TIME FOR CHANGE: HOW GOOGLE'S ANTICOMPETITIVE CONDUCT REVEALS THE DEFICIENCIES OF MODERN ANTITRUST REGULATION

Benjamin Clay Hughes[†]

TABLE OF CONTENTS

I. INTRODUCTION 399
II. ANTITRUST FRAMEWORK IN THE U.S. AND EU 404
A. Tying 406
B. Essential Facilities 408
C. Refusal to Deal 409
III. MICROSOFT IN THE U.S. 412
IV. MICROSOFT IN THE EU 415
V. GOOGLE SHOPPING 417
A. Background 417
B. Google Search: An Essential Facility 419
VI. GOOGLE ANDROID 421
A. Background 423
B. Google's Monopolization through 'Anti-fragmentation Agreements' 426
C. Tying of the Play Store and Google's Mobile Apps 428
D. Revenue Share Agreements 430
VII. CONCLUSION 432

I. INTRODUCTION

Internet platforms have been an ongoing point of consternation for antitrust regulators. In recent years, the laissez-faire regulatory environment implemented in the U.S. reached a tipping point, leading to a re-examination of the current antitrust system as to whether the current framework is robust enough to ensure fair competition in the tech

sector.[1] Simultaneously, COVID-19 has dramatically changed the economy. While some industries are being torn apart by an unprecedented drop in demand,[2] growth in tech has been accelerating. For example, the online retail giant, Shopify, benefitted substantially from this trend as then COO and current President, Harley Finkelstein, told investors, "[COVID-19] has catalyzed e-commerce, introducing major changes in buyer behavior and pulling forward what retail would look like in 2030 into 2020."[3] Similarly, Microsoft, a leader in software, cloud, and videoconferencing, saw its business improve from this shift. Microsoft's CEO Satya Nadella exclaimed in April 2020, "[a]s Covid-19 impacts every aspect of our work and life, we've seen two years' worth of digital transformation in two months."[4] Slack, the creator of its eponymous enterprise chat application, "saw a 40% increase in customer growth compared with the prior two quarters."[5] Slack's battle with Microsoft in the enterprise chat space is a microcosm of the issues created by a hands-off regulatory environment. When a dominant player enters a secondary market, copies existing products, and then distributes theirs for free, how can smaller firms possibly compete? They cannot.

In November 2016, Microsoft launched 'Teams' to compete with Slack. In doing so, they copied Slack's most popular features and integrated Teams into their Office 365 bundle, distributing the product to

---

† Notes Editor of Cardozo International and Comparative Law Review; J.D. Candidate, Benjamin N. Cardozo School of Law, 2021; Master 2, Droit International et Comparé, Université Toulouse 1 Capitole, 2015; Master 1, International and European Law, Université Toulouse 1 Capitole, 2014; B.A., Franklin & Marshall College, 2013. A special thank you to Professor Samuel N. Weinstein and Mme Jacqueline Riffault-Silk, without whom this note would not have been possible.

1 Editorial Board, *Big Tech's Antitrust Parodox,* WALL ST. J. (July 29, 2020), https://www.wsj.com/articles/big-techs-antitrust-paradox-11596064516.

2 Scott McCartney, *The Devastated Travel Industry, by the Numbers,* WALL ST. J. (Apr. 15, 2020), https://www.wsj.com/articles/the-devastated-travel-industry-by-the-numbers-11586959775.

3 *Shopify (SHOP) Q2 2020 Earnings Call Transcript,* THE MOTLEY FOOL (July 29, 2020), https://www.fool.com/earnings/call-transcripts/2020/07/30/shopify-shop-q2-2020-earnings-call-transcript.aspx.

4 Aaron Tilley, *Microsoft Takes on Zoom and Slack in a Battle for Your Work Computer*, WALL ST. J. (June 2, 2020), https://www.wsj.com/articles/microsoft-aims-to-dominate-technology-at-work-starting-with-those-video-calls-11591108757.

5 *Id.*

their existing customers.[6] In just three years, Teams had twenty million users, as compared to Slack's twelve million.[7] Facing insurmountable competition from Microsoft, Slack filed a complaint with the European Commission (the "Commission"), accusing Microsoft of anticompetitive conduct.[8] In part, Slack likely brought this issue to the European Union ("EU") because of their "aggressive pursuit of antitrust cases against U.S. companies," and favorable jurisprudence.[9] Slack's General Counsel stated that the company was "'having conversations with relevant U.S. authorities,' adding it's not ruling out actions in other jurisdictions."[10] The current dilemma regarding the deficiency of antitrust regulation of internet platforms and products, is a far-cry away from what was anticipated when the laws were initially codified.

Modern antitrust law developed in the context of the industrial revolution, where regulators sought to regulate the actions of 'old economy'[11] companies like newspapers,[12] industrial corporations,[13] and railroads.[14] The law was crafted in a way that placed the judiciary in a central position to resolve disputes, and where the decisions would result in pro-competitive benefits to consumers. However, in the context of tech platforms, U.S. jurisprudence evolved to shield monopolies

---

6 *Id.* ("Microsoft includes Teams for companies that pay for Office 365, which includes Word, Excel and PowerPoint. While Slack and Zoom have free versions, paid versions with the features most businesses want start at $6.67 per person a month on Slack, and $14.99 per host a month on Zoom. Mr. Teper said when he was appointed to run Teams in January, the job came with orders from Mr. Nadella to integrate more Microsoft products.").

7 Jordan Novet, *Slack Stock Drops as Microsoft Claims Big Lead With 20 Million Teams Users*, CNBC (Nov. 19, 2019), https://www.cnbc.com/2019/11/19/microsoft-teams-reaches-20-million-daily-active-users.html.

8 Sam Schechner, *Slack Files EU Antitrust Complaint Against Microsoft,* WALL ST. J. *(*July 22, 2020*),* https://www.wsj.com/articles/slack-files-eu-antitrust-complaint-against-microsoft-11595423056?mod=searchresults&page=1&pos=7; Aoife White & Natalia Drozdiak, *Slack Urges EU to Probe Microsoft amid Covid-19 Video Boom*, BLOOMBERG (July 22, 2020) (quoting a Slack press release) ("Microsoft has illegally tied its Teams product into its market-dominant Office productivity suite, force installing it for millions, blocking its removal, and hiding the true cost to enterprise customers.").

9 Sam Schechner, *Slack Files EU Antitrust Complaint Against Microsoft,* WALL ST. J. (July 22, 2020), https://www.wsj.com/articles/slack-files-eu-antitrust-complaint-against-microsoft-11595423056?mod=searchresults&page=1&pos=7.

10 Aoife White & Natalia Drozdiak, *supra* note 8.

11 PETER THIEL & BLAKE MASTERS, ZERO TO ONE 44-58 (2014).

12 Lorain J. Co. v. United States, 342 U.S. 143 (1951).

13 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

14 Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSPECTIVES 96 (2019).

from liability, except in the most extreme of circumstances.[15] Still, internet platforms pose unique challenges for regulators as they are distinct from old economy businesses in two major ways: their network effects and economies of scale.

Tech platforms benefit disproportionately from network effects and economies of scale. Network effects "make a product more useful as more people use it."[16] Since a tech company's dominance derives from "the interplay between the platform and the network it orchestrates,"[17] network effects create a powerful barrier to entry. A prime example can be seen with the mutualistic relationship between riders and drivers using Uber. Riders gravitate to platform where they can quickly order a car service and, consequently, drivers seek a platform that provides the most riders.[18] An upstart competitor will need to establish both a roster of drivers and convince the general population that they can provide an adequate service in order to succeed. The difficulty arises when a company like Uber, one with an established network of both riders and drivers, takes notice and taps into its network to entice users away from the competitor. Over time, the network effects of a product become so powerful that a new market-entrant will find it difficult, if not impossible, to compete.

Likewise, economies of scale are amplified in tech companies. Tech founder and investor Peter Thiel noted, that "[s]oftware startups can enjoy especially dramatic economies of scale because the marginal cost of producing another copy of the product is close to zero."[19] Tech products can therefore see enormous growth in a short period of time, as they are not restrained by high production costs. Coupled with amplified network effects, a large, established tech company can enter a market, tap into its network, and flood its users with their product. In little time, a once competitive market will be left with only a few major players. This combination of network effects and economies of scale creates significant difficulties for regulators. This is an issue that permeates antitrust regulation, where the environment is constantly shifting, and competitors can quickly rise and fall making it difficult to define the market and assess competitive effects. The restraint on tech

15 *See* discussion *infra* Part II.C. Refusal to Deal.

16 *See* THIEL & MASTERS, *supra* note 11, at 50.

17 Feng Zhu and Marco Iansiti, *Why some Platforms Thrive and Others Don't,* HARV. BUS. REV. (Jan.—Feb. 2019), https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont.

18 *Id.*

19 *See* THIEL & MASTERS, *supra* note 11, at 51.

companies in the internet space has not, until recently, been confronted directly by U.S. regulators; by contrast, the EU has aggressively prosecuted internet platforms in recent years.[20]

However, active regulation is not the only issue; both the U.S. and the EU face complications with regulation due to the lethargic pace of antitrust litigation. Large tech companies are advantaged by being able to afford stellar legal representation, which allows them to defend a lawsuit over a number of years. During that time, they can establish their barriers to entry, and cause irreparable damage to the market by the time the suit is resolved.

