

Comments

A Case for Global Cooperation When Enforcing United States Antitrust and European Union Competition Laws Against Modern Technology Companies

By ROBERT BREWINGTON*

Introduction

MODERN TECHNOLOGY COMPANIES ARE a massive benefit to the global economy: from Microsoft's persistent progress in the computer software market, to Google's revolutionizing web browsing and email, to Facebook's seemingly colossal goal of keeping people connected through innovative social media methods. It would be hard to imagine a world without such vital mechanisms used to make transferring information faster, cheaper, and easier for businesses consumers around the world. However, these companies face a serious problem. Inconsistent enforcement of the United States' Antitrust laws and the European Union's Competition laws substantially hinder what these companies do best: furthering the global economy. Given the dominant global nature of modern technology companies, it is essential that a more globally cooperative body of competition law be created.

This Comment will dissect United States Antitrust law and compare it with the European Union's Competition law with the focus on how these conflicting bodies of law negatively affect modern technol-

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ogy companies. Specifically, this Comment will analyze the effect that these antitrust and competition laws have had on Microsoft,¹ are currently having on Google,² and could have in the future on technology companies such as Facebook.³ Finally, this Comment will discuss the need for more cooperation in establishing an internationally recognized body of competition law⁴ and provide as an example a successful antitrust agreement between the United States and Australian governments.⁵

I. European Union Competition Law Versus United States Antitrust Law

The pertinent European Union competition laws are found in Article 102 (“Article 102”)⁶ of the Treaty on the Functioning of the European Union (“TFEU”),⁷ which was authored by the member states.⁸ Article 102 states: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”⁹

At first glance, the European Union’s Article 102 seems quite similar to Section 2 of the United States’ Sherman Antitrust Act (“Sherman Act”), which states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or

1. See *infra* Part III.A–B.

2. See *infra* Part III.C.

3. See *infra* Part IV.A.

4. See *infra* Part V.

5. See *infra* Part VI.

6. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326) 47, 89 [hereinafter TFEU], available at http://eur-lex.europa.eu/resource.html?uri=cellar:ccccda77-8ac2-4a25-8e66-a5827ecd3459.0010.02/DOC_1&format=PDF. Article 102 was previously known as Article 82. See Consolidated Version of the Treaty Establishing the European Community art. 82, Dec. 24, 2002, 202 O.J. (C 325) 65 (as in effect 2004) [hereinafter TEEC], available at <http://www.refworld.org/docid/3ae6b39c0.html>.

7. TFEU, *supra* note 6, at 47.

8. See *id.* at 49.

9. *Id.* at 89 (“Such abuse may, in particular, consist in: (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.”).

with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.¹⁰

After all, both laws seek to stunt dominant market positions.¹¹ However, there are a few key differences between the laws. First, the Sherman Act applies to any monopolistic conduct including attempts to monopolize as well as conspiracies to monopolize,¹² whereas Article 102 proposes to govern only *abuses of dominance*.¹³ In other words, the Sherman Act focuses on any conduct that results in or might lead to a monopolistic position, but Article 102 governs abusive actions taken by a firm already in a dominant position.¹⁴ Further, while both systems require a firm to acquire a certain level of market power to be considered dominant, § 2 usually requires a market share of over 50 percent, while EU law only requires a market share of 38 percent before intervention becomes necessary.¹⁵ Lastly, Article 102 punishes dominant firms that negatively impact the *competitive process*, whether there is evidence of harm to the consumer or not,¹⁶ while the Sherman Act maintains its focus on *consumer welfare*.

10. 15 U.S.C. § 2 (2012).

11. *Compare id.* (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”), with *Application of Articles 101 102 TFEU (Formerly Articles 81 and 82 of the EC Treaty)*, EUROPA (Mar. 14, 2011), http://europa.eu/legislation_summaries/competition/firms/126092_en.htm [hereinafter *Application of Articles 101 102*] (“In order to ensure that the rules on competition concerning agreements, decisions of associations of undertakings and restrictive practices (Article 101) and abuses of a dominant position (Article 102), which are liable to be anticompetitive, are applied, the Commission has a number of powers to take decisions, to conduct investigations and to impose penalties.”).

12. 15 U.S.C. § 2.

13. *Application of Articles 101 102, supra* note 11.

14. See Pierre Larouche & Maarten Pieter Schinkel, *Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act 3* (Amsterdam Ctr. for Law & Econ., Working Paper No. 2013-08, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293141 (“With the term ‘monopolization’, § 2 would focus on how a monopoly position is obtained or maintained, and not so much on the actions of the monopolist once that position has been achieved, whereas Article 102 would not pay attention so much to how a dominant position has arisen, but would instead police particular abusive actions of the dominant firm . . .”).

15. *Id.* (“The prevailing measure for market power in both systems is market share in the relevant market. Under EU law, a (combined) market share of 38% can be sufficient to raise the rebuttable presumption of a dominant position, . . . whereas in the US interventions based on § 2 will usually require a market share of over 50% . . .”).

16. *Id.* at 7 (“When dominant firms inflict *injury on the competitive process* as such, this is already sufficient to trigger the application of Article 102 TFEU, even in the absence of

Finally, a patent holder in the United States is not required to issue licenses that allow others to use the patented technology.¹⁷ However, in the European Union, refusing to issue licenses to use a patented technology would likely result in a violation of competition laws.¹⁸ European Union patent holders must make a patent available to rivals using fair, reasonable, and non-discriminatory terms and prices.¹⁹

Overall, the European Union's competition laws are a more stringent means of governing competition in the marketplace. The ambiguous nature of the law leads to a broad scope of competition protection, which poses unique challenges for modern technology companies seeking to comply with both legal regimes.

II. United States Antitrust Law

While there are many veins of United States Antitrust law, this Comment will focus on the relevant laws governing the creation, maintenance, and destruction of monopolies. A monopoly is defined as the “exclusive ownership [of a commodity] through legal privilege, command of supply, or concerted action.”²⁰ The Sherman Act—passed by Congress in 1890—sought to prohibit business practices that may be deemed to exhibit anticompetitive behavior.²¹ Section 2 of the Act is most pertinent to the governing of monopolies.²²

concrete evidence of consumer harm . . . [whereas] the US now has – by all accounts – a strong focus on consumer welfare as the ultimate objective . . .”).

17. See John Paul & Brian Kacedon, *Exclusive Patent Licensees May Have Standing to Sue for Infringement Even If Others Have the Right to License the Patent*, LES INSIGHTS (Jan. 24, 2011), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=7853c148-f3b8-46a3-927b-8b45ec995719> (explaining that “[a] U.S. patent provides a statutory right to exclude others from practicing the invention claimed in that patent” and thus gives the patent holder the choice as to whether he or she wants to issue licenses for others to use the invention or process covered by the patent).

18. See Jonathan Radcliffe, *Recent Impact of EU Competition Law on Patent Strategies for Life Sciences Companies*, BLOOMBERG BNA (Feb. 21, 2013), <http://www.bna.com/recent-impact-eu-n17179872473/>.

19. See *id.* (discussing the tension between the European Union's competition and patent laws).

20. *Monopoly Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/monopoly> (last visited Feb. 9, 2014).

21. See 15 U.S.C. §§ 1–7 (2012). The Sherman Act also sought to prohibit conspiracies resulting in restraint of trade among the several states and foreign nations. *Id.* § 3.

22. See *id.* § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if

Although the Sherman Act prevents unlawful business practices, its purpose is to protect consumers and the market.²³ When deciding the case of *Spectrum Sports, Inc. v. McQuillan*,²⁴ the Supreme Court noted that

[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.²⁵

To enforce this purpose, the Sherman Act gives the federal government—by way of the United States Department of Justice—the jurisdiction to prosecute violators criminally, as well as the authority to bring civil actions.²⁶ However, despite its ability to bring criminal actions, the Department of Justice typically chooses to initiate civil enforcement proceedings against those who violate the Sherman Act.²⁷

The Sherman Act makes unlawful three different practices: (1) monopolization; (2) attempts to monopolize; and (3) combinations or conspiracies to monopolize.²⁸ If a company appears to be violating § 2 of the Sherman Act, the first step of the analysis is determining whether that company possesses monopoly power in the relevant market.²⁹ Although there has been some inconsistency among the courts regarding the proper method for this inquiry,³⁰ the Supreme Court in *United States v. Grinnell Corp.*³¹ began its analysis by defining the relevant product market.³² Specifically, identification of a relevant product market “requires identification of a specific product market in a

a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”)

23. *Id.*

24. 506 U.S. 447 (1993).

