

Don't Google It: The European Union's Antitrust Parade ("Enforcement") Against America's Tech Giants

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I. INTRODUCTION

“Google is not a conventional company,” but the founders never intended it to be one.¹ Nicole is two hours deep into her online shopping spree and has decided that she must have a pair of new jeans. After another 20 minutes of extensive online browsing, Nicole has narrowed it down to a pair of Hudson jeans. Now she needs to know where she can buy the prized Hudson denim. She types “Hudson jeans” into Google’s search bar. 2,350,000 results pop up in .46 seconds. The top three results are Hudson’s, Nordstrom’s, and Macy’s official websites—clearly all paid advertisement placements. On the entire right-hand side of the webpage is the “Google Shopping” sponsored feature showing pictures of particular styles of Hudson’s with the MRSP and website where Nicole can buy the jeans. This feature cost Google \$2.7 billion.²

Everyone knows the internet would not be the same without Google. Other search engines *do* exist, but the “world’s biggest and arguably the best” serves over 1 billion results every day to 146 countries from its California headquarters.³ Google continues to be the most widely used Internet service not only in the European Union (“EU”), but the world. The search engine has changed the internet to be what it is today and has become the staple of almost every internet transaction. Yet this world-changing company is also just one of many American “tech” companies that are being punished for their success by the European Union.

American tech companies, especially large, monopoly-like corporations, such as Google, are facing the unjust consequences of their success in the EU. In the past six years, the European Commission (“EC”), the enforcement arm of the EU, has started a parade of legal actions against several American tech corporations under their antitrust statutes.⁴ It began in 2000 when the EC sued Microsoft for abuse of its dominant position in the market.⁵ The monetary judgment of 732 million was unprecedented: the world had never

1. ALPHABET, IN., <https://abc.xyz/> [<https://perma.cc/4SW3-9DD9>] (last visited Sept. 23, 2017).

2. See James Vincent, *Google Fined a Record €2.4 Billion by EU for Manipulating Search Results*, VERGE (June 27, 2017, 5:48 AM), <https://www.theverge.com/2017/6/27/15872354/google-eu-fine-antitrust-shopping> [<https://perma.cc/YY59-8YJM>].

3. Sara Boboltz, *29 Awesome Things You Didn't Know About Google (But Should)*, HUFFINGTON POST (Feb. 3, 2014, 3:11 PM), https://www.huffingtonpost.com/2014/02/03/google-search-facts_n_4697542.html [<https://perma.cc/QX73-XHL6>].

4. See Vincent, *supra* note 2.

5. *European Commission vs Microsoft: Chronology of the Case*, FREE SOFTWARE FOUND. EUR., <https://fsfe.org/activities/ms-vs-eu/timeline.en.html> [<https://perma.cc/4RUE-YKVA>] (last visited Jan. 28, 2018).

seen such a steep fine for an antitrust violation.⁶ Since 2000, the EC has brought multiple suits against Google under the EU's antitrust statute for abusing its market position by illegally playing favorites with its own services and restricting competition on its platform.⁷ Since just 2015, the EC has brought three suits against Google.⁸ The harsh reality is, not a single EU-based tech company has emerged to compete against Google in the same magnitude or capacity. Why is the EU punishing a company that its constituents continue to use daily if there are no comparable available alternatives? This Article will begin to answer this politically and economically charged question. It seems, however, that Google is being punished because it strategically chooses to use and favor its own services on its own platform—a regular business practice for any competitive company.

This Article details several case studies, each exemplifying the EU's pro-competition practices versus the American monopoly-like corporations of Google, Microsoft, and Amazon. The EU claims that each of these companies have abused their dominant position in their respective markets. Many companies (including those not listed in this comment) that have faced the EU's antitrust wrath are merely the successful giants of their field, who should be enjoying their success, not sitting in fear of success's implications in the global arena. This comment will conclude with a warning to future American corporations on the path to monopoly-like power and status as they continue to capture the European market, especially under the current Presidency. As Trump's reputation fluctuates in the European Union, the antitrust regulatory treatment against Google, Microsoft and Amazon may vary in severity. At least in the European Economic Area (EEA), unless a company chooses to use "bad" business strategies that contradict self-preservation ideologies and normal growth projectiles and milestones, it is not safe from the EU's parade of enforcement.

Success is not evil; it is not abusive. It is capitalism. So, are these companies truly "guilty" for abusing their dominant position or are they just companies enjoying their superior positions they have rightly earned?

6. *Microsoft Hit by Record EU Fine*, CNN (Mar. 25, 2004, 5:37 AM), <https://web.archive.org/web/20060413082435/http://www.cnn.com/2004/BUSINESS/03/24/microsoft.eu/> [https://perma.cc/5N8D-PWWX].

7. See Sally Hubbard, *Seven Reasons Why Europe's Antitrust Cases Against Google Are a Big Deal*, FORBES (Mar. 16, 2017, 6:34 AM), <https://www.forbes.com/sites/washingtonbytes/2017/03/16/7-reasons-why-europes-antitrust-cases-against-google-are-a-big-deal/#4cff48821498> [https://perma.cc/86CZ-RSWF].

8. *Id.*

A. *The Rise of Google*

Google's success is a story of brains, determination, and two really cool dudes with a dream. Their creation expanded a world-wide commodity—the internet—and turned it into monopoly, all from the comfort of a college dorm room.

Google's story began in 1995 at Stanford University by Larry Page and Sergey Brin.⁹ Brin was a second-year computer science graduate student.¹⁰ Page was a potential student, and a recent engineering graduate from the University of Michigan.¹¹ In 1996, after overcoming some differences and forming a partnership, the two created Backrub, a search engine that used links to organize and determine the importance of webpages on the internet.¹² Brin and Page realized they had created a querying tool that would change the World Wide Web and would continue to scale as the web scaled. The page ranking system worked by analyzing links; the bigger the Web got, the better the engine would become.¹³ Backrub soon became Google, a name inspired by “the mathematical expression for the number 1 followed by 100 zeroes and aptly reflect[ing] Larry and Sergey's mission ‘to organize the world's information and make it universally accessible and useful.’”¹⁴ Continuing to operate out of dorm rooms, Page and Brin built a server out of deconstructed, used, and borrowed personal computers, piggy-backing off Stanford's server resources.¹⁵ Both made the decision to continue growing Google, withdrawing from their graduate programs.¹⁶

Google, Inc. was born in August 1998 when Sun Microsystems co-founder, Andy Bechtolshiem, wrote a check to Google, Inc., a then nonexistent corporation, for \$100,000.¹⁷ They quickly incorporated, raised more money, and opened the Google, Inc. office in a garage in Menlo Park, California.¹⁸ In late 1999, Google removed its beta (test status) and became the Google we use today.¹⁹ The unconventional company features the motto “[d]on't

9. *Our Story*, GOOGLE, <https://www.google.com/intl/en/about/our-story/> [<https://perma.cc/T8FM-TR4Z>] (last visited Sept. 23, 2017).

10. John Battelle, *The Birth of Google*, WIRE (Aug. 1, 2005, 12:00 PM), <https://www.wired.com/2005/08/battelle/> [<https://perma.cc/F4A9-QWYG>].

11. *Id.*

12. *Our Story*, *supra* note 9; Mary Bellis, *History of Google and How It Was Invented*, THOUGHTCO (June 27, 2017), <https://www.thoughtco.com/who-invented-google-1991852> [<https://perma.cc/KM9H-ERM4>].

13. Battelle, *supra* note 10.

14. *Our Story*, *supra* note 9.

15. Bellis, *supra* note 12; Battelle, *supra* note 10.

16. *See* Battelle, *supra* note 10.

17. *Our Story*, *supra* note 9.

18. *Id.*

19. Bellis, *supra* note 12.

be evil” and lives by “[t]he ten things we know to be true,” both of which capture the still fun-loving spirit of Google.²⁰

In 2004, Google moved to Googleplex in Mountainview, California, which remains its current headquarters.²¹ That same year, on August 19, Google arranged its IPO (initial public offering) on the NASDAQ at \$85 per share.²² Google made over \$1.6 billion at its IPO.²³ Alphabet Inc., formed in 2015, is the American multinational holding company that owns a collection of companies, including Google.²⁴ Alphabet allows Google to be a progressive, environmental, and health-conscientious company able to reach goals and seek opportunities beyond Google.²⁵ Another clever selection, the name “Alphabet” was chosen as a representation of the complexity of language, which becomes the core of Google search.²⁶ Google has become much more than just Google.com; it now includes numerous other business ventures including Google Maps, Android, Google Photos, and YouTube which have billions of users across 163 countries.²⁷ Today, Google employs over 60,000 people in fifty countries and has expanded to much more than just a search engine, offering hundreds of products and services to the world.²⁸

B. Google in the European Economic Area

Few argue against the contention that Google rules the world (and market) of search engines. Surprisingly, Google is substantially more dominant in European markets than American, despite being an American-originated

20. *Our Story*, *supra* note 9.

21. *Id.*

22. See Jillian D’Onfro, *Here’s How Much You Would Have Made if You’d Invested in Google at its IPO*, BUS. INSIDER (Aug. 19, 2016, 6:33 PM), <http://www.businessinsider.com/google-ipo-how-much-would-you-have-made-2016-8> [<https://perma.cc/9UHA-LKTU>].

23. *See id.*

24. *Alphabet Inc. Story*, SUCCESSSTORY, <https://successstory.com/companies/alphabet-inc> [<https://perma.cc/LT4C-T93S>] (last visited Jan. 31, 2019).

25. See ALPHABET, INC., *supra* note 1, for a discussion about the focuses and benefits of Alphabet Inc. versus Google.

26. *Id.*

27. Anita Balakrishnan, *Here’s How Billions of People Use Google Products in One Chart*, CNBC (May 18, 2017, 4:29 PM), <https://www.cnbc.com/2017/05/18/google-user-numbers-youtube-android-drive-photos.html> [<https://perma.cc/5Y8K-URWF>].