The EU confronted these issues in multiple cases against Google.[21] The U.S., by contrast, just initiated their first major antitrust lawsuit against a tech giant since the *United States v. Microsoft* litigation.[22] The paucity of regulation by the U.S. is perplexing when one looks to the statutes in force today: both jurisdictions have laws that would allow regulators to restrain internet platforms. This begs the question as to why the EU is able to successfully prosecute cases while the U.S. often is powerless to do the same. This discrepancy can be traced to the fact that the jurisprudence in the U.S. weakened the application of the relevant antitrust laws, resulting in tools that are too limited to handle common tech-sector claims.

Part II of this note will canvass the antitrust rules, illegal arrangements, and doctrines in the U.S. and the EU, underlying their textual similarities, particularly regarding tying, refusals to deal, and the essential facilities doctrine. Parts III-IV turn to specific case studies, reviewing the jurisprudence of the parallel U.S. and EU *Microsoft* cases, comparing the EU's Google decisions to demonstrate two different paths: the EU's prosecutions, and the U.S.'s acquiescence. In

---

20 Larry Bumgardner, *Antitrust Law in the European Union,* 8 GRAZIADIO BUS. REPORT No. 3 (2005), https://gbr.pepperdine.edu/2010/08/antitrust-law-in-the-european-union/.

21 Google Search (Shopping) (Case COMP/ AT.39740), Commissioner decision of June 27, 2017, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 [hereinafter *Google Shopping*]; Google Android (Case COMP/ AT.40099), Commissioner discussion of July 18, 2018, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf [hereinafter *Google Android*].

22 United States v. Microsoft Corp., 253 F.3d 34 (2001); Complaint, United States v. Google LLC (D.D.C. Oct. 20, 2020), ECF 1, (No. 1:20-cv-03010), https://www.justice.gov/opa/press-release/file/1328941/download; Press Release, DEPARTMENT OF JUSTICE, *Justice Department Sues Monopolist Google For Violating Antitrust Laws*, (Oct. 20, 2020) https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

conclusion, and this note will ultimately propose amendments to current U.S. law to provide the tools necessary for U.S. regulators to unwind the dominance that internet platforms have come to establish today.

II. ANTITRUST FRAMEWORK IN THE U.S. AND EU

In the U.S., antitrust law is set out mainly through the Sherman Antitrust Act of 1890 (the "Sherman Act") and the Federal Trade Commission Act of 1914 (the "FTC Act"). Section 1 of the Sherman Act prohibits agreements that are unreasonable restraints of trade,[23] while Section 2 forbids corporations from "monopoliz[ing], or attempt[ting] to monopolize . . . any part of the trade or commerce."[24] The Federal Trade Commission ("FTC") is empowered by the FTC Act "to intervene and challenge business practices if [the FTC] has reason to believe that such practices violate Section 5's prohibition on unfair methods of competition, and create a likelihood of significant injury to competition," including activities that violate Sherman Act Section 2.[25]

Within the realm of Section 2 enforcement, courts take a nuanced approach. A firm's bigness in-of-itself is not unlawful, unless "accompanied by an element of anticompetitive conduct."[26] The legal framework has two requirements, "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[27] The monopoly power must be "durable rather than fleeting" and is commonly defined as "the ability to raise prices profitably above those that would be charged in a competitive market."[28]

---

23 15 U.S.C. § 1 (1890); *see* Standard Oil Co. v. United States, 221 U.S. 1, 54 (1911); *see also* Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW. 440 (2012).

24 15 U.S.C. § 2 (1890); DOJ, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (Jun. 25, 2015), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1 [*hereinafter* DOJ Report].

25 *In the Matter of Google Inc., FTC No. 111-0163*, STATEMENT OF THE FEDERAL TRADE COMMISSION REGARDING GOOGLE'S SEARCH PRACTICES 2 (Jan 3. 2013) https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

26 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

27 United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

28 DOJ Report, *supra* note 24, at 5 (Note: the D.O.J. later withdrew this report as it relates to executive guidance in reference to exclusionary conduct).

Both statutorily and structurally, the EU's antitrust laws are similar to the U.S.[29] The Commission has exclusive competency[30] in regulating competition across the EU.[31] To counter dominant firms that act anticompetitively, the EU has Article 102 of the Lisbon Treaty, which is an analog to Section 2 of the Sherman Act, but "sweeps more broadly,"[32] and prohibits abuses of dominance such as:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[33]

In assessing illegal conduct, the Commission uses a similar methodology to that of the U.S.[34] Their view is that "the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance."[35] Once a

---

29 *See* Gráinne de Búrca, *Is EU Supranational Governance a Challenge to Liberal Constitutionalism,* 85 CHICAGO L. REV. 353 (2019). Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) § 4 [hereinafter TFEU]. *Id.* at arts. 244-50; *Id.* at arts 223-34 (describing the legislative role of the EU Parliament); *Id.* at arts 251-281 (full list of EU court system powers).

30 When the EU has exclusive competency, "only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts." *Id.* at art. 2 § 1.

31 *Competition,* EUROPEAN UNION, https://europa.eu/european-union/topics/competition_en (last visited Jan. 9, 2020) ("The EU's rules on competition are designed to ensure fair and equal conditions for businesses, while leaving space for innovation, unified standards, and the development of small businesses.").

32 *See* ANDREW I. GAVIL, ET. AL., ANTITRUST LAW IN PERSPECTIVE 642 (3d ed. 2017).

33 TFEU, *supra* note 29 at art. 102 (a-d).

34 *Competition: Antitrust procedures in abuse of dominance (Article 102 TFEU cases),* European Commission (July 2013), https://ec.europa.eu/competition/publications/factsheets/antitrust_procedures_102_en.pdf.

35 *Id.* ("If a company has a market share of less than 40%, it is unlikely to be dominant.").

corporation obtains a dominant position in a relevant market, it has a special responsibility not to harm competition.[36]

A. Tying

Both Section 1 and Article 102(d) prohibit *tying*, an anti-competitive arrangement wherein a dominant firm uses its market power in one market to eliminate competition in a secondary market.[37] Tying is anticompetitive because it funnels users to the dominant firm's product by reducing "the incentives of users to choose a product from among those of other suppliers than the dominant undertaking."[38] Moreover, tying chills innovation as distributors are less likely to promote competing products, and competitors abstain from entering into the market.[39]

To determine whether a tie is illegal, the EU and U.S. use a similar four-factor test.[40] First, the tying and tied products must be "two separate products."[41] Second, the firm must have a dominant market share in the tying product.[42] Third, the company selling the tying and tied products must not "give its customers or end users a choice to obtain the tying product without the tied product."[43] Fourth, the tie is "capable of restricting competition."[44] If all four factors are satisfied, the company "bears the burden of proof, to demonstrate the existence of any objective justification for its conduct."[45]

---

36 *Id.*

37 A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5-6 (1958). Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969); Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 461-62 (1992).

38 *Google Android*, *supra* note 21, at 165.

39 *Id.* at 166.

40 *See id.* at 165; U.S. v. Microsoft, 253 F.3d 34, 85 (2001) ("There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.").

41 *Google Android, supra* note 21, at 165; U.S. v. Microsoft, 253 F.3d 34, 85 (2001).

42 *Google Android*, *supra* note 21, at 165; *Microsoft*, 253 F.3d at 85.

43 *Google Android*, *supra* note 21, at 165; *Microsoft,* 253 F.3d at 85.

44 *Google Android*, *supra* note 21, at 165; *Microsoft,* 253 F.3d at 85.

45 *Google Android, supra* note 21, at 165; *Microsoft,* 253 F.3d at 85.

The Commission assesses the "distinctness of [the] two products . . . by reference to customer demand and not, for example whether the tying product was regularly offered without the tied product."[46] Products that are typically sold together, 'complementary products,' can still be considered separate products as some "customers may wish to obtain complementary products together, but from different sources," while "the technical integration of one product into another does not mean that the two products are no longer separate . . . ."[47]

The EU takes a stricter approach to tying while in the U.S., tying is stuck in a legal limbo, where under black-letter law, it "is one of the few remaining antitrust areas where a rule of per se illegality exists."[48] An agreement is per se illegal when the "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[49] Per se condemnation is typically limited to price fixing, bid rigging, and market allocation.[50] Despite the doctrinal tradition of per se illegality, U.S. law has evolved to recognize that tying "has the potential to help consumers" and is not always anticompetitive.[51] Like the EU's 'consumer facing test,' U.S. courts require the application of the *Jefferson Parish* separate-products test to analyze whether there is an illegal tie.[52] *Jefferson Parish* refocuses the tying inquiry from the "functional relation[ship] between [the two products] . . . [to] the character of the demand for the two items."[53] Thus, when there is "'sufficient demand' for the purchase of one product 'separate from' the second product, then there are two products for the purpose of tying analysis."[54]

Ties are examined by both "direct and indirect evidence of consumer demand."[55] The direct evidence asks whether "when given a

---

46 *Google Android, supra* note 21, at 165

47 *Id.*

48 *See* DOJ Report, *supra* note 24 at 89; Cavanagh, *supra* note 23, at 444.

49 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434 n. 16 (1990); *see* Cavanagh, *supra* note 23, at 444 n. 82.

50 *See* Cavanagh, *supra* note 23, at 446.