25. *Id.* at 458.

26. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995), available at <http://www.justice.gov/atr/public/guidelines/internat.htm>.

27. See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Spectrum Sports*, 506 U.S. 447; *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001).

28. 15 U.S.C. § 2 (2012).

29. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

30. Compare *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965), with *Grinnell Corp.*, 384 U.S. at 570–71, *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991), and *Deauville Corp. v. Federated Dep’t Stores, Inc.*, 756 F.2d 1183, 1192 n.6 (5th Cir. 1985).

31. 384 U.S. 563 (1966).

32. *Id.* at 570–71 (explaining that under § 2 of the Sherman Act, a monopoly offense has two elements, the first being the possession of monopoly power in the relevant market).

particular geographic market.”³³ In other words, a court must identify which market the product is in with regard to competing products in the given geographic area, and whether any market alternatives exist.³⁴ Because ultimately, “where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist.”³⁵ The second step of the inquiry asks whether the company acquired market power by means of willful conduct, or by way of “growth or development as a consequence of a superior product, business acumen, or historic accident.”³⁶ Essentially, there must be an analysis of the conduct that gave rise to the allegation. If there was questionable conduct, the court will ask whether the defendant acquired or maintained a monopoly other than by superior competition on the merits or if the company used predatory or exclusionary conduct in an attempt to force or keep others out of the market.³⁷ Exclusionary conduct, as explained by the circuit court in *United States v. Microsoft*,³⁸ requires that a company’s actions have an *anticompetitive effect*.³⁹ That is, the behavior “must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.”⁴⁰

III. Problems with the Current Overlap Between United States Antitrust Law and European Union Competition Law

Companies are not well served by conflicting antitrust and competition laws because the penalties effectively destroy a company’s

33. 27 A.L.R. Fed. 762 (1976).

34. WILLIAM HOLMES & MELISSA MANGIARACINA, *ANTITRUST LAW HANDBOOK* § 3:4 (Thomson Reuters 2013).

35. *Id.* (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

36. *Grinnell Corp.*, 384 U.S. at 570–71.

37. See U.S. DEP’T OF JUSTICE, *COMPETITION AND MONOPOLY SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT* ch. 1 (2008), available at http://www.justice.gov/atr/public/reports/236681_chapter1.htm (“Such conduct [suitable for an antitrust violation] often is described as ‘exclusionary’ or ‘predatory’ conduct. This element includes both conduct used to acquire a monopoly unlawfully and conduct used to maintain a monopoly unlawfully. A wide range of unilateral conduct has been challenged under section 2, and it often can be difficult to determine whether the conduct of a firm with monopoly power is anticompetitive. Some basic boundaries are provided by the law’s requirements that the conduct harm ‘competition itself,’ that it be ‘willful,’ and that it not be ‘competition on the merits’ . . .”).

38. 253 F.3d 34 (D.C. Cir. 2001).

39. *Id.* at 58.

40. *Id.*

overall competitiveness. In addition to creating arguably unfair results, the conflict between the United States and European Union legal regimes leads to problems such as lack of information sharing due to confidentiality issues.⁴¹

In 1995, Roscoe B. Starek III⁴² addressed this concern in his speech entitled “International Aspects of Antitrust Enforcement.”⁴³ Mr. Starek spoke about guidelines that “appropriately balance a commitment to prudent antitrust enforcement against considerations of comity and other principles of international cooperation.”⁴⁴ The revised guidelines included the expansion of cooperation limits as well as increased collaboration among agencies.⁴⁵ Responding to those who characterized the approach taken by the guidelines as overreaching, Mr. Starek reminded them “that the government is equally committed to building bilateral and multilateral cooperation with its trading partners.”⁴⁶ In theory, the revised process for enhanced cooperation designed to promote information sharing should have led to more cohesive investigations. However, almost two decades later not much has changed, and companies are still subject to multiple investigations conducted by the United States and Europe, which are not necessarily, if at all, cooperative.⁴⁷ The following sections outline the implications this lack of cooperation has had, and continues to have, on modern technology companies.

41. See Roscoe B. Starek, III, Former Comm’r, Fed. Trade Comm’n, International Aspects of Antitrust Enforcement, Address at Antitrust 1996 A Conference Presented by Business Development Associates, Inc. Washington, D.C. (Sept. 29, 1995), available at <http://www.ftc.gov/public-statements/1995/09/international-aspects-antitrust-enforcement> (“Business information obtained in investigations is deemed confidential under both U.S. and EU laws, and those laws do not permit sharing of such information with foreign law enforcement authorities.”).

42. Roscoe B. Starek is the former Commissioner of the United States Federal Trade Commission. *Roscoe B. Starek, III*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc/biographies/roscoe-b-starek-iii> (last visited June 9, 2014).

43. See Starek, *supra* note 41.

44. *Id.*

45. See *id.* (“Some other points worth noting about the Act include the authority granted to the Justice Department and the FTC to use their compulsory process tools to obtain evidence for a foreign enforcement authority even where the matter in question would not violate U.S. law. Another is that information obtained by criminal grand juries may be made available to foreign enforcement authorities. Finally, although information obtained through the U.S. premerger notification program may not be shared, the Act does allow the FTC and the Justice Department to use their compulsory processes to obtain information in merger cases that then can be shared with foreign authorities.”).

46. See *id.*

47. See James Kantor & Steve Lohr, *As Europe Presses Google on Antitrust, U.S. Backs Away*, N.Y. TIMES (Dec. 17, 2012), http://www.nytimes.com/2012/12/18/technology/eu-and-google-to-discuss-antitrust-issues.html?_r=1.

A. United States Antitrust Law Implications for Microsoft

One of the most widely known antitrust cases is *United States v. Microsoft*.⁴⁸ The United States brought suit in federal court against the tech giant for violating §§ 1 and 2 of the Sherman Act.⁴⁹ Specifically, the United States alleged that Microsoft “waged an unlawful campaign in defense of its monopoly position in the market for operating systems designed to run on Intel-compatible personal computers (‘PCs’).”⁵⁰ The United States further asserted that Microsoft engaged in “a series of exclusionary, anticompetitive, and predatory acts to maintain its monopoly power.”⁵¹ The United States also argued that Microsoft unsuccessfully attempted to monopolize the market for web browsers.⁵² Lastly, the United States contended that Microsoft engaged in illegal tying by bundling its browser to its operating system and “entering into exclusive dealing arrangements” to do so.⁵³

The district court held that Microsoft had: (1) fostered a monopoly in the market for Intel-compatible PC operating systems in violation of § 2; (2) attempted to gain a monopoly in the market for Internet browsers in violation of § 2; and (3) illegally tied together two purportedly separate products, Windows and Internet Explorer, in violation of § 1.⁵⁴ Microsoft appealed the decision to the United States Court of Appeals for the District of Columbia.⁵⁵ The Court of Appeals affirmed the first § 2 violation, reversed the second § 2 violation, and remanded the case with regard to the § 1 violation.⁵⁶

In determining whether Microsoft held monopoly power within the relevant market, the district court

defined the [relevant] market as “the licensing of all Intel-compatible PC operating systems worldwide,” finding that there [were] “[] no products—and . . . there [were] not likely to be any in the near future—that a significant percentage of computer users worldwide could substitute for [the operating systems] without incurring substantial costs.”⁵⁷

48. 253 F.3d 34 (D.C. Cir. 2001); see also Max Schanzenbach, *Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of U.S. v. Microsoft*, 2002 STAN. TECH. L. REV. 4, ¶ 1 (2002).

49. *Microsoft Corp.*, 253 F.3d at 45.

50. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Microsoft Corp.*, 253 F.3d at 45.

55. *Id.*

56. *Id.* at 46.

57. *Id.* at 52.

