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THE PROTECTIONIST INTENT BEHIND ANTITRUST LAWS: AN ASSESSMENT OF THE EUROPEAN UNION'S COMPETITION POLICY

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Abstract
Competition and antitrust laws are naturally protectionist in that they serve to protect those who would naturally be forced to exit the market. This paper explores how the European Commission (EC) has used its competition laws to increase the costs of firms with a large market share in the European technological and digital sectors. Using a public choice analysis and Cranston and Winston's framework for evaluating antitrust policy, the paper examines the incentives of the EC and firms participating in antitrust cases. The case studies analyze proceedings against Microsoft, Intel, and Google. The EC relies on its competition policy to punish dominant, competing firms as evidenced by the vagueness of the competition laws that have allowed for a culture of pursuing cases in the European Union (EU). The EC exhibits an overreliance on market share for competition and allows it to take advantage of the protectionist nature of the laws to bring competition cases. This paper argues that the EC is incentivized to bring competition cases to increase its popularity as the fines can be used to fund the EU budget, subtracting from the contributions made by Member States.

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I. Introduction

The European Commission (EC) has become increasingly active in deploying its competition policy. Competition policy is generally synonymous with antitrust policy, as is competition law with antitrust law. The differences are idiosyncratic and stem from the formation of agencies and adoption of laws at the national level. For example, in the United States, antitrust law is "a law that prohibits monopolies and cartels or monopoly-like behaviors" whereas antitrust policy is "the laws and agencies created by legislation in an effort to preserve competition" (Butler and Drahozal 2006, 499). The use of antitrust to name such laws and policy came about because of the popularity of trusts, which were a form of monopoly that the United States government wanted to break up. Competition laws are an element of competition policy, which, as with antitrust policy, encompass the laws and agencies aimed at preserving competition. Competition law and competition policy are generally used outside of the United States to describe the equivalent of antitrust law and antitrust policy.

The competition policy of the European Union (EU) is developed from two central articles of the Treaty on the Functioning of the EU: Article 101 and Article 102 (European Commission 2014a). The Articles relevant in the cases discussed later are Article 82 of the EC Treaty, Article 102 of the Treaty on the Functioning of the EU, and Article 54 of the European Economic Area Agreement (Europa 2017a). Article 82 of the EC Treaty states that abuse of a dominant position within the common market is prohibited to the extent that it affects trade between Member States. The abuses include imposing unfair prices or other trading conditions, limiting production or technological development, discriminating transactions based on trading partners, or by concluding contracts subject to the acceptance of supplementary obligations. Article 54 of the European Economic Area Agreement applies the same restrictions as Article 82

of the EC Treaty but has jurisdiction in the European Economic Area, which is the entirety of the EU and Iceland, Liechtenstein, and Norway (European Free Trade Association Surveillance Authority, accessed 2017). Finally, Article 102 of the Treaty on the Functioning of the EU declares that firms that hold a dominant market position are prohibited from abusing it by charging prices deemed unfair, limiting production, or by refusing to innovate, and that if any firm is found to violate Article 102, the EC has the authority under the Treaty to investigate and impose fines. The manner in which the EC deploys its competition law will be illustrated in the case studies in section IV.

Competition enables the efficient allocation of resources and stimulates technological advancement and innovation. This leads to greater variety for consumers, lower prices, improved quality, and increased productivity. A report by Philip Lowe, who at the time was the Director-General for Competition, explains the purpose of competition law for the EU (Lowe 2009).[1] Lowe believes that competition produces the listed benefits but that it can only result from a loose model of perfect competition, in which there must be many firms in the market in order for competition to flourish. Consistent with this is the idea that monopolies (determined by dominant market share) are harmful. This is the basis for the EU's competition policy.

The competitive market system is an important regulator of the behavior of firms and prevents excessive private economic power. In the pursuit of profits, rivalry is created, which forces firms to produce at their maximum efficiency. Competition policy presents businesses with a perplexing paradox because it is the goal of firms to be the biggest and the best, but competition policy actively works against the firms that succeed in achieving that goal (Butler and Drahozal 2006, 122–123). This results in misdirected policy that promotes protectionism,

[1] As of December 2018, Philip Lowe is the Director-General for Energy for the European Commission.

which is anti-competitive. Protectionism occurs when the federal government chooses winners and losers from companies within its jurisdiction. It must be emphasized that this paper is not arguing that the EC is specifically targeting American firms as, in many cases, it was an American firm that brought a case against its American competitor.

This paper investigates whether the EU's competition policy serves protectionist aims. The EC relies on a faulty idea of competition. The time and resources invested in competition cases are wasted and the punishments are distortionary because the firms in question are more efficient. These firms do not impede competition; they fuel it by continually fighting to stay on top. If these firms were not providing the best product, consumers would substitute because they consume where their marginal benefit is greater than or equal to their marginal cost. That consumers continue to consume such products signals to these firms that their product is the best in the market. This fuels competition as other firms try to beat those at the top and bring the next best thing. This market process results in the efficient allocation of resources, technological advancement, and innovation, which leads to more variety for consumers, lower prices, improved quality, and increased productivity.

Competition policy punishes the firms that create these benefits, thereby creating uncertainty. While uncertainty may not hurt the firms that can afford any large fines imposed, it could disincentivize smaller firms from entering the market, thereby reducing the dynamism that promotes competition.

I do not contend that the EU is targeting US firms for reasons of nationalism or national protectionism. However, competition laws, as applied by the EC, are protectionist in that they protect losers and, therefore, are anti-competitive.

Section II introduces the EC and the increasing centralization of the EU. This is important context for analyzing the political economy of the EU's competition laws, which will be carried out in Section III. Section IV will evaluate the protectionist intent of competition laws and the incentives to which the EC responds using evidence from case studies. The case studies summarize cases brought by the EC against Microsoft, Intel, and Google. Section V will lay out a policy recommendation. Section VI concludes.

II. Institutional Analysis of the European Union

Institutions are created by the formal and informal rules that govern human behavior. Before the formation of the EU, Europe was comprised of brawling nations (Europa 2017b). Based on the ideological view of institutional emergence, past experiences are an important part of the cultural endowment. The importance of these past experiences is established in path dependence; a concept that explains the way that institutions and beliefs developed in past periods can constrain choices in the current period. More specifically, past experiences "facilitate or constrain the transformation of situations of conflict into situations of coordination" (Boettke and Coyne 2009, 153). Trading between nations was an important factor in the fostering of cooperation between European nations. However, the key to the EU's success as a formal institution is the change in underlying beliefs that have promoted cooperation. Although each European nation has a distinct culture, the EU has created a uniform identity, which has emerged through a gradual change in underlying belief systems. Douglass North emphasized that "formal rules and institutions are indeed important but must be complemented and reinforced by informal rules and institutions (conventions, beliefs, norms, etc.) in order to operate in the desired manner" (Ibid., 153). Therefore, the history of the EU provides an important context for understanding how its

organizational processes have evolved and why it succeeds as a formal institution. These ideas are foundational to how political incentives have evolved within the EU. This will be explored in the public choice analysis of the competition cases brought against Microsoft, Intel, and Google.

a. The Centralization of the European Union

The EU formed after World War II as European countries increasingly relied upon cooperation to foster cross-border trade. In the 1980s and 1990s the EU evolved and formed a single market based on the four freedoms: movement of goods, services, people, and money. The EU has increased from seven countries in 1958 to twenty-eight countries, with the latest country, Croatia, joining in 2013.

The increase in the number of Member States raised questions about increased centralization of the EU. The Eurozone, the group of Member States that use the euro, allowed the EU to integrate further. In 2004, ten more countries joined the EU, and seven of those countries joined the Eurozone. Centralization can result in concentrated power and control. European voters were concerned that this enlargement and integration of the EU would increase centralization and that would attract and favor powerful interest groups (The Economist 1998). Persson and Tabellini (1994) argued that lobbying led to an increase in the size of the government because of free-riding incentives that are created by federally funded programs with localized benefits (Persson and Tabellini 1994, 765). This is because the potential size of rents that can be extracted expands when the size of government increases, which increases the activity of rent-seekers.

