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Financial Power in Competition Policy as a Key Component of Modern Bigness

ARTICLE

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ABSTRACT

At the sidelines of antitrust and competition law there have always existed theories that reach beyond the mere harms of market power and look at the effects of financial power or financial bigness. In light of the power currently held by the Big Tech giants, competition law has returned its attention to such effects and even introduced new (asymmetric) competition tools and regulations such as the Digital Markets Act and Section 19a of the German Competition Act that list financial power as an assessment criterion. Applying a broad definition, this contribution revisits diverse theories ranging from (antitrust) theories of bigness to the theory of financialisation, to understand the significance and influence of financial power. It then looks at legal avenues in competition law that allow the consideration of financial power in order to better understand this aspect of modern bigness and how it can be challenged.

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1. INTRODUCTION

In recent years high market concentrations[1] and diverse, often new, manifestations of corporate power in the digital sphere have troubled law enforcers, academia, civil rights groups and policy makers.[2] An overall consensus has been reached that traditional competition law enforcement has failed to prevent this power and to sufficiently curb its effects on competition.[3]

In light of these findings, the EU and its member states have introduced new sector specific regulations (the Digital Markets Act, DMA and the Digital Services Act, DSA)[4] and new competition tools (for example Section 19a German Competition Act, *Gesetz gegen Wettbewerbsbeschränkungen*, GWB) that, for the sake of effectiveness and speedy enforcement, move away from the traditional method of establishing market power and their focus on the harms of market power alone. Where the finding of market power (and the definition of the relevant market) is a time-consuming task, the addresses of the new tools and regulations can be determined more quickly by use of a set of quantitative criteria.[5] Significant financial power[6] is among the (optionally stand-alone) criteria to establish or designate the new addresses of these regulations and competition law tools.

While competition laws have always noted the relevance of financial power (for instance in Article 2 (1)(b) of the European Merger Regulation, EUMR), theories of bigness and the effects of financial power have, in the last decades of competition law enforcement, either been rejected[7] or considered refuted.[8] Anne C. Witt, for instance, shows how in under two decades just a handful of undertakings had acquired over 800 businesses, amongst them hundreds of innovative tech start-ups, but there is little analysis of the financial resources fuelling these structural changes.[9] Financial power has thus become somewhat of an *elephant in the room*: its effects on markets and the idea of merit-led competition seem obvious and troublesome, but have been near-impossible to prove sufficiently in court.[10] The concentration of power and the vast financial wealth now held by leading Big Tech firms have made these problems hard to ignore.[11]

Given these developments, this contribution first, (re-)visits past and current theories of bigness, all of which address problems 'customarily neglected'[12] by antitrust doctrine. In doing so we

1 See for instance D Autor et al., 'The Fall of the Labor Share and the Rise of Superstar Firms' (2020) 107/5 American Economic Review 180; G Gutiérrez & T Philippon, 'Ownership, Concentration and Investment' (2018) 108 AEA Papers and Proceedings 432.

2 See inter alia S Zuboff, *The Age of Surveillance Capitalism. The fight for a human future at the new frontier of power* (Public Affairs, 2019); N Petit, *Big Tech and the Digital Economy – The Moligopoly Scenario* (OUP 2020); D Acemoglu & S Johnson, Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity (Basic Books 2023).

3 A range of important studies were conducted on this question. See for instance: J Crémer et al., 'Competition policy for the digital era' (EU Commission, April 2019), J Furman et al., 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (UK Digital Competition Expert Panel, March 2019); Chicago Booth George J. Stigler Center, 'Report from the Committee for the Study of Digital Platforms' (September 2019); Australian Competition & Consumer Commission's Report, 'Digital Platforms Inquiry' (July 2019); A Wambach et al., 'A New Competition Framework for the Digital Economy – Report by the Commission' (December 2019).

4 Regulation (EU) 2022/1925 of the European Parliament and Council of 14 September 2022 on contestable and fair markets in the digital sector [2022] OJ L 265/1 (Digital Markets Act); Regulation (EU) 2022/2065 of the European Parliament and Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC [2022] OJ L 277 (Digital Services Act).

5 These include user numbers, financial earning and the significance of these firms or undertakings in a number of digital markets or platform services.

6 While Section 19a GWB simply lists financial power (*Finanzkraft*) as a criterion, Art. 3 (2)(a) DMA specifies an 'annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States'.

7 H Hovenkamp, 'The Slogans and Goals of Antitrust Law' (2023) 25 New York University Journal of Legislation and Public Policy 705.

8 R Posner, 'Conglomerate Mergers and Antitrust Policy: An Introduction' (1969) 44 St John's Law Review 529.

9 A C Witt, 'Who's afraid of conglomerate merger?' (2022) 67/2 Antitrust Bulletin, 208–236 (208).

10 A good example is the European Intel Case, see Case C-413/14 P, *Intel Corp v European Commission* [2017] ECLI:EU:C:2017:632; see also M Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga', (2022) 7 European Papers 627; L Karlinger & M Motta, 'Exclusionary Pricing When Scale Matters' (2012) 60/1 The Journal of Industrial Economics, 75.

11 A Gerbrandy & P Phoa, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power' in M Bennett, H Brouwer and R Claasen (eds), *Wealth and Power* (Routledge 2022), 166.

12 C Edwards, 'Conglomerate Bigness as a Source of Power', in NBER (ed), *Business Concentration and Price Policy* (PUP 1955), 331–359.

choose a broad definition of financial power that includes (antitrust related) theories of bigness (deep pockets, entrenchment), but also looks at theories of common ownership structures and financialisation to critique underlying power and structures of financial capital. We then look at the role that financial power plays in understanding modern bigness and how current competition law – both older and newer instruments, doctrines and theories – can prevent the manifest harms associated with it. Here a special focus is placed on financial power in the context of predatory abuse, merger control and new competition law tools.

2. FINANCIAL POWER AND THEORIES OF BIGNESS

Much of the theoretical framework examined in this section is primarily rooted in US antitrust scholarship. In section 3, we translate these theoretical insights into the context of current EU competition law.

Financial power is the power or *economic capacity*[13] derived from access to financial resources and thus comprises all of an undertaking's financial assets and its financing options in terms of equity and debt financing as well as its access to the capital market.[14] In competition policy this can be defined narrowly to only include a short-term spending capacity, i.e., cash-flow or liquidity,[15] or very broadly to include multiple types of financial assets: liquidity, solvency, investments, and even access to cross-subsidisation[16] and state aid.[17]

This paper relies on a broad definition of financial power in order to not restrict the scope of its analysis. To explain the effects of financial power, so-called theories of *bigness* (rather than of market power) have been developed. In keeping with the broad definition, we do not only include traditional theories of *bigness* but also at theories that look at the structural interconnectedness of wealth, ownership and investments, as further (more long-term and even entrenched) expressions of financial power: While the so-called theory of deep pockets stipulates the effect of financial power most directly, theories of common ownership and financialisation also look at wealth concentration and its effects that are not market-related or limited to delineated competition law markets. In addition, financialisation and common ownership are also essential to understand the financial power and (long-term) business model of Big Tech. A recent economic study shows that after a period of scaling and creating network effects and a period of surviving high costs and low revenues, many of the Big Techs have transformed into rent-seeking monopolies. These in turn generate their revenues not through producing goods, but through 'platform ownership drawing in a large ecosystem of users whose digital footprints can be monetised'[18] and financialisation allows this rent extraction to be perfected.