Microsoft argued that the District Court's finding was incorrect because the court failed to take into consideration non-PC based operating systems, such as Mac OSX.⁵⁸ However, the court of appeals held:

Microsoft neither points to evidence contradicting the District Court's findings nor alleges that supporting record evidence is insufficient. And since Microsoft does not argue that even if we accept these findings, they do not support the District Court's conclusion, we have no basis for upsetting the court's decision to exclude Mac OSX from the relevant market.⁵⁹

Microsoft posed several other arguments the court did not find persuasive⁶⁰ and finally entered into a complex settlement agreement with the United States.⁶¹ The settlement agreement required Microsoft to share its application programming interfaces with third-party companies and to appoint a technical committee with the authority to

interview . . . any Microsoft personnel . . . inspect and copy any document in the possession . . . of Microsoft personnel . . . obtain reasonable access to any [of Microsoft's] systems . . . obtain access to, and inspect, any physical facility . . . and require Microsoft personnel to provide compilations of documents, data and other information.⁶²

B. European Union Competition Law Implications for Microsoft

In the European Union's case against Microsoft, the European Commission alleged the company refused to provide Sun Microsystems⁶³ with technical design information, which would have allowed Sun to create work group server operating systems that would "seamlessly integrate" with Microsoft's Windows platform.⁶⁴ The commis-

58. *Id.*

59. *Id.*

60. *See generally id.* (detailing various other arguments Microsoft posed to the court of appeals).

61. *See generally* Final Judgment, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232 (CKK)), 2002 WL 32153514, *available at* <http://www.justice.gov/atr/cases/f200400/200457.pdf> (detailing the complex terms of the settlement agreement).

62. *Id.* at 11.

63. *See Oracle and Sun*, ORACLE, <http://www.oracle.com/us/sun/index.html> (last visited June 9, 2014) ("Oracle acquired Sun Microsystems in 2010, and since that time Oracle's hardware and software engineers have worked side-by-side to build fully integrated systems and optimized solutions designed to achieve performance levels that are unmatched in the industry.").

64. *See* European Commission Decision of 24 May 2004 Relating to a Proceeding Pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement Against Microsoft Corporation No. 53/2007, 2007 O.J. (C 900) 23, 25 [hereinafter Article 82 Decision], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:032>

sion further stated that Microsoft's platform was indispensable to competitors, and by failing to provide the technical specifications, Microsoft risked eliminating Sun from the work group server operating systems market.⁶⁵ The European Union alleged that such a refusal hindered the progress of technical development to the detriment of consumers.⁶⁶ Ultimately, by blocking others from entering the market for work group server operating systems, Microsoft was creating an abuse of a dominant position.⁶⁷

The European Union found that Microsoft's abuse of a dominant position violated Article 82 (now Article 102)⁶⁸ and issued a remedy that was a bit sterner than the United States' remedy.⁶⁹ The European Union's decision held:

Microsoft [is ordered] to disclose the information that it had refused to supply and to allow its use for the development of compatible products. The disclosure order is limited to protocol specifications, and to ensuring interoperability with the essential features that define a typical work group network. It applies not only to Sun, but to any undertaking that has an interest in developing products that constitute a competitive constraint to Microsoft in the work group server operating system market. To the extent that the Decision might require Microsoft to refrain from fully enforcing any of its intellectual property rights, this would be justified by the need to put an end to the abuse.⁷⁰

The European Union also required Microsoft to pay a fine of EUR 497,196,304⁷¹ or about \$613 million,⁷² the largest fine ever imposed by the Union for abuse of a dominant market position or participation in a cartel.⁷³

In sum, Microsoft was considered a monopoly and was rightfully punished for it. However, the question remains whether it was neces-

:0023:0028:EN:PDF ("Microsoft has refused to provide Sun with information enabling Sun to design work group server operating systems that can seamlessly integrate in the 'Active Directory domain architecture', a web of interrelated client PC-to-server and server-to-server protocols that organise Windows work group networks.").

65. *Id.*

66. *Id.*

67. *Id.*

68. See TEEC, *supra* note 6; Article 82 Decision, *supra* note 64, at 27.

69. See Article 82 Decision, *supra* note 64, at 27–28.

70. *Id.* at 27.

71. *Id.* at 28.

72. Peter Sayer, *EU Fines Microsoft \$613 Million*, TECHHIVE (May 24, 2004), <http://www.techhive.com/article/115334/article.html>.

73. *Microsoft Hit by Record EU Fine*, CNN (Mar. 25, 2004), <http://web.archive.org/web/20060413082435/http://www.cnn.com/2004/BUSINESS/03/24/microsoft.eu/> ("The European Union has found Microsoft guilty of abusing the 'near-monopoly' of its Windows PC operating system and fined it a record 497 million euros (\$613 million).").

sary to punish Microsoft twice. Admittedly, Microsoft was punished for different *actions* in each jurisdiction—i.e., bundling Internet Explorer with Windows in the United States⁷⁴ and blocking Java on Internet Explorer in the European Union⁷⁵—however both actions stemmed from Microsoft’s antitrust violations, i.e., its attempt to monopolize or its abuse of dominant position.⁷⁶ Double punishment for antitrust violations could be avoided if there were global guidelines that companies—like Microsoft—could follow, instead of being subjected to different standards and arguably inconsistent punishments that do not necessarily correlate to the particular violation. Subjecting Microsoft to multiple penalties does not properly address what is at the heart of antitrust and competition laws; especially when such penalties cumulatively dissipate a company’s competitiveness by displacing its resources. These are concerns that future companies must face and current companies are facing—namely, Google, who has been investigated by the United States Department of Justice and is currently being investigated by the European Union.⁷⁷

C. Current Implications of the Two Bodies of Law on Google’s Search Engine

Google, a company that started in 1998 with a check written for \$100,000,⁷⁸ has grown into the most used search engine⁷⁹ and delivers results for more than three billion searches per day.⁸⁰ However, Google’s tremendous growth came with increased legal scrutiny. The following sections discuss the effects of United States antitrust and EU competition laws on Google.

1. United States Antitrust Analysis

Over the years, Google has faced various antitrust issues ranging from private civil suits to Department of Justice investigations.⁸¹ One

74. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000).

75. *See* Article 82 Decision, *supra* note 64.

76. *See id.*; *Microsoft Corp.*, 87 F. Supp. 2d 30.

77. *See Google Faces New EU Antitrust Complaint*, 195 ANTITRUST COUNSELOR 7 (Mar. 2011).

78. *Company: Google Inc.*, GOOGLE, <http://www.google.com/about/company/> (last visited June 9, 2014).

79. *See Top Sites Global*, ALEXA, <http://www.alexa.com/topsites/global> (last visited June 9, 2014).

80. Soutik Biswas, *Digital Indians: Ben Gomes*, BBC NEWS (Sept. 9, 2013), <http://www.bbc.co.uk/news/technology-23866614>.

81. *See, e.g.*, *TradeComet.com L.L.C. v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011); *Person v. Google, Inc.*, 346 F. App’x 230 (9th Cir. 2009); Press Release, U.S. Dep’t of Jus-

such issue stemmed from Google's deal with Yahoo!—"Google wanted to serve its ads for certain search terms on Yahoo's pages in exchange for a share of the revenue those ads generated."⁸² The proposal led the Department of Justice to threaten an antitrust suit⁸³—specifically, a violation of § 2 of the Sherman Act for potentially holding monopoly power.⁸⁴ The Department of Justice invoked § 2 to destroy Standard Oil in 1911,⁸⁵ pick apart AT&T in 1982,⁸⁶ and prosecute Microsoft in 1998.⁸⁷ The threat proved deadly for Google's proposed deal: "Google and Yahoo tried to salvage the negotiations, but on the morning of November 5, three hours before the DOJ was going to file its antitrust case, they abandoned the deal."⁸⁸ The deal was extinguished, but Google found itself still facing a possible antitrust monopoly investigation.⁸⁹

As previously stated, when performing a Sherman Act § 2 analysis, the relevant market of the alleged monopolizer must be determined.⁹⁰ For purposes of antitrust laws, Google is categorized in the online search and search advertising market, which includes other providers such as Microsoft and Yahoo!.⁹¹ Thus, because Google is not

tice, Statement of the Dep't of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2013), *available at* <http://www.justice.gov/opa/pr/2012/February/12-at-210.html>.

82. See Nicholas Thompson & Fred Vogelstein, *The Plot to Kill Google*, WIRED (Jan. 19, 2009), http://web.archive.org/web/20130702092635/http://www.wired.com/techbiz/it/magazine/17-02/ff_killgoogle?currentPage=all.

83. See *id.* ("Now Barnett was signaling not just that the Google-Yahoo deal was dead but that the government saw Google as a potential monopolist. In fact, Barnett insisted, if the deal wasn't substantially changed or scuttled, he would sue within five days. It was a stunning blow. Google had expected a speedy approval. Now the company, whose brand is defined by its 'Don't be evil' slogan, faced the prospect of being hauled into court on an antitrust charge.").