Soon after the creation of the monetary EU, the Eurozone, Mazza and Van Winden (2002) extended the analysis of Persson and Tabellini (1994) by presenting a model that divides

the budgeting process into two stages to better illustrate the institutional framework of the EU. The first stage involves the Council, which chooses the size of the budget and the second stage is the allocation of the budget by the EC. The Council is composed of the heads of state or governments of all twenty-eight Member States, the European Council President, and the President of the European Commission (Europa 2018a). Its purpose is to set the policy agenda of the EU. The EC writes proposals for new legislation and implements the decisions of the Council and the European Parliament, which passes laws (Ibid.).

Mazza and Van Winden find that the separation of powers in the European Parliament in the budgetary process actually "restricts free riding and, therefore, reduces the incentives to lobby" (Mazza and Van Winden 2002, 379). They also find in their model that the budget remains unchanged under increased centralization. Finally, Mazza and Van Winden find "that if the lobbying activity is directed to both policymakers, competitive lobbying may actually *reduce* the size of the public sector under centralized policymaking" (Ibid.). However, since 2002, the EU has grown from fifteen countries to twenty-eight countries. As the number of Member States has almost doubled, the application of Mazza's and Van Winden's findings is questionable.

The EC is largely autonomous in its decision making in budget procedures and is transparently influential in inter-institutional budget negotiations. Goetz and Patz (2016) analyze how the EC responded to increased pressure after the financial crisis and look at the changes in administrative organization and budgeting procedures. They state that "scholarship… and previous research on the administrative dimension of budgeting under stress suggest increased centralization [was] a key response" (Ibid., 1038), and find evidence of increased centralization after the 2010 annual budget processes. Moreover, it was "most pronounced during discussions on the 2014–2020 Multiannual Financial Framework (MFF), when regular routines came under

increased pressure in entangled budget negotiations" (Ibid.). Europe's past wars have created an underlying value for certainty. Centralization can be attractive because it promotes standardization, thereby providing certainty. However, it often results in vast inefficiencies that ineffectively serve citizens.

Instead of centralization, competition between jurisdictions would provide benefits to constituents that are better suited to them. Otmar Issing, the former chief economist of the European Central Bank advocated against increased centralization and stated that competition between the jurisdictions of the currency union is vital for continued dynamism. This is particularly relevant during difficult times such as after the financial crisis, where Issing pointed out that the best-performing EU economies were "those with (relatively) flexible labor markets, reasonable tax rates, and open access to professions and business" (Issing 2013).

Elinor and Vincent Ostrom were pioneers of the idea of jurisdictional competition, or polycentricity. They argued that the best path to efficient public administration was not coordination that relied on "bureaucratic command structures controlled by chief executives" (Tarko 2017, 56). Public administrations can use systems that manifest market-like characteristics that would display efficiency-inducing and error-correcting behavior (Ibid.). The strong underlying value for certainty within the EU is important for understanding the desire to increase centralization. Centralization and the larger size of the governing bodies of the EU promoted political incentives that may have favored increased the competition cases brought by the EC.

III. The Political Economy of Competition Laws

The EC is transparent about using fines from competition cases as a source of revenue to fund the EU budget. For example, Microsoft was fined €899 million, Intel was fined €1.06 billion, and Google was fined €2.42 billion, in total that amounts to €4.38 billion, which is around $5.5 billion.[2] It is possible that the EC felt pressured to fine Microsoft due to the financial crisis. Aydin and Thomas (2012, 533) state that governments and firms in the EU during the financial crisis felt particular pressure to adopt protectionist measures, which put pressure on the Directorate-General for Competition of the European Commission. However, the EC should be wary that fines are not a sustainable source of revenue for the EU budget.

The goal of competition policy is to improve the competitiveness of markets. A competitive market does not necessarily mean that it has the most rivalry moment-to-moment. The picture of perfect competition, in which small buyers and sellers continuously shout out bid and asked prices, is a hypothetical construct that is useful as a model but should not automatically be the goal of policymakers for all markets (Easterbrook 1985, 1). Competition is facilitated by the substantial cooperation that is important for every market. In order to look at the effectiveness of competition and competition policy through a public choice lens, the incentives of the necessary parties must be investigated. This includes consumers, rivals, and policymakers.

In *The Calculus of Consent*, James Buchanan and Gordon Tullock (1962) explore how politicians aim to maximize voter support. Voter maximization replaces "the attempt of individuals to maximize utilities in the market process" (Ibid., 10). Therefore, instead of responding to incentives that increase the utility derived from consumption, politicians respond

[2] Dollar value based on conversion rates at the times fines were levied.

to incentives that will increase their likeability among voters with the hope that it will win their votes. This illustrates that politics (a non-market context) is an arena for exchange, "for example, votes for policy positions" (Ibid., 11). The difficulty arises in winning votes because it is hard for the politician to assess the demand of voters. Buchanan and Tullock illustrate that the voter has a demand for public goods, which are provided by the politicians in exchange for a vote (Ibid., 33).

Each year Member States contribute a certain amount of money to the EU budget (Europa 2018b). However, the value varies based on numerous factors. The Commissioners of the European Union are elected by the Members of European Parliament (MEPs).[3] If a Commissioner can make it so that a Member State does not have to contribute as much to the budget, the MEP of that Member State will likely vote for the Commissioner to keep their seat. However, the constituents of the Member States elect who represents them in the European Parliament (Ibid.). Therefore, it is the MEPs who must evaluate their constituents' demand for public goods. The individual voter may face a trade-off between demand for public goods and their income. Buchanan and Tullock (1962) argue that "the average the individual will vote for 'more' collective activity when the taxes he must pay are reduced, other things being equal" (33). It can be hypothesized that if a Commissioner can reduce the contribution paid by a Member State, an MEP will give them their vote. If the MEP illustrates to their constituents that taxes will not be increased due to EU membership but that they will receive more public goods, voters will continue to support that MEP. An example of a public good could be the promise of stability in the region.

In the market context, businesses are motivated by profits. If they succeed in making profits, this signals that consumers are engaging in a mutually beneficial exchange. Successful

[3] MEPs represent the Member States.

firms that manage to earn higher profits fuel competition as they attract new entrants into the market. This drives profits down, pushing entrepreneurs to innovate in order to stay ahead. Innovations can mean higher quality, better service, lower prices, or increased efficiency. When a firm does one or more of these things better, that increases competition and worries rivals. However, the competitive relationship between firms reveals their incentives, particularly when firms bring competition cases against their rivals (McAfee, Mialon, and Mialon 2005).

Competition policy is driven by businesses urging government to intervene when their competitors pose a threat. It is used by firms that are struggling to compete against better-performing rivals or to work out a grievance (Malek 2004). The desire is to injure competitors by involving them in litigation that causes an increase in costs. Raising rivals' costs can be profitable without forcing them to exit the market because "[i]t is better to compete against high-cost firms than low-cost ones" (Salop and Scheffman 1983, 267). This is because "cost increases generally raise prices, not lower them" (Ibid.). This boosts the chances of a shift in customer base.

Competition cases brought by competitors can be particularly harmful as firms can "prevent their rivals from realizing efficiencies through mergers and other contractual arrangements, to restrain aggressive pricing, or merely to burden their rivals with litigation cost" (Snyder and Kauper 1991, 551). This is often referred to as "raising rivals' costs" theory, and it considerably broadens the scope of practices that may be thought to deter entry or limit a rival's effectiveness. This practice allows firms to expand the ways in which they might try to exclude otherwise efficient competitors (Ibid., 561–562). The firm's demand curve can be thought of as the difference between the summation of the supply of the firm's rivals and market demand

(Ibid., 562). When there is a cost increase for a firm's rivals, they might exit or prevent entry of other firms, which allows the firm to gain an advantage.

There are a variety of market contexts where such anticompetitive exclusion may take place. In a case where firms band together to exclude a more efficient competitor, the firms must exercise classical market power in the product market or input market, or help to create that market power to impair the otherwise more efficient rival (Ibid., 564). However, for this to work, there needs to be two market conditions. The market must have a high degree of market concentration that allows firms to coordinate and exercise classical market power, and the barriers to entry must reduce the ability of possible entrants and cause fringe competitors to substantially increase their production in response to that (Ibid.).

