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# Is European Competition Law Protectionist?

## Unpacking the Commission's Unflattering Track record

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## Introduction

> "*I told you so! The European Union just slapped a Five Billion Dollar fine on one of our great companies, Google. They truly have taken advantage of the U.S., but not for long!*"
>
> Donald Trump[1]
>
> "*When I look into merger control, antitrust control, state aid control, I find no U.S. bias.*"
>
> Margrethe Vestager[2]

Last month, the European Commission slapped another fine upon Google for infringing European competition rules (€1.49 billion this time).[3] This brings Google's contribution to the EU budget to a dizzying total of €8.25 billion (to put this into perspective, the total EU budget for 2019 is €165.8 billion).[4] Given this massive number, and the geographic location of Google's headquarters, it is perhaps not surprising that some commentators have raised concerns about potential protectionism on the Commission's part.[5]

This is nothing new. Critics have long argued that European competition law has been used to shield European industries from their large American rivals. From the notorious decision to block the

[1] *See* Donald Trump, Twitter, Jul. 19, 2018, https://twitter.com/realdonaldtrump/status/1019932691339399168?lang=en.

[2] *See* EC press conference by Commissioner Margrethe Vestager, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine", Jul. 18, 2018, https://audiovisual.ec.europa.eu/en/video/I-159088.

[3] *See* European Commission Press Release, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising", Mar. 20, 2019, available at http://europa.eu/rapid/press-release_IP-19-1770_en.htm.

[4] *Id. See also*, European Council website, "EU Budget for 2019", available at https://www.consilium.europa.eu/en/policies/eu-budgetary-system/eu-annual-budget/2019-budget/.

[5] *See* James Pethokoukis, "Europe's idiotic war on Google", THE WEEK, Jul. 19, 2018, https://theweek.com/articles/785500/europes-idiotic-war-google.

GE/Honeywell merger in 2001, to more recent enforcement activities in the tech sector, every European intervention against a US company tends to usher in a fresh wave of accusations.[6]

This criticism has come from both sides of the US political aisle, and both Donald Trump (quoted above) and Barack Obama have led the charge during their respective Administrations. Referring to European investigations against US tech companies such as Facebook and Google, then President Obama famously decried that:

> Sometimes their vendors—their service providers—who can't compete with ours, are essentially trying to set up some roadblocks for our companies to operate effectively there. We have owned the Internet. Our companies have created it, expanded it, perfected it, in ways they can't compete. **And oftentimes what is portrayed as high-minded positions on issues sometimes is designed to carve out their commercial interests**.[7]

But is there any merit to these claims of protectionism? A quick look at the monetary penalties assessed by recent decisions of the European Commission reveals that its enforcement activities (under article 101[8] and 102[9] TFEU, excluding cartels) have disproportionately affected US companies. Since the entry into force of Regulation 1/200310 (the main piece of legislation that implements the competition provisions of the EU treaties), US companies have been fined a total of €10.91 billion by the European Commission, compared to €1.17 billion for their European counterparts. On its face, this seems to stand in stark contrast to the findings of a recent study by Anu Bradford, Robert Jackson, and Jonathon Zytnick, which rejects claims that EU merger control is biased against US firms (findings that are certainly bolstered by the Commission's condemnation of the contemplated merger between Siemens and Alstom).[11]

As we explain, the harsh fines inflicted upon US firms are not necessarily evidence of protectionism.

Instead, they are likely a result of the Commission's decision to focus significant attention on the tech sector. Because the vast majority of large tech firms are US-based, all else equal, it is to be

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[6] *See* CBS News Staff, "EU Blocks GE, Honeywell Merger", CBS NEWS, https://www.cbsnews.com/news/eu-blocks-ge-honeywell-merger/ ("*U.S. senators accused EU regulators of protectionism and warned of a possible "chilling effect" on tran-Atlantic relations. Even President Bush expressed concern.*").

