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Social Capture of EU Competition Policy

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Social Capture of EU Competition Policy

Jan Broulík[*]

Abstract

This article argues that EU competition policy may be becoming more lenient through social capture. Social capture is a process whereby the social environment of public officials consciously or inadvertently shapes their policy-relevant views in a direction that serves the regulated entities. Unlike in other areas of public policy, the social environment influencing competition officials is not formed by the actual regulated entities, i.e. highly heterogeneous big business, but rather by the competition practitioners advising and representing them. The practitioners work mainly for large corporate defendants, which leads to their community leaning strongly towards non-interventionism. Because of the following three channels of social influence, this worldview may become endorsed also by competition officials: First, the officials often socially identify with the community of practitioners. Second, the officials tend to perceive the practitioners as having higher status. And, third, many officials regularly interact and develop relationships with the practitioners. The risk of social capture needs to be taken seriously considering the major efforts of big business to make EU competition policy more lenient through other avenues such as lobbying and sponsored research. The article also discusses measures to address social capture, cautioning nevertheless that its causes may at the same time generate countervailing policy benefits.

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Introduction

The objective of EU competition policy is to strengthen the Union's economy by preventing powerful firms from restricting competition. Some commentators have recently cautioned that this objective might be frustrated should big business be successful in its efforts to capture competition policy (see, e.g., Ezrachi and Stucke 2016: 244-247). This issue has been touched on also by Wouter Wils, a Hearing Officer for competition proceedings at the European Commission, who raises a concern that his fellow EU public officials tasked with designing and enforcing of competition policy (competition officials) might have become too lenient due to the following two reasons (Wils 2017: 93): The community of competition experts working in the private sector (competition practitioners) 'is structurally biased towards the outlook and interests of big business' because it is their main client. And this bias may spread into design and enforcement of competition policy because competition officials 'identify professionally and maybe also socially with and end up feeling accountable to [the mentioned] community.'

The current article explores this concern, understanding it as follows: EU competition policy may be – through *social influence* on competition officials' views – being tilted towards non-intervention.[1] Remarkably, Baker (2010), Davidoff (2010), Johnson (2009), Kwak (2014) and other academic commentators have identified shaping of public officials' views through social influence as a major cause of the global financial crisis in the late 2000s. By integrating insights derived from the financial crisis with competition-policy literature and social psychology research, this article contributes to a better understanding of how the social environment of competition officials may make them develop non-interventionist views and, consequently, serve big business by lenient decision-making (*social capture*). Concluding that social capture of EU competition policy is plausible, the article also discusses potential countermeasures.

[1] This would approximate the European Union to the United States, where the minds of competition officials have arguably already been captured by non-interventionist ideas (Lynn 2016).

Throughout the article, the focus is primarily on the EU institutional environment at the level of the Union, represented mainly by the Brussels private competition practice and by the Directorate-General for Competition of the European Commission (DG Competition). Nevertheless, attention is also paid to and the conclusions largely hold for EU member states as well as for non-EU competition systems.

Big business influencing competition policy

This part considers the big business's influence on competition policy in general. By discussing for instance lobbying, incentives-based regulatory capture, and other types of views-based capture it provides a larger context for social capture of competition policy as the primary object of interest in this article.

Big business's preference for non-interventionist competition policy

Competition policy is a branch of public policy regulating use and acquisition of market power. There are three main pillars of EU competition policy: Article 101 of the TFEU prohibits agreements among competitors restricting competition, i.e. joint abuse of market power. Article 102 renders unlawful unilateral abuse of market power. And Regulation 139/2004 precludes mergers that would lead to a company having too much market power. **C**ompetition policy regulates market power because it, as a type of market failure, may lead to social harm in form of a dead-weight loss (Motta 2004: 39-89). The purpose of competition policy is to prevent this harm. Decisions concerning both design and enforcement of competition policy (cf. Mariani and Pieri 2014: 427-428; Massel 1960: 158; Orton 2011: 50) are addressed primarily to firms with substantial market power (big business). They are the regulated entities or, in other words, potential and actual defendants. Market power gives these firms the ability to *profitably* raise prices above competitive levels.[2] That is to say that firms have incentives to acquire and exercise market power and, hence, that public intervention is against their interests. As Wils

[2] While market power is usually, for tractability, defined with respect to pricing, the concept may concern also other market dimensions such as quality or innovation. See, e.g., Geradin et al. (2012: 79).