Traditionally bigness theories have been placed in sharp contrast to theories looking more concisely at competition (i.e., effects on welfare or the competitive process).[19] Here it is often suggested that theories of bigness fall outside of the scope of competition policy and intend to protect a more far-reaching set of goals. Where competition policy's analysis of power is focussed specifically on market power and aims to protect competition, theories of bigness venture into an analysis of other sources and manifestation of economic power and seek to indiscriminately limit bigness rather than to prevent welfare-encroaching effects on competition.[20] It is thus suggested that, rather than being a competition question, the control of *bigness* would require a regulation of certain sectors or the economy at large.[21] In contrast to this understanding,

13 On capacity as power, see L Li, *Power' in Competition Law: A Reconception and Its Application in the Digital Era* (Apollo – University of Cambridge Repository 2021).

14 See A Fuchs, Commentary on 18 GWB, in Immenga/Mestmäcker, (eds) Wettbewerbsrecht Bd. 2, 7. Ed, 2024, para 125, 126.

15 See German Monopolies Commission, V. Expert Opinion, Economic criteria for the application of law, 1984, (Monopolkommission, HG V: Ökonomische Kriterien für die Rechtsanwendung) para 788.

16 Commission Decision, 21.10.2002, M.2908 *Deutsche Post/DHL (II)*, para 29 et seqq.

17 Case T-156/98 *RJB Mining plc v Commission* [2001] ECLI:EU:T:2001:29; Commission Decision, 7.5.2002, ECS C.1350 *RAG/Saarbergwerke/Preussag Anthrazit (II)*, para 47 et. seqq.

18 R Fernandez et al., Engineering digital monopolies – The financialisation of Big Tech, SOMO Report, Amsterdam 2020, see https://www.somo.nl/wp-content/uploads/2020/12/Engineering_Financial-BigTech.pdf, 47.

19 Hovenkamp (n 7) 705.

20 ibid, 717.

21 Ibid, 721.

however, it must be acknowledged that several theories of bigness have been developed within the antitrust and competition disciplines with the aim of closing existing enforcement gaps and in order to address problems 'customarily neglected'[22] by antitrust doctrine. Crucially, authors of these theories seek to address underlying problems that result from pervasive economic power which interact with or impact the harms traditionally targeted by antitrust and competition policy and are not always entirely distinct from it. Such problems relate to sources of economic power beyond market power (i.e., financial power and more recently 'data power'[23]), corporate structures that reach across the boundaries of narrowly defined markets (common ownership and conglomerates) and non-market problems (social and political) that result from economic power and in turn affect the competitive free market system.[24] Several theories of bigness place a special emphasis on alternate sources or structures of economic power and thus investigate criteria mentioned in competition acts themselves (i.e. Article 2(1)(b) EUMR, Section 19a(1) GWB).

By relying on a very broad notion of financial power, this paper, also however, recognises that the effects of power and concentration cannot be limited to a small set of competition parameters. Individual liberties, political freedoms, and discursive freedoms too rely on the functioning of markets and competition and are interconnected with these. This connection is highlighted by Fox's assertion that 'democracy requires markets', which implicitly positions antitrust/competition policy as a mechanism to ensure the proper functioning of those markets.[25] Whether or not this forms part of the 'foundational myth' of competition policy, as Elias Deutscher suggests,[26] there remains a valid argument that competition law, even if not explicitly designed for this purpose, can serve as a tool to safeguard democracy by preventing economic domination. A recent OECD study builds on this premise, emphasising the complex yet undeniable links between economic and political power and underscoring the importance of dispersed economic power for a functioning democracy.[27] Building on decades of economic thinking, Johnson and Acemoglu echo this perspective in their proposal to redirect technology toward empowering individuals and democratising progress. They identify antitrust as one of the necessary policies, stating: 'breakup and, more broadly, antitrust should be considered as a complementary tool to the more fundamental aim of redirecting technology away from automation, surveillance, data collection, and digital advertising'.[28] This paper contributes to these debates by exploring financial power as a specific manifestation of economic power and examining how competition policy can incorporate this into its analytical framework.

2.1. BRANDEISIAN THOUGHTS ON BIGNESS (AND FINANCIAL POWER)

While the writings of Justice Brandeis span from issues of privacy to those of tax law and the role of financial institutions in economy, Louis Brandeis has become synonymous with suspicions against bigness in the antitrust community and his essay *The Curse of Bigness*[29] has inspired an equally encompassing and broad-stroke look at the effects and perils of concentration and bigness by authors such as Tim Wu and Lina Khan.[30] *The Curse of Bigness* dissects the tremendous

22 Edwards (n 12).

23 Please refer to Justine Haekens, presentation at MOBI conference. Justine's article will not be included in the special issue.

24 In fact, to suggest that 'market' and 'non-market' aspects of economic power can always be separate from one another denies the pervasive effect that modern capitalism has on our societies and lives.

25 E M Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46/4 Legal Issues of Economic Integration, 317.

26 E Deutscher, 'The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy' (2022) 41 Yearbook of European Law, Volume 197.

27 OECD, 'The Interaction between Competition and Democracy' (2024) <https://www.oecd.org/en/publications/the-interaction-between-competition-and-democracy_8b3a575f-en.html> accessed 20 November 2024; This connection is particularly pertinent in addressing the challenges posed by Big Tech, especially when the 'toxic mix' of technology, concentration, and profit-driven motives, as described by Ezrachi and Robertson, threatens the democratic foundations of society, see: Ariel Ezrachi and Viktoria HSE Robertson, 'Can Competition Law Save Democracy? Reflections on Democracy's Tech-Driven Decline and How to Stop It' (2024) Journal of Antitrust Enforcement.

28 Acemoglu & Johnson (n 2), 406.

29 L Brandeis, *The Curse of Bigness*, in Osmond K Fraenkel (ed) *Miscellaneous Papers of Louis Brandeis* (New York: The Viking Press, 1934).

30 L Khan, 'Amazon's Antitrust Paradox' (2017) 127 Yale Law Journal 710; T Wu, *The Curse of Bigness – Antitrust in the New Gilded Age* (Columbia Global Reports 2018); for a critical analysis see D Crane, 'How Much Brandeis Do the Neo-Brandeisians Want?' (2019) 64/4, *The Antitrust Bulletin*, 531.

wealth held by the railroad companies and combinations of his times and offers suggestions of how to divest this wealth.[31] In addition, dissenting opinions by Brandeis in judgements such as *Louis K. Liggett Co. v. Lee* (a state tax law case involving chain stores)[32] illustrate how bigness 'encroaches(...) upon the liberties and opportunities of the individual'.[33] He further suggested that large private stock companies serve only the interests of the investment banker.[34] In his writings Brandeis placed the large corporation at the centre of economic, political and social climate of his time,[35] offering insights that are in part nostalgic — longing for a time defined by a more cautious economic policy — and deeply sceptical of the effects of corporate power. While Brandeis' critique of bigness is thus not methodological or rooted in antitrust doctrine, it offers insights into the full scope of problems that can be associated with large corporations and has thus inspired conversation on 'bigness' and the power of capital ever since.