[7] *See* Kara Swisher, "White House. Red Chair. Obama Meets Swisher: Here's the full transcript of Kara Swisher's interview with President Obama", RECODE, Feb. 15, 2015, https://www.recode.net/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher.

[8] Consolidated Version of the Treaty on European Union art. 101, 2012 O.J. C 326/13.

[9] *Id.* art. 102.

[10] *See* Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4.1.2003, p. 1–25.

[11] *See* Anu Bradford, Robert J Jackson Jr & Jonathon Zytnick, *Is eu merger control used for protectionism? an empirical analysis*, 15 JOURNAL OF EMPIRICAL LEGAL STUDIES, 165-191 (2018). See also, European Commission Press Release, "Mergers: Commission prohibits Siemens' proposed acquisition of Alstom", Feb. 6, 2019, available at http://europa.eu/rapid/press-release_IP-19-881_en.htm.

expected that the majority of investigations and enforcement actions would involve US firms. At the same time, for reasons also discussed below, the Commission's tech-industry focus may tend to lead to larger fines when infringements are found.

Nevertheless, some caution is warranted with this conclusion. It bears noting that the Commission is a political body, and, as we discuss below, it is hardly structured to be immune to domestic political influences that may tend toward protectionism. The decision to prioritize enforcement in the tech sector is not taken in a vacuum. Whether this policy preference is down to legitimate concerns about high-tech markets or to (potentially unconscious) protectionism is almost impossible to tell. Similarly, neither a finding of infringement nor the magnitude of the fine imposed is mechanical: Even if its outcomes generally correspond with the expected outcomes from a country-neutral, tech-sector focus, the specific decisions the Commission makes, as well as the magnitude of the fines it imposes, may show a protectionist bias. Without a more robust statistical analysis it is impossible to rule out entirely the possibility that these decisions are influenced by a protectionist impulse, as well.

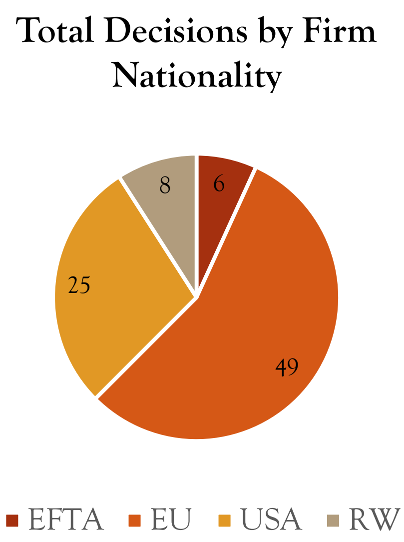
## A comparison of fines: USA, € 10.91 Billion; EU, €1.17 Billion

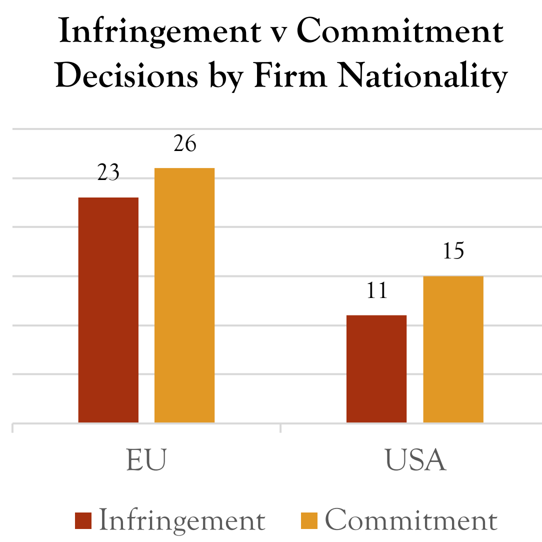
To derive these numbers, we analyzed all of the European Commission's antitrust decisions (excluding cartels), since the entry into force of Regulation 1/2003 on May 1st, 2004.[12] The adoption of this Regulation was instrumental in "modernizing" European Competition law. This makes it a convenient starting point to test whether European competition law, *as it is applied today*, is indeed protectionist.