(2017: 93) puts it, '[d]ominant firms can thus be expected to lobby strongly against full enforcement.'

Influence and its modalities

Competition policy may be subject to influence by big business as its addressee (cf. Ezrachi 2017: 70; Orton 2011: 50). A relatively well-documented avenue through which the influence gets exercised is lobbying, i.e. persuasion of competition officials through direct contact with them or through indirect mobilization of the public (see Ezrachi 2017: 70; Mariani and Pieri 2014: 430). Ezrachi (2017: 70) observes that '[o]n-going efforts by pressure groups, chambers of commerce, corporations, and other interested parties, have dominated the antitrust landscape since its early days,' and extensive competition lobbying is reported also from the contemporary European Union (Decker 2009: 113; Talbot 2018: 57; Wilks and McGowan 1996: 242). As pointed out by Mariani and Pieri (2014: 426), 'a distinction needs to be made in relation to whether lobbying efforts are pursued in the context of an individual antitrust case or with respect to general competition policy.' While both may be subject to influence, the latter type of decision-making tends to be more susceptible (Orton 2011: 53) because an official enforcing competition rules is more constrained by existing law than one designing it (Baker 2013: 5-6). Still, also competition enforcement entails considerable discretion (Wright 2012: 256) and, thus, is not immune to influence (Baker 2013: 6; Decker 2009: 113; Ezrachi and Stucke 2016: 245-246; Gavil and First 2014: 22-25). Although this article concerns a different avenue of influence, the example of lobbying illustrates that big business expends considerable effort to shape competition policy to its liking.

Before focusing on undue distortion of competition policy, it needs to be acknowledged that not all interaction of the competition rules' addressees – or their representatives – with the decision-making process is undesirable. To be able to perform their tasks effectively, competition officials need to gather relevant factual information, and the regulated entities may serve as one of its sources (Kwak 2014: 76; Rubinstein Reiss 2012: 595). This image of a rational debate between the business and competition officials underlies an optimistic account of lobbying according to which lobbyists ought

to serve as a 'source of expertise for institutions and authorities' (Mariani and Pieri 2014: 435) and 'help improve legislative and agency outcomes' (Baker 2013: 7). DG Competition is in this vein receptive to the opinion of the competition rules' addressees (Talbot 2018: 57) and regularly seeks their and other stakeholders' inputs through public consultation procedures. Interest groups do nevertheless share their expertise with DG Competition's officials also more informally (Orton 2011: 51), e.g. through 'phone calls, letters, and face-to-face meetings' (Mariani and Pieri 2014: 430).

Still, the influence of big business's interests on competition policy may often be distortive. Generally speaking, the literature denotes a situation in which public officials are 'consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry' (Kwak 2014: 13) as regulatory capture.[3] 'Captured [officials] will thus be lenient towards the sector they are supposed to independently monitor' (Veltrop and de Haan 2014: 2). While the capturing interests may sometimes be apparently distinct from the public interest, there are also 'less clear-cut situations in which the industry position is arguably a plausible reading of the public interest' (Kwak 2014: 79). This was for instance the case when US financial regulators became non-interventionist before the financial crisis. It seems to hold also in current EU competition policy: While most European competition academics – including the author – would probably believe that a significant shift of the policy towards non-intervention would amount to 'excessive tolerance of market power' (Neven et al. 1993: 224) rather than improved promotion of competition, it is not possible to outright discard voices to the contrary. Yet, the policy potentially becoming more lenient because of competition officials' views being covertly shaped through social influence of big business's representatives appears disconcerting regardless.

The purpose of the remainder of this part is to introduce social capture as a theory of capture best representing the concern under consideration. Nevertheless, before proceeding to the theory as such, it is in order to set it in a larger context by reviewing the difference between capture based on incentives of public officials and capture based on distortion of their views.

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[3] Some authors speak about regulatory capture only if it obtains 'by the intent and action of the industry itself' (Kwak 2014: 13). I nevertheless follow the stream of scholarship that does not impose this condition.