2.2. THEORY OF DEEP POCKETS

The, albeit short-lived, theory of *deep pockets* (alias theory of *cut-throat competition* or *entrenchment*) dates back to the emergence of large corporate conglomerates or portfolio firms such as Dow/DuPont and General Electric in the US in the 1950s. Famously, the New Deal/FTC economist Corwin Edwards developed a theory of 'Conglomerate Bigness' to address the market and non-market harms of financial power.[36] This theory was developed to address problems 'customarily neglected' by an economic thinking centred around the single-market enterprise. These include various dimensions of across-market power but also what Edwards calls 'non-market manifestations' of power, as Edwards saw the very conditions of democracy undercut and threatened by big enterprise.[37] Like Brandeis, Edwards was concerned with bigness ('I shall treat the problem of the conglomerate as synonymous with the problems of bigness in business enterprise and of diversification in business activity'[38]) but quickly established a focus on financial power of deep pockets ('An enterprise that is big in this sense obtains from its bigness a special kind of power, based upon the fact that it can spend money in large amounts.'[39]). According to Edwards, financial power has a direct and prevalent effect of competition since '(m)oment by moment the big company can outbid, outspend, or outlose the small one; and from a series of such momentary advantages it derives an advantage in attaining its large aggregate results.'[40] In line with traditional antitrust theory, Edwards proposed restrictions of predation, tying (tie-in selling) and price discrimination, but also what he calls the 'reciprocal favours' that are offered and met amongst firms (and their adjoining financial institutions) that reach a particular size.[41]

Apart from this overarching theory, the decade between 1965 and 1975 saw the development of more intricate theories of predation and *cut-throat* competition,[42] as well as the embracing of an entrenchment theory in merger cases such as *Procter & Gamble Co.* by both the Supreme Court[43] and the Department of Justice and its merger guidelines of 1968.[44] Both theories were

31 Brandeis (n 29).

32 US Supreme Court, Louis K. Liggett Co. v. Lee 288 US 517 (1933).

33 Louis K. Liggett Co. v. Lee 288 US 517, 548 (1933).

34 Louis K. Liggett Co. v. Lee 288 US 517, 545 (1933).

35 'We cannot maintain the democratic conditions in America if we allow organization to arise in our midst with the power of the (United States) Steal Corporation.' Statement of Louis Brandeis, Hearings before the House Committee on Investigations of the United States Stela Corporation 62d Cong. 2d Session 2862, see 'Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined' (1956) 66/1 The Yale Law Journal, 69.

36 Edwards (n 12), 331.

37 Wu (n 30).

38 Edwards (n 12), 333.

39 ibid, 334.

40 ibid, 335.

41 Edwards (n 12) 340–345.

42 J S McGee, 'Predatory Price Cutting: The Standard Oil (N.J.) Case' (1958) 1 Journal of Law and Economics 137; J S McGee, 'Predatory Pricing Revisited' (1980) 23(2) Journal of Law and Economics 289; L.G. Tesler, 'Cutthroat Competition and the Long Purse' (1966) 9 Journal of Law and Economics 259.

43 US Supreme Court, United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

44 US Department of Justice, 1982 Merger Guidelines, https://www.justice.gov/archives/atr/1982-merger-guidelines.

linked as the latter (entrenchment theory) rests on the premise that the large firms resulting from such mergers would have access to economies of scale and scope not available to other firms and an incentive to engage in predatory conduct.

While many of these conglomerates later disappeared in a series of bust-up takeovers when the conglomerate corporate structure lost popularity in the 1980s,[45] the rise of Chicago School thinking and the embrace of more meticulous welfarist methods also meant that such theories soon fell from favour. In a paper from 1969 Posner refuted all of Edwards antitrust assumptions and theories of harm,[46] while other Chicago School scholars, such as John McGee and Lester Tesler, argued that price cutting was neither a logical nor effective strategy for a firm seeking to monopolise a market, and that a firm's *long purse* and access to capital would not enable *cutthroat competition* due to the costs of maintaining and using such resources.[47] More fundamentally, authors such as Bork contended that mergers decisions such as *Procter & Gamble* only made sense through an antitrust lens that is (wrongly) pro-small business.[48] The US Merger Guidelines of 1982 eliminated entrenchment as a basis for challenging non-horizontal mergers.[49]

The Merger Guidelines of 2023, however, reintroduce an entrenchment theory of harm and pay tribute to decisions such as *Procter & Gamble Co.*[50] The new guidelines distinguish anticompetitive entrenchment from 'growth or development as a consequence of increased competitive capabilities or incentives'[51] and link entrenchment to the raising of entry barriers (in digital markets), the removal of nascent competitive threats and the extension of market power into another market. While other jurisdiction have not re-embraced *deep pocket* or entrenchment theories this explicitly, variants thereof include the *agency theory*, which looks at the misalignment of the incentives of shareholders and those of management,[52] the *internal capital market theory*, which looks at a big firms access to capital,[53] the *resource theory* which does not only analyse a firm's access to resources but also their incentives to use their resources (goods but also a highly skilled and educated workforce) to continue to grow and diversify[54] and the *market power theory* which looks at increased power by diversification across markets.[55]

2.3. COMMON OWNERSHIP

In contrast to the deep pockets theory, *common ownership* looks not at the resources of a firm or undertaking but at the financial structures underlying — and thereby tying together — a number of interrelated undertakings. Common ownership is the phenomenon of institutional investors buying, managing and selling shares and assets — often on behalf of clients — in competing and also vertically integrated undertakings in a particular industry (see Lianos 2018 on the agrochemical sector and food supply chains).[56] Through portfolio managers, institutional investors are an attractive alternative to diversifying the risks arising from capital investment by taking advantage of the expertise of portfolio managers, who develop and execute investment strategies and oversee portfolio assets on a daily basis. Common ownership is an important

45 G Davis et al., 'The Decline and Fall of the Conglomerate Firm in the 1980's: The Deinstitutionalization of an Organizational Form' (1994) 59 American Sociological Review 4, 54; J Mendelsohn, 'Reconsidering Conglomerates – How are digital conglomerates different from those in the past? Theory and implication' (2023) 15/1 Competition Law Review 83; See Y Lim, 'Tech Wars: Return of the Conglomerate – Throwback or Dawn of a New Series for Competition in the Digital Era?' (2020) 19 Journal of Korean Law 47.

46 Posner (n 8).

47 McGee (n 42); Tesler (n 42).

48 R H Bork, *The Antitrust Paradox* (1978), 255.

49 DOJ 1982 (rn. 39).

50 US Department of Justice, 2023 Merger Guideline, 2.6, see https://www.justice.gov/atr/merger-guidelines/applying-merger-guidelines/guideline-6 referencing United States Court of Appeals, District of Columbia Circuit, *United States v. Microsoft Corp* 253 F.3d 34 (D.C. Cir. 2001).

51 *United States v. Microsoft Corp* 253 F.3d 34 (D.C. Cir. 2001) (n 45).

52 See M Bourreau & A de Streel, 'Digital Conglomerates and EU Competition Policy' (2019) Working Paper March 2019, 5; OECD, 'Roundtable on Conglomerate Effects of Mergers – Background Note' (DAF/COMP(2020)2) 7.

53 Bourreau & de Streel (n 52) OECD (n 47).

54 ibid, 6 and OECD (n 47) 7.

55 ibid.