84. *Id.*

85. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

86. See *United States v. Am. Tel. & Tel.*, 552 F. Supp. 131 (D.D.C. 1982).

87. See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000).

88. See Thompson & Vogelstein, *supra* note 82.

89. *Id.* ("Google isn't out of the antitrust woods yet, either. Sanford Litvack—a government lawyer who would have run the DOJ's suit against Google had it not withdrawn the Yahoo proposal—says that, in his opinion, Google's current position may already constitute a monopoly, even without Yahoo.").

90. U.S. DEP'T OF JUSTICE, *supra* note 37, at 5-18.

91. Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 194 (2011) ("A preliminary issue for assessing Google's business is determining the relevant market in which it operates. Although colloquially it is understood that Google is the dominant search and search advertising provider in an online search market comprised of Google, Microsoft, and Yahoo!, the anti-

the sole provider in the market for online search and search advertising, market alternatives do exist. The next inquiry under § 2 is to determine whether there was a willful acquisition or maintenance of market power.⁹² At the time of the proposed deal with Yahoo!, Google was said to hold a 70 percent market share within the search advertising provider market, and Yahoo! held a 20 percent market share.⁹³ Those opposing the deal argued that if allowed, the deal would create a situation in which advertisers would be less able to negotiate ad rates, which would result in advertisers paying more for ad space.⁹⁴ While Google was able to circumvent monopolistic violations in the United States by expending resources to prove that they were creating a better product for consumers, the company is still amidst an investigation in Europe based on an alleged abuse of dominance.⁹⁵

2. European Union Competition Law Analysis

While it appears Google has circumvented its legal troubles in the United States, the battle is not over abroad.⁹⁶ The search giant is currently battling scrutiny by the European Commission.⁹⁷ This battle may prove more challenging than the prior domestic battle. Herbert Hovenkamp, a law professor at the University of Iowa,⁹⁸ distinguished Google's current battle in Europe from that in the United States, stating that

trust relevance of this assessment is questionable. The competitive landscape Google confronts is complex, and the company plainly faces competitive threats from a range of sources, both actual and potential; the notion of a well-cabined, 'online search advertising market' is decidedly messy. The antitrust-specific question is whether this messiness is significant enough to cast doubt, absent viable econometric data, on the antitrust relevance of a simplified 'online search advertising market.' There is reason to be skeptical.”)

92. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, (1966).

93. Thompson & Vogelstein, *supra* note 82 (“It went like this: Google had 70 percent of the search advertising business, and Yahoo had 20 percent. Now those two companies were proposing a business deal. That would give advertisers less leverage to negotiate ad rates, and they would end up paying more.”).

94. *Id.*

95. See Claire Cain Miller & Mark Scott, *Google Settles Its European Antitrust Case; Critics Remain*, N.Y. TIMES (Feb. 5, 2014), http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-european-union.html?_r=0.

96. See *id.*; Kanter & Lohr, *supra* note 47.

97. See Kanter & Lohr, *supra* note 47 (“Joaquín Almunia, the competition commissioner of the European Union, placed the contentions about search bias at the top of his list of concerns about Google. And in a private meeting this month, Mr. Almunia told Jon Leibowitz, chairman of the F.T.C., that European antitrust officials remain focused on that issue, according to two people told of the meeting, who asked not to be identified because they were not authorized to speak about it.”).

98. *Id.* (“Mr. Hovenkamp advised Google on one project, but no longer has any financial connection to the company.”).

[i]n America, dominant companies are given great leeway, if their conduct can be justified in the name of efficiency, thus consumer benefit. Google has consistently maintained that it offers a neutral, best-for-the-customer result. [However,] [i]n Europe, antitrust experts say, the law prohibits the “abuse of a dominant position,” with the victims of the supposed abuse often being competitors. “The Europeans tend to use competition law to level the playing field more than is the case in the United States”⁹⁹

Essentially, the European Union will not accept the efficiency argument that tends to be the focal point of United States antitrust law.¹⁰⁰ Joaquin Almunia, the Competition Commissioner of the European Union, is primarily concerned with Google’s method of displaying search results.¹⁰¹ Specifically, Mr. Almunia states: “Google displays links to its own vertical search services differently than it does for links to competitors . . . [the] concern [] [is] that this may result in preferential treatment compared to those of competing services, which may be hurt as a consequence.”¹⁰²

Negotiations are currently in progress between the European Union and Google, and the ultimate goal is to agree on a settlement.¹⁰³ If a settlement is not agreed upon, Google could face a fine of up to 10 percent of its annual global revenue, or somewhere around \$3.79 billion.¹⁰⁴ Despite this large penalty, there is an advantage to the European Union for settling with Google¹⁰⁵: namely, avoiding lengthy resolution proceedings, which will ensure that any proposed remedies remain relevant in the quickly changing technology marketplace.¹⁰⁶

However, even if both sides reach an agreement, Google will once again have expended significant time, money, and effort combating the investigation. Without global cooperation between agencies, it is unfair to subject Google and other technology companies to the possibility of dual enforcement by the United States and Euro-

99. *Id.*

100. *See id.*

101. *See id.*

102. *Id.* (quoting Joaquín Almunia).

103. *See id.*

104. *Id.* (“If Mr. Almunia ultimately accepts a settlement offer, Google would avoid a possible fine of as much as 10 percent of its annual global revenue, about \$37.9 billion last year. It would also avoid a guilty finding that could restrict its business activities in Europe.”).

105. *See id.* (“A settlement would offer advantages for Mr. Almunia, too. He has sought to speed up resolution of antitrust cases to prevent them from dragging out, particularly in the fast-changing technology marketplace, where proposed remedies often rapidly lose their relevance.”).

106. *Id.*

pean Union antitrust laws because the duplicative punishments that follow take away from research and development that in turn spurs competition and benefits consumers. Some critics argue that “enforcement action[s] against Google . . . create[] substantial risk for a false positive which would chill innovation and competition that currently provides immense benefits to consumers.”¹⁰⁷

IV. Problems with Antitrust Enforcement Against Technology Companies

Antitrust and competition laws, both in the United States and Europe, have recently shifted attention toward modern technology companies.¹⁰⁸ However, at some point the effects of this heightened scrutiny may do more harm than good. Ronald Coase,¹⁰⁹ a law professor and economist, warned against this issue when he commented on antitrust law and its implications for technology:

One important result of this preoccupation with the monopoly problem is that if an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation, frequent.¹¹⁰

Essentially, Mr. Coase is indicating that there are inherent dangers in antitrust and competition laws.¹¹¹ Often there is—incorrectly—greater focus on whether the actual laws are being violated, and less focus on understanding the business conducted by the entity in question.¹¹² It seems that a better way to determine whether antitrust and competition laws are violated is to fully understand an entity’s business practices prior to analyzing those business practices parallel to the laws. This will help prevent uninformed decisions regarding antitrust or competition law violations by providing a landscape of the practices within a business field. However, the current practice avoids

107. Manne & Wright, *supra* note 91, at 244.

108. See Steve Lohr & Miguel Helft, *New Mood in Antitrust May Target Google*, N.Y. TIMES, May 17, 2009, at B1, available at http://www.nytimes.com/2009/05/18/technology/companies/18antitrust.html?_r=0.

109. Mr. Ronald Coase was a Professor Emeritus of Economics at the University of Chicago Law School. *About Ronald Coase*, RONALD COASE INSTITUTE, <http://www.coase.org/aboutronaldcoase.htm> (last visited June 9, 2014).

110. Ronald Coase, *Industrial Organization: A Proposal for Research*, 3 ECON. RESEARCH: RETROSPECT AND PROSPECT 59, 67 (1972).

111. *Id.*

112. *Id.* at 70.

this sort of analysis and thus may leave future successful technology companies in a precarious position.

A. United States Antitrust Implications for Facebook

If being a monopolist means possessing enough market power to exclude competitors,¹¹³ it is debatable whether Facebook has enough market power to be considered a monopoly. In *NCAA v. Board of Regents of the University of Oklahoma*,¹¹⁴ the Supreme Court defined market power as “the ability to raise prices above those that would be charged in a competitive market.”¹¹⁵ Facebook provides a social networking service that is free to users.¹¹⁶ Because the services Facebook offers are free to the consumer,¹¹⁷ it is hard to argue that the company’s existence is harmful to consumers because there are no prices to raise or control. However, Facebook could face potential antitrust scrutiny after its recent acquisition of WhatsApp.¹¹⁸ The merger was seen as Facebook’s attempt at broadening its reach on smartphone and tablet users by strengthening its messaging service.¹¹⁹ Thus, future antitrust scrutiny would likely target the “extent of competition between WhatsApp’s service and Facebook’s own application, Facebook Messenger, and [determine] whether the deal would give Facebook undue control of the messaging market”¹²⁰

Accordingly, while it may currently be difficult to discern which of Facebook’s business practices might potentially violate antitrust

113. See U.S. DEP’T OF JUSTICE, *supra* note 37, at ch. 2 (“The Supreme Court has defined . . . monopoly power as ‘the power to control prices or exclude competition.’”) (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

114. 468 U.S. 85 (1984).

