorts to lobbying, having lost its ability to exert more subtle avenues of influence.

Not all of the components that we discuss need to coexist for an entity to be in a position of power. However, the more indicators and parameters found and the more extreme they are, the more likely it is that the entity they characterize holds an economy-wide concentration of power that should be of concern.

V. CONCLUSION

The famous writer, futurist, businessman, and editor of *Fortune* magazine, Alvin Toffler, once quipped, “[I]n thinking about the future,

it is better to err on the side of daring than the side of caution.”²⁴⁹ This approach may not be the optimal recipe for developing new methods of regulation, but when others have already dared, it would be commonsensical to draw on their experience in formulating better regulation. This Article proposes exactly that. Looking back at three decades of regulatory reforms implemented in the Israeli economy to break up economy-wide concentrated power in the banking system, the financial system, and the corporate arena, one clearly observes that antitrust laws played no role in tackling bigness. Instead, one realizes that bigness is related, complemented, and amplified by the ability of economy-wide entities to exert power over policymakers. It matters not whether this power encourages policymakers and regulators to bestow favorable or advantageous treatment on the already powerful or simply paralyzes them when intervention is called for in the public interest. Either way, public welfare is undermined. What makes the Israeli case unique is the evolution of reforms, culminating with the recognition that it is sometimes better to undercut the creation of economy-wide concentration of power before it happens than to incur its harm for decades before the time is ripe to break up concentrated economic entities. This accumulated experience was used here to draw the outline of a universal methodology for identifying those entities that should be, at least, monitored.

How economy-wide concentrated entities should be regulated is an entirely different question. Some of the answers may lie in the ambit of antitrust enforcement because antitrust enforcement is essentially concerned with curbing excessive corporate power. Merger control or breaking up corporations can be the solution for entities that are already too big or potentially dangerous according to the parameters and indicators of the proposed methodology. However, our parameters and indicators can also be used to identify entities in earlier stages of the accumulation of power. In these cases, the toolbox of antitrust enforcement does not contain appropriate measures. The answers will then often require special restrictions within a targeted legislation, tailored for the specific problems. These can include restrictions on corporate pyramidal structures, limitations on the amount of public or

249. ALVIN TOFFLER, *FUTURE SHOCK* 419 (1970).

private credit that a corporation or its controllers can take, restrictions regarding appointment of directors who retired from the government, limitations on participation in public tenders, restrictions on mergers and acquisitions even if—and maybe especially if—the expansion is in new sectors rather than sectors in which the entity is already active, etc.

Some measures are obviously more intrusive and drastic than others. For example, rejecting a corporation's offer in a government tender or refraining from granting a license based on the concern that it might increase the corporation's economy-wide concentration may sound severe, but breaking up a conglomerate is harsher. The proposed methodology can be helpful in this respect as well. The more parameters and indicators one finds in a concentrated entity, the stricter the regulatory response should be.

The adaptable methodology that we propose here fills a gap in the implementation of antitrust law. As a final note, we suggest that this methodology can work in two directions. The proposed methodology's binoculars can also be flipped. When its parameters and indicators blink a "red alert" of economy-wide concentration of power and no action is taken, or, worse, policymakers vehemently deny or discard the findings, then at least it is clear that the public welfare is not served.