56 I Lianos, 'The Bayer/Monsanto merger: a critical appraisal', German parliamentary hearing 19(9)90 (2018) https://www.bundestag.de/resource/blob/561882/f3c2c54c94f77f312e806e7d97615d18/sv-lianos-data.pdf.

aspect of analysing the competitive effects of financial power since it offers insights into financial concentration. In addition, common ownership structures give deep insights into the novelty of Big Tech – the ability of large platforms to cross-subsidise, acquire ever more assets and influence and to entrench their roles as 'infrastructural cores of the larger tech universe'.[57]

As noted by Martin Schmalz, institutional investors challenge the traditional models of competition based on the assumption that firms' shareholders don't also own shares in the same firms' competitors'.[58] Hence, the common ownership theory originates from the concern over ownership concentration across several firms in the same industry that could 'diminish each *individual* firm's incentives to cut prices or expand output by increasing the costs of taking away sales from rivals'.[59] This ownership concentration can manifest in various forms, with it not always being obvious that anti-competitive effects only stem from controlling interests: Concentrated common ownership, for instance, refers to the scenario where a common shareholder possesses full ownership and control of one firm and holds a passive non-controlling interest in a competing firm. Conversely, diffuse common ownership entails a common shareholder holding minority stakes in two competing firms,[60] which may pose a competition risk on a cumulative basis.[61]

The approaches to dealing with potential or actual anti-competitive threats of common ownership differ by jurisdiction. Some merger control systems catch certain structural links that emerged from common ownership, while there are also other complementing mechanisms to detect minority shareholdings in competing entities through ex ante or ex post notification obligations.[62] In EU, common ownership theories of harm have been discussed from a theoretical point of view,[63] borrowing insights from the competitive analysis carried out in merger control procedures.[64] Given that merger control may catch part — but not all — cases that may be concerning, some authors suggest that competition law currently lacks a specific tool to properly address this issue.[65] Thus, despite the potential anti-competitive effects that have been the subject of extensive legal research[66] and the solid economic (theoretical) foundation, common ownership concerns have seldom shaped competition policy and often lack sufficient empirical evidence.[67]

2.4. THE THEORY OF FINANCIALISATION

Financialisation can be broadly defined as 'the increasing role of (...) financial actors and financial institutions in the operation of the domestic and international economies.'[68] I.e., the increasing role of the *logic of finance* and the specific incentives of the actors or agents in

57 SOMO report (n 18) 47.

58 M C Schmalz, 'Common Ownership and Competition: Facts, Misconceptions, and What to Do About It' (2017) OECD Background material for Hearing on Common Ownership by Institutional Investors and its Impact on Competition, 3.

59 E Elhauge, 'Horizontal Shareholding' (2016) 192 Harv L Rev, 1267, 1274. Elhauge also notes that communications to facilitate coordination may lead to worse anti competitive effects, but in absence of such coordination, there are still anti competitive effects derived from the structural links of common ownership.

60 A Tzanaki, 'Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy' (2022) 18(1) Journal of Competition Law & Economics 168, 182–183.

61 Tzanaki (n 60), 177.

62 OECD, 'Hearing on Common ownership by institutional investors and its impact on competition – Summaries of Contributions' (2017) https://one.oecd.org/document/DAF/COMP/WD(2017)83/en/pdf.

63 A comprehensive study of common shareholding across industries and its link to competition policy is available in N Rosati et al., 'Common Shareholding in Europe' (2020) EUR 30312 Joint Research Centre.

64 S Frazzani et al., 'Barriers to Competition through Common Ownership by Institutional Investors' (2020) ECON Committee of the European Parliament, 50.

65 Tzanaki (n 60) 252ff.

66 Tzanaki (n 60).

67 J J Rotemberg, 'Financial Transaction Costs and Industrial Performance' (1984) Mass Inst of Tech, 1554; T Bresnahan and S C Salop, 'Quantifying The Competitive Effects of Production Joint Ventures' (1986) 4 Inter'l J Ind Org 155; R J Reynolds and B R Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures', (1986) 4 Inter'l J Ind Org.141; E A Posner et al., 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) 81 Antitrust LJ 669.

68 For a similar, but broad definition, see G Epstein *Financialization and the World Economy* (Edward Elgar 2005), 3.

financial markets in the broader economy.[69] The use of this term has had resurging popularity in times of either financial crises or general discontent with the workings or the results of dominant economic policy (currently the rise of Big Tech).[70] In these contexts financialisation has been used to describe (and critique) (i) the increasing relevance and dominance of the financial industry (financial markets, products, institutions, assets, elites or investors) in the economy;[71] (ii) how welfare is increasingly created through financial channels rather than through commodity production;[72] (iii) and how this has led to ascendency of shareholder value.[73] It has also been suggested that the greater reliance on financial markets has changed market rationales and made markets more volatile and more susceptible to regulatory capture.[74] In addition, sociological theorists also suggest that financialisation can alter relevant political and cultural narratives on the functioning of the economy.[75]

While competition policy is concerned with economic power, in particular market power, the financial sources behind this power and how these resources align with other incentive structures and rationales are, however, seldomly assessed. In addition, it is often suggested that the rise of financialisation and the increased influence of financial investors and institutions has led to greater consolidation and concentration.[76] Alongside structural changes (down-sizing) often made by institutional investors (effects of private equity[77]) that lead to a greater concentration of sectors, another type of, perhaps less visible, consolidation emerges. This consolidation is not material or financial in nature but instead consists in large parts of industries (firms, investors, but also regulators) beginning to follow similar incentives structures and adopting a similar mindset — thereby following the *logic of finance*.[78]

First attempts to apply this theory to the Big Tech companies, show that financialisation can help to highlight the enormous financial wealth held by the leading firms and the amount of wealth required to compete with them[79] and how market capitalisation and access to financing by these firms entrench their power.[80] While Ioannis Lianos and Andrew McLean have shown that many of the Big Tech firms still have traditional management styles and ownership structures and thus do not always 'think' or act like hedge funds of large-scale investors,[81] recent research looking specifically into the balance sheets, payouts, and growth of goodwill and intangible assets of seven large tech firms, very much describes the power and tremendous profits of Big Tech as a result of financialisation.[82] The authors of this research argue that 'unchecked corporate power (and their) highly financialised nature' make Big Tech a distinct enterprise

69 In addition, we also see an ever-great disconnect between financial value and the real economy. See P Krugman, Opinion: 'Stocks are roaring. So is misery' (2020), NY Times (online), https://www.nytimes.com/2020/08/20/opinion/stock-market-unemployment.html?unlocked_article_code=1.bE4.5yBj._YpxDzQQvSCB&smid=url-share (22.11.2024).

70 SOMO Report (n 18) 25.

71 G Epstein, *The Political Economy of Central Banking* (Edward Elgar 2019) 380 (Chapter 14 'Financialization, Rentier Interests, and Central Bank Policy').

72 G Krippner, 'The financialization of the American economy' (2005) 3/2 Socio-Economic Review 173.

73 Epstein (n 71).

74 J Mendelsohn, *Systemrisiko und Wirtschaftsordnung* (Nomos 2018) Ch. 3.

75 K Phillips, *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century* (Viking 2006) 268; C Marazzi, *The Violence of Financial Capitalism*, (MIT Press 2010).

76 For the pharmaceutical industry see Lianos (n 42).

77 J Hook, *The Myth of Private Equity* (Columbia Business School, 2021).

78 In an interview Bethany McLean powerfully described how the financial sector before 2008 had fallen prey to 'a corruption that occurs when everybody thinks the same way', referring to a revolving doors phenomenon but also a mindset that made it possible to ignore large risks. See C-Span, Q&A with Bethany McLean, All the Devils are Here, November 2010 https://www.c-span.org/video/?296214-1/qa-bethany-mclean- (19.05.2024).

79 For example OpenAI's GPT-4 used an estimated $78 million to compute to train in 2023, while Google's Gemini Ultra required an estimated $191 million, see Artificial Intelligence Index Report 2024, https://aiindex.stanford.edu/report/.

80 I Lianos & A McLean, 'Competition Law, Big Tech and Financialisation': The Dark Side of the Moon, 15.09.2021 citing R J Caballero et al., 'Speculative Growth: Hints from the U.S. Economy' (2006) 96(4) The American Economic Review 1159.

81 Lianos & McLean (n 80).

82 See SOMO report (n 18) 29 et seqq. This report investigates the financial numbers behind the operations of seven leading Big Tech companies, five of which are headquartered in the US, namely Alphabet (Google), Apple, Amazon, Facebook and Microsoft, and two in China, namely Alibaba and Tencent.