51 *See* DOJ Report, *supra* note 24, at 89-90.

52 U.S. v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001).

53 Samuel N. Weinstein, *United States v. Microsoft Corp.*, 17 BERKELEY TECH L. J. 276 (2002).

54 *Id.*

55 United States v. Microsoft Corp., 253 F.3d at 86; Stefan Holzweber, *Tying and Bundling in the Digital Era,* 14(2-3) EUROPEAN COMPETITION J. 2-3 342, 355 (Oct. 11, 2018), https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1533360 (citing Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty' 2009/C 45/02. at recital 52.).

choice, consumers purchase the tied good from the tying good maker, or from other firms," whereas indirect evidence looks to "the behavior of firms without market power in the tying good market."[56] In relation to the indirect evidence, "[i]f competitive firms always bundle the tying and tied goods, then they are a single product."[57] Therefore, while both jurisdictions interdict tying, tech companies with market power in the U.S. are practically incentivized to attempt illegal ties. Even if the government sues, they still will benefit in federal court from the rule of reason standard which is used to interpret the Sherman Antitrust Act. This distinction is one reason why the EU has been able to successfully charge tech companies, while the U.S. regulators have waited on the sidelines.

B. Essential Facilities

Unlike tying, which is derivative of an agreement, monopolists can run afoul of the law by becoming so important in their industry that they are functionally irreplaceable. When this happens, a company may be required to work with its competitors, or risk antitrust scrutiny. This is known as an *essential facility*.[58] Under Section 2, this doctrine is violated when: "the monopolist controls access to an essential facility, . . . the facility cannot be reasonably duplicated by a competitor, . . . the monopolist denies access to a competitor, and . . . it was feasible to grant access."[59] However, caselaw has limited the essential facilities doctrine.[60] A firm can avoid such classification, by benefitting from the rule of reason standard, meaning that "most courts also have recognized that a valid business justification will protect a firm from liability."[61]

By contrast, in the EU, the essential facilities doctrine is actively used to limit the influence of monopolists, and is codified in Article 102(c).[62] Additionally, the European Court of Justice has enshrined the doctrine, extending its application to encompass a right for competitors to access a firm's "intellectual property . . . in 'exceptional

---

56 United States v. Microsoft Corp., 253 F.3d at 86.

57 *Id.*

58 Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, 76(3) ANTITRUST L.J. 741, 743 (2010).

59 *Id.*

60 *Id.* at 744; *see also* Law Offices of Curtis V. Trinko, LLP v. Verizon Commun's, 540 U.S. 398 (2004); *see* discussion *infra*, II.C. Refusal to Deal.

61 *See* Waller & Tasch, *supra* note 58, at 743.

62 *See id.* at 745.

circumstances."[63] Therefore, the Commission can require dominant firms to share their intellectual property with competitors if they are found to be harming such competitors specifically for their own gain. This doctrine is especially relevant when a tech platform competes both horizontally with equal-size competitors and hosts smaller companies on their platform with whom they compete.

C. Refusal to Deal

Fair dealing is a recurring issue with internet platforms, as they may hold enormous market power, while seeking to exclude competitors from their products. When a dominant firm refuses to deal with its competitors, such activity may violate Section 2 and Article 102(c). However, recent U.S. caselaw has whittled down the application of refusal to deal precedents, leaving American regulators with a weaker tool than their European counterparts.[64]

The U.S. Supreme Court expanded Section 2's application to refusals to deal in *Lorain Journal Co. v. United States*.[65] In *Lorain Journal*, a local newspaper dominated 99% of the local advertising market and sought to exclude a local radio station from accessing its subscriber base.[66] The newspaper did so by refusing to accept local advertisements from any local advertiser who advertised, or could advertise on the competing radio station.[67] The Supreme Court admonished the newspaper for "us[ing] its monopoly to destroy threatened competition," in violation of Sections 1 and 2 of the Sherman Act.[68]

The Supreme Court later expanded this doctrine in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[69] There, the Supreme Court held that a monopolist can violate Section 2 of the Sherman Act when it makes a decision that results in "an important change in the character

63 *See id.* (quoting 15 Joined Cases C-241/91 P 8c C-242/91 P, Radio Telefis Eireann & Indep. Publ'ns Ltd. v. Comm'n, 1995 E.C.R. 1-743, 50 (Eur. Ct. Justice) (Magill)).

64 Federal Trade Commission, *Refusal to Deal,* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal (last visited Sept. 25, 2020) ("For industries that are regulated, companies may be required by other laws to deal on non-discriminatory terms with other businesses, including competitors and potential competitors."); Case T-201/04 Microsoft v. Commission, ECLI:EU:T:2007:289, par. 331-333.

65 Lorain J. Co. v. United States, 342 U.S. 143 (1951).

66 *Id.* at 147-49.

67 *Id.* at 148.

68 *Id.* at 154.

69 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

of the market."[70] In *Aspen Skiing*, three of the four mountains in Aspen, Colorado, were owned by Aspen Skiing Co. ("Ski Co."), the fourth was owned by Aspen Highlands Skiing Corp. ("Highlands"). The two companies had a ticket-sharing agreement, which allowed customers to access all four mountains.[71] Ski Co. pulled out of the deal in order to push Highlands out of the market. As a result, Highlands lost the majority of its business.[72]

Prior to the Supreme Court's grant of certiorari, the 10th Circuit found that the original deal amounted to an essential facility, which thereby imposed a duty on Highlands to continue the deal.[73] The refusal to deal was found unlawful because it lacked legitimate business justifications, and was characterized by the court as an act by a monopolist who "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[74] The Court even went as far as to say that "the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival."[75]

More recently, however, the Supreme Court limited the application of refusals to deal.[76] In *Eastman Kodak*, the Petitioner, a manufacturer of photocopiers, provided services and replacement parts for its machines to third parties, but changed its practices to promote its own repair services.[77] The Supreme Court recognized that the conduct was exclusionary, as it strengthened the Petitioner's control on the parts aftermarket. However, the court did not find the Petitioner liable under Section 2.[78] Then, in *Law Offices of Curtis V. Trinko, LLP v. Verizon Communications*, the Supreme Court limited the application of refusals to deal even further, while excoriating the essential facilities doctrine.[79] Prior to *Trinko*, the United States Congress passed the

70 *Id.* at 604.

71 *Id.* at 589.

72 *Id.* at 595. ("The case was tried to a jury which rendered a verdict finding Ski Co. guilty of the § 2 violation and calculating [plaintiff's] actual damages at $ 2.5 million.").

73 *Id.* at 599 (citing United States v. Terminal R.R. Assn. of St. Louis, 224 U.S. 383 (1912)).

74 *Aspen Skiing*, 472 U.S. at 610-11.

75 *Id.* at 610.

76 Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451 (1992).

77 *Id.* at 455.

78 *Id.* at 483 (quoting Aspen Skiing, at 605; United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945)).

79 *See generally* Law Offices of Curtis V. Trinko, LLP v. Verizon Commun's, 540 U.S. 398 (2004).

Telecommunications Act of 1996, which "impos[ed] certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors."[80] Trinko sued when Verizon took steps to frustrate the purpose of the legislation, by not fully cooperating with rival telecoms.[81] The Supreme Court defended Verizon's (clearly anticompetitive) practices, stating that the company's "prior conduct shed . . . no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice."[82] The Court thus heightened the threshold for an illegal refusal to deal, holding that "insufficient assistance in the provision of service to rivals is not a recognized antitrust claim."[83]

The Supreme Court further limited the essential facilities doctrine, describing it as a doctrine that "[w]e have never recognized."[84] The court was concerned with the possibility of the judiciary acting as a regulator, finding it an ill-fit for the promotion of a competitive marketplace,[85] one which could stifle innovation.[86]

By contrast, the EU's refusal to deal framework is covered under Article 102(c): "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[87] The breadth of this provision, in practice, allows for the Commission to charge companies who, in exceptional circumstances, refuse competitors access to their platforms. Such circumstances are assessed as to whether:

> "the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market . . .

---

80 *Id.* at 401.

81 *Id.* at 404 ("Respondent filed a complaint . . . on behalf of itself and a class of similarly situated customers . . . [A]lleg[ing] that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service.").

82 *Id.* at 409.

83 *Id.* at 410.

84 *Id.*

85 *Id.* at 415 ("The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.").

86 *Id.* at 414. ("The cost of false positives counsels against an undue expansion of § 2 liability."). *See id.* ("One false-positive risk is that incumbent [telecom companies'] failure to provide a service with sufficient alacrity might have nothing to do with exclusions.").

87 TFEU, *supra* note 29, art.102(c).

> the refusal is of such a kind as to exclude any effective competition on that neighbouring market . . . the refusal prevents the appearance of a new product for which there is potential consumer demand."

If these factors are established, then "the refusal by the holder of a dominant position to grant a license may infringe Article [102] unless the refusal is objectively justified."[88] Therefore, the EU has a stronger mandate and tools to regulate tech platforms who actively demote their competitors' products in favor of their own. To understand in part why U.S. antitrust litigation is so ineffective at confronting tech companies, it is important to first recognize the schism between the U.S. and EU's approaches to the *Microsoft* cases.