Incentives-based capture

Under the traditional account, public officials become captured due to their self-interest. Made famous by George Stigler's seminal contribution (Stigler 1971), this account proceeds from the 'idea that policymakers are for sale, and that regulatory policy is largely purchased by those most interested and able to buy it' (Kwak 2014: 9). Within the respective stream of scholarship, there are for instance models of implicit bribes or models assuming that a regulator inclined to pursue the public interest is scared off from doing so by threats of retaliation (Kwak 2014: 18). An often-considered explanation of capture concerns the movement of personnel between public authorities and regulation's addressees known as the revolving door (e.g. Rubinstein Reiss 2012: 592-593): Experts coming from the private sector to the government are expected to have incentives to treat their old friends more leniently than they should. And the prospect of moving in the opposite direction may make officials act in the same way towards their future employers (Kwak 2014: 3; Stiglitz 2016: 500).

While it is sometimes argued that competition policy 'is just another form of economic regulation, which countless students of the regulatory process have shown to be vulnerable to "capture" by the very industries regulators are appointed or elected to oversee' (McChesney et al. 2015: 149), conventional wisdom suggests that competition policy – despite the doors of competition agencies revolving a great deal (see below) – is not very prone to incentives-based capture:

> [I]t is generally believed that competition enforcement agencies in both the United States and the European Union are not overly subject to this type of capture. Rather, most competition specialists with whom I have spoken on this subject [...] have indicated that, while no regulatory agency is entirely free of regulatory capture, the competition enforcement agencies tend far to the low end of the spectrum of the degree to which such capture commonly occurs, when ranked against other governmental regulatory agencies. (Graham 2003: 963)

Competition policy, it is argued, does not deal with a particular business sector or subset of firms but cuts across the entire economy (Wilks and McGowan 1996: 242). The

'regulated industry' – i.e. firms with substantial market power from all economic sectors – may thus not easily coordinate on a capture strategy.

Views-based capture

Instead of public officials' material self-interest, the considered capture of EU competition policy is based on distortion of their *views*. One possibility how such distortion may arise is that the regulated entities are able to manipulate the information on the basis of which decisions are made (Agrell and Gautier 2012: 287; Bagley 2010: 5; Baker 2013: 2; Dal Bó 2006: 220; Wagner 2010: 1328-1351).[4] In such a case, we are talking about a reverse side of the rational dialogue between public officials and the regulated industry discussed above – the industry may outright lie or

> provide information that supports its interests, place emphasis on things that support its views, or tend to downplay the things it prefers not to have regulated. Industry may even do that without intending to; a known cognitive bias is the confirmation bias, which suggests that people (or companies) tend to emphasize and be more receptive to things that support their initial point of view. Almost automatically, the tendency will be to downplay or ignore adverse information – to rationalize it away. (footnote omitted) (Rubinstein Reiss 2012: 599)

Nevertheless, while this danger does threaten EU competition policy – as evidenced by actual business efforts to persuade public authorities to limit competition by governmental action (see, e.g., Ernst 2000; Vossestein 2000) – it is not the source of the regulatory capture considered by this article.

Instead, the source lies in a subtler distortion of competition officials' views through shaping of their ideological beliefs.[5] The commentary describes the process with a variety of formulations. For example, Kwak (2014: 76) maintains that certain influences can 'shape the way regulators think about the problems they are tasked with solving' or 'color their beliefs.' Engstrom (2013: 32) refers to 'creeping colonization of [regulators'] ideas.' Mariniello et al. (2015: 3) argue that it is possible to 'subtly influence the priors

[4] This is usually referred to as information capture.

[5] Note that the terminology is not settled – the resulting capture has been called cognitive, cultural, deep, intellectual or social (e.g. Poulain 2016).

that will affect the judgments that the decision makers will have to make.' And, finally, Ezrachi and Stucke (2016: 246), Veltrop and de Haan (2014: 4), and Kwak (2014: 20) speak about 'shaping' of their, respectively, 'opinions,' 'views,' and 'assumptions, lenses, and vocabularies,' and Davidoff (2010) about 'worldviews' being 'affected.' Wils's concern that EU competition officials are 'biased towards the outlook and interests of big business' (Wils 2017: 93) is to be understood in this vein – the officials are suspected to have 'come to see the world the way that [the] regulated entities do' (Bagley 2010: 5), 'end[ed] up sharing the views of the industry' (Poulain 2016: 6), or been convinced to 'think like it' (Engstrom 2013: 32).