Although the EC is not a business competing for profit, it still responds to incentives. By keeping large businesses such as Microsoft, Intel, and Google in competition litigation, it raises the costs incurred by these firms, which gives their rivals an advantage that could give them the ability to increase their market share. A less efficient firm in the EU may not gain enough of an advantage to out-compete those firms, but the EC is incentivized to injure the tech firms with a large market share in their territory because of cultural aversion to technological change and fear of failure. A marketplace that promotes experimentation is an important step in innovation and the freedom to fail has been the key to successful entrepreneurship in the United States (Thierer 2016, 52).

There is a significant difference in the institutional and cultural values of the EU and the United States. The EC does not trust technology. It is incentivized to increase the costs of large tech companies in an aim to reel in some of the power the firms hold and transfer it to the EC. The EU has always been wary of technology and the internet. In 1995, the EU adopted its "Data

Protection Directive" to restrict data collection and use (Ibid.). Its approach has been designed using the precautionary principle and "combined with 'a deeply ingrained fear of failure that is a bigger impediment to entrepreneurship on the Continent than in other regions,'" which has resulted in a lack of innovation and development in the European technology sector (Ibid.).

The ingrained value of risk aversion and need for stability incentivize European regulators to use their authority to inhibit the strength of the digital sector. The fear of disruption and change motivates the EU to use policies that protect "industries, organizations, professions, or even just cultural norms that are threatened by technological change" (Ibid., 55). Unfortunately, this fear of change and failure incentivizing the EC to fight technology could make the EU more prone to increasingly dangerous and systematic failures in the long run (Ibid., 56).

Competition laws are an ineffective way for European policymakers to promote stability. They tend to be drawn out over time and require an extensive use of resources that create uncertainty in the market, harming all actors. When a market is not conducive to entrepreneurial opportunities, firms will be disincentivized from innovating and incentivized to relocate (Ibid.). This is known as global innovation arbitrage, where firms take "advantage of differences in regulatory environments as well as in the cost of talent, specialized services, and other inputs to the innovation process" (Kao 2009). It is imperative that policymakers face incentives for jurisdictional competition for innovation as it is the key to economic development.

IV. Case Studies

In this section, I examine three competition cases that were brought by the EC against United States technology firms that resulted from complaints by their competitors. These cases were

chosen because of their timing. Microsoft was the earliest case, beginning in 1998 and ending in 2009. Intel's case began in 2000 but also ended in 2009 with a decision coming from the European Court of Justice (CJEU) in 2017. Google's case began in 2009 and was concluded in 2017. The closeness in timing of these cases raises interesting questions about the incentives to which the EC was responding.

In each of these cases, I apply the economic theory of competition law as well as an analysis of the incentives facing actors within the context of the EU to determine whether the EC capitalized on the protectionist intent of its competition laws.

a. Microsoft

In 1998, Sun Microsystems filed a complaint alleging that Microsoft would not supply the firm with the information needed to interoperate with Microsoft's PC operating system. The EC investigated the complaint and found that other firms had also "been refused this and that these non-disclosures by Microsoft were part of a broader strategy designed to shut competitors out of the market" (European Commission 2004). The complainants stated to the EC that "Microsoft's non-disclosure of interface information artificially altered their choice in [favor] of Microsoft's server products. Survey responses submitted by Microsoft itself confirmed the link between the interoperability advantage that Microsoft reserved for itself and its growing market shares" (Ibid.).

This led the EC to broaden the scope of the investigation by looking at Microsoft's behavior in the market with regard to the Windows Media Player (European Commission 2012). In August 2000, after receiving information from the market, the EC sent Microsoft a Statement of Objections alleging that the firm had denied the disclosure of interface information, which

"rival work group server operating system vendors needed to interoperate with Microsoft's dominant Windows PC operating system" (Ibid.). A year later, the EC contacted Microsoft again with a second Statement of Objections, which expanded the first Statement of Objections alleging interoperability objections taking into account Microsoft's new "Windows 2000 generation of PC and server operating systems" and included a new claim "that Microsoft had engaged in anti-competitive tying of its Windows Media Player product with its Windows PC operating system" (Ibid.). The EC concluded that as Windows Media Player was tied to the PC system it reduced "the incentives of music, film and other media companies, as well software developers and content providers to develop their offerings to competing media players" (European Commission 2004), and alleged that consumer choice was reduced as the competing products were disadvantaged due to the tying and not due differences in price or quality. Moreover, the EC stated that without intervention the market would continue to "favor" Microsoft, allowing Microsoft to control related markets, which "deters innovation and reduces consumer choice" (Ibid.).

Two years later, in August 2003, Microsoft was sent a third Statement of Objections, which confirmed that the interoperability and tying objects were sent to Microsoft previously. Microsoft responded to each Statement of Objections. After Microsoft received the third Statement of Objections, it requested an oral hearing, which was held on November 12-14, 2003 (European Commission 2012). The investigation was concluded in 2004 and the EC found that Microsoft:

"had abused its dominant position in the PC operating system market by:

- refusing to supply competitors in the work group server operating system market interface information necessary for their products to interoperate with Windows, and

hence to compete viably in the market. The Decision ordered Microsoft to disclose, within 120 days, complete and accurate interface information which would allow rival vendors to interoperate with Windows, and to make that information available on reasonable terms;

- harming competition through the tying of its separate Windows Media Player product with its Windows PC operating system. The Decision ordered Microsoft to provide, within 90 days, a version of Windows which did not include Windows Media Player" (European Commission 2012).

However, this was not the end of the case for Microsoft. In June 2005, Microsoft released a version of Windows in Europe that did not have Windows Media Player tied to it, called Windows XP N (Microsoft 2009). In December 2005, Microsoft made available additional technical documentation for protocol and royalty information but the EC issued a Statement of Objections stating the documentation was not in compliance with the 2004 decision. In January 2006, Microsoft expanded the documentation to meet the requirements of the 2004 decision, however in July, the EC fined Microsoft "€280.5 million for inadequate technical documentation and announces that any further finding on non-compliance will result in fines of up to €3 million per day" (Ibid.). In October, the EC stated that Microsoft had fully complied with the 2004 decision.

In January 2008, the EC opened two new investigations against Microsoft based on a complaint "relating to interoperability" and "a complaint from European browser maker Opera relating to inclusion of [Internet Explorer] in Windows" (Ibid.). In February, the EC fined Microsoft "€899 million for protocol pricing under in the 2004 decision, for the period prior to October 22, 2007. In May, Microsoft [appealed]" (Ibid.). In January 2009, the EC issued a Statement of Objections "expressing the preliminary view that including [Internet Explorer] in Windows since

1996 was an abuse of Microsoft's dominant position" (European Commission 2009). In July 2009, the EC accepted Microsoft's proposals and allowed it to test the market for Internet Explorer included in Windows 7, and in December, the proposals were formally accepted and the EC stated its concerns about interoperability and Internet Explorer in Windows had been satisfied.

There are two parts to this case: the market dominance and the tying objections, both of which can be considered controversial as it could be argued that the EC was protecting the competitors rather than the competition that Microsoft brought to the market. Tying, which the EC alleged gave Microsoft an unfair advantage with Windows Media Player but not with Internet Explorer, is known as a direct form "of competitive restraint by firms with some degree of market power" (Ponsoldt and David 2007, 423). From an antitrust analysis, "requiring a consumer to purchase one good or service in connection with another more desired product, a seller leverages demand for its tying product against the consumer" (Ibid.). This allows the seller to reduce the consumer's autonomy and "restrains competition in the market for the tied product" (Ibid.).