115. *Id.* at 109 n.38.

116. See *Internet Software and Services: Company Overview of Facebook, Inc.*, BLOOMBERG BUSINESSWEEK (Feb. 9, 2014), <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=20765463>; *Create an Account*, FACEBOOK, <https://www.facebook.com/help/345121355559712/> (last visited June 9, 2014) (answering, “Does it cost money to use Facebook? Is it true that Facebook is going to charge to use the site?”).

117. *Create an Account*, *supra* note 116.

118. See David McLaughlin & Stephanie Bodoni, *Facebook WhatsApp Bid Seen Avoiding U.S. Antitrust Case*, BLOOMBERG (Feb. 20, 2014), <http://www.bloomberg.com/news/2014-02-20/facebook-s-whatsapp-deal-seen-avoiding-u-s-antitrust-challenge.html> (“The FTC will probably review the WhatsApp transaction based on the expertise acquired from earlier reviews of Facebook’s business, said Maurice Stucke, a lawyer at GeyerGorey LLP and a law professor at the University of Tennessee.”). Although the WhatsApp application may be free to download, the application requires a small subscription fee after the first year of use. *FAQ: What are WhatsApp Subscription Fees?*, WHATSAPP, <https://www.whatsapp.com/faq/en/general/23014681> (last visited July 12, 2014).

119. *Id.*

120. *Id.*

laws, it might only be a matter of time before the social network giant also finds it must answer to both the United States Department of Justice and the European Commission.

B. European Union Competition Law Implications for Technology Companies

Data collection might be the next way the EU seeks to enforce its competition laws on modern technology companies.¹²¹ Companies such as Facebook and Twitter collect personal data to provide a personalized experience for users that visit their websites.¹²² A positive aspect of this data collection is that “users benefit from free, personalized consumer experiences such as Internet search, social networking, geo-referenced listings, or content distribution platforms.”¹²³ This is because the collection of data conveniently places the consumer’s interests in one place and more accurately meets his/her needs.¹²⁴

While the European Union has not formally opened any investigations to determine whether data collection might lead to a violation of competition laws, the European Commissioner, Joaquín Almunia, stated in a speech in November of 2012 that “today, personal data are a type of asset for companies Companies evidently try to use their access to personal data to gain commercial advantage vis-à-vis users. It is necessary to strike the right balance between regulation and competition policy enforcement.”¹²⁵ Thus, while Mr. Almunia has not yet initiated an enforcement investigation into data collection practices,¹²⁶ it seems highly probabilistic. Such investigations will surely have implications for nearly any company with a web-based presence.¹²⁷ Without proper guidelines set forth and agreed upon by the United States and Europe, these investigations could lead to further

121. See Gabrielle Accardo & Carmelo Fontana, *Personal Data and Competition Law Enforcement in the Online Environment: E.U. and U.S. Perspectives*, TRANSATLANTIC TECH. L. FORUM, <http://www.law.stanford.edu/organizations/programs-and-centers/transatlantic-technology-law-forum/personal-data-and-competition-law-enforcement-in-the-onlin> (last visited June 9, 2014).

122. See *Data Use Policy*, FACEBOOK, <https://www.facebook.com/about/privacy> (last visited June 9, 2014); *Privacy Policy*, TWITTER, <https://twitter.com/privacy> (last visited June 9, 2014).

123. See Accardo & Fontana, *supra* note 121.

124. See, e.g., *Data Use Policy*, *supra* note 122; *Privacy Policy*, *supra* note 122.

125. See Press Release, Joaquín Almunia, Vice President of the European Comm’n Responsible for Competition Policy, Competition and Personal Data Collection (Nov. 26, 2012), http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm.

126. See *id.*

127. See *id.*

obstacles for these companies—such as multiple investigations and punishments—creating the need to expend valuable resources such as time and money.

V. The Need for Global Competition Cooperation Agreements

An internationally recognized cohesive agreement governing antitrust and competition laws is necessary to ensure consistency and efficiency. Companies whose business reaches outside its domestic borders can be subject to multiple enforcement agencies, often reaching very inconsistent conclusions.¹²⁸ While modern global technology companies should indeed be regulated, they should not be punished multiple times when providing services that ultimately benefit consumers and advance modern technology.¹²⁹ There should be more consistency between enforcement agencies so that it is easier for companies to predict the legal scrutiny they may encounter.

Further, the United States Department of Justice has itself long recognized the need for more consistency among antitrust agencies.¹³⁰ At the Organisation for Economic Co-operation and Development (“OECD”)¹³¹ Global Forum on Competition in 2001, then Assistant Attorney General Charles A. James¹³² spoke about the “explosive growth in the number of countries with antitrust laws and agencies”¹³³ and “the importance of cooperation among antitrust agencies in ensuring sound antitrust enforcement in an increasingly global marketplace”¹³⁴ Mr. James discussed instances where the

128. See discussion *supra* Part III.A–B.

129. See discussion *supra* Part III.

130. See Charles A. James, Assistant Attorney General, U.S. Dep’t of Justice, Remarks before the OECD Global Forum on Competition (Oct. 17, 2001) [hereinafter Remarks by Charles A. James], available at <http://www.justice.gov/atr/public/speeches/9330.htm>.

131. *About the OECD*, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/about/> (last visited June 9, 2014).

132. Mr. Charles A. James is a former Assistant Attorney General at the Department of Justice. *Charles James (Attorney)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Charles_James_\(attorney\)](http://en.wikipedia.org/wiki/Charles_James_(attorney)) (last visited June 9, 2014); see also Remarks by Charles A. James, *supra* note 130.

133. See Remarks by Charles A. James, *supra* note 130 (“There was a time, not so many years ago, when few countries had antitrust laws and fewer still enforced them. (Indeed—and this strains the imagination—there was a time when there were very few international antitrust conferences.) But during the past decade, market principles, deregulation, and respect for competitive forces have been broadly embraced, and many countries have created antitrust laws and agencies that are committed to enforcing them. Over 90 countries currently have antitrust laws of some sort, and roughly 20 more countries are in the process of drafting such laws.”).

134. See *id.*

Department of Justice and the European Union have lacked cohesion, most notably, the proposed merger between General Electric and Honeywell.¹³⁵ The Department of Justice approved the merger, while the European Commission “blocked the transaction in its entirety”¹³⁶ despite “analyzing identical product and geographic markets and having access to the same facts” as the Department of Justice.¹³⁷

The General Electric and Honeywell merger is just one example of the unpredictability that can result from having inconsistent international standards regarding competition law. The major difference between the United States’ and the European Union’s analysis of this merger was that the Department of Justice focused more on the potential for improved products at lower prices as a result of the merger, while the European Union focused more on the potential for devastating effects on competitors.¹³⁸

This is the crux of the problem: having to work with multiple enforcement agencies creates huge issues.¹³⁹ These issues can have negative consequences for the companies subject to the enforcement, as well as the consumer. For example, in the case of the proposed merger between General Electric and Honeywell, the United States Department of Justice concluded that “the merged firm would have offered improved products at more attractive prices than either firm could have offered on its own, and that the merged firm’s competitors would then have had a great incentive to improve their own product offerings.”¹⁴⁰ However, after speaking with the two companies’ competitors, regulators in Europe concluded that the deal would “stifle

135. *See id.* (“After reviewing the recent proposed \$42 billion merger of General Electric and Honeywell, the Justice Department cleared the merger, while requiring divestiture to address competitive concerns in two markets. But the European Commission, analyzing identical product and geographic markets and having access to the same facts we did, blocked the transaction in its entirety.”).