III. MICROSOFT IN THE U.S.

The first strike across the bow in the modern regulatory battle between the government and large tech companies occurred in the early 1990s. At that time, Microsoft required "purchasers of its operating system software . . . to [also] license its browser software."[89] The Department of Justice ("D.O.J.") investigated Microsoft's conduct, and required the company to enter into a consent decree, which prohibited "Microsoft from conditioning a license for any of its products on acceptance of a license for any other product."[90] In October 1997, the D.O.J. charged Microsoft for violating this consent decree, in an attempt to control the nascent web browser market, and to directly harm Netscape.[91] Microsoft placed contractual burdens on third-party original equipment manufacturers ("OEM"s) that "prevented many OEMs from distributing browsers other than" Internet Explorer ("IE").[92] Microsoft's restrictions were numerous: OEMs were prevented from preinstalling competing browsers alongside IE, could not "modify[] the initial boot sequence," in a way that would encourage "users to choose

88 *See* Case T-201/04 Microsoft v. Commission, ECLI:EU:T:2007:289, par. 332.

89 Michael W. De Vries, Sherman Act Violations: Monopolization *United States v. Microsoft*, 14 BERKELEY TECH. L.J. 303 (1999).

90 *See* De Vries, *supra* note 89, at 304; U.S. v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).

91 John P. Jennings, *Comparing the US and EU Microsoft Antitrust Decisions*, 2 ERASMUS L. & ECON REV. 71, 73 (2006); Robert Liu, *DOJ Seeks Microsoft Fine,* CNN MONEY (Oct. 20, 1997), https://money.cnn.com/1997/10/20/technology/microsoft_a/.

92 *Microsoft Corp.*, 253 F.3d at 60.

from a list of [Internet access software] assembled by the OEM"; and were prohibited from modifying user interfaces from launching automatically at startup, "adding icons or folders different in size or shape from those supplied by Microsoft, and from using the 'Active Desktop' feature to promote third party brands."[93]

Microsoft defended its practices by arguing that even with such restrictions, "Netscape [was] not completely blocked from distributing its product,"[94] and that "Windows (the tying good) and IE browsers (the tied good) [were] not 'separate products.'"[95] The D.C. Circuit rejected Microsoft's justifications, finding that "although Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones."[96] The court issued a mixed ruling and remanded the case back to the District Court.[97] Microsoft however, was ultimately victorious. The company entangled IE to the Windows operating system to such a degree that the law was unable to prevent Microsoft from tying the two products.[98] This decision resulted in a major win for tech platforms, as the D.C. Circuit henceforth required a rule of reason analysis for determining ties on platform software products.[99] In effect, the ruling laid the groundwork for today's laissez-faire regulatory environment.

On remand, the parties entered into a settlement that required Microsoft to end its anti-competitive practices.[100] Accordingly, Microsoft could no longer prevent OEMs "from adding competing software programs, altering the desktop icon and shortcut layout, [or] installing boot sequences that divert users away from Microsoft products."[101] To ensure that Microsoft did not exclude its competitors, it was also required to allow "competitors to utilize Windows for their own programs . . . [and] provide reasonable, non-discriminatory licenses to Independent

---

93 *Id.* at 62.

94 *Id.* at 64.

95 *Id.* at 85.

96 *Id.* at 64.

97 *Id.* at 46. (Of note in this case is that the District Court judge was found to have "seriously tainted the proceedings . . . and called into question the integrity of the judicial process. *Id.* The D.C. Circuit went as far to say the judge engaged "in impermissible *ex parte* contacts by holding secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside the courtroom." *Id.* at 88-9).

98 *Microsoft Corp.,* 253 F.3d at 88-9.

99 *Id.* at 84.

100 U.S. v. Microsoft Corp., No. 98-1233 (CKK), Stipulation at 1 (D.D.C, Nov. 6, 2001).

101 *See* Jennings, *supra* note 91 at 75.

Software Vendors."[102] Finally, the settlement required Microsoft to give users the ability to uninstall Microsoft programs from the Windows operating system.[103]

Six years later, the parties filed a "Review of the Final Judgments" with the D.C. District Court, which detailed the competitive benefits of the 2001 settlement.[104] Internet Explorer "face[d] renewed competition, primarily from Firefox, but also from a range of other products including Opera and Apple's Safari browser. All of these competing browsers [were] cross-platform and therefore . . . work[ed] on multiple operating systems."[105] The settlement was comprehensive enough to spur competition in the browser space, while allowing Microsoft to host its own products on the Windows operating system.[106] In effect, the settlement succeeded where the courts failed, in "safeguard[ing] the ability of software developers to develop, distribute, and promote competing middleware products."[107]

While the settlement may have been successful in protecting competitors from Microsoft, it also demonstrates the difficulty of prosecuting Section 2 claims against a tech giant. The never-ending nature of antitrust litigation left Netscape fatally wounded by Microsoft's practices. In a period of five years (1995-2000), the internet browser market shifted drastically; Netscape had 90% market share in the beginning,

---

102 *See* Jennings, *supra* note 91, at 75.

103 *See* Jennings, *supra* note 91, at 76.

104 United States v. Microsoft Corp., No. 98-1232 (CKK) Review of the Final Judgments by the United States and New York Group at 6, 9 (D.D.C. Aug. 30, 2007) ("Since the entry of the Final Judgments, there have been a number of developments in the competitive landscape relating to middleware and to PC operating systems generally that suggest that the Final Judgments are accomplishing their stated goal of fostering competitive conditions among middleware products, unimpeded by anticompetitive exclusionary obstacles erected by Microsoft.") ("Microsoft was never found to have acquired or increased its monopoly market share unlawfully. Therefore, the Final Judgments were targeted to re-invigorating competitive conditions that Microsoft had suppressed, not to slicing off some part of Windows' market share.").

105 *Id.* at 6.

106 *See* Jennings, *supra* note 60, at 76 ("Microsoft preserved the right to bundle its own software with Windows as long as it can be removed or altered by computer manufacturers or end-users. This permits Microsoft's programs to function as the "default" software, especially for less sophisticated computer users who do not alter the essential Windows setup.") (Firefox, Opera, and Safari are all web browsers).

107 United States v. Microsoft Corp., No. 98-1232 (CKK) Review of the Final Judgments By the United States and New York Group at 2 (D.D.C. Aug. 30, 2007).

and at the end, Microsoft owned 95% market share.[108] The ruling further whittled away at the illegality of tying, making it more difficult for parties to challenge tech monopolists. In the context of today's rapid tech advancement, the presumption in favor of the defendant in a tying or Section 2 case provides the defendant ample time to benefit from network effects and grow its barrier to entry. By the time a lawsuit is finally resolved, a once successful competitor could still be excluded from the marketplace.

IV. MICROSOFT IN THE EU

The EU took a more aggressive stance in its Microsoft litigation. Around the time of the initial *U.S. v. Microsoft* investigation, Sun Microsystems filed a complaint with the EU, alleging that "Microsoft withheld key technical information that Sun needed for its computer servers to communicate with Windows-based PCs."[109] This led to an Article 102 (then Article 82) investigation of Microsoft for its actions in '"limiting production, markets or technical development to the prejudice of consumers' and 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.'"[110] On March 24, 2004, the Commission determined that Microsoft abused its position of dominance.[111] The Commission ordered the company to un-bundle the Windows Media Player from the Windows operating system[112] and compelled Microsoft to "disclose information sufficient to permit rival producers of work group server operating systems to produce software that would more easily interoperate with Windows client software."[113] As a punitive measure, the Commission fined Microsoft 479 million euros.[114]

108 John Naughton, *Netscape: The Web Browser That Came Back To Haunt Microsoft*, GUARDIAN (Mar. 22, 2015), https://www.theguardian.com/global/2015/mar/22/web-browser-came-back-haunt-microsoft.

109 *See* Jennings, *supra* note 91, at 77; see European Commission, *Microsoft Case*, https://ec.europa.eu/competition/sectors/ICT/microsoft/investigation.html (last visited Oct. 10, 2020).

110 *See* Jennings, *supra* note 91, at 77; *See* Press Release, *Commission Opens Proceedings Against Microsoft's Alleged Discriminatory Licensing and Refusal to Supply Software Information*, (Aug. 3, 2020), https://europa.eu/rapid/press-release_IP-00-906_en.htm (Under Articles 82(b) and 82(c) of the EC treaty, which were incorporated into Article 102).

111 *See* GAVIL, ET. AL. *supra* note 32, at 557; Case Comp/C-3/37.792 Microsoft (2004).

112 *See* GAVIL, ET. AL. s*upra* note 32, at 557.

113 *Id.*

114 *Id.*

Microsoft appealed to the European Court, where the Commission's decision was upheld by the Court of First Instance.[115] This ruling fundamentally expanded the powers of the Commission. The EU could in turn require a dominant company to allow competitors the ability to use their platform to provide its own IP to aid competitors. A theme seen later in the Google decisions.

In 2009, long after the original *U.S. v. Microsoft* litigation and settlement, the Commission issued a decision on Microsoft's tying of IE to Windows.[116] In stark contrast to the D.C. Circuit's opinion, the Commission found IE and Windows to be separate products. As separate products, the Commission found an illegal tie, which was the cause of "Internet Explorer's market share remain[ing] much higher than that of its competitors, although it could not be considered as a superior product."[117] Microsoft chose to end its conduct and accept a settlement.[118] In the end, the Commission extracted certain concessions.[119] For a period of five years, Microsoft was required to provide users with the option to download competing browsers upon startup or update.[120] The decision forced Microsoft to promote its competitors since "many users [were] not sufficiently informed about web browsers and the fact that non-Microsoft web browsers can be downloaded."[121] Due to the futility of challenging EU law and jurisprudence, Microsoft in turn agreed to promote rivals on its own platform.