However, bundling products in this way can also create efficiencies, particularly in the software industry. It is often the case that when software manufacturers are faced with tying accusations they can "present compelling cost-saving arguments" (Ibid., 424). In the case of *Commission v. Microsoft*, this did not hold up. The EC vigorously pursued Microsoft on the issue of tying and took the traditional approach by applying "a qualified per se rule of illegality against Microsoft's software bundling practices" (Ibid., 425). As evidenced in the Microsoft case, this traditional approach has affected the way that Microsoft has been able to distribute and sell in the EU jurisdiction. The EU does not and "refuses to differentiate between regular products and intangible, ephemeral software, despite well-recognized economic differences (Ibid., 451). This has increased uncertainty for manufacturers who must "comply with rules that do not contemplate their

products" (Ibid.). Although the United States does not require manufacturers to comply with such strict rules and does differentiate between products, it is still not clear what a permissible software bundle is. Therefore, "[s]oftware manufacturers are left to hazard guesses as to which bundles are permissible: manufacturers erring on the side of caution will not engage in some innovative and useful bundles for fear of exposure to antitrust liability" (Ibid.).

The EC aimed to increase competition by disallowing tying because Sun Microsystems struggled to compete with Microsoft in the European market. In 2004, the European Competition Commissioner Mario Monti stated that "[b]y setting a legal precedent in the current antitrust case against Microsoft, the EC will make it easier to pursue Microsoft in future antitrust cases" (Meller 2004). The EC states on its website that fines received from competition are used to help fund its budget. It seems that the EC has an incentive to pursue Microsoft and similar companies in the future.

The EC has financial incentives when it comes to pursuing competition cases. A firm like Microsoft fits the defendant criteria because of its market dominance, which put it in a position that allowed it to pay the fines imposed by the EC without hurting its dominant share of the market. However, the remedies, in this case, were ineffective in hurting Microsoft's market position, which aligns with the findings of Crandall and Winston in the United States antitrust cases.

Having reviewed the procedures of the EC and the reasoning behind *Commission v. Microsoft*, several factors suggest that the motivations behind this case were protectionism and precaution. The EC found that European consumers are wary of technology (Pethokoukis 2016). The EC may also have been incentivized to increase its popularity because cases such as *Commission v. Microsoft* demonstrate its power by standing up to the "big, abusive" tech

companies that threaten stability.

Sun Microsystems was also in litigation with Microsoft during this case. By bringing cases from multiple sides, it was engaging in the idea of raising their rival's costs so that it could reduce the market share of Microsoft. Although Sun Microsystems and the EC won in their cases against Microsoft, it seems that instead of pursuing innovation to become the most competitive, Sun Microsystems relied on using litigation to keep its market share and increase its rival's cost to reduce its own. From 1989 to 1999, Sun Microsystems' revenue increased steadily from $1.77 billion to $11.73 billion (Securities and Exchange Commission, accessed 2018). However, because of decisions against particular innovations of the time, Sun Microsystems was unable to recover after the dot-com crash. Sun Microsystems did not expand its presence in the x86 processors market, which led to its downfall and ultimate acquisition by Oracle in 2010 (Brodkin 2009).

Sun Microsystems aimed to increase the costs incurred by Microsoft so that its market share would be reduced. The EC responded to incentives that would increase its popularity. This is evidenced by the hefty fines the EC imposes on companies in its competition cases. The Microsoft case study supports the argument that the EC promotes policies that it believes create stability in the EU.

The digital and technological sectors thrive on experimentation and the ability to fail. The EC is averse to policies that give the freedom to firms to do this. Protectionary and precautious policies such as the Data Protection Directive and the more recent General Data Protection Regulation could result in the hindrance of innovation and increased uncertainty for producers. Although these rules fall under the jurisdiction of the EU, "the global nature of the Internet means that [GDPR] will affect both companies and individuals worldwide" (Hobson and Calder,

2018). The regulations that encapsulate GPDR are “onerous, expansive and vague” (Ibid.). Businesses, particularly small businesses that do not have the resources to hire legal teams are unclear on their responsibilities and do not want to risk being fined the non-compliance fee of €20 million or 4 percent of global revenue, depending on which is highest (Ibid.). This is increasing pressure to exit the market.

However, it is not only visible costs that are rising because of GDPR. There are unseen consequences such as more costly experimentation (Ibid.). Cybersecurity firms have expressed concerns that the new obligations increase the risk of incompliance when exploring new technologies such as cloud-based apps (Ibid.). This disincentivizes firms from innovating and disadvantages small businesses.

The EC and, more largely, the EU, value stability because of the volatile relations between European countries in the past. The EU and the technological and digital sectors were fairly young when the Microsoft case began in 1998. The EC was incentivized to bring this case in order to demonstrate their power and distaste for these sectors and how they threaten stability in the EU. The fine imposed on Microsoft and the years of litigation were unsuccessful in raising its costs enough to harm its market share. Competition is not about the number of firms in the market, it is about the “process of trying to beat rivals by providing a superior product or service” (Malek 2004). The EC used the protectionist nature of the competition laws to its advantage in an attempt to stifle influence in European territory. However, the market prevailed and Microsoft continued to hold its large market share because it was the most efficient and innovative in the industry, which was evidenced by consumers continuing to choose its products over others.

b. Intel

In October 2000, a formal complaint was brought to the EC by Advanced Micro Devices (AMD) against Intel, a microchip manufacturer. AMD claimed that Intel was forcing it out of the market as it dealt exclusively with computer manufacturers to purchase its x86 Computer Processing Units (CPUs) instead of CPUs from AMD. This complaint was supplemented with new allegations in November 2003 that led to a round of investigations in May 2004 (Europa 2009). The EC and other National Competition Authorities carried out on-the-spot inspections at Intel locations in the United Kingdom, Spain, Italy, and Germany (Ibid.). These investigations were followed up with a Statement of Objections from the EC regarding Intel's conduct with its major Original Equipment Manufacturers (OEMs), which included Dell, HP, Acer, NEC, and IBM (Ibid.). It was suspected that Intel engaged in exclusive dealing by offering rebates to computer manufacturers, who were the retailers aforementioned and Media-Saturn-Holding GmbH (MSH), a European retailer of microelectronic devices and Europe's largest PC retailer (Ibid.). MSH was brought into the investigations after AMD filed another complaint in July 2006 to the German National Competition Authority, which was passed on to the EC (Ibid.).

In February 2008, additional on-the-spot inspections were carried out at the sites of Intel and several European PC retailers, and written requests for information were addressed to several OEMs regarding exclusive dealing (Ibid.). In July 2008, the EC issued a supplementary Statement of Objections addressing Intel's dealings with MSH and other OEMs. Intel responded by filing an application with the Court of First Instance (CFI) requesting additional documentation, including the file of the private litigation between Intel and AMD that occurred in Delaware (Ibid.). Intel also applied to suspend the EC's procedure pending a ruling from CFI and asked to be granted thirty days from the date of the judgement to reply to the July 2008

supplementary Statement of Objections (Ibid.). In December 2008, the EC contacted Intel drawing attention to specific pieces of evidence that were to be potentially used in the final Decision of the case, to which Intel did not respond. In January 2009, the President of the CFI rejected Intel's request for additional documentation and extension to reply to the July 2008 supplementary Statement of Objections (Ibid.). In February 2009, Intel responded to the CFI rejection with a written submission that included arguments responding to the July 2008 supplementary Statement of Objections. Later in February, Intel requested an oral hearing relating to the July 2008 supplementary Statement of Objections, which was rejected by the Hearing Officer on February 17, 2009. In May 2009, the EC concluded that Intel held a dominant market position as it was calculated that between 1997 and 2007, Intel held a market share of around 70 percent. Furthermore, the Decision stated that the exclusive dealing and rebates granted by Intel to Dell, HP, NEC, and MSH were an abuse of its dominant position and Intel had violated Article 82 of the EC Treaty and Article 54 of European Economic Area Agreement by using such rebates to remove competitors from the x86 CPU market. Intel was fined €1.06 billion. In 2017, Intel took the matter to the European Court of Justice (CJEU), which had the General Court (GC) re-examine if the rebates were capable of restricting competition.