Competition policy famously provides significant scope for ideological beliefs in decision-making (e.g. Salop 2014: 603). To be sure, there is general agreement as to economic pro-competitiveness or anti-competitiveness and (ensuing) lawfulness or unlawfulness of some market practices (Lao 2014: 654). With respect to many others, however, economic analyses of competitive effects are indeterminate and/or legal rules are worded too vaguely, which leads to ideological beliefs coming – consciously or unconsciously – into play in competition policy design and enforcement. The two most important of these beliefs concern whether markets are robust, being thus able to correct market power on their own, and whether public institutions have the capacity to intervene successfully in markets. Lao (2014: 667-669) distinguishes between, on the one hand, non-interventionist ideology associated with the twin beliefs that markets tend to be self-correcting and public intervention counter-productive and, on the other hand, pro-interventionist ideology based on the beliefs that markets are often imperfect and public institutions make the right choices. Regarding big business, as discussed above, it clearly benefits from and promotes the non-interventionist ideology and beliefs. Officials' bias towards the outlook and interest of big business therefore means bias towards those beliefs.

There are different mechanisms through which the ideological beliefs of competition officials may be shaped. One of them entails big business capturing the scholarly debate by funding of articles, academic initiatives and think tanks (Ezrachi and Stucke 2016: 247; Ritter 2017). To illustrate, a report by a watchdog NGO identified 331

research papers published between 2005 and 2017 directly or indirectly funded Google that concerned public policy matters of interest to the company, including competition policy matters (Campaign for Accountability 2017).[6] It is also worth mentioning in this context that the global Academic Society for Competition Law has recently reacted to a surge in sponsored research by adopting a Declaration of Ethics that urges competition scholars to disclose any potential source of bias in their research.

This article nevertheless concerns a less explicit mechanism, whereby competition officials 'internalise and adopt, as if by osmosis' (Buiter 2009: 79) the beliefs of people in their social environment. Social psychologists bring together the processes through which one's social environment changes his or her views or behaviour under the heading of social influence (e.g. Gass 2015: 348). Such influence may be inadvertent or accidental and the target may be unaware of it taking place (Gass 2015: 348). Of the numerous channels through which social influence takes place, we shall focus on three that Kwak (2014: 80) identified as relevant for the context of capture: public officials socially identifying with a group consisting of (representatives of) the regulated entities, perceiving members of the group as having higher status, and developing relationships with them.[7] These three channels of social capture are further elaborated below, structuring the analysis of competition officials' adoption of competition practitioners' non-interventionist views. Before examining this adoption, it is nevertheless necessary to discuss why practitioners are likely to hold such views in the first place.

Competition practitioners leaning towards non-intervention

As noted in the introduction, Wils observes that competition practitioners hold non-interventionist beliefs because non-intervention benefits big business as their main client. The previous part has already considered why big business prefers non-interventionist competition policy. The current one first analyses what competition practitioners do and

[6] The report itself has nevertheless been heavily criticized due to an involvement of Google's rivals.

[7] Kwak himself never invokes the concept of social influence, drawing in fact much more on economic studies than on social psychology research. He links the three mentioned channels of influence together only with a reference to them all operating 'through a set of share but not explicitly stated understandings about the world' (Kwak 2014: 79). Kwak also does not speak about social capture but cultural capture. Due to the centrality of social influence, the current article nevertheless follows Davidoff (2010) in using the former term.

why big business is their main client. Subsequently it discusses what the relationship is between competition practitioners working for big business and the beliefs that they hold.