We have included all the competition law decisions (excluding cartels and mergers) that were adopted by the European Commission between May 1st, 2004 and the writing this article (March 25, 2019). This gives a total of 35 commitment decisions (these are roughly equivalent to consent decrees in US law) and 29 infringement decisions. In addition, the Commission fined companies for procedural infringements on three separate occasions. Finally, the Commission also fined Microsoft for not complying with commitments it had made to the Commission (we count the commitment decisions and the subsequent penalty as a single decision; this excludes previous decisions taken by the Commission against Microsoft). This amounts to a total of 68 decisions, each of which concerns one or multiple firms. We then sorted these decisions according to the defendants' nationality: "US", "EU", "EFTA" (European Free Trade Association, a set of countries that are part of the European free trade area, but not the European Union), or "RW" (Rest of the World).[13]

[12] *See* Regulation 1/2003, *supra* note 10.

[13] The four members of the EFTA are Iceland, Liechtenstein, Norway and Switzerland.

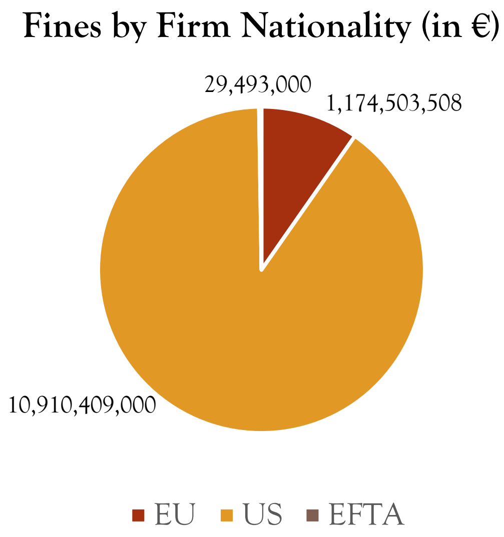


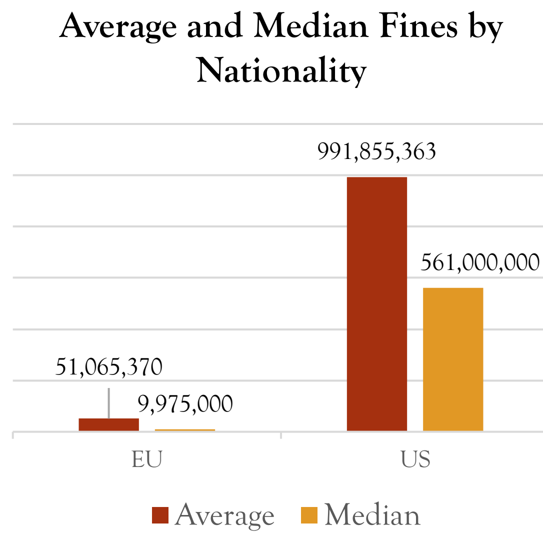




Looking at these cases, a first observation is that EU firms were on the receiving end of roughly twice as many decisions as US firms (49 to 25), and that EFTA and RW firms were involved in even fewer decisions (6 and 8, respectively). In addition, US firms are more likely to submit to commitment decisions than their European counterparts (38.46% of decisions against US firms were infringements, compared to 46.93% for European firms).

It is hard to draw any firm conclusions from either of these figures. Critically, the fact that European firms were sanctioned twice as often as their US counterparts is insufficient on its own to absolve European competition law of protectionism. Indeed, if anything, US firms may be *over*represented. To take one crude measure: While US firms account for roughly 29% of European competition law infringements, they likely occupy a much smaller share of business within the EU. To give readers some idea, US exports to the EU (including services) amounted to roughly €440 billion (at a recent exchange rate) in 2016 compared to the EU's 2016 GDP of €3,100 billion – or 14%.[14]

[14] *See* Website of the Office of the United States Trade Representative, "European Union", available at https://ustr.gov/countries-regions/europe-middle-east/europe/european-union (last viewed, Mar. 25, 2019). *See also*, Eurostat, "Share of Member States in EU GDP", EUROSTAT, Apr. 10, 2017, https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1.