28. *Our Story*, *supra* note 9.

company.²⁹ In the search engine industry, one may believe that Microsoft and Yahoo are holding their ground in the fight for market share against Google, but that's only the case in the United States.³⁰ As of October 2014, Google owned 92.38% of the European search engine market share with its competitors, Yahoo and Bing, trailing behind with a measly 2.67% and 2.34% respectively.³¹ In Europe, 73.9% of smartphone users use Google Android, with only 15.9% using iOS.³² In global digital advertising revenue, Google earns almost four times more revenue than its nearest competitor, Facebook.³³ Looking at these statistics, with the large market share that Google occupies, it's easy for Google to dominate when its users are typing word-for-word what they want every second of every day into Google's search box.³⁴ Google doesn't have to expend time, energy, or resources on gathering data because its users are doing it for them, allowing Google to adapt to its customer needs with ease.³⁵ Additionally, because the users keep coming back, this allows the mogul to keep its superior position in Europe (and everywhere else) without many of the difficulties and expenses its competitors endure.

II. APPLICABLE LAW

A. European Union Antitrust Regulations

The European Union is governed by two primary treaties: (1) The Treaty on the Functioning of the European Union ("TFEU") (also known as the Treaty of Rome), and (2) the Maastricht Treaty (formally known as the Treaty on European Union) ("TEU"). These serve as the constitutional basis of the Union.³⁶ By establishing the scope of EU's authority and drafting principles of law in the areas of law where the EU is permitted to operate, the TFEU lays the foundation of EU law.³⁷ The treaty also created the European Economic Community ("EEC"), a regional committee purposed with economic

29. Matt Rosoff, *Here's How Dominant Google Is in Europe*, BUS. INSIDER (Nov. 29, 2014, 2:38 PM), <http://www.businessinsider.com/heres-how-dominant-google-is-in-europe-2014-11> [<https://perma.cc/D7Z2-YYRT>].

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See Finn Laursen, *The Founding Treaties of the European Union and Their Reform*, OXFORD RES. ENCYCLOPEDIA POL. (Aug. 2016), <https://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-151> [<https://perma.cc/K77U-RWCB>]; see also Consolidated Version of the Treaty on the Functioning of the European Union art. 1, May 9, 2008, 2008 O.J. (C 326) 47 [hereinafter TFEU].

37. See generally TFEU, *supra* note 36.

integration of the member states through a single market of goods, services, labor, and capital.³⁸ The TFEU was signed by Belgium, France, Italy, Luxemburg, Netherlands, and West Germany in Rome on March 25, 1957, and came into force on January 1, 1958.³⁹ The Lisbon Treaty, ratified by all twenty-seven member states of the EU on December 1, 2009, amended both the TFEU and the Maastricht Treaty to simplify the EU's governance structure.⁴⁰

The EU's antitrust regulatory scheme is set out in just two articles of the TFEU.⁴¹ Article 101 bans agreements between two or more independent market operators which restrict competition.⁴² Restriction of competition occurs when the purchaser loses the element of freedom over what to do with goods and services.⁴³ This highlights the primary goal of competition law: to protect and promote certain economic freedoms.⁴⁴ Both horizontal (agreements between competitors in the same industry) and vertical (agreements between distributor and manufacturer) agreements are prohibited.⁴⁵ The most common example of an Article 101 violation is price-fixing and market sharing.⁴⁶ Article 101 immediately voids any agreements, undertakings, or concerted practices that:

directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of

38. *Id.*

39. EUROSTAT, GLOSSARY: TREATIES OF ROME, https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Treaties_of_Rome [<https://perma.cc/AK8G-9J8A>] (last visited Oct. 8, 2017).

40. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]; see also *Lisbon Treaty*, BRITANNICA, <https://www.britannica.com/event/Lisbon-Treaty> [<https://perma.cc/E7ZF-WWAN>] (last visited Oct. 8, 2017).

41. EUROPEAN COMM'N, ANTITRUST OVERVIEW (2014) [hereinafter ANTITRUST OVERVIEW].

42. *Id.*

43. OKEOGHENE ODUDU, THE BOUNDARIES OF EC COMPETITION LAW: THE SCOPE OF ARTICLE 81 (2006), <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199278169.001.0001/acprof-9780199278169-chapter-5> [<https://perma.cc/6UPG-EH5T>] (last visited Mar. 19, 2018).

44. *Id.*

45. ANTITRUST OVERVIEW, *supra* note 41.

46. *Id.*

supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁴⁷

The second major component of EU's antitrust regulatory scheme is Article 102. Article 102 prohibits companies that hold a dominant position in the marketplace from abusing that position.⁴⁸ This exceedingly simple law can be extremely confusing in practice. Article 102 reads "[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."⁴⁹ Examples of an Article 102 violation would include charging unfair prices, limiting production, or applying dissimilar conditions to an identical transaction with different parties.⁵⁰ For example, the European Commission (EC) fined Lithuanian Railways €28million (\$34.6 million) for "hindering competition on the rail freight market . . . by removing a rail track connecting Lithuania and Latvia" forcing a major customer of Lithuanian Railways to close a refinery.⁵¹ The EC Commissioner, Margrethe Vestager, the woman in charge of EU's competition policy, issued a statement that "'Lithuanian Railways used its control over the national rail infrastructure to penalize competitors. In the rail transport sector . . . it is unacceptable and unprecedented that a company dismantles a public rail infrastructure to protect itself from competition.'"⁵²

In addition to the twenty-seven state-managed competition authorities of the member states, the EC is the institution tasked with executive powers in the areas of competition law and external trade.⁵³ Simply put, the EC is the enforcement arm of the EU. The EC was created and given its power by Article 17 of the Maastricht Treaty.⁵⁴ It is given the authority to apply the antitrust rules, investigate potential violations using a variety of tactics (such as searching business and non-business premises), and lay fines if a violation is found.⁵⁵ The EC attempts to maintain a policy of prevention by providing guidance on how to comply with Article 101 and 102 on its

47. TFEU, *supra* note 36, art. 101.

48. ANTITRUST OVERVIEW, *supra* note 41.

49. TFEU, *supra* note 36, art. 102.

50. *Id.*

51. Court of Justice of the European Union Press Release IP/17/3622, The Court of Justice, Antitrust: Commission Fines Lithuanian Railways €28 Million for Hindering Competition on Rail Freight Market (Oct. 2, 2017).

52. *Id.*

53. EUROPEAN PARLIAMENT, FACT SHEETS ON THE EUROPEAN UNION (2017); Bruce Prager & Howard Rosenblatt, *US & EU Competition Law: What Every Counsel Needs to Know*, LATHAM & WATKINS, LLP (Sept. 27, 2011), <https://www.lw.com/presentations/us-and-eu-competition-law-2011> [<https://perma.cc/DV8B-N54W>] (last visited Mar. 19, 2018).

54. *See* Treaty on European Union, May 9, 2008, art. 17 [hereinafter TEU].

55. ANTITRUST OVERVIEW, *supra* note 41.

website.⁵⁶ Although primarily concerned with prevention, the EC will “punish and [sic] deter” violators without hesitating.⁵⁷ Fines are calculated based on a percentage of relevant sales or profit made by the violation and consideration of the duration of violation; fines can then be adjusted at the Commission’s discretion but cannot exceed more than ten percent of the annual turnover of the company.⁵⁸

The EC has created distinct policies and procedures for Article 101 and Article 102 violations.⁵⁹ Article 101 cases can originate from a complaint, the opening of an own-initiative investigation, whistleblowers, or from internal complaints of a company or cartel.⁶⁰ After the initial complaint is filed, the Commission conducts an investigation into the accused company.⁶¹ If evidence of anti-competition practices is found during the investigation, the Commission issues a statement of objection and prohibits the company from continuing the violating conduct.⁶² Companies then have the right to defend themselves, and can even request an oral hearing which is heard by an independent Hearing Officer.⁶³ After hearing the parties’ arguments, the Commission can amend part or all of its objections and choose to either close the case or draft a decision prohibiting the infringement.⁶⁴ The draft then gets submitted to the Advisory Committee, a committee comprised of representatives from Member States, which approves the draft. Finally, the draft is submitted to the College of Commissioners, who adopts the decision.⁶⁵ In the alternative, the Commission can make a commitment decision under Article 9 of the Regulation 1/2003.⁶⁶ Under Article 9, the Commission does not have to prove infringement and does not impose fines, but instead voices its concern about a company’s policies or practices and the parties can then come forward with promises to change these practices.⁶⁷

56. EUROPEAN COMM’N, FINES FOR BREAKING EU COMPETITION LAW (2011).

57. *Id.*

58. *Id.*

59. ANTITRUST OVERVIEW, *supra* note 41.

60. EUR. COMM’N, PROCEDURES IN ANTICOMPETITIVE AGREEMENTS (ARTICLE 101 TFEU CASES) (last updated Mar. 15, 2017).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

If the Commission finds the promises satisfactory, it makes the commitments legally binding.⁶⁸ All parties have the right to appeal.⁶⁹

Article 102 cases also originate from either a complaint or the opening of an own-initiative investigation.⁷⁰ The Commission first determines whether or not the accused is dominant in its relevant market before conducting its full investigation into a violation.⁷¹ If an Article 102 infringement is found, the Commission follows the same procedures as those expressed in Article 101.⁷²

B. American Antitrust Regulations

The United States' antitrust laws consist of the Sherman Antitrust Act, the Federal Trade Commission Act (hereinafter "FTC Act"), and the Clayton Antitrust Act.⁷³ Enacted in 1890, the Sherman Act is a comprehensive act designed to preserve free and unfettered competition by prohibiting unreasonable restraints on trade.⁷⁴ The Sherman Act outlaws "every contract, combination in the form of trust or otherwise, or conspiracy, in [an effort to] restrain [sic] trade or commerce among the several States, or with foreign nations."⁷⁵ It also declares, "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."⁷⁶ The Supreme Court held in subsequent cases that any and all restraints on trade were not illegal, but only those that were unreasonable.⁷⁷ What is considered unreasonable can be explained as:

[f]or instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "*per se*" violations of the Sherman Act; in other words, no defense or justification is allowed.⁷⁸

68. *Id.*

69. *Id.*

70. EUR. COMM'N, PROCEDURES IN ABUSE OF DOMINANCE (ARTICLE 102 TFEU CASES) (last updated Aug. 16, 2013).

71. *Id.*

72. *Id.*

73. FED. TRADE COMM'N, THE ANTITRUST LAWS (last visited Mar. 19, 2018).

74. *See generally* Sherman Antitrust Act, 15 U.S.C § 1 (1890).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

The purpose of the Sherman Act is not to protect consumers from legitimate successful businesses, nor is it to prevent businesses from making honest profits at the expense of others; rather its purpose is to preserve a competition-based marketplace and protect innocent consumers from abuse.⁷⁹ Although most enforcement actions are civil litigations, violations of the Sherman Act can result in criminal prosecutions by the Department of Justice with fines up to “\$100 million for a corporation, \$1 million for an individual, and ten years in prison.”⁸⁰ Criminal actions are usually limited to intentional and malicious violations like price fixing.⁸¹ Moreover, “the maximum fine can be increased by twice the amount the conspirators gained from the illegal acts or twice the amount lost by victims, if either of those amounts are over \$100 million.”⁸²

The Federal Trade Commission Act created the Federal Trade Commission (“FTC”), an independent agency of the United States government.⁸³ The Act also bans “unfair methods of competition” and “unfair or deceptive acts.”⁸⁴ It allows the FTC to: seek monetary redress and other judiciary relief against conspirators for consumer-injurious conduct; proscribe rules and regulations that define specific acts that are unfair methods of competition, or unfair and deceptive acts, and how to avoid these violations; gather, compile, and investigate organizations, businesses, or practices that may violate the Act; and make reports and legislative recommendations to Congress and the general public.⁸⁵ Violations of the Sherman Act also violate the FTC Act; however, the FTC Act outlaws more than anti-competition practices and is more comprehensive than the Sherman Act.⁸⁶ Only the FTC can bring actions under the FTC Act.⁸⁷

Finally, the Clayton Act builds upon the Sherman Act by identifying specific practices not addressed in the Sherman Act, such as mergers and acquisitions or strategic discrimination.⁸⁸ For example, section 18 of the Clayton Act prohibits the merger and acquisition of stock companies when

79. KATALIN J. CESERES, COMPETITION LAW AND CONSUMER PROTECTION 291–93 (2005).

80. FED. TRADE COMM’N, *supra* note 73.

81. *Id.*

82. *Id.*

83. *See generally* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1914).

84. *Id.*

85. FED. TRADE COMM’N, FEDERAL TRADE COMMISSION ACT (last visited Jan. 29, 2019).

86. FED. TRADE COMM’N, *supra* note 73.

87. *Id.*

88. *Id.*

“the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”⁸⁹ The Robinson-Patman Act of 1936 amended the Clayton Act to also outlaw practices such as using varying or discriminatory prices, services, and allowances between different merchants.⁹⁰ After another amendment in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, the Clayton Act required companies planning large mergers or acquisitions to notify the government of their plans before closing the deal.⁹¹ Under the Clayton Act, private party victims are permitted to sue for triple damages,⁹² and a Court can issue an order prohibiting future anti-competitive practices.⁹³ Additionally, most U.S. states have their own antitrust statutes that are modeled after the federal regulations, and enforceable via private plaintiffs or the state attorneys general.⁹⁴

C. Comparison of European Union and American Antitrust Regulations

Despite extensive cooperation and communication between the EU and American antitrust enforcers, including partnered participation in international forums and the exchange of “preliminary drafts of guidelines and other forms of policy guidance,”⁹⁵ the European and American antitrust statutes are notably different.

With over 100 years of legal development, America’s antitrust laws are deep-rooted.⁹⁶ America’s legislation is embodied in a series of legislations that have been redrafted and changed over time, while the EU’s is two small articles of a single document—its governing treaty created during modern times. The complexity and density of America’s antitrust statutes evidence the progression and revolution of our businesses and industries, which is largely in response to the ebbs and flows of the American economy. The stature, age, and experience of America’s antitrust regulations and enforcers makes it difficult for an organization like the EU to ignore America’s experiences when dealing with antitrust.⁹⁷ For example, it is nearly impossible for other legal systems to *not* discuss American antitrust case law when

89. Clayton Act, 15 U.S.C. § 18 (1914); *see also* FED. TRADE COMM’N, *supra* note 73.

90. Clayton Act, 15 U.S.C. § 13 (1914); *see also* FED. TRADE COMM’N, *supra* note 73.

91. Clayton Act, 15 U.S.C. § 18a (1914); *see also* FED. TRADE COMM’N, *supra* note 73.

92. Clayton Act, 15 U.S.C. § 15(a) (1914); *see also* FED. TRADE COMM’N, *supra* note 73.

93. Clayton Act, 15 U.S.C. § 26 (1914); *see also* FED. TRADE COMM’N, *supra* note 73.

94. *Id.*

95. Alden F. Abbott, *A Brief Comparison of European and American Antitrust Law*, U. OXFORD CTR. FOR COMPETITION L. & POL’Y 3 (2005).

96. Dr. Wernhard Möschel, *US Versus EU Antitrust Law* (2007) (unpublished paper) (on file with author).

97. *Id.*

addressing competition issues, since America has the most thorough and expansive case precedent.⁹⁸ It is interesting to consider why the country with the most complex laws finds no issue with Google's practices. Perhaps the specificity of the American legislation allows Google to know exactly what is and is not allowed. By contrast, the broad, over-reaching language of Article 101 and 102 has permitted the EU to strong-arm companies who may be unsure as to what is a violation.

Additionally, antitrust law is a pivotal and influential part of the American political system. Antitrust statutes have influenced and determined the outcome of presidential elections.⁹⁹ America's legislation also imposes criminal sanctions and punishment, whereas the EU's does not. The EU's antitrust legislation is solely a civil process; the accused are not at risk of facing significant jail-time or millions of dollars in monetary sanctions as an individual.¹⁰⁰ The availability of criminal remedies creates public awareness. A potentially liable individual may not be scared of the EU's legislation because he is not personally liable. Such an individual is shielded by his company and can just "stop" the practice to appease the EC. In America, individuals do not enjoy this same luxury of being able to just stop without further repercussions.

Another major difference is the role of the state in the respective countries' antitrust regulatory schemes. In the United States, antitrust proceedings are more of a private matter (although they occur in a federal courthouse which is a public forum), while in the EU, antitrust proceedings exclusively involve the state.¹⁰¹ This is largely due to the extensive involvement and integration of government bodies and organizations in everyday life of the EU because of the socialist-political ideologies of many of the member states. This is reflected in Article 86(2) of the Lisbon Treaty, which reads that under certain circumstances, competition rules do not apply to public services and commodities.¹⁰² For example, in 2003, German utility giant (and second largest electric company in the world) E.ON merged with Germany's largest natural gas provider Ruhrgas, despite outcry from competitors.¹⁰³ Many competitors sought injunctions preventing the merger,

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See *Path Cleared for E.On, Ruhrgas Merger*, DW (Jan. 31, 2003), <https://www.dw.com/en/path-cleared-for-con-ruhrgas-merger/a-768681> [<https://perma.cc/NYQ8-PK6M>].

but E.ON and Ruhrgas reached out of court settlements promising to pay six of the nine plaintiffs over \$96 million in total.¹⁰⁴ Due to the overriding public interest of “national safety” the merger received “extraordinary clearance by the Secretary of Economic Affairs.”¹⁰⁵ In contrast, the United States takes pride in its system of checks and balances, giving immense freedom and liberty to powerful independent agencies such as the FTC.¹⁰⁶ The FTC is an agency within the executive branch, which is required to make biennial reports to Congress—part of the legislative branch.¹⁰⁷ Despite being accountable to all three branches of the U.S. government,¹⁰⁸ the FTC has complete authority to investigate and punish antitrust violations without being required to make daily reports or “check-in” with the U.S. government on a regular basis; instead, the FTC behaves more as a silent party that speaks only when procedural or administrative issues arise.¹⁰⁹ This is not the case in the EU, where there is no explicit exception for public services and commodities.¹¹⁰ The United States’ commodities and public services are not outside the purview of the FTC, or U.S. law in general.¹¹¹ Also, the U.S. has delegated generous power to an independent agency which has been given a long leash to accommodate the check and balance ideology, hoping to ease the pains of managing a country with a population of 323.1 million. In comparison, in the EU there is a designated governing body—the “enforcement arm” of the EU—in addition to each country’s government systems. Additionally, the EU is composed of 28 countries,¹¹² while the United States is a single country without an overarching organization created to unite and protect it. Finally, in the U.S., private parties can litigate through exclusively private avenues such as a class actions suits if they so choose.¹¹³

104. *Id.*

105. *See* Möschel, *supra* note 96.

106. *Id.*

107. FED. TRADE COMM’N, MATERIALS FOR PARENTS AND TEACHERS: ABOUT THE FTC (last visited Jan. 31, 2019); FED. TRADE COMM’N, PRESS RELEASES: FTC ISSUES BIENNIAL REPORT TO CONGRESS ON THE NATIONAL DO NOT CALL REGISTRY (2017) (used as an example to show how often the FTC reports back to Congress, providing support of the fact that the FTC is more of a private independent agency separate from the state, instead of a direct arm of the state like the European Commission).

108. FED. TRADE COMM’N, SPEECHES: THOUGHTS ON THE FTC’S RELATIONSHIP (CONSTITUTIONAL AND OTHERWISE) TO THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES (2009).

109. *Id.*

110. *See* Sherman Antitrust Act § 1.

111. *See generally* Complaint, *United States v. AT&T*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017) (provided as an example to show that the U.S. government can and will sue public services and commodity companies).

112. EUROPEAN UNION, ABOUT THE EU: COUNTRIES (last updated July 12, 2018).

113. *See* Prager & Rosenblatt, *supra* note 53.