Exclusive dealing is a contract that exists "when one firm agrees to buy only from another, most commonly when a dealer agrees to handle only the goods of a particular manufacturer" (Bork 1978, 299). The rebates that resulted from the contracts made by Intel with the PC retailers were not exactly exclusive dealing because they did not have to purchase solely from Intel, with the exception of Lenovo and MSH. Intel offered rebates to HP Inc. from November 2002 to May 2005 as long as HP purchased at least 95 percent of its x86 CPU from

Intel (Intel v. Commission 2009, 7). NEC was offered rebates from October 2002 to November 2005 for the purchase of no less than 80 percent of its x86 CPU from Intel for its desktop and notebook segments (Ibid.). During 2007, Lenovo was offered rebates for exclusive purchase of Intel's x86 CPU for its notebook segment (Ibid.). Finally, between October 2002 and December 2007, MSH was offered payments for selling exclusively Intel-based PCs (Ibid.).

The use of such contracts could not grant monopoly power because the rebates should only serve to increase competition with rivals. The PC retailers did not have to agree to these contracts as there were competitors of Intel in the x86 CPU market. Intel incentivized retailers with rebates in a similar way to how retailers incentivize us to buy from them with sales or loyalty cards. Bork (1978) quotes Justice Frankfurter who argued that "requirements contracts… may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to consumers'" (300). The rebates offered may have reduced the costs of the PC retailers allowing them to reduce prices for consumers. By allowing retailers to reduce costs, it may increase efficiency. Exclusive dealing is a form of vertical integration, which generally does create "efficiencies and does not create restriction of output" (Ibid., 303). The beauty of contracts is their ability to create efficiencies. The retailers would not have agreed to the exclusive dealing contracts solely for the rebates, they would also acknowledge that "the advantage of the contract… [is] the creation of efficiency" (Ibid., 304–305).

Intel was cited as infringing upon Article 54 of the European Economic Area, which states that, "[a]ny abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties" (EFTA Surveillance Authority, accessed 2017). Intel was also found to infringe upon Article 82

of the EC Treaty, which states that, "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States" (Europa 2017a). If the contracts could not grant monopoly power to Intel, then their large market share must be due to other factors, such as increased efficiency. Higher efficiency due to economies of scale is likely the cause that allowed Intel to offer the rebates in the first place, which only served to increase efficiency for its retailers as they would be given "an assured source of supply and the elimination of selling and buying costs" (Bork 1978, 309).

Intel was trying to increase its efficiency through contracts and there is strong evidence to show that exclusive dealing does not result in the abuse of monopoly power. Intel's case was similar to the Microsoft case. A rival, AMD, brought a complaint to the EC aimed to increase the costs incurred by Intel to diminish its market share. However, in the case of Intel, the CJEU became involved and overruled the decision of the GC, saving Intel from the €1.06 billion fine. The CJEU stated that the GC failed to examine Intel's arguments concerning the "efficient competitor" test, which is used "to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market" (Depoortere et al. 2017).

During Intel's case, there was a change of European Commissioner for Competition from Mario Monti to Neelie Kroes. When Kroes delivered the news of the fine on Intel, she famously stated, "I would like to draw your attention to Intel's latest global advertising campaign, which proposes Intel as the sponsors of tomorrow, well now they are the sponsors of the European taxpayer" (EURACTIV 2009). After releasing the decision, Kroes traveled to the United States to gives speeches about "how procedurally fair, consumer-oriented and economically sound her

bureau's decisions [were]" (Cass 2009). It seems as though Kroes as the Commissioner responded to the incentives of many politicians and bureaucrats. Kroes used rhetoric and a press tour to signal that the EC had taken down a big, bad company that would now serve the European taxpayer to increase her popularity and win her votes to stay in office.

However, since Intel's case was overturned by the CJEU, more questions are raised about the EC's incentives in ruling against Intel in the first place. In *Bureaucracy*, Ludwig Von Mises (1944) writes about complacency experienced by bureaucrats. He writes about how the bureaucrat's job is to serve the public and that his job has been established "directly or indirectly by a legislative act and by the allocation of the means necessary for its support in the budget." (63). The sheer size of Intel's fine brings into question the pressure to charge fines on companies that could be used to fund the budget. The bureaucrat performs duties that show he is a valuable member of society and will put laws into practice even when they are harmful because he is not responsible for their inadequacy (Ibid.). At the time, Intel's fine was the largest ever imposed by the EC on a single firm. The protectionist nature of competition laws allowed for Neelie Kroes and bureaucrats of the EC to respond to incentives that would increase the popularity of the bureau and the EC. It can be concluded that AMD's complaint was a conduit for protectionism that would increase the popularity of the EC.

c. Google

In 2009, Foundem filed a complaint under Article 102 to the EC against Google to look at how the search engine directed users to its comparison shopping service. Google's comparison shopping service returns product offers from websites in response to queries, which enables users to compare products and prices (European Commission 2017, 11). In 2004, Google launched a

shopping service under the name "Froogle" in the United Kingdom and Germany. Froogle was separated from Google as a standalone website and merchants did not have to pay to be listed because it was funded by advertisements (Ibid.).

In 2007, Google renamed Froogle to "Google Product Search" and launched a separate website dedicated "OneBox" for Google Product Search, which was referred to as "Product Universal" (Ibid.). Product Universal was launched in the UK and Germany in 2008, France in 2010, and Italy, the Netherlands, and Spain in 2011. It "comprised specialised search results from Google Product Search, accompanied by one or several images and additional information such as the price of the relevant items" (Ibid.). In 2012, Google Product Search was renamed "Google Shopping" and Product Universal, "Shopping Unit". Google also changed its business model from being free for merchants to list their products to a paid inclusion model, where merchants had to pay Google when their product was clicked on in Google Shopping (Ibid.). The Shopping Unit comprises specialized results from Google Product Search the same way that Product Universal comprised specialized search results from Google Product Search. However, the results within the Shopping Unit take users directly to the pages of Google's merchant partners, which was not the case for Product Universal (Ibid., 11–12). The Shopping Unit was launched on Google's domains in the EEA.[4]

The EC received numerous complaints against Google in addition to a number of pending cases before individual Member States' competition authorities, which were re-allocated to the EC (Ibid., 13). The first complaint was lodged by Infederation Ltd. ("Foundem") in November 2009 but was replaced in February 2010 by a new version, which led the EC to send Google a

[4] The Shopping Unit was also launched in Czech Republic, France, Germany, Italy, the Netherlands, Spain, the United Kingdom, Austria, Belgium, Denmark, Norway, Poland, and Sweden, in 2013. In 2016 Google started a Shopping Unit experiment in the Republic of Ireland (European Commission 2017, 12).

non-confidential copy of the complaint. In May 2010, Google submitted a formal reply to Foundem's complaint, to which Foundem responded formally, stating that it deconstructed and rebutted "Google's extraordinarily misleading submission" (Raff and Raff 2015, 17). Foundem also stated that it believed its response to Google significantly contributed "to the EC's decision to move to a Formal Investigation of Google in November 2010" (Ibid.). In the same year, three more companies lodged complaints against Google.[5]

In November of 2010, the EC began proceedings against Google in relation to numerous practices (European Commission 2017, 14).[6] In 2011, the Italian competition authority transferred a complaint lodged against Google by Mr. Sessolo ("nntp.it"), Elf B.V. ("Elf") also filed a complaint against Google, as did Microsoft Corporation ("Microsoft"), and La Asociación de Editores de Diarios Españoles ("AEDE"), to which Google provided comments. In June 2011, Twenga SA ("Twenga"), submitted an application to be heard as a third and in January 2012, Twenga lodged a complaint against Google, to which Google provided comments. A firm wishing to remain anonymous, Company E, submitted an application to be heard as a third party, which was rejected by the Hearing Office. In March 2012, Yelp Inc. ("Yelp") submitted an application to be heard as a third party, which was approved by the Hearing Office (Ibid., 14-15).