The Microsoft cases provide the foundation for two contrasting approaches to regulating tech companies. While both the EU and the

---

115 David A. Heiner, *Single-Firm Conduct Remedies: Perspectives from the Defense*, 75 ANTITRUST L. J. 872 (2009); Microsoft Corp. v. Comm'n, 2007 E.C.R. 11-3601 (Case T-201/04) (Ct. First Instance) (*CFI Decision* 2007).

116 Microsoft (Tying)(Case Comp/C-3/39.530)(2009) [hereinafter, *Microsoft Tying*].

117 *Id.* at 12.

118 *Antitrust: Commission Accepts Microsoft Commitments to Give Users Browser Choice*, EUROPEAN COMMISSION (Dec. 16, 2009), https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1941.

119 *Microsoft Tying*, *supra* note 116, at 14-5.

120 *Id.* at 25 ("Prominently displaying five web browsers and seven more when the user scrolls sideways reflects the market situation. The leading five web browsers are by far more widely accepted than the others by the market. Moreover, displaying seven additional web browsers gives web browsers with smaller usage share an opportunity to be included on the choice screen, and therefore to raise awareness about their products and gain new users."); *Id.* at 19-20 ("The choice screen strikes an appropriate balance between the need to properly inform users about available web browser options and the need to have a clear design to allow them to effectively exercise their choices."). *Id.* at 18.

121 *Microsoft Tying, supra* note 116, at 25.

U.S. required Microsoft to stop its anticompetitive practices, the Commission applied a stricter tying standard and required Microsoft to promote its rivals on its operating system.[122] The EU came away with enhanced powers to require companies to provide an equal playing field for their competitors, and preserved the Commission's power to regulate platform-based tying. Eight years after the Commission's IE settlement, Google was charged for its anticompetitive practices relating to the demotion of rivals on its platform.[123]

V. GOOGLE SHOPPING

A. Background

The technological leap between the 1990s and the 2010s was groundbreaking. The Microsoft cases arose while the internet was a nascent industry, and the technologies associated with it were at an early stage of growth. In the early 2010's however, Google had already developed a sophisticated internet-based platform, run by algorithms, and improved by user inputs. The sophistication of this technology makes the prosecution of a Section 2 or Article 102 case all the more complicated. Google's main platform is its search engine, where the consumer inputs their query and receives a populated list of links.[124] The links are typically sorted by "generic search algorithms to rank web pages."[125] In 2002, to diversify its product offerings, Google unveiled the comparison shopping tool, "Froogle," which "allowed consumers to compare products and prices online and find deals from retailers of all types."[126] Google later rebranded Froogle in 2007 to "Google Product Search," and later changed the name again in 2012 to "Google Shopping."[127]

The 2012 rebrand of Google Shopping, involved a major overhaul. Google sought to monetize Google Shopping. The new business model

---

122 *Microsoft Tying*, *supra* note 116, at 10. (The Commission in part required this because "[F]or various reasons, the Commission reached the preliminary conclusion that the downloading of web browsers from the internet does not provide a sufficiently effective distribution alternative.").

123 *See* discussion *infra* Part V, *Google Shopping*.

124 *Statement by Commissioner Vestager on Commission decision to fine Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, EUROPEAN COMMISSION (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1806.

125 *Google Shopping, supra* note 21, at 78.

126 *Id.* at 11.

127 *Id.*

was changed to a "paid inclusion" model wherein "merchants pay Google when their product is clicked on in Google Shopping."[128] Google additionally included its new shopping vertical on its main search page, resulting in a snippet of the Google Shopping page being positioned above Google's regular search results, thereby circumventing the need to access Google Shopping from a separate webpage.[129]

In conjunction with the repositioning of its product, Google modified its general search algorithm.[130] While Google's main algorithms trawl the internet for results, there are also algorithms that demote results to websites that violate Google's Webmaster Guidelines.[131] The Webmaster Guidelines demote sites that try to game the search algorithm through "hidden text or hidden links, automated queries to Google, pages loaded with irrelevant keywords, duplicate content, malware (e.g. viruses), and pages with little or no original content."[132] Google maintains the discretion to demote websites with misleading practices. Though this is mostly executed via the use of algorithms, Google also directs employees to manually demote websites that violate their guidelines.[133]

The combination of new algorithms and the inclusion of the new Google Shopping vertical on the main results page led to the demotion of rival comparison-shopping services that would normally populate the generic search results. Google attested that the demotions occurred because such rivals typically copy the content of other webpages and are "sites with low levels of original content."[134] The Commission was alerted to this practice and fined Google over 2.4 billion euros in an Article 102 decision.[135] At the time, Google maintained dominant market shares of "general search services" ("Search"),[136] in excess of 80%.[137] Google's dominance in Search was also protected by its

---

128 *Id.*

129 *Id.*

130 *Id.* at 78.

131 *Google Shopping*, *supra* note 21, at 78.

132 *Id.*

133 *Id.*

134 *Id.* at 79.

135 *Id.* at 213 ("For the infringement referred to in Article 1, the following fine is imposed: Google Inc.: EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet Inc.").

136 *Id.* at 28.

137 *Google Shopping*, *supra* note 21, at 58. ("2010 data by Nielsen (based on page views) indicates that Google's share of the national markets for general search services in 2010 was 84.6% in France, 85.3% in Germany, 85.9% in Italy, 91.3% in Spain and 81.3% in the United Kingdom. None of Google's competitors had a market

powerful network effects. In effect, the algorithms that Google uses were developed from a vast number of user queries.[138]

B. Google Search: An Essential Facility

The Commission evaded an extensive tying analysis and instead treated Google's platform as an essential facility.[139] Google's search platform is the main location where users find comparison shopping websites, and this platform could not be "replaced by other sources of traffic currently available to competing comparison-shopping services."[140] In the eyes of the Commission, Google is like a railroad crossing that has a duty to enter into deals with its competitors "by providing them access to Google Search on certain terms which ensure that their services are subject to the same rules that Google applies to the display of its own services."[141] Without such equal treatment, the imbalance of power between Google and its competitors could have a "negative impact on consumers and innovation."[142] The potential for such negative impact is clear. Google wields an enormous amount of power by being able to decide who can access the first page of Google's search results; the average consumer looking for a comparison-shopping page, could be left with one option—to click on Google's proprietary shopping page.[143]

---

share exceeding 4.1% in any of these five countries."). *Id.* ("across the [European Economic Area], except for the Czech Republic.").

138 Google Shopping, *supra* note 125, at 62 (explaining that the Commission recognized that "the establishment of a fully-fledged general search engine requires significant investments in time and resources," and elucidated upon the importance of network effects).

139 Pinar Akman, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law*, 2 J. L. TECH & POL'Y 307 (2017) ("An 'essential facility,' in turn, is defined as 'a facility or infrastructure, without access to which competitors cannot provide services to their customers.'"). *Id.* at 308; *see also* European Commission, *Communication from the Commission-Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7, ¶ 75.

140 *Google Shopping*, *supra* note 21, at 77.

141 *See* Akman *supra* note 139, at 308.

142 *See id.* at 304.

143 *Google Shopping*, *supra* note 21 at 167. ("[N]one of the existing alternative sources of traffic currently available to competing comparison shopping services (traffic from AdWords, mobile applications, direct traffic and other sources of traffic such as affiliate websites, social networks, generic or paid traffic from other general search services) can effectively replace generic search traffic from Google's general search results pages.").

The *Google Shopping* decision is a fundamental lesson in how modern regulatory bodies can restrain tech platforms in the twenty-first century and demonstrates the need for a similar approach in U.S. law. At one point between the Microsoft settlement and the Google Shopping decision, the FTC attempted to intervene. In 2013, the FTC investigated Google's search practices. The regulator assessed allegations that "Google unfairly promoted its own vertical properties through changes in its search results page . . . . [and] Google manipulated its search algorithms in order to demote vertical websites that competed against Google's own vertical properties."[144] Though the resulting evidence uncovered in the investigation was similar to the EU's findings, the FTC reached the opposite conclusion. "The totality of the evidence indicates that, in the main, Google adopted the design changes . . . to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose."[145] While the FTC did address the fact that "some of Google's rivals may have lost sales due to an improvement in Google's product," they classified such lost sales as "a common byproduct of 'competition on the merits' and the competitive process that the law encourages."[146] Clearly, something was wrong at the FTC. The regulator decided to ignore the anticompetitive effects of Google's actions. The decision to take no action was a missed opportunity to ensure consumers could benefit from a choice on a major internet platform.

The stark contrast of the Commission's *Google Shopping* decision demonstrates the myopia of the FTC's judgment. The FTC missed a key element of how tech platforms operate—they compete both horizontally with other tech platforms, and vertically with the companies who use their platforms.[147] One can imagine a future where Google's Search platform, a durable monopoly, has successfully demoted all alternatives to its secondary products and services by algorithmically sorting their links to the fifth and sixth page of search results. Under the FTC's standard, Google can avoid Section 2 liability by proffering nominal benefits for the consumer. Moreover, the split in jurisdictions creates an opportunity for Google in the U.S.; the company has the freedom to snuff out all nascent competition, regardless of its legal

---

144 *In the Matter of Google Inc., FTC No. 111-0163*, *supra* note 25, at 1.