'confirm the need to look at Big Tech as a sector'.[83] They describe the relevant business model as follows:

> 'The Big Tech model essentially revolves around creating, maximising and monetising network effects. These companies do this by exploiting their role as gatekeepers and owners of scarce and vital infrastructures, by leveraging this role to control prices of inputs and outputs, by promoting their own products and services, and by extracting rents'.[84]

2.5. FINANCIAL POWER AS PART OF A THEORY OF 'MODERN BIGNESS'

The rise of extremely large platforms and digital ecosystems has put the question of *bigness* back on the agenda. While their continued exclusionary and exploitative practices have called the efficacy of competition law[85] into question, the bigness and power of these firms and a true understanding thereof transcends the various facets and harms of market power and even of traditional market-oriented thinking. Instead, these firms have become a prevalent force in our social interactions, workspaces, structures of political debate, and even our (personal) preferences and habits.[86] The market power and the economic power of these firms has thus become deeply intertwined with their social power (their dominance and power of attention, value, meaning, truth and speech and social/media spaces),[87] normative power (ability to determine new rules of conduct, contract, preference, speech)[88] and political power (social media influence, old-school lobbying).[89]

When looking at modern bigness size (scope, reach, user numbers, network effects) matters, but so does wealth.[90] Vast financial power undermines the assumption that competition is based on merit, and allows long-term predatory practices (copying, purchasing, intimidating) to become dominant competitive strategies that fuel all of the non-market harms (social, political and normative) associated with modern bigness. Any (modern) bigness theory would thus be incomplete without a critical analysis of the financial resources and capabilities of the large firm.

In what follows we look at new and old legal gateways to consider and deal with financial power in competition law. Since such analysis is either new or has been dormant for some time, both the broad definition and the theories discussed above are still very much needed to understand the full scope and nature of the problem before applying the law accordingly.

3. COMPETITION LAW CONSIDERATIONS OF FINANCIAL POWER

While effects of financial power have carried little weight in competition law thus far, the rise of the large tech giants and the increases in market concentrations have renewed the interest in facets of economic power that reach beyond market power. In this section we show that both Article 102 TFEU and the EUMR are designed to allow the consideration of the effects of financial power and that there are new theories of harm (in particular of predation) and even new instruments (DMA notifications requirements and new competition tools) that enable a more profound engagement with the harms of financial power.

If used properly by the competition agencies (EU Commission and NCAs)[91] these instruments could place limitations on financial power, making sure that, as the deep pockets theory

83 SOMO report (n 18) 10.

84 SOMO report (n 18) 11.

85 For the comment that competition policy suffered from a 'slowness and lack of teeth' see G Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021), TILEC Discussion Paper No. 2021-04.

86 V Morozovaite, 'Hypernudging in the changing European regulatory landscape for digital markets' (2023) 15/1 Policy & Internet, 78; Sylvia Delacroix, *Habitual Ethics?* (Hart 2022).

87 Gerbrandy & Phoa (n 11).

88 J Mendelsohn, 'Die "*normative Macht" der Plattformen* – Gegenstand der zukünftigen Digitalregulierung' (The normative power of digital platforms – a concern for future regulation) [2021] MMR 857.

89 Instructive and far-reaching analysis, J Broulík, 'Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU' (2022) 45/2 World Competition 159.

90 See Gerbrandy & Phoa (n 11), 171.

91 While these uses of the law would ultimately be validated by the Courts (CJEU) the wording of the provisions are broad enough to allow the development of such theories of harm.

suggests, it is not used to exclude competition or to make markets incontestable. In addition, they could be used to prevent entrenchment and avoid further concentration effects of financial power. More systemic effects – concentration through common ownership and financialisation – of financial power can only be avoided with structural tools and are thus referenced in the context of merger regulation.

3.1. FINANCIAL POWER AND PREDATORY ABUSE

Ex post competition policy rests not on *bigness* or power (market power) alone, but requires abuse of that power to be shown with a theory of harm. In the past many non-horizontal theories of harm have been developed that can be linked to capabilities that result from financial power. Dating back to Edwards these include predation, price discrimination, tie-in selling and reciprocal favours. Newer theories include (platform) envelopment,[92] the organisation of products into ecosystems, acquisitions of potential competitors in related markets (discussed under 3.2.), the enabling parallel exclusionary conduct across multiple markets.[93] Amongst the theories of harm that can be linked to financial power, theories of predation (predatory pricing) are probably the most prevalent but also contentious.

Although predation cases 'are as old as antitrust laws themselves',[94] US and EU courts have been rather reluctant in sanctioning this type of behaviour. In the US, the predatory pricing doctrine dates back to the 1911 *Standard Oil* case and was soon legally formalised in the Clayton Act (1914) and later reinforced by the Robinson-Patman Act (1936) as an undesirable practice.[95] However, in the early 1960s, and more significantly from the 1980s onward, strong criticism from Chicago School academics resulted in a setback to the enforcement of these practices,[96] particularly through the inclusion of the proof of recoupment to the predatory theory of harm in the US, and Posner's advocacy for the use of economics to prove anti-competitive behaviours.[97] While the US judicial practice was not entirely embraced in the EU, which is founded on ordoliberal principles,[98] the cost-price analysis was recognized as a fundamental element in determining whether a price is predatory[99] under Article 102 TFEU. As a result, the application of the *As Efficient Competitor* (AEC) -Test, designed to assess whether an equally efficient competitor can effectively compete with the pricing conduct of the dominant undertaking, became relevant. However, this test has proven challenging for the EU Commission in predatory cases such as *Intel*[100] and *Qualcomm*,[101]

92 The concept of envelopment refers to the ability of a platform with dominance in one market to enter another platform market (whether the platforms are complements, substitutes, or unrelated) by bundling or tying the two platform products. See OECD, 'Roundtable on Conglomerate Effects of Mergers – Background Note' (2020) <https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf> accessed May 20, 2024 para 61.

93 See OECD (n 92) para 66.

94 M Motta, *Competition Policy: Theory and Practice* (CUP 2004) 412.

95 McGee (n 42) 137ff; Khan (n 30), 723–724.

96 As mentioned in section 2.2., in relation to the influence of Chicago School scholars. Additionally, the predatory pricing doctrine became more complex due to the introduction in 1975 of the average variable cost concept by Turner and Areeda, to distinguish predatory practices from legitimate competition. P E Areeda & D F Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88(4) Harv L Rev 697–733.

97 R A Posner, 'Exclusionary Practices and the Antitrust Laws' (1974) 41(3) U Chi L Rev 506, 520.

98 E Deutscher & S Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11(2) Competition Law Review 181, 194.

99 R Whish & D Bailey, *Competition Law* (OUP, 2022) 781.

100 Case T-286/09 RENV – *Intel Corporation v Commission* [2022] ECLI:EU:T:2022:19. In its recent decision, the ECJ dismissed the Commission's appeal and reiterated that the AEC test, as one of the possible methods for assessing conducts beyond 'normal competition'(para 181), serves as an econometric model for evaluating the exclusion of a competitor as efficient as the dominant firm (para 205). In this regard, the Commission must make specific methodological choices regarding the data to be included in the application of the test, ensuring that the conclusions are based on factual, accurate, reliable and consistent information (para 268). Case C-240/22 *European Commission v Intel Corporation Inc* [2024] ECLI:EU:C:2024:915.