During the same time, Streetmap EU Ltd ("Streetmap") and Expedia Inc. ("Expedia") lodged complaints against Google, to which Google provided comments. In April 2012, the complaints lodged by Ciao, eJustice, VfT, BDZV and VDZ, Elf, Euro-Cities and HotMaps,

[5] Google responded to the complaints issued by: Ciao GmbH ("Ciao"), eJustice.fr ("eJustice"), and Verband freier Telefonbuchverleger ("VfT").
[6] One month later complaints lodged against Google were transferred by Germany's competition regulator. The companies included: Bundesverband Deutscher Zeitungsverleger ("BDZV"), the Verband Deutscher Zeitschriftenverleger ("VDZ"), Euro-Cities AG ("Euro-Cities"), and Hot Maps Medien GmbH ("Hot Maps") (European Commission 2017, 14).

nntp.it, Microsoft, and Twenga were merged with the Foundem case to make one large case (Ibid., 15).[7]

On 13 March 2013, the EC adopted a Preliminary Assessment addressed to Google. In the Preliminary Assessment, the EC stated that Google engages in particular business practices that may infringe upon Article 102 of the Treaty and Article 54 of the EEA Agreement (Ibid., 16). The particular business practices in question were the "favourable treatment, within Google's general search results pages, of links to Google's own specialised search services as compared to links to competing specialised search services" (Ibid.), the "copying and use by Google without consent of original content from third party websites in its own specialised search services" (Ibid.), agreements "that de jure or de facto oblige websites owned by third parties (referred to in the industry as 'publishers') to obtain all or most of their online search advertisement requirements from Google" (Ibid.), and contractual "restrictions on the management and transferability of online search advertising campaigns across online search advertising platforms" (Ibid.). Google disagreed that it had infringed upon Article 102 of the Treaty and Article 54 of the EEA Agreement but offered three sets of commitments to address the EC's concerns about the listed business practices (Ibid., 17). Throughout 2014, more complaints were lodged by numerous companies including: Open Internet Project ("OIP"), Deutsche Telekom AG ("Deutsche Telekom"), Yelp, and HolidayCheck AG ("HolidayCheck"). The EC sent letters to all complainants that had lodged a complaint before 27 May 2014 outlining that Google had presented a satisfactory set of commitments in response to the EC's

[7] A year later, in April 2012, Odigeo Group ("Odigeo") and TripAdvisor Inc. ("TripAdvisor") lodged complaints against Google, to which Google provided comments. In June, Nextag Inc. ("Nextag") and Guenstiger.de GmbH ("Guenstiger") lodged a complaint against Google with the Commission, to which Google provided comments (European Commission 2017, 15). In July 2012, the Hearing Office approved the application of MoneySupermarket.com Group PLC ("MoneySupermarket") to be heard as a third party. In January 2013, Visual Meta GmbH ("Visual Meta") and the Initiative for a Competitive Online Marketplace ("ICOMP") lodged complaints against Google with the Commission, to which Google provided comments (Ibid., 16).

concerns and that the EC was rejecting its complaints if they were related to the concerns identified in the Preliminary Assessment (Ibid.). Nineteen complainants submitted written observations in response to this. However, Streetmap and nntp.it did not submit responses within the time and therefore were withdrawn from the case (Ibid., 18). After reviewing the observations of the nineteen complainants, the EC decided that it could not adopt a decision, which bound Google's commitments in relation to the business practices covered in the Preliminary Assessment (Ibid.).

In 2015, Trivago GmbH ("Trivago"), News Corporation ("News Corp"), Tradecomet.com Ltd and its parent company Tradecomet LLC ("TradeComet"), and VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH ("VG Media") lodged complaints with the EC against Google. Eight parties submitted applications to be heard as third parties.[8]

In April 2015, the EC reverted its decision that it could not adopt a decision and adopted a Statement of Objections addressed to Google stating that they had reached a provisional conclusion that Google had abused dominant market position and therefore, had infringed upon Article 102 of the Treaty (Ibid.). In August 2015, Google responded to the Statement of Objections and did not request to express its views at an oral hearing (Ibid., 20).

In April 2016, Microsoft and Ciao withdrew their complaints, while Getty and News Corp filed additional complaints (Ibid., 20-21). In May 2016, Promt GmbH ("Promt") lodged a complaint against Google. In July, the EC began a proceeding against Alphabet and adopted a

[8] The companies approved to be heard as third parties included: Company AC, a company that wished to remain anonymous, FairSearch Europe ("FairSearch"), SARL Acheter moins cher ("Acheter moins cher"), S.A. LeGuide.com ("LeGuide"), Kelkoo SAS ("Kelkoo"), Getty Images, Inc. ("Getty"), Myriad International Holdings B.V. ("MIH"), and the European Technology & Travel Services Association ("ETTSA") (European Commission 2017, 18–19).

Supplementary Statement of Objections addressed to Google and Alphabet that Alphabet addressed in the original Statement of Objections (Ibid., 21). Google and Alphabet responded to the Supplementary Statement of Objections and again did not request an oral hearing. In February 2017, the EC sent Google and Alphabet a letter of facts that illustrated "pre-existing evidence that was not expressly relied on in the [Statement of Objections] and [Supplementary Statement of Objections], but which, on further analysis… could be potentially relevant to support the preliminary conclusion reached in the [Statement of Objections] and [Supplementary Statement of Objections] (Ibid., 21-22). The EC also brought attention to additional evidence given to the EC after the adoption of the Supplementary Statement of Objections that also may be relevant to the preliminary conclusion (Ibid., 22).

On June 27, 2017, the EC concluded that Google was dominant in "each national market for general internet search throughout the European Economic Area (EEA), i.e. in all 31 EEA countries" (Europa 2017c). The EC stated that the assessment was "based on the fact that Google's search engine has held very high market shares in all EEA countries, exceeding 90 percent in most" (Ibid.) and fined Google €2.42 billion (around $2.73 billion[9]).

Abuse of dominant market position, in other words, monopoly, has historically been used to bring competition or antitrust cases against large, efficient firms. Google became the most popular search engine by breaking the norms of the industry with regard to stickiness, which was an industry metric that measured how long users used a site. Search engines' ad revenue came from how long a user spent on their site, but Google focused on the opposite by ensuring that it would give users the best results and earn its revenue from advertisements instead. The focus on

[9] Based on the average exchange rate on June 27, 2017, at https://www.poundsterlinglive.com/best-exchange-rates/euro-to-us-dollar-exchange-rate-on-2017-06-27

providing a better product to consumers is what made Google the most successful search engine and allowed it to gain the large market share cited by the EC.

Arguments against monopoly come from the idea that monopolies create inefficiencies because monopolies do not allow for competition (Armentano 1986, 22). It is also a mistaken assumption that monopolies aim to raise prices in order to assume monopoly profits. Armentano states, "[i]n any serious attempt to monopolize some free market, businesses are far more likely to lower costs than they are to raise them, and to expand rather decrease production" because the "most effective way to gain and hold a free-market monopoly position is to be more efficient than rivals" (Ibid.).

Google's shopping service switched to only showing advertisements, which required merchants to bid against one another for the most advantageous placement (Reback 2017). However, merchants bid for placement because of Google's success as a search engine. Google promotes competition by having merchants bid against one another to gain an ad placement. Google suggested to the EC that it will "create a standalone unit for its shopping service and force rivals to bid against that unit (and each other) for ads shown at the top of Google's search results page" (Ibid.). The EC claimed that Google's dominant market position or monopoly power disabled its rivals, which it did because it was more efficient as a search engine for shopping products. It is also not convincing that Google's market share disabled its rival shopping comparison sites from competing with Google Shopping because consumers tend to comparison shop at sites like Amazon, or a number of the rivals who were involved in the case.

Furthermore, the EC uses market share to define dominant market position, which is "calculated with reference to their sales of the relevant product in the relevant area" (EUR-LEX 2011). It was calculated that Google had around 90 percent of the market share, meaning that out

of all sales, Google held 90 percent (Ibid.). This implies that Google's product was preferred by consumers, which illustrates that Google was outcompeting its rivals. There were over twenty rivals involved in the case and the case was originally brought by a rival to the EC because they were being outcompeted by Google. By supporting Google's rivals, the EC gave it protection. Therefore, the motivation for this case was protectionism and did not aim to serve consumers, who demonstrated that Google provided the best product in its market.