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* (“When transactions are reviewed by multiple authorities, the risk of substantive and procedural conflicts can increase dramatically, and effective cooperation among a large number of agencies can be extraordinarily difficult. On the substantive side, the potential for inconsistent outcomes increases substantially. On the procedural side, the burdens, costs, and uncertainties associated with filing in and dealing with a large number of reviewing jurisdictions pose serious concerns for the international business community. Among other things, they may discourage, unduly delay, or at best, constitute a tax on efficient, consumer-friendly transactions. These are difficult issues that may not have easy solutions, and certainly cannot be resolved unilaterally or through bilateral efforts alone.”).

140. *Id.*

competition,” and without communicating with the Department of Justice, essentially squashed the deal.¹⁴¹ The European Union’s decision to put a stop to the merger had clear repercussions for the two companies.¹⁴² However, the failed merger did not only affect the two companies;¹⁴³ it also affected consumers because they could not take advantage of improved products at better prices, which in the United States is “the very essence of competition.”¹⁴⁴ This contradiction stems from different agendas (i.e., protecting competitors versus protecting consumers)¹⁴⁵ and inconsistent enforcement standards, as well as a lack of agency cooperation.¹⁴⁶

The Department of Justice’s Rachel Brandenburger¹⁴⁷ addressed these problems in her remarks to the Law Society’s European Group in 2010.¹⁴⁸ She stated:

Our aim is to intensify the Antitrust Division’s cooperative relationships with other competition agencies and to encourage our staffs to be mindful of the international implications of our actions right from the very start of an investigation through to the remedial phase. We need to approach our work in this way because the challenges presented by today’s global economy and multi-polar world demand it.¹⁴⁹

Ms. Brandenburger reiterated those assertions more recently to the International Bar Association in 2012,¹⁵⁰ which evidences that incon-

141. *See id.*

142. *See* Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME (July 8, 2011), <http://content.time.com/time/business/article/0,8599,166732-1,00.html> (“Honeywell and GE were both industrial conglomerates, but their product lines had few overlaps. A combined company, however, would be a powerful force.”).

143. *See* Remarks by Charles A. James, *supra* note 130.

144. *See id.*

145. *See* Kanter & Lohr, *supra* note 47.

146. *See id.*

147. Rachel Brandenburger is a former Special Advisor at the Department of Justice. *Archive of Speeches by Rachel Brandenburger*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/atr/public/speeches/speech-brandenburger.html> (last visited June 9, 2014).

148. Rachel Brandenburger, Special Advisor, Int’l Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for the Law Society’s European Group: Challenges and Opportunities in International Competition Policy (Nov. 9, 2010) [hereinafter Brandenburger, *Remarks at Challenges and Opportunities*], available at <http://www.justice.gov/atr/public/speeches/272860.pdf>.

149. *Id.* at 4.

150. Rachel Brandenburger, Special Advisor, Int’l Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for International Bar Association Midyear Conference: The Many Facets of International Cooperation at the Antitrust Division 2–3 (June 15, 2012), available at <http://www.justice.gov/atr/public/speeches/284239.pdf> (“One of our key objectives at the Antitrust Division is to intensify our cooperative relationships and interactions with competition agencies around the world, and to do so not just with our long-time colleagues, but also with newer competition agencies. We encourage Antitrust Division staff

sistency among international entities has yet to be remedied and that consistency remains an imperative goal.

VI. Moving Toward Change

This section discusses ideas that may be used to battle the issues surrounding inconsistent enforcement of antitrust and competition laws. Ms. Brandenburger's "Seven Principles for Effective Global Competition Enforcement"¹⁵¹ provide a solid foundation for a remedy to the inconsistency problem between the enforcement of United States antitrust and European Union competition laws. However, these principles must be broken down and built upon in order to lead to effective change.¹⁵² The United States' Antitrust Cooperation Agreement with the Australian Government offers an example of a successful agreement between two countries with differing laws. The seven principles and the template for a cooperative agreement, taken together, offer a starting point from which the United States and European Union can develop a cooperative antitrust enforcement policy.

A. Principles for Effective Global Competition Enforcement

Ms. Brandenburger's "Seven Principles for Effective Global Competition Enforcement"¹⁵³ are a good starting point for a solution to the inconsistency problem. The principles are: (1) transparency; (2) mindfulness of other jurisdictions' interests; (3) respect for other jurisdictions' legal, political, and economic cultures; (4) trust in each other's actions; (5) ongoing dialogue on all aspects of international competition policy and enforcement; (6) cooperation; and (7) convergence.¹⁵⁴ While most of these principles have been considered in the past,¹⁵⁵ they must be manipulated and improved upon in order to create a more cooperative solution to the inconsistency between United States antitrust laws and European Union competition laws. Several of these principles are more relevant than others in achieving this goal.

constantly to be, 'mindful of the international implications of our [enforcement] actions right from the very start of an investigation through to the remedial phase.'" (alteration in original)).

151. Brandenburger, *Remarks at Challenges and Opportunities*, *supra* note 148, at 10.

152. In the text that follows, some of the principles have been combined, altered, or omitted so as to conform to the author's viewpoints.

153. Brandenburger, *Remarks at Challenges and Opportunities*, *supra* note 148, at 10.

154. *Id.*

155. *Id.*

1. Trust

Trust is essential to cooperation and is the first step toward advancing the global cooperation on competition enforcement.¹⁵⁶ It will require “not only improving the ways [the United States Department of Justice] work[s] with the agencies [it] know[s] well and [is] accustomed to cooperating with, but also establishing day-to-day working relationships with an increasing number of agencies.”¹⁵⁷ Once trust is established, agencies will be more willing to share information without fear of agency exploitation or deception and will foster mutual respect and “facilitate inter-agency cooperation.”¹⁵⁸ Without such a framework, presumably, ideas will not be shared, deference for cooperation will diminish, and inconsistencies will thrive.

To build trust, agencies must be honest with each other about any interests or objectives they are seeking to achieve, instead of waiting until companies have been negatively impacted, at which point it is too late. Building trust also includes maintaining integrity by doing what is promised or even maintaining an open line of communication when a particular situation necessitates a broken promise. With trust comes a foundation for improving global cooperation when enforcing competition laws.

2. Transparency

Creating a transparent situation involves open communication between different jurisdictions’ investigative and enforcement agencies.¹⁵⁹ Ideally, increased transparency will create a situation where agencies tasked with enforcing competition laws more efficiently “communicate, cooperate, respect each other, or converge effectively with one another”¹⁶⁰ In effect, transparency will allow these agencies to better understand each other’s approaches to enforcement and cohesively present companies with a framework to follow regarding potential competition law violations.¹⁶¹ This is important because it will give companies insight into how rules will be applied in certain

156. *See id.*

157. *Id.* at 13.

158. Rachel Brandenburger, Special Advisor, Int’l Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for St. Gallen International Competition Law Forum: Transatlantic Antitrust: Past and Present 9 (May 21, 2010) [hereinafter Brandenburger, *Remarks at St. Gallen*], available at <http://www.justice.gov/atr/public/speeches/260273.pdf>.

159. *See* Brandenburger, *Remarks at Challenges and Opportunities*, *supra* note 148, at 10–11.

160. *Id.* at 10.

161. *See id.* at 10–11; Brandenburger, *Remarks at St. Gallen*, *supra* note 158, at 9.

cases¹⁶² and perhaps lead to the end of duplicative investigative processes and punishments. Transparency could also benefit consumers by allowing companies to remain focused on improving their products instead of expending unplanned resources to defend against enforcement by multiple agencies. The result would mean better products for consumers, while technology companies are allowed to continue advancing the global economy.

Of course simply saying that enforcement agencies should be more transparent is much easier said than done. However, when thinking about what might lead to increased transparency, it is noteworthy that the process starts with cultivating and deepening the existing relationships between governmental enforcement agencies. In other words, actually making efforts to understand the guiding principles behind each other's actions will better allow for the cohesion that transparency will bring. Critics may argue that the difference in overarching principles is exactly what prevents transparency from occurring in the first place. While this might be partially true, the concept of being more transparent, in itself, does not necessarily require agencies to seek the same goals with regard to protecting competition or consumers. Instead, being more transparent will, at the very least, bring varying concerns to the forefront, which is exactly what is needed to begin to cooperate with one another. At that point, agencies can decide the level of cooperation they feel comfortable with. Either way, the inconsistencies in antitrust enforcement are being recognized and addressed.