The major similarity between the EU's and the United States' statutes is the policy and ideology behind them. Both the EU and the U.S. want to protect the competitive marketplace and consumers from abusive businesses.¹¹⁴ Capitalism needs competition to survive and thrive. Over the course of U.S. history, companies like Google have morphed into monopolist organizations that have phased out their competition by successfully capturing the market and using efficient business strategies. Thus is the nature of capitalism.

Additionally, both sets of statutes provide for international reach. The breadth of the language of Article 101 and 102 and the United States' acts allow the countries to effectively investigate and punish international and domestic companies.¹¹⁵ This is especially important for the U.S. because an international company needs to successfully penetrate its market to be internationally successful,¹¹⁶ although the U.S. only constitutes about five percent of the world population, a "baby born in the United States will consume during its lifetime twenty times as much of the world's resources as an African or Indian baby."¹¹⁷

III. DISCUSSION

A. Emergence of Hostility Towards United States' Powerhouses

A corporate monopoly is a company with "exclusive ownership through legal privilege, command of supply, or concerted action," or one with "exclusive possession or control."¹¹⁸ Google is a "*de facto* monopoly."¹¹⁹ But it is not illegal to dominate a market. It is not illegal to dominate multiple, multi-national markets. It is not illegal to be a monopoly. But it is

114. See EUROPEAN COMMISSION, COMPETITION: OVERVIEW: MAKING MARKETS WORK BETTER (last updated Sept. 28, 2015); see also Derek Thompson, *America's Monopoly Problem: How Big Business Jammed the Wheels of Innovation*, ATLANTIC (Oct. 2016), <https://www.theatlantic.com/magazine/archive/2016/10/americas-monopoly-problem/497549/> [<https://perma.cc/X7WT-QM98>] (explaining that the Sherman Act was passed to protect the competitive marketplace even though it was not successful for several years).

115. See Prager & Rosenblatt, *supra* note 53, at 4–15; see also Sherman Antitrust Act § 1.

116. See Mark Sagoff, *Do We Consume Too Much?*, ATLANTIC (June 1997), <https://www.theatlantic.com/magazine/archive/1997/06/do-we-consume-too-much/376877/> [<https://perma.cc/GUG3-PBET>].

117. *Id.*

118. *Monopoly*, MERRIAM-WEBSTER.COM DICTIONARY (2019).

119. See Jim Edwards, *Look at the Evidence: Google's Troubles in Europe are Entirely of Its Own Making*, BUS. INSIDER (June 27, 2017, 6:30 AM), <https://www.businessinsider.com/eu-google-antitrust-monopoly-europe-case-2017-6> [<https://perma.cc/BF2L-C8VL>].

illegal to abuse that position at the cost of consumers or use anti-competition behavior towards other companies.¹²⁰ In the eyes of the European Union, this is where U.S. tech powerhouse companies are in the wrong.

The EC has found Microsoft, Intel, and Google “guilty” of abusing their dominant positions in the European market.¹²¹ The EC’s valiant antitrust efforts are advertised as an effort to prevent harm and protect consumers, but this propaganda is nothing more than a wolf in sheep’s clothing. It appears that the concern is actually more focused on the effect the violating practices have on other companies, not end-users and general consumers.

In 2000, the EC took its first historic stand against United States-based “monopolies” in *Microsoft Corporation v. Commission*. The Commission found that Microsoft abused its dominant position in the market.¹²² The investigation into Microsoft was triggered after Sun Microsystems filed a complaint claiming “Microsoft had failed to provide technical information needed for servers running Sun’s Solaris operating system to fully inter-operate with PCs running Windows.”¹²³ The Commission found that Microsoft’s refusal “resulted in the foreclosure of competitors from the server OS market.”¹²⁴ The Commission ordered Microsoft to grant licenses on reasonable and non-discriminatory terms to parties interested in developing and distributing work group server operating system products.¹²⁵

The second major issue was the “tying” of Windows Media Player and Windows PC operating system.¹²⁶ The Commission found that such “tying,” “prevented the suppliers of other media players from gaining comparable

120. See Prager & Rosenblatt, *supra* note 53, at 2–4.

121. Case T-201/04, *Microsoft Corp. v. Computing Tech. Industry Ass’n, Inc.*, 2017 E.C.R. II-3619, 3629; Court of Justice of the European Union Press Release No. 90/17, The Court of Justice Sets Aside the Judgment of the General Court Which Had Upheld the Fine of €1.06 Billion Imposed on Intel by the Commission for Abuse of a Dominant Position (Sept. 6, 2017) (the judgment was later set aside in 2014 when the General Court dismissed Intel’s action); European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017).

122. See Robin van der Hout, *Microsoft Corporation v. Commission of the European Communities*, LEXISNEXIS LEGAL NEWSROOM: INT’L L. (May 22, 2008), <https://www.lexisnexis.com/LegalNewsRoom/international-law/b/commentary/posts/microsoft-corporation-v.-commission-of-the-european-communities> [<https://perma.cc/F5U4-N5LJ>].

123. See *Ten Years of Legal Wrangling Between Microsoft and EU: The Milestones Since the EU Began Investigating Microsoft’s Business Practices in 1988*, GUARDIAN (Feb. 27, 2008, 8:13 AM), <https://www.theguardian.com/business/2008/feb/27/microsoft.europe1> [<https://perma.cc/VQZ9-B8FS>].

124. See van der Hout, *supra* note 122.

125. Katharine Stephens, *Microsoft v. Commission of European Communities*, BIRD & BIRD (Mar. 3, 2005), <https://www.twobirds.com/en/news/articles/2005/microsoft-v-commission-of-european-communities> [<https://perma.cc/GGT7-2KUK>].

126. van der Hout, *supra* note 122.

access to consumers' PCs."¹²⁷ Consequently, Microsoft was required to offer a version of Windows without Windows Media Player and was fined €497.2 million.¹²⁸

In 2009, the Commission imposed a €1.06 billion (\$1.3 billion) fine on Intel.¹²⁹ Intel, the United States-based microchip manufacturer, was found guilty of abusing its dominant position in the market of x86 central processing units ("CPUs").¹³⁰ The Commission determined that Intel abused its dominant position in the market by implementing a strategy that foreclosed its competitor, Advanced Micro Devices Inc. (AMD), from access to the market.¹³¹ Intel offered rebates to four main computer manufacturers (Dell, Lenovo, PC, and NEC), on the condition they buy most, if not all, of their CPUs from Intel.¹³² Additionally, Intel offered payments to Media-Saturn-Holding and other OEM's (aftermarket retailers who bundle services around Intel's products) on the condition that they exclusively sell computers containing Intel's CPU's, thus delaying, restricting, and canceling the ability of non-Intel CPU producers to be competitive at these retailers.¹³³ At the time, Intel held approximately 70% of the market share.¹³⁴

On one hand, it appears that Intel used incentivizing business strategies, not abusive ones. On the other hand, the Commission found that it was extremely difficult for competitors to enter the market and expand because of the steep investment necessary by non-Intel CPU producers for research and development, intellectual property, and production facilities, which in the end would not produce enough income to compete with Intel's discount and incentive practices to support and sustain a profitable business.¹³⁵ Intel appealed the Commission's decision hoping to annul it or receive a substantial fine reduction, but the General Court upheld the decision in 2014.¹³⁶ On September 6, 2017, on appeal to the highest court of the European

127. *Id.*

128. *Id.*

129. Case COMP/C-3/37.990—Intel, Comm'n Decision, ¶ 1803 (May 13, 2009) (summary at 2009 O.J. (C 227) 13), https://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf [<https://perma.cc/8R8B-HGMZ>].

130. Court of Justice of the European Union Press Release IP/90/17, The Court of Justice Sets Aside the Judgment of the General Court Which Had Upheld the Fine of €1.06 Billion Imposed on Intel by the Commission for Abuse of a Dominant Position (Sept. 6, 2017).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.*

136. *Id.*

Union, the court remanded the case back to the lower court to take a second look at Intel’s case to analyze whether the rebates at issue were capable of restricting competition in light of the arguments put forward by Intel.¹³⁷ There are currently no updates on the status of the remand as of the time of writing.

In *European Commission v. Google*, the EC issued a €2.4 billion fine against Google for violations of EU antitrust laws.¹³⁸ The EC gave Google ninety days to terminate its preferential conduct of displaying its own shopping comparison services above competitors and ordered Google to give equal treatment to rival comparison shopping services on its platform, or face penalty payments of up to five percent of the average daily worldwide turnover of Alphabet.¹³⁹ In the decision, the EC confirmed that Google has held the dominant position in general internet search markets in Europe since 2008 (except the Czech Republic where it has held its position since 2011).¹⁴⁰ The main issue in this case were desktop searches, which as opposed to mobile platforms, provide significantly more digital “real estate” for Google to list its competitors’ services while still displaying its own.¹⁴¹ Mobile devices by default provide even less “real estate” for search results, so it is fair that Google would prioritize its own services on mobile platforms.¹⁴² The contention was that when a user in the EEA conducted a Google search on its laptop, home computer, or desktop, the top portion of the screen was dedicated to the “Google Shopping” search results.¹⁴³ Competitor shopping comparison sites were generally listed further down in the search results.¹⁴⁴ According to the EC’s research, the top ten results on the first page receive 95% of all clicks for generic search results, which means comparison sites would not receive similar attention.¹⁴⁵

In a press release, Margrethe Vestager, Commissioner of the EC, stated: “What Google has done is illegal under EU’s antitrust rules. It denied other

137. *Id.*; James Kanter & Amie Tsang, *Intel’s \$1.3 Billion Fine in Europe Requires Review*, *Court Says*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/business/intel-eu-antitrust-fine.html> [<https://perma.cc/UM5U-CYXR>].

138. Case AT.39740—Google Search (Shopping), Comm’n Decision, ¶ 754 (June 27, 2017) (summary at 2018 O.J. (C 9) 11), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [<https://perma.cc/KRB3-2RV3>]; European Commission Press Release IP/17/1784, *supra* note 121.