In Google's case, there were a string of rivals who wanted to increase Google's costs to reduce its market share. During Google's case in 2014, the EC put out a press release that stated it would "cash in more than €1.5 billion in additional revenue, mainly from competition fines" (European Commission 2014b). This reduced the amount that Member States were required to contribute to the 2015 EU budget by €1.4 billion (European Commission 2015). Although this was a few years before the conclusion of Google's case, it illustrates the financial incentives of the EC to bring competition cases against large firms that can pay the massive fines. The EC transparently uses the fines to help fund the budget and as this reduces the amount that Member States have to contribute, this will incentivize the EC to pursue more cases and larger fines that will allow it to gain favorability from the Member States.

In 2014, the EC was getting ready to settle with Google but the number of complainants continued to increase, which put pressure on the EC, particularly Joaquin Almunia, the European Commissioner on Competition (Hirst 2014a). Almunia claimed that the EC was independent, impartial, and objective (Ibid.). During this time, the competition bureau was being lobbied by national politicians, Members of European Parliament (MEPs), Commissioners, and firms about the legal process and Almunia's decision to accept a round of concessions without a market test (Hirst 2014b; Competition Policy International 2014). Almunia had pushed for the third

settlement deal but eventually, along with other Commissioners, rejected it, further drawing out Google's case. In October 2014, Almunia lost his seat as European Commissioner for Competition to Margrethe Vestager. During her confirmation hearings, Vestager stated that she favored reaching settlement of cases in the form of reduced fines or negotiated concessions decided with the firms (Chee and Macdonald 2014). However, she did not pursue this strategy when she took over the Google case from Almunia. This was most likely because she had to appease the Commissioners in the same way as Almunia.

It seems that as the cases brought by the EC became more publicized, the EC began to respond to political incentives in a manner unlike the previous cases. This was because of the important image it had built from being tough in those previous cases. If the EC did not rule against Google, it could have had a negative impact on how Member States viewed its effectiveness in going after big tech firms. The fines against Google were much larger than those in the cases of Microsoft and Intel. Google was fined €2.42 billion. Since the amount of competition fines collected allowed for Member States to contribute less to the EU budget, it is likely that the lobbying by MEPs, in this case, promoted a larger fine that would support them paying even less to the EU budget for the 2018 year. Finally, this case illustrates the power of lobbying and the protectionist nature of competition laws in protecting the interests of rivals who used the EC as a vessel to increase the costs of their rival, Google.

V. Policy Recommendation

The EC lives by the precautionary principle, particularly when the technology and digital industries are in question. Policymakers should be aware of the negative implications precaution has on the success of technology companies operating within the institutional environment they

helped design. The implementation of GDPR will likely negatively affect technology firms as they will be subjected to burdensome regulation, potentially making it easier to bring competition cases. The EC relies on market power in its competition laws. GDPR could increase the market power of technology companies such as Facebook and Google making them more susceptible to competition cases in the EU (Thierer et al. 2018, 2).

GDPR does not fully address the rise in "Big Data" practices (Zarsky 2017, 996). The incompatibility of the regulation with the environment could "alter the way that Big Data analysis is conducted, transferring it to one that is suboptimal and inefficient" (Ibid.). This uncertainty that GDPR brings about for businesses could also allow for the EC to bring cases against firms, particularly firms such as Google, who rely on Big Data to cater its business to individual consumers.

The EC should be wary of bringing competition cases as they lead to a misallocation of labor and resources. Fines imposed on the firms in these cases were not effective in changing their competitiveness relative to their rivals. Analysis demonstrates that in these cases, the firms are winning larger market share because they are competitive. These cases also harm consumers. If firms cannot compete, they will exit the market, or if prices increase to the point that consumers are displeased, they will reduce or stop their consumption of that good or service.

The large market share (that is calculated by the number of sales the firm made compared to its competitors) illustrates that consumers are signaling to the firms that they are pleased with the product. If that is the case, then any action taken against these firms will only hurt consumers. Furthermore, competition is fueled by the goal to gain the largest market share, so by winning, these firms are only serving the competitive process. Policymakers and antitrust litigators should refrain from relying on market share as a measure of competitiveness.

Anticompetitive activities, such as fraud or nefarious litigation, should be punished but market share is not evidence that a firm is abusive. Firms and markets evolve. During this evolution, there are variabilities in market share. Many firms that were the monopolies of yesterday are the losers of today. This is evidenced by Crandall and Winston's case studies (2003). The dynamism of the market must be respected in order to promote true competition in the market.

VI. Conclusion

Competition laws are protectionist by nature. The EC in the cases of Microsoft, Intel, and Google responded to incentives that perpetuated the protectionist intent of those laws. The details and context of these case studies suggest that the proceedings were motivated by a goal of protecting losers in the industry that would increase the popularity of the EC as it aimed to preserve stability in the European market. Market share is not a legitimate indicator of a lack of competition. Because a firm is successful in capturing a large percentage of the market does not mean that it is not competitive. The cases that were brought by the EC served the rivals of the most efficient technology firms in the industry.

Furthermore, the incentives to which the EC responds matter. The budgetary and political gains that could have been achieved from ruling on these competition cases were a great incentive. In each case, a rival made a complaint and the EC used this to its advantage, revealing the protectionist intent behind competition laws.

The arguments against tying, exclusive dealing, and monopolization were inadequate and these tactics used by the firms in question are what has made them the most efficient, which has made them the most successful. Adam Smith stated that "[c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it

may be necessary for promoting that of the consumer" (Smith 1976, 660). To this end, policymakers should move beyond market share as a measure of competitiveness. In acknowledging the protectionist motives behind antitrust proceedings, policymakers on the international stage can facilitate better outcomes for consumers.

VII. References

Armentano, Dominick T. *Antitrust Policy: The Case for Repeal*. Cato Institute, 1986.

Aydin, Umut, and Kenneth P. Thomas. "The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century." *Journal of European Integration*34, no. 6 (August 3, 2012): 531–47. doi:10.1080/07036337.2012.707359.

Boettke, Peter J., and Christopher J. Coyne. "Context Matters: Institutions and Entrepreneurship." *Foundations and Trends in Entrepreneurship*5, no. 3 (2009): 135–209. doi:10.1561/0300000018.

Bork, Robert H. *The Antitrust Paradox A Policy At War With Itself*. Basic Books Inc., 1978.

Brodkin, Jon. "The Downfall of Sun Microsystems." Network World. April 24, 2009. https://www.networkworld.com/article/2268096/servers/the-downfall-of-sun-microsystems.html.

Buchanan, James M., and Gordon Tullock. *The Calculus of Consent: Logical Foundations of Constitutional Democracy.* Foreword by Robert D. Tollison. Vol. 3. 1962. 1999. http://files.libertyfund.org/files/1063/Buchanan_0102-03_EBk_v6.0.pdf.

Butler, Henry N., and Christopher R. Drahozal. *Economic Analysis for Lawyers*. 2nd ed. Durham, NC: Carolina Academic Press, 2006.

Cass, Ronald A. "Antitrust: Caught In The 'Kroes-Fire'." Forbes. June 19, 2013. https://www.forbes.com/2009/09/27/neelie-kroes-antitrust-intel-amd-opinions-contributors-ronald-a-cass.html#43d00967566e.

Chee, Foo Yun, and Alastair Macdonald. "New EU Antitrust Head Not Swayed by Anti-Americanism, Bullies." Reuters. September 23, 2014. https://www.reuters.com/article/us-eu-antitrust-vestager/new-eu-antitrust-head-not-swayed-by-anti-americanism-bullies-idUSKCN0HI26L20140923.

Competition Policy International. "EU: Almunia on the Defense about Google." February 23, 2014. https://www.competitionpolicyinternational.com/eu-almunia-on-the-defense-about-google/.

Crandall, Robert W., and Clifford Winston. 2003. “Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence.” *The Journal of Economic Perspectives* 17, no. 4: 3–26.

Depoortere, Frederic, Michael J. Frese, Andreas Kafetzopoulos, Giorgio Motta, and Ingrid Vandenborre. "Intel Ruling: General Court Failed to Examine All of Intel's Arguments, Court of Justice Says." September 8, 2017. https://www.skadden.com/insights/publications/2017/09/intel-ruling-general-court-failed-to-examine-all.