3. Mindfulness and Respect for Jurisdictional Interests

Mindfulness means agencies strive to “understand the ways in which their colleagues in other jurisdictions operate,” and also take into account “the impact of their actions and approaches outside of their own jurisdiction”¹⁶³ Being aware of other jurisdictions' interests, in theory, requires enforcement agencies to take into careful consideration, “the impact of their remedial options outside of their jurisdiction”¹⁶⁴ Additionally, by making agencies responsible for taking into account each other's enforcement decisions, mindfulness will seek to put an end to overlapping remedial outcomes.¹⁶⁵ It is real-

162. See Brandenburger, *Remarks at Challenges and Opportunities*, *supra* note 148, at 10–11.

163. *Id.* at 11.

164. *Id.*

165. *Id.* at 11–12.

istic that a situation might arise requiring different approaches to enforcement; however, ideally the agencies would not move forward without first considering each agency's preferred plan of action, essentially bringing the agencies closer to a more cooperative and cohesive competition enforcement mechanism.

Critics might argue that *being mindful* of each jurisdiction's interests is a waste of time because each government has its own set of priorities and although being mindful might sound like a good idea, it will simply get lost in the shuffle of those competing interests. Critics may also argue that there is no way to measure or quantify who is being mindful and at what level. In response to such arguments, a framework for an initiative may be used to prevent the concept of being mindful from getting lost in the shuffle. The framework would be structured around an agreement requiring each member to submit its interests and priorities with regard to competition laws and the enforcement of those laws. The agreement would next call for each member to produce negatives and positives of the other member's submitted interests. This step would be an attempt at eliminating the stigma that one member's priorities are more important or should take precedence over another's. In effect, this process will force members to think about why each agency goes about regulating competition differently and would in turn lead to continued mindfulness. These submissions would be discussed at bi-annual meetings and would be self-regulating. Thus, if one member decides to be less involved, it would have to answer to the group as a whole at the next meeting. Through this process each jurisdiction would be held personally responsible for making sure that it is not acting in a strictly self-serving manner, but also being mindful of the interests of its fellow jurisdictions.

Some may argue that jurisdictions might not want to participate or might not prioritize being mindful with regard to the enforcement of competition law. This may be true for some, however, most jurisdictions recognize the need for global cooperation when enforcing competition laws—as seen through the past attempts to cooperate¹⁶⁶—

166. See Rachel Brandenburger, *Twenty Years of Transatlantic Antitrust Cooperation: the Past and the Future*, U.S. DEPT. OF JUSTICE at 1 (Oct. 14, 2011), <http://www.justice.gov/atr/public/articles/279068.pdf> ("A mere 18 months passed between then-Competition Commissioner Sir Leon Brittan's first public reference to 'the desirability of a treaty or less formal agreement' to deal with 'the possibility of conflicts of jurisdiction' and the signing of the US-EC bilateral antitrust cooperation agreement on September 23, 1991. It is not surprising that the negotiators, including then-Assistant Attorney General Jim Rill, were able to produce the text—which became the model for many subsequent US antitrust

leaving the jurisdictions that choose not to participate in the minority. Again, being mindful does not mean that each member or agency must prioritize others' interests, it simply means that these jurisdictions would be at least cooperating with each other and moving closer toward more effective global competition enforcement.

Being mindful might hopefully also lead to being open to the ideas of other jurisdictions. Once jurisdictions approach each other with an open mind, they may recognize that other agencies might have ideas that would benefit the system as a whole.¹⁶⁷ Diversity of thought will spur new and creative ideas that will promote solidarity of enforcement and allow agencies to learn from each other. However, none of this is possible without the agencies' initial willingness to include each other when weighing divergent outcomes.¹⁶⁸ Respect is important to facilitating cooperation¹⁶⁹ and thus may help to avoid inconsistent outcomes by allowing these agencies to keep open communications.

4. Ongoing Dialogue

Ongoing dialogue between competition agencies, as well as “with the business community, consumers, practitioners, academics, and the public” will ensure that “important insights and different perspectives” are shared.¹⁷⁰ Ideally, ongoing dialogue should also include necessary feedback that can be used to measure the success of different approaches. Additionally, by maintaining dialogue and open communication, there will be very little surprise for companies that are targeted for investigation. Instead, companies will know what to expect by way of competition regulation and then may make the appropriate changes in order to comply.

Critics might argue that maintaining necessary feedback will be too burdensome and time consuming for agencies. However, when balancing these costs against the negative effects of not maintaining substantial ongoing dialogue, the decision is easy. By maintaining an open line of communication, being receptive to constructive criticism, and continually sharing ideas, everyone benefits.

cooperation agreements—in a relatively short time, by the standards of international negotiations. This was clearly an idea whose time had come.”).

167. *See id.* at 12.

168. *Id.*

169. *See* Brandenburger, *Remarks at St. Gallen*, *supra* note 158, at 9.

170. *See* Brandenburger, *Remarks at Challenges and Opportunities*, *supra* note 148, at 14.

5. Cooperation

As this Comment has discussed, cooperation is essential for progressing toward a more a more cohesive enforcement of competition law. Through increasing the four previously mentioned principles, agencies will be cooperating. Cooperation among agencies has already proven to promote consistency and efficiency¹⁷¹ and will be critical to properly enforce competition laws in this new age of globalized business. While improving cooperation is not an easy task and will remain a work in progress, its progression is imperative to ensure the best outcomes aimed at reducing duplicative burdens on technology companies and providing clearer standards. When cooperating with each other, competition agencies will be able to pool their resources and design a system that eliminates duplicity and instead encourages efficiency.

Some might argue that the current system works and that making an effort toward cooperating will be wasted effort. However, it is this author's opinion that the current system does not work fine when companies are inconsistently investigated and punished. The current system stunts innovation and investment into the global market. By cooperating with each other, agencies will maximize global efficiency through the use of shared resources, which will again, benefit everyone.

6. The End Goal of Convergence

Convergence refers to the intersecting of approaches used by the different agencies.¹⁷² Ultimately, convergence will "improve the likelihood that agencies get to similar answers on similar questions."¹⁷³ For example, the United States Department of Justice and the Irish Competition Authority have converged regarding cartel enforcement,¹⁷⁴ and have produced impressive results. A survey of antitrust authorities from forty-six jurisdictions "revealed that the agencies have achieved increased convergence in several important areas, including the au-

171. See *id.* at 15 ("[W]e have seen progress on the joint negotiation of remedies in individual transactions (most recently in *Ticketmaster/Live Nation*, where the Antitrust Division and the Canadian Competition Bureau worked together to impose the same remedy for the U.S. and Canada) . . .").

172. See Christine A. Varney, Assistant Attorney General, U.S. Dep't of Justice, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference: Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency 1-2 (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.pdf>.

173. Brandenburger, *Remarks at St. Gallen*, *supra* note 158, at 11.

174. *Id.* at 12.

thorization and use of greater investigative powers to detect and prove cartel activity, the widespread adoption and refinement of increasingly effective leniency programs, and the imposition of more effective sanctions for cartel violations.”¹⁷⁵ Thus, if properly implemented and maintained, convergence will move agencies toward a sound anti-trust and competition law regime.¹⁷⁶

Convergence is a principle that may be easily attacked by critics. However, critics must remember that this is the end goal of the process. By building trust, creating more transparency, being mindful, continuing ongoing dialogue, and working to cooperate with each other globally, we will create an environment in which different approaches begin to mirror each other. Ultimately this will lead to, at the very least, global cooperation when enforcing United States anti-trust and European Union competition laws—especially at a time when technology is, more than ever before, rapidly transforming and creating a global marketplace.

B. An Example of a Cooperative Antitrust Agreement

While a great deal of the inconsistent antitrust penalties stem from differences in substantive laws, agreements that effectively manage cooperation among governmental investigatory agencies do exist.¹⁷⁷ One such agreement was made in 1982 between the Department of Justice and the Federal Trade Commission on behalf of the United States Government and the Australian Government’s Competition Enforcement Agency.¹⁷⁸ This agreement outlined how the agencies would cooperate on shared antitrust matters.¹⁷⁹ The first consideration in the agreement pertains to notification.¹⁸⁰ Specifically, when the United States government decides to undertake an antitrust investigation that may have implications for the Australian government, laws, or policies, the investigatory agency must first notify the Australian government.¹⁸¹ The same notification requirement ap-

175. *Id.*

176. *Id.* at 13.

177. Agreement Between the Government of the United States of America and the Government of the Commonwealth of Australia Relating to Co-operation on Antitrust Matters, June 29, 1982, 34 U.S.T. 3888, 21 I.L.M. 702 (1982), *available at* <http://www.justice.gov/atr/public/international/docs/austral.us.txt>.