At the same time, the number of actions doesn't tell the whole story: also relevant is the harshness of the penalties. One staggering statistic is that US firms have paid roughly 9 times more in fines (€10.91 billion) to the European Commission than have European firms (€1.17 billion), despite being involved in far fewer cases. Conditional on the Commission adopting an infringement decision, US companies paid an average fine of €991 million compared to roughly €51 million for EU firms. That is more than 19 times higher. The difference in median fines was even larger: roughly €10 million for EU firms compared to €561 million for US firms.

Ideally, it would also have been useful to look at the detailed fine calculations made by the Commission in these cases. For instance, the Commission applies a multiplier to fines in order to reflect the gravity of the underlying infringement.[15] This begs the question: does the Commission generally apply higher multipliers when US firms are involved? Unfortunately, this information is regularly redacted from published decisions, making reliable comparisons impossible.

## The Tech Firm Bias

So what explains this discrepancy? A first potential explanation is that the US simply has larger companies than the European Union does. Because European competition law fines are capped at 10% of firms' global turnover, larger companies can theoretically be saddled with more significant fines.[16]

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[15] *See* European Commission, "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003", 2006/C 210/02, Sept. 1, 2016, available at 19-21.

[16] *See* Regulation 1/2003, *supra* note 10, art. 23.

But this explanation is not particularly convincing. Take the four US firms that have received the largest fines: Google (€2.42 billion, €4.34 billion and €1.49 billion), Intel (€1.06 billion), Qualcomm (€997 million), and Microsoft (€561 million; this amount would be much higher if one included the large fines, €1.67 billion, which it received as the result of another Commission decision rendered just days before the entry into force of Regulation 1/2003). At the time of writing, not a single one of these companies is among the largest 50 companies in the world by turnover.[17] Granted, they are considerably higher ranked when it comes to actual profits, but this still does not explain the discrepancy (especially because the cap on fines is, as noted, based on turnover, not profits).[18] Not only does Europe also have its share of profitable companies but, in any case, the US firms in the dataset are not an order of magnitude larger or more profitable than their European peers.

A more realistic hypothesis is that the differences in fines are driven by US dominance of the tech sector[19]: **Of all the fines paid by American companies, €10.86 billion (or 99.61%) stemmed from the four tech firms mentioned in the previous paragraph.**

In addition to being part of the tech sector, these companies have another important feature in common: They all derive a large share of their revenue from single products/markets. At the time of their respective competition proceedings, Google earned almost all of its income from advertising, particularly on its search engine[20]; Qualcomm derived 76% of its revenue from its CDMA technologies[21]; more than three quarters of Intel's earnings came from PC chips[22]; and Microsoft's revenue was largely generated by its Windows suite of products.[23] This is important because the Commission calculates its fines on the basis of an infringing company's revenue from the goods that directly or indirectly relate to its infringements (the Commission calls this the value of sales).[24] Other things being equal, a firm that derives most of its income from a single market will thus tend to receive higher fines for infringing European competition law. This might be less of an issue for the

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[17] *See* Wikipedia, "List of largest companies by revenue", available at https://en.wikipedia.org/wiki/List_of_largest_companies_by_revenue (last viewed, Mar. 25, 2019).

[18] *See* Statista, "The leading companies in the world in 2017, by net income (in billion U.S. dollars)", available at https://www.statista.com/statistics/269857/most-profitable-companies-worldwide/ (last viewed, Mar. 25, 2019).

[19] *See* Wikipedia, "List of the largest information technology companies", available at https://en.wikipedia.org/wiki/List_of_the_largest_information_technology_companies (last viewed, Mar. 25, 2019).