Easterbrook, Frank H. "The Limits of Antitrust." *Texas Law Review* 63 (August 1984): 1–40. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles.

EFTA Surveillance Authority. "Article 54 EEA." *Article 54 EEA*, European Free Trade Association Surveillance Authority. Accessed 2017.

EURACTIV. "Kroes: Intel Now 'Sponsor of the European Taxpayer.'" YouTube. May 13, 2009. https://www.youtube.com/watch?v=ReBN51NY2-A.

Europa. "Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service." News release, June 27, 2017c. Press Release Database. http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

Europa. "Antitrust: Commission Imposes Fine of €1.06 Bn on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices." News release, May 13, 2009. Press Release Database.. http://europa.eu/rapid/press-release_IP-08-318_en.htm.

Europa. "Article 82 of the EC Treaty (Ex Article 86)." European Commission, accessed December 2017a, ec.europa.eu/competition/legislation/treaties/ec/art82_en.html.

Europa. "The History of the European Union - European Union - European Commission." European Union. October 24, 2017b. https://europa.eu/european-union/about-eu/history_en.

Europa. "The European Council." March 22, 2018a. http://www.consilium.europa.eu/en/european-council/.

European Commission. "Amending the Budget to Cover Research, Education, Support to Businesses and Cohesion Policy." News release, May 28, 2014b. http://europa.eu/rapid/press-release_IP-14-612_en.htm.

European Commission. "Competition, Antitrust Overview, Article 102." Last updated November 21, 2014a. http://ec.europa.eu/competition/antitrust/overview_en.html.

European Commission. "Competition, Information Communication Technologies, Microsoft Case." Last updated April 16, 2012. http://ec.europa.eu/competition/sectors/ICT/microsoft/index.html.

European Commission. "Daily News 15/04/2015." News release, April 15, 2015. http://europa.eu/rapid/press-release_MEX-15-4784_en.htm.

European Commission. *Summary of Commission Decision of 13 May 2009 Relating to a Proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case*

COMP/C-3/37.990 — Intel). September 22, 2009. http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1521054000052&uri=CELEX:52009XC0922(02).

European Commission. *Summary of Commission Decision of 4 May 2017 Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40153 — E-Book MFNS and Related Matters).* August 11, 2017. http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1521055769151&uri=CELEX:52017XC0811(02).

European Commission. 2004. "Press Release Database, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine." March 24, 2004. Last updated February 20, 2017. http://europa.eu/rapid/press-release_IP-04-382_en.htm?locale=en.

EUR-Lex. "EUR-Lex Access to European Union Law." *EUR-Lex - 31995L0046 - EN*, OPOCE, 20 Apr. 2011, eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l26073.

Goetz, Klaus H., and Ronny Patz. 2016. "Pressured budgets and the European Commission: towards a more centralized EU budget administration?" *Journal of European Public Policy* 23, no. 7: 1038–1056. https://doi.org/10.1080/13501763.2016.1162835.

Hirst, Nicholas. "Almunia and Google in the Firing Line." *Politico EU*, June 12, 2014a. https://www.politico.eu/article/almunia-and-google-in-the-firing-line/.

Hirst, Nicholas. "Almunia Struggles to Defend Google Case." *Politico EU*, September 24, 2014b. https://www.politico.eu/article/almunia-and-google-in-the-firing-line/.

Hobson, Anne, and Alice Calder. "Data Privacy at a Price: The GDPR Just Isn't Worth It." Mercatus Center: Academic & Student Programs. March 25, 2018. https://asp.mercatus.org/commentary/data-privacy-price-gdpr-just-isnt-worth-it?_ga=2.167055102.1382693061.1547513852-1500359915.1545116910.

Intel v. Commission. Case T-286 (2009). https://antitrustlair.files.wordpress.com/2012/07/intel-report-hearing.pdf.

Issing, Otmar. 2013. "The Risk of European Centralization." *Project Syndicate*, July 2, 2013. https://www.project-syndicate.org/commentary/the-risk-of-european-centralization-by-otmar-issing?barrier=accessreg.

Kao, John. "Tapping the World's Innovation Hot Spots." Harvard Business Review. August 01, 2014. https://hbr.org/2009/03/tapping-the-worlds-innovation-hot-spots.

Lowe, Phillip. *Competition Policy and the Global Economic Crisis.* 2009. http://ec.europa.eu/competition/speeches/text/cpi_5_2_2009_en.pdf.

Malek, Ninos P. "Anti-trust Is Anti-Competitive." Mises Institute. July 13, 2004. https://mises.org/library/anti-trust-anti-competitive.

Mazza, Isidoro, and Frans Van Winden. 2002. “Does Centralization Increase the Size of Government? The Effects of Separation of Powers and Lobbying.” *International Tax and Public Finance* 9: 379–389.

McAfee, R. Preston, Hugo M. Mialon, and Sue H. Mialon. "Private Antitrust Litigation: Procompetitive or Anticompetitive?" *SSRN Electronic Journal* 5, no. 18 (August 16, 2005): 1–14. doi:10.2139/ssrn.784805.

Meller, Paul. "Microsoft-EU Antitrust Talks Collapse." Macworld. March 18, 2004. https://www.macworld.com/article/1029983/mseu.html.

Microsoft. “Timeline of European Commission Cases against Microsoft, 1998-2009.” Last updated December 2009.

Mises, Ludwig Von. *Bureaucracy*. New Haven: Yale Univ. Pr., 1944.

Persson, Torsten, and Guido Tabellini. "Does Centralization Increase the Size of Government?" *European Economic Review* 38 (1994): 765–73. doi:10.1016/0014-2921(94) 90112-0.

Pethokoukis, James. "Why Europe Failed to Match America’s Tech Boom." American Enterprise Institute. September 9, 2016. https://www.aei.org/publication/why-europe-failed-to-match-americas-tech-boom/.

Ponsoldt, James F., and Christopher D. David. 2007. “Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted.” *Northwestern Journal of International Law and Business* 27, no. 2: 421–452.

Raff, Adam, and Shivaun Raff. *The European Commission's Google Search Case A Timeline of Significant Events.* Report. April 15, 2015. http://www.foundem.co.uk/Foundem_Google_Timeline.pdf.

Reback, Gary. “Google Outwits the European Commission Once Again.” *Financial Times*, 26 Oct. 2017, www.ft.com/content/d211baec-ba3a-11e7-bff8-f9946607a6ba.

Salop, Steven C., and David T. Scheffman. "Raising Rivals' Costs." *American Economic Association* 73, no. 2 (May 1983): 267–71.

Smith, Adam. *An Inquiry Into the Nature and Causes of the Wealth of Nations*. Vol. 1. Oxford University Press, 1976.

Snyder, Edward A. and Thomas E. Kauper. "Misuse of the Antitrust Laws: The Competitor Plaintiff." *Michigan Law Review* 90, no. 3 (December 1991).

Tarko, Vlad. *Elinor Ostrom: An Intellectual Biography*. London: Rowman Et Littlefield International, 2017.

The Economist. "Gambling on the Euro." *The Economist*, December 31, 1998. https://www.economist.com/special/1998/12/31/gambling-on-the-euro.

Thierer, Adam D. *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom*. Arlington, VA: Mercatus Center at George Mason University, 2016.

Thierer, Adam, Michael Kotrous, Jennifer Huddleston Skees, and Anne Hobson. "Lifting Barriers To Entrepreneurship: A 'Permissionless Innovation' Approach To Competition And Consumer Protection Policies." Public Interest Comment. August 16, 2018.

Securities and Exchange Commission. "Sun Microsystems, Inc." Accessed December 14, 2018. https://www.sec.gov/cgi-bin/browse-edgar?company=Sun Microsystems&owner=exclude&action=getcompany.

Zarsky, Tal. "Incompatible: The GDPR in the Age of Big Data." *SSRN*, 2nd ser., 47, no. 4 (August 22, 2017): 995–1020. file:///C:/Users/user/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/SSRN-id3022646 (1).pdf.