139. European Commission Press Release IP/17/1784, *supra* note 121.

140. *Id.*

141. Gerrit De Vynck, *These Search Results Show Why Europe Is Mad at Google*, BLOOMBERG (June 27, 2017, 4:03 PM), <https://www.bloomberg.com/news/articles/2017-06-27/these-google-search-results-show-why-europe-is-mad> [<https://perma.cc/WTV3-R8KG>].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation.”¹⁴⁶ The EC found Google was illegally using favoritism practices on the Google Shopping feature by demoting rivals and unfairly promoting its own services.¹⁴⁷ The EC gathered over 5.2 terabytes of actual search results from Google (about 1.7 billion search queries) during its investigation.¹⁴⁸ Surprisingly, most of the complaints did not come from European consumers, but rather disgruntled American technology companies and their lobbyists whose international businesses have been injured by Google’s practices.¹⁴⁹ Google may also be subject to civil actions for damages by any business or individual that has been personally injured by its anti-competitive behavior.¹⁵⁰

The EC still has two open cases against Google for its AdSense and Android services.¹⁵¹ In the case against Google’s AdSense, the Commission is concerned that Google has reduced consumer choice by preventing third-party websites from sourcing search ads from Google’s competitors.¹⁵² In the current investigation against Google’s Android operating system, “the Commission is concerned that Google has stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy on mobile devices to protect and expand its dominant position in general internet search.”¹⁵³

Business competition and consumer choice are not the only factors that drive antitrust regulation; the political and economic climate of international bodies and governments that impact European regulation on American tech businesses are additional factors that drive the field forward. The subsequent section will discuss America’s political climate under the Trump presidency and how the fluctuations of this climate may correlate to the European Union’s regulatory scheme and treatment of existing and emerging American tech giants.

146. European Commission Press Release IP/17/1784, *supra* note 121.

147. *Id.*

148. *Id.*

149. Jim Edwards, *Look at the Evidence: Google’s Troubles in Europe Are Entirely of its Own Making*, BUS. INSIDER (June 27, 2017, 6:30 AM), <https://www.businessinsider.com/eu-google-antitrust-monopoly-europe-case-2017-6> [<https://perma.cc/WY28-P884>].

150. European Commission Press Release IP/17/1784, *supra* note 121.

151. *Id.*

152. *Id.*

153. *Id.*

B. Trump's Reputation in the European Union

Disregarding personal political views, it is incontestable that there are drastically mixed opinions on President Donald Trump, nationally and internationally. Although Trump won the electoral vote, more Americans voted for Hillary Clinton in the popular vote than any other losing presidential candidate in the history of the U.S.¹⁵⁴ Clinton outpaced Trump by almost 2.9 million votes, and it shows.¹⁵⁵ According to surveys, 295 days into Trump's presidency 56.1% of the American people disapprove of the President.¹⁵⁶

Internationally, many have described Trump as "dangerous, arrogant, and intolerant."¹⁵⁷ The Pew Research Center's annual survey on global attitudes towards the U.S. and its president found that of 37 countries, 22% had confidence that Trump would do the right thing when it comes to international affairs, and 74% had *no* confidence in him.¹⁵⁸ Shockingly, 27% of those surveyed were confident that even Vladimir Putin would do the right thing when it comes to international affairs.¹⁵⁹ Overall, all of Trump's major policy proposals featured in the survey (such as the withdrawal from the Iran nuclear deal, ending support of major trade agreements, and implementing the travel ban, among others) faced strong opposition.¹⁶⁰ In comparison, former President Barack Obama was favorably viewed by 64% of survey respondents at the end of his second term.¹⁶¹

Trump's announcement of the U.S.'s withdrawal from the 2015 Paris Climate Agreement triggered global condemnation.¹⁶² The European Union even rejected the President's proposition to renegotiate, choosing instead to bypass Washington and work directly with U.S. states, major corporations, and climate change groups.¹⁶³ Donald Tusk, President of the European

154. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://perma.cc/Q8CV-RVSQ>].

155. *Id.*

156. *How (Un)popular is Donald Trump?*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/trump-approval-ratings/> [<https://perma.cc/D357-M8BS>].

157. Jason Le Miere, *Trump's Approval Rating Is Even Lower Globally, and He's Destroying the U.S.'s Reputation: Survey*, NEWSWEEK (June 26, 2017, 8:10 PM), <https://www.newsweek.com/trump-approval-rating-putin-global-629195> [<https://perma.cc/F3H6-YJEQ>].

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Daniel Boffey, Kate Connolly & Anushka Asthana, *EU to Bypass Trump Administration After Paris Climate Agreement Pullout*, GUARDIAN (June 2, 2017, 8:08 AM), <https://www.theguardian.com/environment/2017/jun/02/european-leaders-vow-to-keep-fighting-global-warming-despite-us-withdrawal> [<https://perma.cc/VR8P-6RMK>].

163. *Id.*

Council, dubbed Trump's move a "big mistake," and Germany, Italy, and France issued a joint declaration in opposition.¹⁶⁴ President Trump's bad reputation has seemingly seeped into the international community's perspective of the U.S. as a whole, with only 49% having a favorable opinion of the U.S. (down from 64% under Obama).¹⁶⁵ According to this survey, the sole glimmer of hope for the President was that 55% of those polled thought he was a strong leader.¹⁶⁶

President Trump's decisions while in office have only solidified his reputation in Europe as a "danger to the planet," which has inadvertently united the continent.¹⁶⁷ In response to Trump's withdrawal from the Paris Climate Agreement, Europe's leaders have vowed to "stick to their guns on Paris and work even harder to save the planet" without America.¹⁶⁸ In Trump's speech to NATO in May 2017, he berated U.S. allies for not spending enough on defense and suggested they owe "massive amounts" in back payments to the U.S., confirming the fears of European leadership that Trump "doesn't just play the Ugly American on TV."¹⁶⁹ To add fuel to the fire, Trump later critiqued Germany for selling too many cars in the U.S. (many of which are made in America), depicting his clear lack of understanding of transatlantic trade and commerce.¹⁷⁰ These actions have translated into a belief that Trump views his "western" allies as a financial relationship, rather than as a community of shared ideologies and values, disrespecting a century-long friendship.¹⁷¹ Instead of America and the EU sharing a common enemy, Trump has made America the enemy.

Following Brexit in June 2016, Europe was in a full-blown funk.¹⁷² But today, economic stagnation has ended, and Europe is a changed continent

164. *Id.*

165. Le Miere, *supra* note 157.

166. *Id.*

167. Matthew Karnitschnig, *Trump Makes Europe (Feel) Great Again*, POLITICO (June 1, 2017, 9:06 PM), <https://www.politico.eu/article/trump-makes-europe-feel-great-again/> [<https://perma.cc/7X29-ENXC>].

168. *Id.*

169. Matthew Karnitschnig, *Trump Confirms Europe's Worst Fears*, POLITICO (May 26, 2017, 8:28 PM) <https://www.politico.eu/article/trump-confirms-europes-worst-fears/> [<https://perma.cc/4SBT-GM44>].

170. *Id.*

171. *Id.*

172. Matthew Kaminski, *Trump and Europe, Trading Places*, POLITICO (May 25, 2017, 2:30 PM), <https://www.politico.eu/article/donald-trump-and-europe-trading-places-political-instability-brussels-washington/> [<https://perma.cc/3XPW-TSFS>].

fueled with confidence.¹⁷³ This changed mentality has birthed a new identity, a common sense of purpose for Europeans that is equipped to combat President Trump’s arrogance, intolerance, and futile political schemes.¹⁷⁴

C. How Will American Monopolies or Monopoly-Like Companies be Treated Under Trump’s Presidency?

Economics played a huge role in the outcome of the United States’ 2016 Presidential Election.¹⁷⁵ The fear of a 2008 Financial Crisis repeat, decline in competition, and America’s reliance on foreign states have fueled complaints and cries from both Republicans and Democrats.¹⁷⁶ President Trump ran a campaign boasting about promoting American businesses, reviving the American economy, and focusing on internal affairs to “Make America Great Again.”¹⁷⁷ After being elected, he continued to position himself as pro-business/pro-monopoly by selecting Jay Clayton, a Wall Street mergers and acquisition attorney who specializes in corporate consolidation, as the chairman of the SEC.¹⁷⁸ Additionally, many business owners are optimistic that their businesses will do much better under the Trump administration’s pro-business, anti-regulatory, and pro-tax reform position, since many small businesses believe that the current regulatory scheme is the “biggest hindrance to their business.”¹⁷⁹ This could be considered evidence of Trump’s inadvertent support of big business and the concentration of businesses that *are allowed to* harm competition, as long as they benefit the American economy and keep American jobs on American soil. Some have even characterized his policies as “pro-business, [but] not pro-market.”¹⁸⁰ Although commonly confused as one in the same, pro-business and pro-market are

173. *Id.*

174. *Id.*

175. See generally Justin Talbot-Zorn, *Will Donald Trump Be the Most Pro-Monopoly President in History?*, NATION (Jan. 14, 2017), <https://www.thenation.com/article/will-donald-trump-be-the-most-pro-monopoly-president-in-history/> [<https://perma.cc/FR8N-K3MW>].

176. *Id.*

177. Bloomberg, *Trump’s Pro-Business Image Tarnished as CEOs Abandon Him*, FORTUNE (Aug. 19, 2017), <https://fortune.com/2017/08/19/donald-trumps-pro-business-image-tarnished-ceos-abandon/> [<https://perma.cc/7GGG-6K4Q>]; *About*, DONALD J. TRUMP, <https://www.donaldjtrump.com/about/> [<https://perma.cc/MP4N-3MN4>].

178. Talbot-Zorn, *supra* note 175.

179. Andrew Soergel, *CEOs Bullish on Trump’s Pro-Business Agenda*, U.S. NEWS (Mar. 14, 2017, 2:11 PM), <https://www.usnews.com/news/articles/2017-03-14/ceos-bullish-on-trumps-pro-business-agenda> [<https://perma.cc/F44Z-VSAG>].