[20] *See* Alphabet Inc., "Form 10-K For the Fiscal Year Ended December 31, 2018", at 27, available at https://abc.xyz/investor/static/pdf/20180204_alphabet_10K.pdf?cache=11336e3.

[21] *See* Qualcomm Inc., "Form 10-K For the Fiscal Year Ended December 31, 2018", at 11, available at https://investor.qualcomm.com/static-files/bde24726-605c-4118-92db-7190e0f58e53.

[22] *See* Intel Inc., "Form 10-K For the Fiscal Year Ended December 26, 2009", at 4, available at https://www.sec.gov/Archives/edgar/data/50863/000095012310015237/f54119e10vk.htm.

[23] *See* Microsoft Crop., "Form 10-K For the Fiscal Year Ended June 30, 2008", at 25-26, available at https://www.microsoft.com/investor/reports/ar08/10k_dl_dow.html.

[24] *See* Commission Fining Guidelines, *supra* note 15, at 13.

EU firms that have received adverse decisions from the Commission. For instance, a number of decisions involving EU companies concerned the pharmaceutical sector, where firms often offer a wide array of products spanning multiple markets. Unfortunately, because the value of sales is almost always redacted from published decisions, it is impossible for us to empirically test this hypothesis.

The combination of America's tech sector dominance along with the fine-inflating features of this industry might explain why US firms have paid significantly higher competition law penalties than their European peers. But if so, the next logical question is whether the Commission's immoderate focus on this area of the economy *itself* amounts to protectionism.

## Protectionism? A case of glass half full or half empty

According to the Oxford dictionary, protectionism is defined as: "The theory or practice of shielding a country's domestic industries from foreign competition by taxing imports."[25] Does the European Commission's policy fall under this definition?

On the one hand, we see no glaring reason to believe that European competition law has been applied differently to American companies. Yes, American firms are slightly overrepresented in competition decisions and receive larger fines. But this is no smoking gun. It is perfectly conceivable that, through legitimate policy choices, European competition law affects some US firms (especially those in the tech sector) more than their European counterparts. These choices notably include a partial equilibrium outlook (where investigations are focused on one or a few markets) and a desire to intervene in dynamic markets, such as the tech sector, where American firms often have a significant advantage. In addition, it stands to reason that the subset of American firms that operate in Europe are simply more prone to antitrust intervention: These are broadly the most successful companies in their respective industries, something that, unfortunately, seems to go hand in hand with competition scrutiny.

It may also be the case that firms operating outside their home jurisdictions are more likely to try to take advantage of consumers. While this is unlikely intentionally the case with respect to the largest tech firms—which, as far as we can tell, generally seem to implement their challenged practices globally—it may nevertheless be a sort of accident of international expansion that the same practices that are not problematic at home (either because they are adopted under more lenient laws or because the state of competition at home is more robust) are more troubling abroad. If correct, this natural, "away game" bias would help to justify more stringent penalties applied to large, foreign firms. Similarly, though we strongly believe this is not the case[26], it is plausible that US-based firms tend to

[25] *See* Definition of protectionism, Oxford Dictionary Online, available at https://en.oxforddictionaries.com/definition/protectionism.

[26] See Geoffrey Manne, "The EU's Google Android antitrust decision falls prey to the nirvana fallacy", TRUTHONTHEMARKET, Jul. 18, 2018, https://truthonthemarket.com/2018/07/18/the-eus-google-android-antitrust-decision-

play more fast and loose with the law — pushing beyond the envelope of allowable competitive conduct in expectation of a free pass at home, and taking their chances abroad.

Another important argument against protectionism lies in the fact that it is often American firms — rather than European rivals — that are complainants in the EU's most high-profile investigations (Sun Microsystems lodged the main EU complaint against Microsoft[27]; Oracle and Microsoft were, among others, the primary movers behind the Commission's Google cases[28]; AMD was a complainant in the Intel case[29]; and Icera - a subsidiary of Nvidia - was a complainant in the Qualcomm case[30]). If complainants are the firms that stand most to gain from an investigation, then it is not clear that European competition intervention systematically protects domestic *European* firms to the detriment of foreign ones, as a standard "protectionism" narrative would seem to require.