178. *Id.*

179. *Id.*

180. *Id.* at art. I.

181. *Id.* at art. I, ¶¶ 2–3.

plies when the Australian government decides to adopt a policy that might have implications for the United States government.¹⁸²

After notification is given, the government will decide if a formal consultation is necessary.¹⁸³ During consultations, both governments identify possible implications for either government's body of law and seek to avoid conflicts by "giv[ing] the fullest consideration to modifying any aspect of the policy which has or might have implications . . . to the enforcement of [either country's] antitrust law."¹⁸⁴

During the notification or consultation processes, any information exchanged "shall be treated confidentially by the receiving [p]arty unless the providing [p]arty consents to disclosure or disclosure is compelled by law."¹⁸⁵ Specifically, this will require the United States government to gain consent from the Australian government when seeking to use information obtained during the notification and consultation stages.¹⁸⁶ However, this does not foreclose the United States from "pursuing an investigation of any conduct which is the subject of notification or consultations, or from initiating a proceeding based on evidence obtained from sources other than the Government of Australia."¹⁸⁷ In other words, after notification is given and a consultation is completed, the United States may initiate a proceeding or investigation based on information obtained from sources beyond that which is received from the Australian Government.¹⁸⁸

182. *Id.* at art. I, ¶ 1 ("When the Government of Australia has adopted a policy that it considers may have antitrust implications for the United States, the Government of Australia may notify the Government of the United States of that policy. If practicable, such a notification shall be given before implementation of the policy by persons or enterprises.").

183. *Id.* at art. II, ¶ 2 ("When it appears to the Government of the United States through notification pursuant to paragraph 1 of Article 1 that a policy of the Government of Australia may have significant antitrust implications under United States law, the Government of the United States shall communicate its concerns and may request consultations with the Government of Australia. The Government of Australia shall participate in such consultations.").

184. *Id.* at art. II, ¶ 6(a)-(b) ("[T]he Government[s] shall give the fullest consideration to modifying any aspect of the policy [or potential investigation] which has or might have implications for the United States [or Australia] in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interests protected by the United States antitrust laws [and vice versa].").

185. *Id.* at art. III ("Documents and information provided by either Party in the course of notification or consultations under this Agreement shall be treated confidentially by the receiving Party unless the providing Party consents to disclosure or disclosure is compelled by law.").

186. *Id.*

187. *Id.*

188. *Id.*

The mutual notification process makes it mandatory for the agencies to come together, thereby preventing one agency from moving forward with an investigation or proceeding without first notifying the other agency. If mere notification is insufficient, the two parties agree to meet and share confidential information about why they would like to pursue enforcement of an antitrust violation. This, in practice, would be a clear example of cooperation. One party decides it wants to take action that might have implications for the other and informs that side of its plan. The two parties then mutually decide whether a consultation is needed. If needed, the two sides meet to compare information, ideas, and theories. It is this collaborative effort that can lead to cooperation and a reduction of inconsistent antitrust penalties.

Critics may argue that this process is unnecessary and time consuming. After all, information moves quickly and by requiring the two parties to meet, fulfilling the requirements of the agreement will turn into a mere formality that will not be carried out as thoroughly as intended. However, while this process may be more time consuming in the beginning, in the end it will give each side a deeper understanding of its counterpart's position. Specifically, by meeting and conferring about potential antitrust actions, both sides are learning more about the processes of the other, which will save both parties time in the long run. The end goal is to move toward cooperating, learning, and acting in uniformity. This notification and consultation process actively strives to accomplish all of these goals.

Next, the agreement presents a concrete plan for achieving cooperation, which ensures future agency conduct is not left open-ended.¹⁸⁹ If the Australian government's proposed policy is deemed to be inconsistent with United States antitrust laws, the Australian government may request a written memorialization of the United State's conclusions, including explanations.¹⁹⁰ Further, after the United States provides a written memorialization, it must then consider requests for a statement that includes its enforcement intentions.¹⁹¹ However, if after the consultation, there is no means for avoiding a

189. *Id.*

190. *Id.* at art. IV, ¶ 1 (“[When the United States] concludes that the implementation of that policy should not be a basis for action under United States antitrust laws, the Government of Australia may request a written memorialization of such conclusion and the basis for it. The Government of the United States shall, in the absence of circumstances making it inappropriate, provide such a written memorialization.”).

191. *Id.*

conflict, “each [p]arty shall be free to protect its interests as it deems necessary.”¹⁹²

One might argue that this provision gives the parties an easy out by allowing them to simply claim that there are no means by which to avoid the conflict. However, such a claim would not be in alignment with the agreement’s primary purpose. If the two parties are essentially agreeing to cooperate and giving a process by which to do so, it would seem that one side might only resort to this *deems necessary* clause only in the presence of extreme circumstances. It is also worth mentioning that the deems necessary clause would only be utilized after all other processes are exhausted. The goal is to increase cooperation by meeting, sharing information, and deciding whether or not divergent opinions can be avoided. At such a point in the process, the agencies have already cooperated with each other. Differences of opinion are bound to arise and the deems necessary clause is included for such rare situations.

The final relevant provision under the Antitrust Cooperation Agreement provides that if the consultation results in an amicable resolution, and “a proposed investigation or enforcement action under the antitrust laws of one nation does not adversely affect the laws, policies or national interests of the other, each Party shall cooperate with the other in regard to that investigation or action . . .”¹⁹³ So ultimately, once the parties determine that national laws, policies, or interests would not be affected by pursuing an antitrust action, the two parties are required to cooperate with each other to ensure efficient enforcement.

Benefits of the 1982 Antitrust Cooperation Agreement between the United States and Australia include its emphasis on information sharing as a result of a commitment to increased cooperation. By prioritizing information sharing, the two countries are moving toward a situation that facilitates trust. Information sharing is something the United States has not been able to accomplish with the EU, and this lack of information sharing often causes undesirable results.¹⁹⁴ The

192. *Id.* at art. IV, ¶ 2.

193. *Id.* at art. V, ¶ 1.

194. Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, U.S. Dep’t of Justice, Remarks as Prepared for Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union: Improving Bilateral Antitrust Cooperation (June 23, 2000), available at <http://www.justice.gov/atr/public/speeches/5075.htm> (“What the U.S. and the EU lack, however, is the ability to share evidence they get in their cartel investigations—the kind of cooperation possible under our MLATs, or under the U.S.-Australia IAEEA agreement. As a consequence it is

US-Australian Antitrust Cooperation Agreement has proven to be quite successful¹⁹⁵ and has even set the framework for future agreements such as the International Antitrust Enforcement Assistance Act¹⁹⁶—an act that both the United States and Australia agreed upon and signed in 1999—which further expands antitrust cooperation between the two countries.¹⁹⁷ In fact, the United States has indicated its desire for more jurisdictions to follow suit by using the template set forth above, as well as its desire to enter into more cooperation agreements.¹⁹⁸

Conclusion

There currently are significant differences between United States Antitrust and European Union Competition laws, which have questionable effects on modern technology companies such as Microsoft, Google, and Facebook. However, the first step in eliminating the inconsistent enforcement of these different bodies of law is to create an environment that fosters substantial cooperation between antitrust enforcement agencies.

While the principles set forth by this Comment will surely not be the end-all to the problem of duplicative—or possibly inconsistent—enforcement of antitrust law, taking these steps will help to move enforcement agencies toward a more cooperative global body of international antitrust law. Ultimately, using these tools will create an environment that fosters business development, while continuing to limit conduct that may be anti-competitive in a more consistent and efficient way.

not possible, for example, for the U.S. and the Commission to coordinate searches in international cartel cases and pool the evidence obtained by our respective efforts—something that would enhance both jurisdictions' anticartel efforts.”).

195. See Press Release, Embassy of the U.S., Attorney General Signs Antitrust Assistance Agreement with Australia (Apr. 29, 1999), available at <http://usrsaustralia.state.gov/us-oz/1999/04/27/doj1.html> (“Australia is an important U.S. trading and investment partner. Two-way trade increased significantly in 1998, to a total of more than \$18 billion, and U.S. foreign direct investment in Australia currently exceeds \$26 billion. The new [1999] agreement builds on a U.S.-Australia antitrust cooperation agreement signed in 1982, and on a close relationship that has developed over the years between the Department, the Federal Trade Commission, and the Australian Competition & Consumer Commission (ACCC).”).

196. *Id.*

197. *See id.*

198. *Id.*