180. Luigi Zingales, *Donald Trump’s Economic Policies: Pro-Business, Not Pro-Market*, PRO-MARKET (Jan. 12, 2017), <https://promarket.org/donald-trumps-economic-policy-pro-business-not-pro-market/> [<https://perma.cc/9EYS-4K8M>].

very different ideologies.¹⁸¹ Pro-business advocates believe the government should directly assist and provide tax benefits to certain businesses and industries, and that the government should limit competition to protect domestic industries and American workers—essentially, businesses are competing for government favoritism.¹⁸² In contrast, pro-market advocates believe the government should ensure a level playing field for competition, including equal tax rates for all, and the government should expand competition, leading to lower prices and better quality goods.¹⁸³ Trump's pro-business tendencies are further evidenced by his tax bill: The Tax Cuts and Jobs Act.¹⁸⁴ It permanently cuts the corporate tax rate from 35 to 21 percent in 2018 (making it the lowest tax rate since 1939) and temporarily reduces individual income tax rates, doubles the standard deduction, and eliminates personal exemptions until 2025.¹⁸⁵ The Act also raises the standard deduction to 20% for pass-through businesses which includes partnerships, sole proprietorships, limited liability companies, S corporations, real estate companies, hedge funds, and private equity funds.¹⁸⁶ Additionally, it allows businesses to deduct the cost of depreciable assets in one year instead of amortizing them over a span of the asset's useful life, resulting in higher net income in more years (except for the year the company opts to depreciate the asset).¹⁸⁷ Despite these drastic tax cuts that benefit businesses overall, the tax bill does provide some pro-market provisions that will generate significant revenues for the nation as whole and hurt highly-indebted corporations.¹⁸⁸

So, what do President Trump's pro-business policies mean for American monopoly-like corporations in the EEA? The EC's decision to fine Google

181. "Pro-Business" or "Pro-Market"? And What's the Difference?, CHARLES KOCH INST. (Mar. 18, 2016), <https://www.charleskochinstitute.org/blog/pro-business-pro-market-whats-difference/> [<https://perma.cc/DA89-MAKM>].

182. *Id.*

183. *Id.*

184. *See generally* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); H.R. REP. NO. 115-409 (2017).

185. Kimberly Amadeo, *Trump's Tax Plan and How It Affects You*, BALANCE, <https://www.thebalance.com/trump-s-tax-plan-how-it-affects-you-4113968> [<https://perma.cc/JW2W-AKXV>].

186. *Id.*

187. *Id.*

188. This list is not exhaustive, but some examples include: limiting the ability of corporations to deduct interest expense, eliminating the Alternative Minimum Tax (AMT) which allows corporations to deduct research expenses, and developing spending or investments in low-income communities. *See id.*

\$2.7 billion led to accusations against the EU of protectionism and anti-American bias.¹⁸⁹ The EU has repeatedly defended its astronomical fines against Google, Intel, and Microsoft by stating that the same guidelines would apply to a company that originated from a member state.¹⁹⁰ However, it is consistently American corporations that experience the necessary success and growth that they accumulate massive percentages of market share in the EEA (and the rest of the world). Although some EU-based companies have been fined in the past (such as Daimler, the manufacturer of Mercedes Benz and other automobiles), concerns have arisen that the EU's antitrust enforcement adversely affects U.S. companies, since American tech corporations are more likely to be dominant in the EEA based on their success.¹⁹¹

A major influencing factor of the EU's antitrust enforcement parade could be culture. The European view of the marketplace is wary of large corporations holding "market power."¹⁹² Thus, the EC might be more likely than America to take affirmative action to protect consumers from anti-competition practices.¹⁹³ This is probably because the EU is made up of smaller economies, where consumers would suffer greater harm in a highly-concentrated economy, because consumers would be unable to successfully put pressure on businesses regarding issues of price, supply/demand, or changes in consumer trends.

The bias may also result from the fear of a company holding economic and political dominance. For example, if a company in Germany is the largest manufacturer in the EU and manufactures 95% of a particular good in the region, then all other member states would be relying on one company for certain categories of goods. That company could greatly influence political, social, and economic policies due to its lobbying power as a result of its control of the market. The EU probably aims to hold enough control through regulation to prevent a country (or company) from gaining enough economic power and stability to do what England did in Brexit (that is, break away from or dominate the Union).

Part of the problem is that Europe is generally not the creator or the originator of these monopoly-like, global companies. Europe's economy has been shrinking over the last century, slowly losing its footing in many

189. Ivana Kottasová, *European Union: We're Not Biased Against American Companies*, CNN: MONEY (June 27, 2017, 4:26 PM), <https://money.cnn.com/2017/06/27/technology/eu-google-biased-protectionism/index.html> [<https://perma.cc/PUX7-MVGA>].

190. *See id.*

191. *Id.*

192. *Id.*

193. *Id.*

industries to other nations.¹⁹⁴ The U.S. and China have been at the forefront of technology and internet innovation for years, and neither of these areas have ever been the European Union's strong suit.¹⁹⁵ BP, HSBC, Vodafone, Nestle, and Shell are among the EU's largest companies and they are largely concentrated in the oil and gas industry.¹⁹⁶ So, is the EU just bitter it isn't innovating on the same scale as the U.S. and is therefore retaliating against American companies? Maybe—but this seems rather petty for the respectable international political and economic Union. It is also possible its antitrust regulatory scheme appears so strict and prejudicial because it does not have the understanding and appreciation for these types of companies, due to the lack of firsthand experience fostering and protecting a monopoly-like company. Finally, and most logically, it's possible that its protectionist ideologies, which stem from its socialist values, are influencing its regulatory scheme. The reality could also be a combination of these possibilities: the EU is ferociously protecting its own smaller-scale economy, in addition to targeting American tech corporations because they are the easy “scapegoat” in this scenario.

As Trump's pro-business policies continue to be implemented and he continues to reiterate his pro-America rhetoric, the EU may increase its hostility towards American monopoly-like corporations in an effort to protect its economy, businesses, and consumers. Thus, although the EU claims it does not have an outright bias against American countries, its distaste for America's leading man and its inclination towards self-preservation will continue to blow back on American companies.

D. Potential Repercussions Against Amazon, the Rising Monopoly

Amazon, the prominent online retailer and cloud service provider, is quickly becoming one of the world's corporate powerhouses.¹⁹⁷ The online retailer based out of Seattle, Washington was launched in 1995 by Jeff Bezos, the

194. Adam Taylor & Sarah Rappaport, *The 20 Biggest Companies in Europe*, THE BUSINESS INSIDER (July 22, 2011, 10:00 PM), <https://www.businessinsider.com/europe-biggest-companies-company-2011-7> [<https://perma.cc/4K3Y-3SHD>].

195. *See id.*

196. *Id.*

197. Shana Lebowitz, *Amazon's Success Is Unparalleled – and 'Type 2 Decisions' Are a Major Reason Why*, BUS. INSIDER (Oct. 8, 2017, 4:15 PM), <https://www.businessinsider.com/why-amazon-is-so-successful-2017-10> [<https://perma.cc/3A9U-B95A>].

current CEO, as a website that only sold books.¹⁹⁸ Jeff originally wanted to name the site “Cadabra” but concerns were raised that it was too close to “Cadaver;” he then considered “Relentless,”¹⁹⁹ but eventually settled on “Amazon,” attributed to the world’s largest river.²⁰⁰ Mr. Bezos’s motto, “Get Big Fast,” a slogan that was printed on employee T-shirts, was rooted in Mr. Bezos’s unwavering faith in the possibilities of the internet.²⁰¹ In just the first year of operation, Amazon had 180,000 customer accounts.²⁰² By year two, it had 1,000,000.²⁰³ “Get Big Fast” was exactly what Amazon did. The company diversified its inventory over the years to include any consumer product imaginable and has since evolved into the technology industry, offering cloud services and software. The company went public in 1997, raising \$54 million through its initial public offering on the NASDAQ.²⁰⁴

Amazon’s primary business strategy has always been simplification for the consumer—a strategy that was largely criticized at the beginning by business analysts and financial journalists, but a strategy that has repeatedly proven effective.²⁰⁵ By the end of 2015, Amazon had 304 million active customer accounts worldwide.²⁰⁶ A 2017 study revealed that a whopping 84% of U.S. consumers made a purchase on Amazon in the previous year, 55% of which were Prime subscribers.²⁰⁷ Let that soak in—almost half of all U.S. consumers are paying \$100 per year for Amazon’s services. According to an Amazon user study, two in five Prime members and more than a quarter of

198. Avery Hartmans, *15 Fascinating Facts You Probably Didn’t Know About Amazon*, BUS. INSIDER (Aug. 23, 2018, 9:22 AM), <https://www.businessinsider.com/jeff-bezos-amazon-history-facts-2017-4/#amazon-wasnt-the-companys-original-name-1> [<https://perma.cc/V5L4-TY8U>].

199. *Id.* EDS: Fun fact: go to relentless.com and see where it leads you.

200. *Id.*

201. Mark Hall, *Amazon.com*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Amazoncom> [<https://perma.cc/6EZ6-P77V>].

202. *Id.*

203. *Id.*

204. Jeff Sommer, *The Mind-Boggling Ascent of Amazon and Jeff Bezos*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/your-money/amazon-jeff-bezos.html> [<https://perma.cc/L7GD-XC5F>]; *Amazon Global Fulfillment Center Network*, MWPVL INT’L, https://www.mwpvl.com/html/amazon_com.html [<https://perma.cc/V48J-MR3Y>].

205. See *Jeff Bezos on Leading for the Long-Term at Amazon*, HARVARD BUS. R., <https://hbr.org/2013/01/jeff-bezos-on-leading-for-the> [<https://perma.cc/9C5M-G47W>] (last visited Mar. 7, 2019); see also *Leadership Principles*, AMAZON: JOBS, <https://www.amazon.jobs/en/principles> [<https://perma.cc/V9F5-RG3D>] (last visited Mar. 7, 2019).