Nevertheless, there is still some basis for telling a less wholesome story.

To begin with, at what point do objective (if misguided) policy choices turn into *de facto* protectionism? It is hard to argue that a competition regime that fines US companies *nine times more* than EU ones (excluding cartels) is not somehow skewed against US businesses — if not in intention, then at least in effect. And even if this amounts to only indirect discrimination, it is no less likely to ultimately encourage foreign policymakers — not least the current US president — to respond in kind. If the current trend goes unchecked (and the investigations which the Commission is contemplating against Amazon and Apple suggest that this may well be the case[31]) it could well undermine the European Commission's credibility among US firms and of the EU as a place to do business.

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falls-prey-to-the-nirvana-fallacy/. *See also*, Dirk Auer, "The Amazon investigation and Europe's "Big Tech" Crusade", TRUTHONTHEMARKET, Oct. 21, 2018, https://truthonthemarket.com/2018/10/21/the-amazon-investigation-and-europes-big-tech-crusade/.

[27] *See* Nicolas Bansasevic, Jean Huby, Miguel Pena, Olivier Sitar and Henri Piffaut, "Commission adopts Decision in the Microsoft case", COMPETITION POLICY NEWSLETTER, N°2 – Summer 2004, 44, available at http://ec.europa.eu/competition/publications/cpn/2004_2_44.pdf.

[28] *See* Nicholas Hirst and Mark Scott, "Oracle and Naspers' stealth lobbying fight against Google", POLITICO, Feb. 16, 2018, https://www.politico.eu/article/oracle-naspers-fairsearch-google-lobbying-europe-antitrust-android-competition-margrethe-vestager/. *See also*, Ian Wishart, "Microsoft files anti-competition complaint against Google", POLITICO, Mar. 31, 2011, https://www.politico.eu/article/microsoft-files-anti-competition-complaint-against-google/.

[29] *See* Brice Allibert, Gabor Bartha, Barbara Bösze, Corneliu Hödlmayr, Damian Kaminski, Marieke Scholz, "Commission finds abuse of dominance in the Intel case", COMPETITION POLICY NEWSLETTER, N°3 –2009, 31, available at http://ec.europa.eu/competition/publications/cpn/2009_3_5.pdf.

[30] *See* Ingrid Lunden, "Europe updates its predatory pricing investigation against Qualcomm over UMTS baseband chips", TECHCRUNCH, Jul. 19, 2018, at https://techcrunch.com/2018/07/19/europe-updates-its-predatory-pricing-investigation-against-qualcomm-over-umts-baseband-chips/.

[31] *See* Auer, *supra* note 26. *See also*, Aoife White, "EU Takes Spotify's Apple Complaint Seriously, Vestager Says", BLOOMBERG LAW, Mar. 14, 2019, https://news.bloomberglaw.com/tech-and-telecom-law/well-take-spotifys-apple-complaint-seriously-vestager-says.

Moreover, antitrust enforcement by the European Union (as opposed to member states — although the same dynamic can apply there, as well) is driven by the European Commission, which is, by design, a political body, and far more solicitous of domestic political pressures. It would be a surprise if its decisions were *not* at least somewhat protectionist. The European Commission pursues a wider, and more ambiguous, range of objectives than its US counterparts. The more-open-ended nature of European competition law gives the Commission some leeway to initiate actions where a weak consumer welfare basis (generally the case for the EU's tech sector competition decisions[32]) may be bolstered at the margin by political (including protectionist) criteria.[33] And because many aspects of the Commission's decisions are largely unreviewed and unchecked by EU courts, EU antitrust is almost inevitably more influenced by parochial political interests than is its US counterpart.