101 Case T-235/2018 *Qualcomm v Commission* [2022] ECLI:EU:T:2022:358 *(Qualcomm – exclusivity payments)*. However, it is noteworthy that, in a recent decision involving Qualcomm, the General Court stated that if the Commission validly demonstrates pricing below ATC but above AVC by a dominant firm, it has implicitly applied the 'as-efficient competitor' test, which is sufficient to dismiss Qualcomm's allegations concerning the test's implementation. Case T-671/19 *Qualcomm v Commission* [2024] ECLI:EU:T:2024:626, para. 527.

where courts identified flaws in the test's application.[102] Particularly in the case of *Qualcomm*, Liliane Giardino-Karlinger suggests that the difficulty arises from the predator's below-cost strategy involving *selective targeting*, which means that the strategy applies to a small portion of the product market – a nuance often missed by standard economic models of predatory practice.[103]

Despite the difficulties of these leading predation cases in court, the literature's concern with the predatory practices of large firms is once again prevalent, calling for a consideration of the role of financial resources in predatory behaviours. In a renowned article titled *Amazon's Antitrust Paradox*, Lina Khan addresses the access to financial resources and the role investors play in the business strategy of *big* firms. The author notes that Amazon's practice of expanding its online business and delivery infrastructure while simultaneously selling products at low-cost items was made possible by the investors' willingness 'to fund predatory growth in winner-take-all markets'[104] and how the 'antitrust doctrine fails to acknowledge this strategy'.[105] Theories that are in part backed by empirical evidence on the growth (and financialisation) of Big Tech.[106] Therefore, Khan's proposals include reconceptualizing the predatory pricing doctrine to acknowledge this phenomenon and incorporating presumptions of predation.[107] European scholars, such as Chiara Fumagalli, Massimo Motta and Claudio Calcagno, have similarly identified the link between predatory practices and the role of investors, drawing on modern corporate finance theory to explain that 'the prey's limited access to external funding is endogenous, since predation affects the perceived risk of lending money, thereby reducing external financial resources to the prey'.[108] The asymmetry of information exploited by the predator, coupled with investors' inability to discern whether profit detriment stems from predation or the prey's inefficient management, has been conceived as a form of modern predation.[109]

Thus, several new theories of predatory practices have emerged, particularly in light of the dynamics of digital markets and the role of venture capital. These modern theories of harm can be categorised into three main types: *financial constraints against smaller competitors*, *predatory copying* and *predatory innovation*. While using financial constraints to undermine competitors is not new, it is especially relevant in digital markets due to the 'growth-over-profits' strategy,[110] that requires substantial capital investment upfront to secure returns later,[111] i.e. monopoly profits.[112] In two-sided markets, it makes economic sense to accept financial losses on one side, if it facilitates growth on the other side of the market,[113] such as offering 'free' social media services to users while monetizing advertisers.[114] This strategy allows resourceful firms to drive financially (and data-constrained) entrants out of the market through tactics such as harassing litigation or patent claims, ultimately leading to the so-called *tipping point* of growth, where its market position becomes entrenched and generates winner-take-all

102 In Intel, the General Court concluded that the Commission 'did not consider properly the criterion relating to the share of the market covered by the contested practice and also did not analyse correctly the duration of the rebates'. General Court, 'The General Court annuls in part the Commission decision imposing a fine of € 1.06 billion on Intel' Press Release No 16/22 (2022) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf> accessed May 18, 2024; and, *Qualcomm v Commission (Qualcomm – exclusivity payments)* (n 94), para 329.

103 L Giardino-Karlinger, 'Targeted Below-Cost Pricing in the Semiconductor Industry: The *Qualcomm Predation* Case', in J Kwoka Jr, T M Valletti and L J White (eds) *Antitrust Economics at a Time of Upheaval: Recent Competition Policy Cases on Two Continents* (Ebook, Competition Policy International 2023).

104 Khan (n 30) 786.

105 Khan (n 30) 788.

106 See SOMO report (n 18).

107 Khan (n 30) 791.

108 C Fumagalli et al., Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance (CUP, 2018) 19.

109 M de la Mano and B Durand, 'A Three-Step Structured Rule of Reason to Assess Predation under Article 102' (2010) Discussion Paper DG Competition, 4.

110 Exactly the strategy criticised by Khan in her manifesto against Amazon's predatory business model. Khan (n 30).

111 Thiel describes this strategy as the 'last mover advantage', an idea captured in the title of Obear's work referenced in footnote 110. P Thiel, *Zero to One: Notes on Startups, or How to Build the Future* (Random House, 2014) 44.

112 Thiel (n 111) 44.

113 G G Parker et al., *Platform Revolution: How networked markets are transforming the economy and how to make them work for you* (W W Norton 2016) 21.

114 On free services and financial losses as a finacialisation strategy, see SOMO report (n 18) 16.

scenarios: users *gravitate*[115] towards one or two platforms, resulting in the winner capturing a market share that approaches the entirety of the market.[116]

Predatory copying is another noteworthy theory, where an incumbent platform with access to vast financial resources exerts pressure on startups to sell their business or, alternatively as retaliation, begins replicating their products to leverage their existing user base and overtake the smaller competitor.[117] While replicating successful products from competitors is not inherently an exclusionary behaviour,[118] Obear notes that in the digital landscape, it can lead to adverse effects, particularly when strong network effects are at play.[119] Although this strategy may lead to improvements and pro-consumer innovations, it can also evolve into an exclusionary practice, resulting in market concentration that harms consumers by reducing choice and disadvantaging advertisers.[120] Moreover, this concentration of power may entail non-economic harms on consumers, such as cognitive overload[121] and addictive interfaces that do not align with a broader notion of welfare.[122] Linked to some extent to predatory copying, the concept of predatory innovation[123] has been re-examined through the lens of digital market dynamics by scholars like Thibault Schrepel, who has advocated for redefining the concept in scenarios where dominant firms disguise their intent to remove rivals from the market under the pretext of improving products and services. He provides a classification of practices that can be framed as predatory innovation[124] and distinguishes it from technological ties,[125] suggesting that predatory innovation should be acknowledged as an independent legal regime encompassing more complex practices than tying.[126] These insightful ideas, however, are still awaiting adoption by competition agencies and courts.

The descriptions of these modern theories show us that, when it comes to the financial power and 'bigness' of leading tech firms today and monopolists in the past, financial power seems to be the (white) elephant in the room — easy to spot but difficult to put to use. Competition law is so closely related to market-based theories and had become ever more inclined to reward efficiencies (low prices) that gestures towards the harms of sheer bigness are difficult to withstand scrutiny. The non-economic harms associated with this power, which transcends the traditional market-oriented thinking, underscore the need for a more comprehensive approach, such as the modern bigness theory.

3.2. FINANCIAL POWER IN MERGER CONTROL

Merger control only applies where undertakings meet the relevant thresholds and have large annual turnovers (Art. 1 (2) EUMR) and thus is already focussed on the large corporation. In

115 Parker (n 113), 224.

116 Gerbrandy & Phoa (n 10) 171. On monopoly rents, see SOMO report (n 18) 25.

117 Bostoen aptly describes this scenario by giving the example of Amazon's acquisition of Quidsi. F Bostoen, *Abuse of Platform Power: Leveraging conduct in digital markets under EU competition law and beyond*, (Concurrences, 2023), 238.

118 F Bostoen, 'We have reached "peak cloning" in Silicon Valley': when does copying your competitor's product become anticompetitive?' (2019) Lexxion <https://www.lexxion.eu/en/coreblogpost/anticompetitive-copying/> accessed May 18, 2024.

119 J Obear, 'Move Last and Take Things: Facebook and Predatory Copying' (2018) 3 Columbia Business L Rev 994, 1052.

120 Commission, 'Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology', (Press Release, 14 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3207> accessed May 18, 2024.

121 For further insights on this matter: M Pittman & E Haley, 'Cognitive Load and Social Media Advertising', (2023) 23(1) Journal of Interactive Advertising, 33–54.