145 *Id.* at 2.

146 *Id.*

147 Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, United States House of Representatives 1-2, (Statement by Margrethe Vestager) [*Hereinafter Vestager Statement*] https://docs.house.gov/meetings/JU/JU05/20200729/110883/HHRG-116-JU05-20200729-SD007.pdf.

obligations under *U.S. v. Microsoft* and Section 2 whereas, in the EU, Google Search is an essential facility that must deal fairly with its competitors. This schism leaves a regulatory gap, where Google is unrestrained from achieving its primary goal: monopolization of user data.

While U.S. regulators stood idly by, the Commission sought to restrain Google's data monopolization. After *Google Shopping*, the Commission issued another salvo in their fight to rein in Google, the *Google Android* decision. *Google Android* unveils Google's complex business model, and how the company seeks to hoard as much user data as possible.

The decision equally exposes the faults in traditional antitrust enforcement. A major tech company is nimbler than traditional antitrust litigation, and like Microsoft in the 1990's, a monopolist can continue to improve its dominant position while the proceedings are ongoing. The only difference between then and now, is the speed at which a tech platform can cultivate its network effects through data capture, making future competition less of a possibility. Absent major changes in U.S. law, it is not difficult to imagine a future where tech giants are free to demote competitors on their platform with the goal of fostering network effects to build their barrier to entry. These companies will be empowered to render all competitors obsolete—irrespective of consumer preferences.[148]

VI. GOOGLE ANDROID

> "Today, mobile internet makes up more than half of global internet traffic. It has changed the lives of millions of Europeans. Our case is about three types of restrictions that Google has imposed on Android device manufacturers and network operators to ensure that traffic on Android devices goes to the Google search engine. In this way, Google has used Android as a vehicle to cement the dominance of its search engine. These practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere. This is illegal under EU antitrust rules."[149]

---

148 *Id.* at 2.

149 *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, EUROPEAN COMMISSION (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

— Commissioner Margrethe Vestager on Google

In 2018, the Commission charged Google with multiple violations of Article 102.[150] Google's business model is "based first and foremost on increasing the audience for its online services so that it can sell its search advertising."[151] Since 2011, Google went to great measures to ensure that its monopoly position in Search would not be eroded by the consumer shift from computers to smartphones. The company leveraged its market power to exclude competitors from entering into the mobile operating system market.[152] Concurrently, Google tied its proprietary app store (the "Play Store") to its mobile applications, like the Google Search app and the Google Chrome browser.[153] Google also entered into agreements wherein it would grant revenue share payments to OEMs and mobile network operators[154] ("Telecoms") to ensure that no competitor search functions would be pre-installed on Android devices.[155]

The duration of these actions makes evident the feebleness of current antitrust law. Even though the law is sophisticated enough to address this type of conduct, the process is not nimble, resulting in an inability of regulators to protect consumers and promote a competitive marketplace. As litigation is still in progress,[156] Google's short-term loss is miniscule, as compared to the durable monopoly it is creating. As the parties wait for a judgment, Google is aggressively harvesting data to support its platform. Google's algorithms run on customer data; the more users it can retain on its platform, the quicker it can build its network. The current process (of investigations, charges, appeals, and the rendering of a final decision) does not anticipate such an efficient actor. This temporally generous process provides Google an opportunity to destroy competition during the interim. Google's conduct was precise and sophisticated in excluding competitors, starving them of

150 *Id.* (Although the fine was issued in 2018, the Commission's full decision was unveiled in September 2019).

151 *Google Android,* supra note 21, at 39.

152 *Id.* at 11.

153 *Id.*

154 Although the Commission abbreviates mobile network operators as 'MNOs', here I will refer to them as 'Telecoms,' since they are wireless telecommunication companies. TECHNOPEDIA https://www.techopedia.com/definition/27804/mobile-network-operator-mno (last visited Aug. 29, 2020).

155 *Google Android, supra* note 21, at 11.

156 *Google appeals against €4.3bn Android fine*, BBC NEWS (Oct. 10, 2018), https://www.bbc.com/news/technology-45810059.

valuable data, and severely injuring their chances of establishing a viable competitor to Google's products.

A. Background

In 2005, Google acquired the smartphone operating system developer, Android, for $50 million.[157] Twelve years later, Android was set to "generate more than $60 billion in revenue," and reach two billion users.[158] To enhance Android's reach, Google provides third party manufactures the source code for free "under an open source license ("AOSP license")," which allows any entity to use and modify the operating system: the modified versions are known as Android Forks.[159] However, despite Android being open source, Google actually maintains tight control over the operating system through this AOSP license. To comply with the license, the Google Play Store must be pre-installed by OEMs, and app developers are prohibited from distributing alternative app stores on the Play Store.[160] Google also offers a bundle of its digital apps and services under the Google Mobile Services ("GMS") license, which includes its most popular mobile applications.[161]

The AOSP license only pertains to the Android operating system and does not "grant hardware manufactures the right to distribute Google's proprietary apps" like, Google Search, Google Chrome, the Play Store and Google Play Services. It also does not provide licenses for the Google's Android logo or other Android related trademarks.[162] To access these critical products, many found in the GMS bundle, OEMs must sign restrictive agreements known as Anti-fragmentation Agreements ("AFA") and Mobile Application Distribution Agreements ("MADA").[163]

---

157 Sam Schechner and Douglass MacMillan, *Google is Fined $5 billion by EU in Android Antitrust Case,* WALL. ST. J. (July 18, 2018), https://www.wsj.com/articles/google-to-be-fined-5-billion-by-eu-in-android-case-1531903470.

158 *Id.*

159 *Google Android, supra* note 21, at 32-3.

160 *Id.* at 35.

161 *Id.*

162 *Id.* at 40.

163 *Id.*; ("In 2017, while being investigated by the European Commission (and long after Google had locked up its monopoly status), Google began shifting its anti-forking restrictions from AFAs to new Android Compatibility Commitments (ACCs). Today, Google has an AFA or ACC with the leading Android device manufacturers, including LG, Motorola, and Samsung. . . . ACCs are marginally less onerous than AFAs because they allow manufacturers to build devices or components for third parties to sell to consumers, even if those devices or components do not comply with

MADAs require OEMs to "place on the device's default home screen the icons which give access to the Google Search app, the Play Store and a folder labelled 'Google' . . . that provides access to a collection of icons for a number of mandatory Google apps . . . ."[164] The MADAs prevented users from being able to "obtain the Play Store without simultaneously obtaining" the Google Search and Google Chrome apps.[165]

The AFA's had three main obligations: (1) OEMs were permitted to sell only Android compatible devices, or software that would run on Android compatible devices;[166] (2) OEMs were prohibited from taking "any actions that may cause or result in the fragmentation of Android";[167] and (3) OEMs were barred from distributing, promoting, or

---

Google's technical standards. But ACCs, like AFAs, prohibit signatories from manufacturing Android forks of their own, distributing devices with Android forks, or using their powerful brands to market forks on behalf of third parties. Most well-known Android manufacturers are bound by AFAs or ACCs."). Complaint at 23, United States v. Google LLC (D.D.C. filed Oct. 20, 2020), ECF 1, (No. 1:20-cv-03010).

164 *Google Android*, *supra* note 21, at 47.

165 *Id.* at 168, 45-49 ("[O]nce a hardware manufacturer decides to pre-install one or more Google proprietary apps on its devices, it must pre-install all mandatory Google apps. . . . hardware manufacturers must place on the device's default home screen the icons which give access to the Google Search app, the Play Store and a folder labelled "Google" ("Google folder") that provides access to a collection of icons for a number of mandatory Google apps. . . . Any other pre-installed Google apps should be placed no more than one level below the home screen. . . . hardware manufacturers are required to "*set Google Search as the default search provider for all Web search access points* . . . ." In October 2014 Google began to remove the wording of certain MADAs requiring Google Search to be set as the default general search service. However, as of April 2017, there remained a number of MADAs in place with language requiring hardware manufacturers to set Google Search as the default general search service.. . . The first hardware manufacturer with which Google entered into a MADA was [MADA signatory] in March 2009. Between March 2009 and April 2017, Google entered into MADAs with at least [200-300] further hardware manufacturers, including major hardware manufacturers such as HTC, Huawei Technologies Co. Ltd. ("Huawei"), Lenovo Group Ltd. ("Lenovo"), LG Electronics Inc. ("LG Electronics"), Samsung and Sony Corporation ("Sony").").

166 *Id.* at 40 ("(1) [COMPANY] will only distribute Products that are either: (i) in the case of hardware, Android Compatible Devices; or (ii) in the case of software, distributed solely on Android Compatible Devices; (2) "[COMPANY] will not take any actions that may cause or result in the fragmentation of Android; and (3) [COMPANY] shall not distribute a software development kit (SDK) derived from Android or derived from Android Compatible Devices and [OEM] shall not participate in the creation of, or promote in any way, any third party software development kit (SDK) derived from Android, or derived from Android Compatible Devices.") (quoting Doc ID 1306-164)).