206. *Annual Number of Worldwide Active Amazon Customer Accounts from 1997 to 2015 (in Millions)*, STATISTA (January 2016), <https://www.statista.com/statistics/237810/number-of-active-amazon-customer-accounts-worldwide/> [<https://perma.cc/8BEA-BHH7>].

207. Tom Popomaronis, *The Inexorable Rise of Amazon: Nine Reasons Why It’ll Only Get Bigger*, FORBES (Aug. 4, 2017, 10:05 AM), <https://www.forbes.com/sites/tompopomaronis/2017/08/04/jeff-bezos-amazon/#7203a9885c16> [<https://perma.cc/XV2H-MWWC>].

non-Prime members check Amazon before making an online purchase.²⁰⁸ Finally, on Prime Day 2016, Amazon's site-wide sale that launched in 2015, nearly fifty million people visited the site (only ten million fewer than the number who visited Amazon on Cyber Monday).²⁰⁹ These numbers speak for themselves: by any measure, Amazon is widely successful.

Amazon is also the most visited online retailer in Europe.²¹⁰ In December 2012, 26.4 million Europeans visited the site.²¹¹ Amazon was also ranked number one in the Internet Retailer 2014 Europe 500.²¹² Retailers from France, Germany, Italy, Netherlands, Spain, and the United Kingdom selling on Amazon generated total sales of \$3.08 billion in one year.²¹³ Amazon has also continued to build up its fulfillment and distribution network in Europe, expanding from twenty-eight distribution centers in 2015 to over 100 distribution centers throughout Europe in 2017.²¹⁴

Amazon offers consumers the ultimate digital experience: combining ease of use and browsing experience, convenience, and price comparison with a speedy website, shipping speed, and customer service.²¹⁵ The notoriety and success of the online mogul has forced brick and mortar retailers and brands to sell on Amazon to survive, or at least to remain competitive.²¹⁶ What's truly amazing is that Amazon started as an online bookstore and has since become a "technology innovation hub expanding far beyond retail sales" and changing the way the world views e-commerce.²¹⁷ Amazon is arguably already a *de facto* monopoly, but nevertheless an innovative and aspirational monopoly.

208. *Id.*

209. Jeff Dunn, *Prime Day Brings Nearly as Many Eyes to Amazon as Cyber Monday*, BUS. INSIDER (July 11, 2017, 6:05 PM), <https://www.businessinsider.com/amazon-prime-day-how-much-traffic-chart-2017-7> [<https://perma.cc/59YE-82WS>].

210. Katie Evans, *Amazon Is the Most Visited Online Retailer in Europe*, DIGITAL COM. 360 (Mar. 25, 2013), <https://www.digitalcommerce360.com/2013/03/25/amazon-most-visited-online-retailer-europe/> [<https://perma.cc/8Z85-Y6MX>].

211. *Id.*

212. Mark Brohan, *Amazon Builds Up Its European Marketplace*, DIGITAL COM. 360 (Apr. 30, 2015), <https://www.digitalcommerce360.com/2015/04/30/amazon-builds-its-european-marketplace/> [<https://perma.cc/GWF9-RP8A>].

213. *Id.*

214. *Id.*; *Amazon Global Fulfillment Center Network*, *supra* note 204.

215. Popomaronis, *supra* note 207.

216. *Id.*

217. *Id.*

The EC already has its eyes on Amazon. In June 2015, the EC launched an investigation into Amazon for its “most-favored-nation” clauses,²¹⁸ which required publishers to alert Amazon about terms offered by its competitors.²¹⁹ The EC was concerned that Amazon was using its dominant position to ensure its terms were at least as favorable as its competitors, leading to less choice, less innovation, and higher prices for consumers, since Amazon would always have an informational advantage.²²⁰ The clauses required publishers to notify Amazon of more favorable prices and differentiators given to competitors, such as business or distribution models and promotions.²²¹ In May 2017, after almost two years of investigation, the EC and Amazon came to a legally binding agreement.²²² Amazon offered to change its contracts to comply with the EC’s concerns by stripping the clauses at issue or by allowing publishers to terminate their e-book contracts that contain the clause for a period of five years.²²³

Amazon was fortunate to avoid fines, but it only did so because it compromised, not because the EC found that Amazon had done no wrong.²²⁴ Margrethe Vestager, the European Commissioner for Competition, stated the compromise “will open the way for publishers and competitors to develop innovative services for e-books, increasing choice and competition to the benefit of European consumers.”²²⁵ Amazon rightfully celebrated the agreement as well.²²⁶ There is no doubt that the EC will remain vigilant to ensure Amazon’s

218. The term “most-favored-nation” (“MFN”) is used in Amazon’s contracts and legal literature surrounding Amazon as a different term of art from how it is used in the trade sense of the word. In the contracts, “MFN” means that the seller cannot sell on another site cheaper than they sell on Amazon. See David Stretfield, *The Week in Tech: Amazon’s Burning Problems*, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/technology/amazon-problems.html> [<https://perma.cc/J9GH-BSZC>]; see also Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2177 (2018) (discussing the MFN clauses contained in various tech companies’ contracts and detailing the effects and purpose of such clauses). Amazon has since repealed the use of these clauses. See Makena Kelly, *Amazon Silently Ends Controversial Pricing Agreements with Sellers*, THE VERGE (Mar. 11, 2019), <https://www.theverge.com/2019/3/11/18260700/amazon-anti-competitive-pricing-agreements-3rd-party-sellers-end> [<https://perma.cc/CKN4-HRM7>].

219. Colin Dwyer, *EU Drops Its Antitrust Probe Over Amazon E-Book Contracts*, NPR (May 4, 2017, 3:45 PM), <https://www.npr.org/sections/thetwo-way/2017/05/04/526893839/eu-drops-its-antitrust-probe-over-amazon-e-book-contracts> [<https://perma.cc/X2DH-5YGS>].

220. *Id.*; European Commission Press Release IP/17/1223, *Antitrust: Commission Accepts Commitments from Amazon on E-Books* (May 4, 2017).

221. Dwyer, *supra* note 219.

222. *Id.*

223. *Id.*; European Commission Press Release IP/17/1223, *supra* note 220.

224. Dwyer, *supra* note 219.

225. *Id.*

226. *Id.*

compliance with its agreement.²²⁷ If Amazon breaches, the Commission could impose fines of up to 10% of Amazon's annual turnover *without* having to find another antitrust violation.²²⁸ Simply choosing not to comply could result in an approximately \$13 billion dollar fine for Amazon.

In this case, the EC merely launched a probe into Amazon and did not initiate a formal case against them. Amazon may not be as lucky in the future. If Amazon violates Article 102, they could be subject to hefty fines. The company is more than capable of paying such a fine (albeit with great reluctance), but it is clear the EC has gotten more confident in handing out steep fines as evidenced by the progressive increase of each fine in the cases discussed above. This investigation should be taken as a warning from the EC and a premonition for what is to come as Amazon continues on its pathway to further success and expansion.

For example, Amazon's recent \$13.7 billion acquisition of Whole Foods opens the door for major expansion of Amazon's Fresh feature by giving the company access to consumer's grocery buying habits, patterns, and preferences and an admired, private label brand.²²⁹ Amazon should be wary that as they continue to expand and employ similar business practices such as the "most-favorable-nation" clauses, they are creating a one-stop, comprehensive marketplace. This could deter consumers from using traditional brick and mortar retailers, potentially putting Amazon at risk of being targeted by the EU. Say, hypothetically, Amazon acquired a pharmaceutical company and created an option for prescriptions to be refilled online and delivered straight to your home; brick and mortar stores such as Rite Aid, CVS, and grocery stores may begin to lose substantial parts of their market share, income, and customer loyalty. According to a survey, consumers are more likely to shop for products online instead of going in store, with brick and mortar stores winning in only one of six categories—household essentials.²³⁰ There is no question that most consumers will choose convenience, but what's

227. *Id.*

228. *Id.*; EUR. COMM'N, FINES FOR BREAKING EU COMPETITION LAW FACT SHEET (2011), http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf [<https://perma.cc/2HAA-SBQA>].

229. Greg Petro, *Amazon's Acquisition of Whole Foods Is About Two Things: Data and Product*, FORBES (Aug. 2, 2017, 12:13 PM), <https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/#1df2a2a80843> [<https://perma.cc/VRE6-K4D6>].

230. Sandy Skrovan, *Why Consumers Prefer to Shop for Nearly All Products Online*, RETAIL DIVE (Mar. 15, 2017), <https://www.retaildive.com/news/why-consumers-prefer-to-shop-for-nearly-all-products-online/437886/> [<https://perma.cc/4Q9X-9B25>].

even more influential is the ability to compare prices.²³¹ It is important to note that this assertion may vary with factors such as age and gender. But, according to some research, 79% of U.S. adults are already shopping online versus in-store.²³²

The fact of the matter is that Amazon isn't getting less popular and so it is not becoming less of a target anytime soon. As it continues to monopolize, the more aggressive its practices and strategies will become, naturally minimizing competition in its field. It may already be too late for new competition in the online retailer industry because the costs of entering the market might be too high for a new business to incur²³³ or existing businesses are not willing to take the risk to compete against the existing mogul, similar to the EU's concerns in the *Intel* case. If Amazon is *already* under a microscope, it is possible that the EU will launch several more investigations against the retailer. Amazon will have to choose whether it wants to continue to comply or face the fines. Regardless, the effect of its business decisions and strategies in the EU should be a concern for Amazon.

Amazon could choose to take the financial and market share hit by not entering the European market with as much force and change its current strategies to avoid dispute with the EC. Because it is an online retailer, it can easily modify its site such that it only implements certain strategies based on the consumer's access location. However, after acknowledging that Europe is the world's second largest economy,²³⁴ it is unlikely Amazon will choose this option unless the cost-benefit analysis weighs in favor of losing profits versus paying the fines. It ultimately comes down to two

231. Sarah Perez, *79 Percent of Americans Now Shop Online, but It's Cost More Than Convenience That Sways Them*, TECHCRUNCH (Dec. 19, 2016), <https://techcrunch.com/2016/12/19/79-percent-of-americans-now-shop-online-but-its-cost-more-than-convenience-that-sways-them/> [<https://perma.cc/ZX5M-LBFE>].