Big business as the main client of competition practitioners

Let us now consider competition practitioners, i.e. competition experts providing their services in the private sector. Generally, it can be said that they include two professions: lawyers and economists. These professions can be further broken down according to the services that they offer. First, there are competition experts providing services concerning competition liability under the existing rules, be it consultation and representation with respect to actual competition proceedings or advice on compliance issues. These services may be provided through the market by independent practitioners or through their larger organizations (law firms or economic consultancies). As perhaps the most numerous category, these practitioners will be at the centre of the discussion below. There are nevertheless also other experts – mainly lawyers – who do not provide the described services through the market but in-house, i.e. as employees of the 'clients' (see Baker 2013: 5; Wilks and McGowan 1996: 243-244).[8] Another type of practitioners' services concerns lobbying, i.e. influence on competition decision-making through other channels than regular pleading in competition proceedings. Lobbying can then be carried out internally by in-house staff of the concerned companies (Mariani and Pieri 2014: 424; Wilks and McGowan 1996: 242) or their associations (Mariani and Pieri 2014: 432; Wilks and McGowan 1996: 242-243), as well as externally by law firms or specialized agencies also known as public affairs consultancies (Kinsella 2011: 42; Mariani and Pieri 2014: 426; Orton 2011: 51).[9]

The main clients of competition practitioners are big firms facing the threat that their market practices or acquisitions will be found in breach of competition rules. The job of the practitioners is then to make sure that these – actual and potential – defendants

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[8] ICLA, an association bringing together primarily EU in-house competition lawyers, counts over 360 members (In-House Competition Lawyers' Association 2019).

[9] 'As of June 2014, 6,652 lobby organisations have registered of which: (a) 816 professional consultancies/law firms/self-employed consultants; (b) 3,305 in-house lobbyists and trade/professional associations' (Mariani and Pieri 2014: 424-425).

are not found liable. To be sure, practitioners' services can be and to some extent are required also by consumers and smaller companies suffering the competitive harm inflicted by big business.[10] However, there is a significant difference in the concentration of the interests (Gavil 2008: 182; Shughart II 1995: 12; Wils 2014: 432-433): while 'the stakes often are enormous for the companies in question [...] consumers in general or the customers of the defendants, will be large in number and typically not well organized' (McChesney, Reksulak and Shughart II 2015: 162). As a result, the latter will be willing to spend much less on the services of competition practitioners – and also on other ways of promoting their interests such as sponsored research (Ritter 2017) – than the former. An additional argument against the one-sided nature of practitioners' work could concern cases featuring a large firm on each side of the controversy. This is because a plaintiff (complainant) firm clearly hires the practitioners in order to convince the authorities to find infringement rather than not. While such cases indeed reduce practitioners' one-sidedness in the areas of competition policy where they occur, one should keep in mind that there are still many more cases where competition practitioners happen to be significantly involved only on the defendant's side. In addition, practitioners' work for large corporate plaintiffs does not entirely make up for the underrepresentation of consumers because interests held by these two groups are not perfectly aligned.

To my best knowledge, no precise estimates are available on how much money working for different client groups contributes to the revenues earned by competition practitioners. Still, one may easily recognize the disproportion for instance with respect to the number of the respective types of clients served by the law firms and economic consultancies. As early as in 1960s, Scanlon (1969: 45) observed that a large bulk of legal work in US antitrust was executed by 'a few hundred law firms on the defense side and [only] a few dozen on the plaintiff's side.' A similar picture is depicted also by the GCR 100, a ranking of the world's top competition – both legal and economic – practices put together by the Global Competition Review. A brief look at the featured profiles of the listed practices reveals that these top players provide their services mostly to suspected

[10] Competition practitioners also sometimes provide their services through the market to enforcement agencies. Such deals nevertheless represent only a little share of their turnover.

infringers of competition rules. In a nutshell, '[f]or antitrust practitioners, dominant companies are the largest and most lucrative clients' (Wils 2014: 433).

Advocating and believing

The question, nevertheless, remains how the fact that competition practitioners serve mainly large corporate defendants interacts with the practitioners' beliefs. The first possibility is that the defendants – or rather law firms and consultancies hired by the defendants – employ mostly competition experts holding congenial anti-interventionist views. This is frequently argued for instance with respect to economists acting as expert witnesses in competition proceedings (e.g. Stigler 1982: 7). Although this explanation is often advanced to suggest that there is no cause for concern because the experts after all adhere to their genuine views (e.g. Colander 2016: 737), it is important to realise that the described process of selection of competition practitioners would still likely lead to an aggregate bias of their community. With a great majority of services being demanded by large corporate defendants, it follows that law firms and consultancies tend to employ experts whose views correspond with the defendants' anti-interventionist needs. As a result, the community of experts working in private competition practice ends up consisting predominantly of people with such views; they become the orthodoxy.