167 *Id.*

creating third party software development kits.[168] By barring OEMs from distributing software development kits to potential competitors, Google could foreclose most horizontal competition. Additionally, if an OEM refused to sign onto the MADAs and AFAs, such OEMs would not be able to sell a product with the Android Operating System ("OS"). It is the equivalent of an OEM being prohibited from selling a computer loaded with the Windows operating system. Google was in fact the only player in the mobile OS market. Indeed, by way of price, there were no real competitors. In Europe from 2009 to 2015, "Apple smartphones . . . on average, cost twice as much as Google Android devices."[169] Google's own data showed that "more than 80% of Apple's sales [were] . . . smart mobile devices priced above USD 550 whereas . . . approximately 20% of Google Android devices" were sold above the same price.[170]

Moreover, the Commission determined that the relevant product market to be licensable is the smart phone OS,[171] excluding PC operating systems and feature phones.[172] Since the market was narrowly defined, excluding Apple and Blackberry products, as they "do not grant licenses to third parties."[173] From the OEM's perspective, the only relevant mobile operating systems "are those which it can competitively license and/or implement, and as for example Apple iOS is proprietary and unavailable for third party OEMs, [and therefore] should be disregarded in the competitive equation."[174] The Commission's assessment on Google's conduct sheds light on how this market became Google's own monopoly.

168 *Id.* (Software Development Kits are "tools used to develop applications for the Android platform." *Android SDK,* TECHOPEDIA, https://www.techopedia.com/definition/4220/android-sdk (last updated Feb. 5, 2019).

169 *Google Android, supra* note 21 at 109.

170 *Id.* at 110.

171 *Id.* at 56.

172 *Id.*; A feature phone is "A cellphone that contains a fixed set of functions beyond voice calling and text messaging but is not as extensive as a smartphone. For example, feature phones may offer Web browsing and email, but they generally cannot download apps from an online marketplace." https://www.pcmag.com/encyclopedia/term/feature-phone.

173 *Google Android*, *supra* note 21 at 59 (Similar to U.S. v. Microsoft where the D.C. Circuit upheld the defined market as "the licensing of all Intel-compatible PC operating systems," to the exclusion of Apple. U.S. v. Microsoft Corp., 253 F.3d 34, 52).

174 *Google Android*, *supra* note 21, at 62

B. Google's Monopolization through 'Anti-fragmentation Agreements'

Google was threatened by competitors creating their own operating systems by modifying the open source Android OS ("forking").[175] Forking is a threat to Google's dominance because competitors are able to create mobile operating systems at a lower cost and in less time.[176] A forked version of Android would equally benefit from Android's network effects, as "the similarities between Google Android and Android forks mean that many apps can run on Android forks" with little or no modifications.[177] The AFAs were imposed on the largest device manufactures in the world,[178] including: BlackBerry, Dell, HP, HTC, Huawei, Lenovo, LG Electronics, Samsung, Sony, Toshiba, and ZTE.[179]

Google's imposition of AFAs spanned at least seven years. In 2012, Acer, in partnership with Alibaba, sought to create a smartphone with a forked version of Android as the operating system.[180] When Google became aware, the company threatened to use their AFA with Acer to terminate Acer's "Android product cooperation and related technical authorization," leading Acer to "ultimately abandon[] the project."[181] This type of behavior was quite common, as the Commission found that Google worked tirelessly to prevent competitors from entering the market.[182] Similarly, Amazon sought to compete with Google through its 'Fire Phone' project.[183] Amazon began discussions with OEMs to license a forked Android operating system; however, the

---

175 *Id. at* 233.

176 *Id.* at 233-34.

177 *Id.* at 234-35 ("Mapquest stated: '[c]onverting an app for a fork typically requires an additional 5-10% above the cost/time required to develop the app originally for Android. The process is much the same but uses different services. When 'converting' to a different operating system, it takes virtually 100% as long as the development time for the original app, because MapQuest builds its app and features from scratch.'").

178 *Id.* at 43-4 ("All the largest OEMs active in the EEA have confirmed that, at present, they have ongoing AFAs with Google.").

179 *Id.* at 44.

180 *Google Android, supra* note 21, at 237.

181 *Id.*

182 *Id.* at 237-39; *Id.* at 243 ("The Commission concludes that that the anti-fragmentation obligations hinder the development of Android forks in a number of ways.").

183 Lorraine Luke, *Amazon, With Suppliers, is Testing a Smartphone*, WALL ST. J. (July, 11, 2012), https://www.wsj.com/articles/SB10001424052702303567704577519800332392724.

project was ultimately canceled because the OEMs were concerned "that selling devices with Fire OS would be a breach of the provisions of their [obligations under their] AFAs with Google."[184]

Google's intent was clear: the Commission found internal discussions among Google employees, explaining "that AFAs [were] meant to '[s]top . . . our partners and competitors from forking Android and going alone,'" and therefore "members of the Android ecosystem 'didn't just commit to ship Android-compatible devices; they committed to *not* ship incompatible devices.'"[185] Undoubtedly, the AFAs were immensely successful. From 2012 to 2019, Google Android's worldwide market share of the smartphone OS (including Apple's IOS) increased from 28% to over 75%.[186] During that time, no competitors successfully entered the smart mobile OS market.[187] In fact, in 2016, "Microsoft exited the market" after their smart mobile OS market share dropped below 2%.[188]

In justifying the AFAs, Google proffered to the Commission that such contractual provisions were the "commercial norm" and that Google's AFAs were less restrictive than those required by Apple, Microsoft and BlackBerry.[189] Furthermore, Google contested that the AFAs helped facilitate "the licensing of Google['s] proprietary apps" and that objective was "to promote interoperability."[190] However, the Commission refuted these arguments, concluding that "Google's conduct help[ed] to maintain and strengthen [their] dominant position in

---

184 Google Android, *supra* note 21, at 246.

185 *Id.* at 41, 244. ("As pointed out by [Google Executive], in the context of the opportunity to grant a GMS license to Cyanogen Inc. ("Cyanogen"), the developer of a compatible fork: 'Actually, the more I think about this, [the more] I'm getting nervous. Basically, we are allowing a software company to distribute a version of our OS without having to be a hardware manufacturer themselves. Basically, they are operating much like we do, with the goal of getting their software ("unencumbered" by hardware) scaled to as many devices as possible. In some ways doesn't that make them more dangerous than Amazon?").

186 *Mobile Operating System Market Share Worldwide*, STATCOUNTER, https://gs.statcounter.com/os-market-share/mobile/worldwide#monthly-201208-201911 (last visited Sept. 10, 2020); *See also* European Commission Press Release, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (July 18, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 ("Today, about 80% of smart mobile devices in Europe, and worldwide, run on Android.").

187 *Mobile Operating System Market Share Worldwide*, STATCOUNTER, https://gs.statcounter.com/os-market-share/mobile/worldwide#monthly-201208-201911 (last visited Sept. 10, 2020).

188 *Google Android*, *supra* note 21, at 102.

189 *Id.* at 230.

190 *Id.* at 230-31.

each national market . . . deter[red] innovation," and harmed consumers.[191]

From a position of absolute dominance, Google forced its partners to not work with Google's competitors even when the Android OS was open source and freely available to the public. This conduct is decidedly worse than the conduct of the monopolist in *Lorain Journal.*[192] At least there, when the newspaper was required to unwind its anticompetitive activity, the advertising market could revert to being competitive. In contrast, Google, over a period of years, created a durable monopoly on the back of exclusionary conduct. Even if Google begins complying with Article 102(c), and ceases to restrict OEMs from working with competitors, there is still uncertainty as to whether a new product will be able to draw consumers, as even a forked OS requires effort from third parties to develop compatible apps. As if excluding horizontal competitors was not enough for Google, the company vertically restricted competition through copying Microsoft's conduct—tying applications to the operating system.

C. *Tying of the Play Store and Google's Mobile Apps*

As mentioned previously, network effects can create a major barrier to entry. Google took note of this and saw an opportunity in the Play Store. Since users desire to have a phone with a plethora of apps, and developers want to create apps on a platform which reaches as many users as possible, unsurprisingly, the Commission uncovered evidence of Google tying the Play Store to its mobile applications. When examining the relationship between the Play Store and the Google Search app, ultimately, the Commission found two distinct products. First, the Play Store serves a different function from the apps that are available for download. "The Play Store enables users to download, install and manage a wide range of diverse apps from a single point in the interface of the smartphone," while "the Google Search app enables users to search for information across the entire Internet."[193] The Google Search and Google Chrome apps, "as well as competing general search apps, can be downloaded via other non-Android app stores."[194] Additionally, there are other tech companies that make

191 *Id.* at 233, 257.

192 *See* discussion *infra* Part II.C. Refusal to Deal.

193 *Google Android*, *supra* note 21, at 167 (Also, the Commission found the same to be true for the tying of "the Play Store and the Google Search App" with Google Chrome."). *Id.* at 201.

194 *Id.* at 167.

competing apps. Both Yahoo and Seznam offer general search apps "on a stand-alone basis, independently of Android app stores;"[195] Huawei and LG Electronics each offer mobile web browsers for download on the Play Store.[196] Google even provides the applications individually for download on Apple's iOS app store.[197] Google made a clear effort to ensure that its proprietary apps would be the first (and likely only) choice for Android users by requiring the apps to be pre-installed on all Android phones. Pre-installation can have a significant effect on consumer behavior.[198] When an app is pre-installed, users "are likely to 'stick' to those apps,"[199] making users less likely and "to look for, download, and use alternative apps, . . . as [the] default already delivers the required functionality to a satisfactory level."[200] Additionally, the barrier of entry is raised for competitors who would "need to convince users that their service is significantly better than the alternative that is already pre-installed. . . ."[201] In a homage to Microsoft's 1990s anti-competitive conduct, Google made its tied products impossible for users and OEMs to uninstall.[202] Google's practices

---

195 *Id.*

196 *Id. at* 200.