122 For a discussion on the role of antitrust in addictive social media: J N Rosenquist et al., 'Addictive Technology and Its Implications for Antitrust Enforcement' (2022) 100(2) North Carolina Law Review, 431–486.

123 An early definition of predatory product innovation was introduced in 1981 by Ordover and Willig, based on product substitutes that divert competitors' sales and incompatible system components. J A Ordover & R D Willig, 'An Economic Definition of Predation: Pricing and Product Innovation' (1981) 91(1) Yale LJ 8, 9. A critique of the ideas proposed by Ordover and Willig can be found in J G Sidak, 'Debunking Predatory Innovation' (1983) 83(5) Columbia L Rev. For a modern view on the shortcomings of the traditional concept of predatory innovation and a constructive proposal on this basis, see T Schrepel, 'Predatory Innovation: The Definite Need for Legal Recognition' (2018) 21(1) SMU Science and Technology L Rev, 19.

124 Schrepel (fn 123), 29–54.

125 ibid, 55–62.

126 ibid.

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addition, Article 14 of the DMA now contains a requirement for gatekeepers (very large providers of so-called core platform services) to notify the Commission of all relevant mergers (targets provide platform/digital services or collect data) prior to implementation, in order to further prevent financial concentration (the notification is independent of a market power assessment) in the digital sphere.

According to Art. 2 (3) EUMR 'a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.' This very flexible SIEC-Test does not necessitate a finding of dominance (market power) and alternative factors that the Commission may consider are listed in Article 2 (1)(b) EUMR and include:

> 'the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition'.

While financial power is listed as one such factor, there are no cases to date that are based solely on financial power and potential impediments to competition that could result from a finding thereof. If we accept that the SIEC-Test does not necessitate a focus on market power, then using a broad definition of financial power (as suggested above) could help to uncover and scrutinise more complex entanglements and sources of concentration: financialisation and common ownership structures. There exists a wealth of literature on how the latter can be done. While a review of this literature is worthy of an independent publication, we emphasise that this can be seen as a manifestation of financial power and can have distinct (coordinative and concentrative) effects.[127] There is far less research on the importance of financialisation considerations in merger control. However, financialisation aspects of mergers that affect entire sectors or industries have raised red flags in the past. Lianos, for instance, offered a detailed look at the financialisation of the Agro-Chemical industry in his expert opinion on the *Bayer Monsanto* merger.[128] In addition, other researchers have looked in the financialisation of Big Tech and how it is accurately portrayed as a highly concentrated sector veering towards monopoly rents.[129]

A recent concern mentioned in the previous section relating to the financial capabilities of acquiring parties are so called *killer acquisitions*. This term was first used to describe acquisitions of small/rising companies by incumbent firms with the sole purpose of 'discontinuing the target's innovation projects and pre-empt future competition'[130] but has since been broadened to include 'all acquisitions of promising companies by incumbent firms with the objective of suppressing potential competition, regardless of whether the target company and its innovative project were terminated post-transaction.'[131] While such mergers sound almost predatory in nature, their harms have been difficult to pinpoint for a number of reasons. First, they often do not meet the thresholds and thus escape the notification requirements of the EUMR.[132] Second,

127 See K Lewellen & M Lowry, 'Does common ownership really increase firm coordination' (2021) 141/1 Journal of Financial Economics, 322.

128 I Lianos, 'The Bayer/Monsanto merger: a critical appraisal' (n 56).

129 SOMO Report (n 18).

130 See C Cunningham et al., 'Killer Acquisitions' (2021) 129/3 Journal of Political Economy, 649; C Caffarra et al., '"How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions' (2020) CPI Antitrust Chronicle May 2020; OECD, 'Start-ups, killer acquisitions and merger control – Note by the European Union' DAF/COMP/WD(2020)24; Killer Acquisitions have also been a leading topic in several reports (see n 3).

131 D Perez de Lamo, 'Assessing Killer Acquisitions: An Assets and Capabilities based view of the start up' (2020) CPI Antitrust Chronicle May 2020.

132 Famously cases such as *Apple/Shazam* or *FacebookWhatsApp* were referred to the Commission either by a member state authority (Art. 22 EUMR) or by notifying parties (Art. 4(5) EUMR). Furthermore, the Commission issued guidelines in 2021 on the application of the referral mechanism described in art. 22 of EUMR, targeting specific categories of cases, including those in the digital sector. See Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' (Communication) COM 113 (1) final. Despite its limited application so far, this provision has already faced scrutiny due to concerns about its impact on legal certainty and its interaction with other regulatory instruments, such as article 14 of the DMA. See for instance Katalin J Cseres, 'Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities' (2023) 14(7) JECLP 410; M Eben & D Reader, 'Taking aim at innovation – crushing mergers: a killer instinct unleashed?' (2023) 42 Yearbook of European Law 286.

they often improve central products or services of the incumbent firms.[133] Third, many start-ups aim to be acquired by a large firm and this encourages their innovative efforts and the financing of them.[134] Moving away from more immediate or short term effects, much of the literature has attempted to tie the harms of these acquisitions to innovation.[135] Here, however, it is often difficult to prove the counterfactual (it is for instance assumed that Meta Platforms may well have risen to the size it has today if it had 'copied' and not purchased Instagram at the time)[136] and the competition/innovation literature itself is still fraught with problems of its own.[137] Fuelled by financial power, such mergers, however, also raise genuine concentration (or bigness) and entrenchment and financialisation concerns as evermore innovative services and products get drawn into a handful of large ecosystems (or leads to their creation).[138] This in turn may '...dissuade others from entering and thus prevent entry from serving as the competitive threat that keeps monopolistic incumbents on their toes'.[139] Moreover, this situation facilitates other strategies that bolster the power of large digital platforms and entrench their power, such as *growth hacking* (accelerating customer and revenue growth)[140] and *platform envelopment* (in which one platform provider enters another's market by integrating their functionalities).[141] In both cases conventional market delineations become blurred as the financialisation of the economy stimulates inter-industrial investment flows,[142] challenging the traditional understanding of how markets and the economy work, as well as the enforcement tools to keep markets competitive. While often not *killing innovation*, much of this activity may fall under the modern entrenchment theory (see US merger guideline 2023 discussed above) that tries to avoid the raising of entry barriers (in digital markets), the removal of nascent competitive threats and the extension of market power into further (adjacent) markets (see above).

3.3. FINANCIAL POWER AND NEW EX-ANTE REMEDIES

Frustrated with the results of bigness and the inability of antitrust policy to curb and prevent concentration, legislators have introduced *new competition tools* and (non-competition) ex ante regulations to tackle the prevalence of the tech giants and to address anti-competitive effects more swiftly.

The EU's DMA establishes quantitative criteria to designate so-called gatekeepers (the regulations addresses), focusing on turnover, market capitalization, and the provision of core platform services.[143] Thus far all major tech giants (such as: Alphabet, Amazon, Apple, Booking, Bytedance, Meta Platforms, Microsoft) have been designated as gatekeepers and have not succeeded in contesting this decision.[144] The application of Section 19a of the German

133 Google, for instance, has acquired a number of start-up/apps to improve the functionality of Google Maps, among them ZipDash, Where2, Keyhole Inc, Endoxon, ImageAmerica, Quiksee, Zagat, Clever Sense, Skybox Imaging, Urban Engines and Waze, see Perez de Lamo (n 131).

134 See Perez de Lamo (n 131).

135 I Letina et al., 'Killer Acquisitions and Beyond: Policy Effects on Innovation Strategies' (2024) 65/2 International Economic Review 591; A C Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions (2020) 38 Yale Journal on Regulation Bulletin 28.

136 See M Ivaldi et al., 'Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries' (2023) TSE Working Paper No. 13–1420.