From the EU perspective, of course, this may be seen as a benefit: What one jurisdiction sees as protectionism, another may see as simply a sound domestic policy agenda. But it still may be "protectionist" in its effect.

Indeed, while DG Comp is almost certainly a relative barrier to naked protectionism compared to other EU institutions (especially member state governments — French President Emmanuel Macron, for example, promotes a "Europe that protects"[34]), the Commission is hardly immune to the internal pressures from these sources, and, at the margin, must adjust its policies accordingly. (Margrethe Vestager's recent decision to block the Siemens-Alstom railroad merger was controversial in part because it was such a stark rejection of powerful member state interests).

Indeed, the process for finalizing a competition action entails a vote by the entire Commission, comprising representatives from each member state, each largely with a mandate (and experience) distinct from competition policy objectives. As Tad Lipsky has pointed out:

> [E]ach Commissioner remains in control of his or her vote on matters coming before the College, including competition decisions. Although Commissioners are bound to […] place loyalty to the EU treaties above loyalty to the interests of the specific Member State that nominated them, there is always a margin for the exercise of discretion on behalf of the EU's objectives (as distinct from Member States), and there is always the possibility for broader perspectives and influences to enter into the Commissioners' deliberations based on sources and considerations lying outside the case record, strictly speaking.

[32] *See* Manne, *supra* note 26.

[33] *See* Geoffrey A. Manne, "Why US Antitrust Law Should Not Emulate European Competition Policy – Statement on A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights", Dec. 19, 2018, available at https://laweconcenter.org/wp-content/uploads/2018/12/Geoffre-A-Manne-Testimony-Why-US-Antitrust-Law-Should-Not-Emulate-European-Competition-Policy-2018-12-19.pdf.

[34] *See* Zachary Young & Nicholas Vincocur, "Macron criticizes 'ultra-liberal' Europe", POLITICO, Nov. 6, 2018, https://www.politico.eu/article/french-president-emmanuel-macron-criticizes-ultra-liberal-europe-calls-for-eu-army/.

> Indeed, it is rarely possible to determine with precision whether a specific Commissioner's actions have been developed subject to inputs that are not known to the recipient of the Commission's decision.[35]

Other institutional factors drive this result, as well. As Daniel Sokol notes, even since modernization, the residue of far-more-interventionist competition policy remains:

> European competition law and policy will continue to suffer from industrial-policy intrusions so long as Europe fails to clean up its case law and take a more active stance in its competition advocacy. Consumer welfare decreases as a result.[36]

This more interventionist stance may notably be the fruit of an unconscious bias against large firms (which often happen to be American). However, as Spencer Weber Waller has observed, numerous competition authorities around the world seem to have followed suit.[37] Perhaps seeking a similarly interventionist (and not strictly "protectionist") approach for themselves, this may lend some credence to the idea that the EU's less permissive approach is down to widely-held ideological preferences, rather than protectionism.

Given all of these uncertainties, it is hard to make a strong case for, or against, protectionism. While US firms have borne the lion's share of EU fines, this disparity is almost entirely driven by a small subset of cases in the tech sector. Although we vehemently disagree with the Commission's conclusions in these cases, we must concede that many in Europe believe that these were objectively important decisions, and not strategic moves destined bolster Europe's fledgling tech industry. But this begs the question: to what extent does Europe's paucity of tech sector giants drive its ideological preference for tech-sector intervention and the protection of the industry's small competitors? For now at least, solving this conundrum will prove elusive.

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[35] Abbott B. (Tad) Lipsky, Jr., "Statement on A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights" Dec. 19, 2018, at 9, available at https://www.judiciary.senate.gov/imo/media/doc/Lipsky%20Testimony.pdf.

[36] *See* D Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV., 1265 (2014).

[37] *See* Spencer Weber Waller, *The Omega Man or The Isolation of US Antitrust Law*, AVAILABLE AT SSRN, 67 (2018).