197 *Id.*

198 *Google Android*, *supra* note 21, at 202 ("Tying of Google Chrome with the Play Store and the Google Search app provides Google with a significant competitive advantage that competing non-OS-specific mobile web browsers cannot offset.").

199 *Id.* at 170.

200 *Id.*

201 *Id.*

202 *Id.* at 181, 202; *compare* U.S. v. Microsoft Corp., 253 F.3d 34, 96 (D.C. Cir. 2001) (Microsoft's practices in U.S. v. Microsoft Corp., "The two practices that plaintiffs have most ardently claimed as tying violations are, indeed a basis for liability under plaintiffs § 2 monopoly maintenance claim. These are Microsoft's refusal to allow OEMs to uninstall IE or remove it from the Windows desktop.") *with* Case T-201/04 Microsoft v. Commission, ECLI:EU:T:2007:298, par. 331-33 ("The Commission demonstrated to the requisite legal standard that the bundling of Windows and Windows Media Player from May 1999 inevitably had significant consequences for the structure of competition. That practice allowed Microsoft to obtain an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world, thus providing a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs. . . . The Commission therefore had ground to state, at recital 984 to the contested decision, that there was a reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition so that the maintenance of an effective competition structure would not be ensured in the foreseeable future.").

were nearly identical to Microsoft's in the 1990s and early 2000's.[203] Furthermore, Google took the additional step to exclude horizontal competition in Search, through its revenue sharing agreements.

D. Revenue Share Agreements

Google, concerned with users choosing alternative Search tools on its Android OS, entered into "portfolio-based revenue share" agreements in which Google would pay OEMs and Telecoms to exclusively pre-install Google's search service on their devices.[204] Such an agreement with Google had major incentives, if a partner "had pre-installed a competing [Search] service on any device within an agreed portfolio, it would have to forego the revenue share payments not only for that particular device but for all the other devices in that portfolio."[205] Google's internal emails demonstrated that they sought to prevent competitors like Bing or Yahoo from "steal[ing] away [their] Android search distribution."[206] The revenue sharing deals could solidify Google's dominance by making their search services the default Search engine for consumers on the concerned wireless networks and devices. Previously, telecoms did not want to ship Android phones with Google search pre-installed. AT&T and América Móvil shipped Yahoo on Android Phones; Verizon shipped Bing; Google reasoned that the only way to maintain their presence on their own phones was to "incentivize carriers to ship Google by . . . pay[ing] . . . for exclusive default placement."[207]

The Commission reasoned that these exclusivity payments "reduced the incentive of OEMs and [Telecoms] to pre-install competing general search services . . . made access to the national markets for general search services more difficult . . . [and] deterred innovation."[208] The agreements were a strong incentive for Google's partners, as competitors would need to not only convince users to switch from using Google Search, but also to ply Google's partners away from a guaranteed revenue stream by equally compensating them. This revenue sharing, established a major barrier to entry—which enabled Google to siphon data from the market to the detriment of its competitors, who

---

203 *See* discussion *infra Part* III, Microsoft in the U.S.; *see* discussion *infra* Part IV Microsoft in the EU.

204 *Google Android, supra* note 21, at 269.

205 *Id.* at 270.

206 *Id.* at 271.

207 *Id.*

208 *Id.* at 272.

sought to compete on the Android platform.[209] Google countered that OEMs and telecoms had no commercial interest in pre-installing competing general search services because "of Google's superior quality."[210] This argument was cast aside by the Commission[211] and is a logically inconsistent conclusion: why would Google need to pay for partners to pre-install the search services if they themselves would have done so anyway?

Google's justifications for their actions clearly did not convince the regulators of their innocence. As a result of the conduct detailed in the *Google Android* decision, the Commission imposed a 4,342,865,000 euro fine, and required that Google halt and "not re-engage in any of the three types of practices. The decision also require[d] Google to refrain from any measure that has the same or an equivalent object or effect as these practices."[212]

The conduct in *Google Android* is a roadmap of how a dominant firm can use its market power to exclude competitors from successfully accessing a market that the firm itself controls. Without the pre-installation of Google's general search services, consumers would have a greater choice "in terms of quality or range of products"[213] to find information on the internet. However, Google hamstringed competitors and harmed consumers by reducing the incentive for competitor companies to "invest in developing innovative features," such as search algorithms and user interfaces.[214] Still, the blame cannot solely rest on Google's well-capitalized shoulders. In part, Google's actions are the fault of legislators and government regulators in the U.S. and EU for failing to evolve the nineteenth century regulatory framework to meet modern needs. Google's conduct spanned years, and what is clear from the numerous fines and investigations of Google by the Commission, is that the current model is broken, and it is time for change.

---

209 *Id.* at 278. ("As a result, a competing general search service would have had to offer a revenue share payment greater than 100% [of Google's payments] in order to compensate an OEM or MNO."). *Id.* at 287.

210 *Google Android, supra* note 21, at 276.

211 *Id.* at 277.

212 *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, EUROPEAN COMMISSION (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

213 *Google Android*, *supra* note 21, at 299.

214 *Id.*

VII. CONCLUSION

What then should be done to remedy the current system? While in the past, the U.S. regulators stood idly by as their European counterparts single-handedly attempted to restrain Google's monopolistic activity, on October 20, 2020, the U.S. D.O.J. and many State's Attorney Generals filed a complaint against Google, for the same practices that riled the Commission in the *Google Android* decision.[215] The U.S. government sued under Section 2 requesting the courts to "[e]nter structural relief as needed to cure any anticompetitive harm," to "[e]njoin Google from continuing to engage" in Google's anticompetitive activities, and to "[e]nter any other preliminary or permanent relief necessary and appropriate to restore competitive conditions in the markets affected by Google's unlawful conduct."[216] Whether or not the U.S. judiciary will be able to remedy these issues is a different story. Of the problems mentioned in this note regarding the current system, two roadblocks will make future remedies difficult: the rule of reason standard set forth in *U.S. v. Microsoft*, and the lethargy of the U.S. court system.

For those reasons, the laws and procedure as they currently exist today are too slow to remedy a tech giant's conduct. Section 2 has not adapted to the modern complexities of the tech sector; in both the U.S. and EU, the litigation timeline is so lengthy that even with an adequate statute, a monopolist can lay waste to the competitive landscape, and suffocate competitors by absorbing all the proverbial oxygen (i.e., data) in the market. There is a clear need for change in the law. Additionally, there is a need for both the U.S. and EU regulatory frameworks to be aligned. What the public is experiencing today—tech platforms remaining functionally unregulated—is a symptom of a jurisdictional split. These tech companies are international organizations, and while their activity can be restrained in one jurisdiction, if they are able to perform the same activities legally in another jurisdiction, then from a competitive market standpoint, it is almost as if the company remains unregulated. Still, what can be gleaned from the Commission's actions is that Article 102 is perfectly crafted to address the issues of the competitive marketplace. A first step that legislators must take is adopting Article 102—in full—to be applied in the context of the regulation of technology platforms.

---

215 *See* Complaint, United States v. Google LLC (D.D.C. filed Oct. 20, 2020), ECF 1, (No. 1:20-cv-03010); Press Release, *supra* note 22.

216 Complaint at 57, United States v. Google LLC (D.D.C. filed Oct. 20, 2020), ECF 1, (No. 1:20-cv-03010).

Amendment to 15 U.S. Code § 2 (Sherman Antitrust Act)

Technology Platforms may have their conduct enjoined by the Federal Trade Commission for any abuse of their market power when they:

(a) directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions;
(b) limit production, markets or technical development to the prejudice of consumers;
(c) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Additionally, the temporal dilemma must also be resolved. Courts have distanced themselves from the continued regulation of industries,[217] and the FTC has made questionable decisions in the past, leaving the tech industry functionally unregulated.[218] Therefore, the U.S. needs to realign the FTC's role with enhanced regulatory powers to apply this proposed amendment to the issues arising from anticompetitive conduct by tech companies in the United States. With such tools at its disposal, the FTC could be granted the authority to issue injunctions to put a stop to anti-competitive arrangements prior to a full-blown Section 2 lawsuit. If this neutral body could stop anti-competitive actions before there is damage to the market, consumers would benefit from having a greater amount of choice with regard to tech products. If there is not a federal agency equipped to prevent companies like Google from illegally diverting all business from its competitors to its own services, then the inequity of the current system will metastasize into other aspects of our economy. Currently, it is still possible to promote a

---

217 *See generally* Law Offices of Curtis V. Trinko, LLP v. Verizon Commun's, 540 U.S. 398 (2004).

218 *See* In the Matter of Google Inc., FTC No. 111-0163, STATEMENT OF THE FEDERAL TRADE COMMISSION REGARDING GOOGLE'S SEARCH PRACTICES (Jan 3. 2013) https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

competitive marketplace but, if no action is taken, there will be little stopping tech giants from destroying all competition.