137 Problems include defining the competitive parameters and 'innovation spaces' correctly, see W Kerber, 'Competition, Innovation, and Competition Law: Dissecting the Interplay' (2017) 42, MAGKS Joint Discussion Paper Series in Economics, pp. 15–16 also and not allowing analysis to be led by the status quo often created by the incumbents, see E Deutscher & S Makris, 'Sustainability concerns in EU merger control: From output-maximising to polycentric innovation competition' (2023) 11/3 Journal of Antitrust Enforcement 350.

138 M G Jacobides & I Lianos, 'Ecosystems and Competition Law in Theory and Practice' (CLES Research Paper Series 1/2021) 7; Bostoen (n 115) 39: 'Despite the differences between the various kinds and methods of expansion, there is a strategy that unites them: ecosystem building.'

139 S K Kamepalli et al., 'Kill Zone' (NBER Working paper 2020) 2.

140 S Ellis & M Brown, *Hacking Growth: How Today's Fastest-Growing Companies Drive Breakout Success* (Ebook, Crown Business, 2017), Part II: The Growth Hacking Playbook.

141 T Eisenmann et al., 'Platform Envelopment' (2011) 32/12 Strategic Management Journal, 1271.

142 I Lianos, 'Polycentric Competition Law' (2018) 71/1 Current Legal Problems, 194.

143 See O Budzinski & J Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation?' (2023) 72–73 ORDO 215.

144 The EU Commission has published its designation decisions:<https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed May 19, 2024.

Competition Act too has enabled the German Cartel Office (*Bundeskartellamt*) to take a proactive stance by identifying Google, Meta, Microsoft, Amazon and Apple as companies with *paramount (or overarching) significance for competition across markets (ORAM*[145]*)*,[146] considering both their financial resources and other assets, such as user base and brand value.[147] This approach acknowledges the multifaceted nature of power in digital markets and the role of financial strength in enabling strategic behaviours to reinforce the company's influence in the economy, among other spheres.

Both tools are asymmetric — they designate a group or class of addressees and then prescribe a list of behavioural pro-competitive obligations to them.[148] Since the competitive effects are not analysed on a specific case-by-case basis, harms resulting from 'bigness' are assumed in a manner that is foreign to competition policy. While Section 19a is integrated into the German Competition Act and enforced as part of larger competition law proceedings, the DMA is a regulatory tool created outside of competition policy, with a distinct set of goals. While neither tool targets bigness directly, financial power is central to application of both.

Regarding the DMA, two arguments suggest that the gatekeeper designation decisions also take into account substantial financial power. The first relates to the quantitative criteria described earlier, where it is worth noting that the turnover and market capitalisation requirements refer to the entire group within the EEA and not to the core platform service specifically. This can be interpreted as an implicit recognition of these firms' *bigness*. The second argument is more explicit, as it involves the acknowledgement in recital 17 of the DMA preamble of the potential for user monetisation and the gateway position of the core platform service, which serve as indicators of 'their financial capacity, including their ability to leverage their access to financial markets to reinforce their position.' Although the designation decisions are fairly standard and do not delve into a detailed description of financial capacities, it should be noted that in the case of ByteDance, the EU Commission rejected the firm's rebuttal of the presumption of core platform service under Art 3 (2) EUMR of the DMA. This rejection was based precisely on recital 17, indicating that the requirements are alternative and that 'a high global fair market value also reflects the financial capacity of the undertakings concerned', a remark that inevitably recalls Khan's observation about the rise in Amazon's stock price despite its slims or even negative profit margins.[149]

All of the German Cartel Office's designation decisions thus far have been supported by the determination that the undertakings in question have substantial financial power.[150] All of the decisions, however, use a number of different factors to establish overarching across market power. Although Section 19a GWB allows designation decisions to be based solely on a finding of financial power, the German Cartel Office has opted for a cumulative approach, but has made it clear that a finding of market power is not required, setting the tool apart from its traditional competition law method. Only Apple and Amazon have challenged their designation decisions. Both argued that they were under intense competitive constraints in their core markets.[151] Thus far the German Federal High Court (*Bundesgerichtshof*, BGH) has confirmed Amazon's designation. In its decision of April 23, 2024, the BGH clarified the nature of the instrument, stating that potential and abstract competitive risks (alias 'strategic and competition possibilities') are sufficient to warrant a Section 19a decision.[152] The BGH also states that Section 19a allows the German cartel office to

145 For the meaning of this criterion see O Budzinski et al., 'Outstanding relevance across markets: A new concept of market power?', (2020) Concurrences N° 3-2020, Art. N° 95888, 38.

146 For an overview of the section 19a designation decisions, see A Stöhr & J Mendelsohn 'Durchsetzung des § 19a GWB: Erste Erfahrungen und Verhältnis zum Digital Markets Act' (Enforcement of Section 19a of the German Competition Act: First Experiences and Relationship to the Digital Markets Act) 2024, in Becker: Wettbewerb auf Digitalmärkten, Nomos 2025, 263-299.

147 See J Franck & M Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021)12 JECLAP 513.

148 The EU Commission has published the gatekeeper's first compliance reports: <https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports> accessed May 19, 2024; for an overview of the 19a-decisions, see Stöhr & Mendelsohn (n 144).

149 Khan (n 30) 786.

150 For a detailed analysis see Stöhr & Mendelsohn (n 144).

151 See Stöhr & Mendelsohn (n 144).

152 Federal Court of Justice (BGH) Case KVB 56/22 – Amazon [2024], para 48.

> 'effective(ly) control of those large digital corporations (...) *whose resources and strategic positioning enable them to exert considerable influence on the business activities of third parties* (emphasis added)and to expand their own business activities into ever new markets and sectors.' (emphasise added).[153]

The BGH further supports the decision of the German Cartel Office not only by reiterating that Amazon is a group operating in several, often vertically integrated, markets, but also that Amazon has 'paramount financial power'[154] and paramount access to data.[155]

4. CONCLUSION

While competition policy has been careful not to reprove sheer financial bigness or power in the past, this contribution has illustrated that the competitive harms associated with deep pockets are diverse and nuanced. Firms that have accumulated a wealth of resources often act in ways that protect, entrench and multiply their capabilities and experience significant competitive advantages as they venture into new markets and domains. Actions described by theories of (large scale) predation and entrenchment, that are the result of a specific digital infrastructure and network effects as much as financialisation and common ownership. This does not only cripple the chances of merit-based competition for their (potential) competitors, but the extreme concentration of power in and across markets means that ever more products, services, ideas and even (political and discoursive) freedoms are harnessed and controlled by a small set of firms and the logic of financial capitalism.

In order to understand the scope and true nature of financial power, this contribution has turned to past and novel theories of *bigness* (alias the theory of deep pockets, financialisation and common ownership) and to a broad definition of financial power and financial capabilities (from cash-flow to ownership structures). We then attempted to apply these ideas to existing instruments and theories of harm in competition law. Due to the prevalence of Big Tech, current competition law and scholarship is ripe with renewed ideas and novel theories of harm that could tackle and challenge the most encroaching (predatory) practices of the big firm. These range from predatory pricing and copying, through the creation of non-interoperable ecosystems, to the systematic practice of killer acquisitions. In addition, new competition tools and regulations (the DMA and Section 19a of the German Competition Act) specifically address financial power. This contribution aimed at highlighting the importance of addressing financial power in order to aid the new theories and instruments in realising their full potential: to become instruments that challenge rather than merely manage new manifestations of digital power.

COMPETING INTERESTS

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153 ibid, para 46.

154 ibid, paras 77–80.

155 ibid, paras 85–89.

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