232. *Id.*

233. Because of how established Amazon is, holding 38% market share in the e-commerce industry, the start-up costs for a new company (research, development, marketing, staff and personnel) compared to the margins and small percentage of successfully capturing the market, strongly discourages companies from taking the risk of entering the e-commerce market. See Rani Molla, *Amazon Could Be Responsible for Nearly Half of U.S. E-Commerce Sales in 2017*, RECODE (Oct. 24, 2017, 2:02 PM), <https://www.recode.net/2017/10/24/16534100/amazon-market-share-ebay-walmart-apple-ecommerce-sales-2017> [<https://perma.cc/W3ZG-JJSN>].

234. The EU's economy based upon gross domestic product (GDP) was ahead of the United States in 2015 and generated \$19.2 trillion of the world's economic output of \$119.4 trillion in 2016. Kimberly Amadeo, *World's Largest Economies: 2017 Results, How It's Measured*, BALANCE, <https://www.thebalance.com/world-s-largest-economy-3306044> [<https://perma.cc/Z26G-DF8B>]; Abby Budiman & Dorothy Manevich, *Few See EU as World's Top Economic Power Despite Its Relative Might*, PEW RES. CTR. (Aug. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/08/09/few-see-eu-as-worlds-top-economic-power-despite-its-relative-might/> [<https://perma.cc/5EC5-DFFE>]; *The Economy*, EUR. UNION, https://europa.eu/european-union/about-eu/figures/economy_en [<https://perma.cc/FWR9-B934>].

choices for Amazon: (1) continue on the path of monopolizing and take the risk of incurring fines from the EC or (2) learn from its predecessors' past mistakes and avoid them by modifying its site, contracts, and strategies to comply with the EC's parameters, thereby losing market share and billions of dollars in revenue in the process. Neither are ideal situations, but both are the realities of being an American based monopoly in a time where the U.S. is not the most loved country in the world, especially by Europe.

IV. PROPOSED SOLUTION

The unfair treatment towards “do no evil” monopoly-like corporations in the EU *must* end immediately. Companies should not be shying away from their well-deserved success, nor should they be limiting their entrance into the world's second largest economic market (which generated \$19.2 trillion in 2016)²³⁵ because they are fearful of the Commission imposing fines. Because of the EU's antitrust regulatory scheme, there is substantial legal pressure to avoid conflict. This reluctance may negatively influence American companies' business strategies, decisions, and implementation in the EEA, ultimately hurting the corporation's overall performance. No corporation should be intimidated to enter a market because they are fearful they will be punished for capturing the market successfully.

It seems clear in the cases of Google and Microsoft that the companies were punished due to their success and reprimanded for employing tactics that promote and favor themselves. From a business perspective, if a corporation is not strategizing and “scheming” to find ways to earn more revenue, be more successful, and capture a greater share of the market, it is not a “good” company. Investors, shareholders, business analysts, and consumers could criticize the company for *not* pursuing greater market shares or earning more revenue, and shareholders could even bring derivative suits against the corporation if the directors and managers are not acting in the best interest of the corporation. From a shareholder perspective, it is the *primary* goal of a corporation to make money, and most hope to generate more money each year, if not every quarter.²³⁶ To earn more revenue, companies need to expand, which realistically is at the expense of other companies.

235. See *supra* text accompanying note 234.

236. Steve Denning, *Is the Goal of a Corporation to Make Money?*, FORBES (Sept. 26, 2011 12:25 PM), <https://www.forbes.com/sites/stevedenning/2011/09/26/is-the-goal-of-a-corporation-to-make-money/#4e34573f54ed> [<https://perma.cc/G6XF-GEAX>].

Capitalism is an economic system and ideology based on private ownership of the means of production and the operation for profit.²³⁷ This lack of control by the state means that there will be unbalance, inconsistency, and disproportionate prosperity by private actors, which is the basis of a *laissez-faire* system.²³⁸ Harshly put, the unsuccessful will fail and it is not the EU's responsibility to protect and preserve those that are unable to compete. On a simple level, it's Darwinism. Those that do not fight to survive and adapt to changing circumstances, go extinct. If a company does not adapt, grow, and implement strategies and procedures that benefit themselves, they will sunset (a business term for decline). We need to let nature take its course. Any business owner knows there is substantial risk when starting a business venture, especially when entering an established market where tech giants roam.

To prevent the mistreatment of American corporations in the future, the EC should employ less strict requirements for an Article 102 "abuse of market dominance" violation. Companies should not be penalized for merely holding substantial market share *and* implementing competitive sales or guaranteed outcome strategies that make competition fierce but not exclusive. Owning and controlling substantial market share means that a company has successfully captured the market and created customer and brand loyalty. The product or service is then in high-demand and the company has most likely found the best marketing or delivery strategies to reach the most people. This could be interpreted as favoritism by consumers. Mere favoritism should not be considered an abuse of power under Article 102.

In addition to loosening the requirements of what is deemed an "abuse of market dominance," the EC should also provide explicitly detailed examples of what "abuse of market dominance" is so American corporations can tailor their products or services to comply with international rules. Examples could include: (1) providing conditional payments to retailers, manufacturers, or producers for exclusivity of sale in a geographic area; (2) disproportionately de-prioritizing competitors on your platform or favoring your products or services on a generic platform; or (3) owning x% of market share and implementing enumerated strategies which are harmful to competitors. This may be particularly helpful for internet-based companies such as Amazon and Google who can easily code their platforms to limit features of their site based on the IP address of the user, similar to how certain Netflix

237. Kimberly Amadeo, *Capitalism, Its Characteristics, With Pros and Cons: How It Works Compared to Socialism and Communism*, BALANCE, <https://www.thebalance.com/capitalism-characteristics-examples-pros-cons-3305588> [<https://perma.cc/HGR8-KAAR>].

238. Arthur Foulkes, *Capitalism and Democracy*, FOUND. FOR ECON. EDUC. (Nov. 1, 2006), <https://fee.org/articles/capitalism-and-democracy/> [<https://perma.cc/B66Y-3B6F>].

shows are available based on the country of access.²³⁹ For example, in the EEA, Google could tailor its Google Shopping feature such that competitors are given equal opportunity to be listed on the first page while in America, companies can continue to purchase their “spot” and Google can self-promote its own services. It is true abuses of market dominance, such as price fixing or unreasonable vertical or horizontal integration, that should be fined, not the reasonable practices of a successful corporation.

These solutions may not be feasible if the EU truly has a bias against American corporations. If the EU's intentions are to protect European-based companies from American giants, then the above suggestions are futile. Even if the EU creates detailed guidelines, procedures, and examples of what companies shouldn't do, companies may still be found liable and imposed fines for their practices simply because it looks like they are abusing their dominant power and hurting European-based companies. It is true that “abuse of market dominance” is not easily definable, can translate to innumerable different types of violations, and requires a complete investigation of the totality of the circumstances. It may not even be possible to draft a precise definition and create guidelines regarding antitrust. Furthermore, from a policy perspective, the EU probably does not want to create a bright-line rule to ensure that the law is broad enough to encompass violations and practices that will evolve in the future. If the law is too narrow, it may be effective, but not fully encompassing. Regardless, as the law currently stands in the EU, it is penalizing companies who truly are doing no evil.

This is not to say that there are not American companies who are illegally abusing their status, power, or employing strategies that violate antitrust law. However, empirically speaking, the companies the EU has chosen to punish are merely innocent companies that are being punished because they are successful compared to their European and international counterparts.

Lastly, American companies who are enjoying fruitful success and becoming moguls in their field should tread lightly when entering and operating in the EEA. Once a company is on the EC's radar, it is difficult to leave, hence why so many investigations have been launched into the same companies. American companies should especially take extra precaution during the remaining years of Trump's presidency. It is important to consider the President's influence on international markets, based on his policies and

239. Eric Rosenberg, *Why Netflix Content Is Different Abroad*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/050515/why-netflix-content-different-other-countries.asp> [<https://perma.cc/9J58-WL4P>].

actions in the White House, and how much influence the U.S.'s international reputation has on international treatment of American corporations when making business decisions or designing corporate strategies. It is inevitable that as Trump's reputation appreciates or depreciates, the EU's treatment of American corporations will vary. No matter how much international consumers love a company, there is no immunity from international governments.

V. CONCLUSION

If Europe continues these anti-competition practices against American corporations, Europe will start to become a no-go zone for corporate America.²⁴⁰ These practices go far beyond penalties for monopoly-like practices but also demands for "unpaid taxes" from companies like Apple, McDonalds, and Amazon that have reached tax deals with member countries.²⁴¹ At the end of the day, it will be Europe's consumers that suffer if American companies begin to avoid European markets.²⁴² The companies the EC has targeted in the past, Microsoft, Intel and Google, are some of the most prestigious innovators of the world, and without them, Europe's businesses will wither and its consumers will suffer the consequences of a lacking market.²⁴³ The EU's practices could even be characterized as a systematic discrimination against American corporations and in the end could result in Google and other American corporations beginning to de-prioritize the European market and eventually withdrawing from the EEA altogether to avoid abuse.²⁴⁴ There is no question that Europe has failed to compete with or produce innovation in the internet and technology industry²⁴⁵ and that American corporations are leading the way for the new universe that is the World Wide Web. If the EU continues to punish these corporations for their success, European markets will no doubt be left behind.

240. Matthew Lynn, *Opinion: Europe Will Regret Chasing All the Innovative American Companies Away*, MARKETWATCH (Sept. 21, 2016, 9:08 AM), <https://www.marketwatch.com/story/europe-will-regret-chasing-all-the-innovative-american-companies-away-2016-09-21> [<https://perma.cc/PU84-7HLD>].

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*