Another possibility is that the pre-existing views of competition experts are not relevant in their selection and that the experts simply advance the argument that best suits the purposes of their client in any given case. After all, '[l]awyers are expected to act as partisans for their clients, regardless of what they believe personally, and to espouse only one side' (Herman 2006: 638). And 'economists have learned to be advocates of the interest of their clients, just as lawyers have learned to do so' (Jenny et al. 1998: 24).[11] This would be unproblematic if the experts' views were immune from the positions that they prevailingly advocate in their professional capacity. In such a case, it would make little sense to speak about a non-interventionist bias of the competition practitioner

[11] An illustration of this point has been provided by Eisinger and Elliott (2016): 'Compass Lexecon experts can, and do, advise both sides in disputes. [...] Compass economists can reach very different answers to the same question, depending on who is paying them.'

community – the fact that most work is done for large corporate defendants would not influence the distribution of the practitioners' views.

It however turns out that it is not all that easy to regularly advocate a certain position without becoming convinced that there is some truth to it. As shown by studies on cognitive dissonance, human beings strive for consistency between one's actions and views (e.g. Harmon-Jones and Mills 2019). A person experiencing inconsistency between the two tends to become psychologically uncomfortable, and so is motivated to reduce the cognitive dissonance, e.g. by adjusting the views to the actions. In the context of legal practice, this phenomenon has been observed by Eisenberg (1993: 393-394):

> Most litigators have seen their own views on legal questions transformed by the experience of advocacy. If they have previously taken an inconsistent position on the same issue, they may see this transformation occurring on a conscious level. More typically, they will not yet have worked out their views on the precise issue presented, and may even be able to persuade themselves that had they thought about the issue hard enough beforehand they would have had to come to the same conclusion regardless of their clients' interests. But if they are candid and introspective, they may have to concede the impossibility of untangling their own views from their clients' interests.

A similar point has been made also by Little (2001: 369-370):

> I have no doubt that acting in a paid consulting capacity can subtly (if not consciously) change one's view or develop one's view in the direction that favors the client. Lawyers are master of rationalization and, I believe, self-deception. (footnote omitted)

The same applies also to economic consultants and lobbyists.

In sum, the fact that EU competition practitioners serve mainly big corporate defendants likely makes the practitioners' community biased toward non-intervention. This bias results from hiring experts with non-interventionist views as well as from the experts' views being shaped by their work in this direction. To be sure, not all competition practitioners are affected by the said bias; some will be less vulnerable to the pressures of cognitive dissonance and others – such as representatives of consumers in competition damages litigation – will even be biased in the opposite direction. On average, however,

due to the sheer prevalence of their pro-defendant work, one may confidently expect the practitioners to hold strong non-interventionist views.

Competition officials' receiving non-interventionism

Having established that competition practitioners' views very likely lean towards non-intervention, we shall now examine the question how this may lead to social capture of EU competition policy. As mentioned, the focus will be on lawyers and economists participating in design and enforcement of competition rules by the European Commission or the Court of Justice of the European Union,[12] and the discussion will be organised around three channels of social influence identified as relevant by Kwak (2014). The first section of this part discusses how the views of competition officials may be shaped by them identifying with the community of competition practitioners. The second section considers what ensues from the officials perceiving the practitioners as having higher status. And the third section looks at the effect of relationships between the officials and practitioners. With all these three elements of social capture being present in EU competition policy, it may be expected that the non-interventionist views of the practitioners will make their way into the minds of the practitioners.

Identity

The first channel of social influence to be discussed concerns social identification (see Kwak 2014: 81-85). The fact that seeing oneself as a member of a group shapes the views that the individual holds has been extensively studied by social psychology. Reviewing dozens of such studies, Gaffney and Hogg (2017: 259) summarize that '[w]hen people claim group membership and identify strongly with a group, they take on the attitudes, behaviors, and norms of the group as their own.' Veltrop and de Haan (2014) are convinced that this obtains also in the context of public policy, observing that those Dutch finance officials who self-reported stronger identification with the industry displayed

[12] For an overview of the key actors and stakeholders in EU competition decision-making, see Mariani and Pieri (2014: 427-428).

poorer performance than their colleagues. As elaborated below, social identification may affect also EU competition policy.

Kwak (2014: 83) notes that public officials do not need to identify with employees of the regulated entities as such but may instead feel that they belong to the same community as the entities' outsourced representatives. This marks an important difference between financial regulation and competition policy. While the former context allows financial regulators to see themselves as members of the same group as bankers and other financiers, it is hard to imagine that competition officials could identify directly with the staff of the highly heterogeneous firms to which competition rules are addressed (see above). Recall, however, that the social capture in question instead concerns competition officials identifying with competition practitioners as people who, outsourced by one regulated entity after another, daily work on competition issues; such identification, by contrast, appears highly plausible.

Revolving door

Kwak (2014: 83) suggests that an important indicator of whether experts in public office and private sector form one community is the extent of transfers between the two. That is to say that revolving door has implications beyond those discussed above; it can also determine (and reveal) whom public officials consider as their in-group (cf. Davidoff 2010). Consider finance as an example: it has been reported that almost 150 former employees of US financial regulatory agencies registered as lobbyists between 2009 and mid-2010 (Lichtblau 2010) and, conversely, that a about half of the officials supervising the financial industry in the Netherlands have come from the industry (Veltrop and de Haan 2014: 10). This illustrates that finance experts in public office and private sector 'are really the same people, only at different points in their careers' (Kwak 2014: 83).

Revolving door, albeit this time leading almost exclusively from the public to the private sector, testifies also to the existence of a joint community of competition experts working in the two sectors. More precisely, there appears to be a community of competition lawyers and a community of competition economists on each side of the Atlantic. As regards lawyers, consider for instance Makkai and Braithwaite (1992: 62): 'Lawyers in the antitrust division of the U.S. Justice Department or the Federal Trade

Commission are essentially trainees getting the experience that will enable them to grab the jobs that bring in big bucks working for business.' Geradin makes a similar observation about DG Competition: 'The "revolving door" goes only in one direction with Commission officials leaving the Commission to monetize their expertise in law firms' (Petit 2012). Trying to quantify the extent in which EU competition lawyers move between public office and private practice, Neyrinck and Petit (2014: 8) review community news published by the Global Competition Review between January 2011 and December 2013 and identify seventeen such moves. Finally, it should be mentioned that the issue concerns not only junior EU competition officials – even former CJEU judges who sat on landmark competition law cases, such as *Airtours*[13] or *Tetra-Laval*,[14] now work for leading European law firms.

There are also frequent transfers from the public sector to economic consultancies. As a matter of fact, the initial growth of the US consultancy industry was based on many economists switching from the government to the private firms (White 2010: 242), and the doors have been revolving ever since in both America and Europe (e.g. Kovacic 1992: 297; Neyrinck and Petit 2014: 8). With consultancies considering insider agency experience a valuable asset, many economic graduates first spend some time working as competition officials and only later transfer to the private sector (Ginsburg and Fraser 2011: 41; White 1999: 13). Nevertheless, such transfers concern also the most prominent government economists as may be illustrated by Pautler's list of later affiliations of the Directors of the FTC's Bureau of Economics (Pautler 2015: 140-143) or by the fact that a half of the former EU Chief Competition Economists now act as senior experts in prominent consultancies.

The phenomenon of revolving door concerns also the lobbying industry. For instance, Neyrinck and Petit (2014: 7) discuss the case of three former officials from DG Competition who moved to public affairs consultancies:

> The first worked at DG Competition for six years, dealing with mergers and then became Associate Director for Competition at a well-known public affairs agency. The

[13] CJEU (2002) Case T-342/99.
[14] CJEU (2002) Case T-5/02.

second worked as an assistant case handler (temporary agent) at DG Competition for 6 years before she became a senior consultant at the same lobby.

The third served as a personal advisor of the Competition Commissioner and as a member of her cabinet, advising on mergers and acquisitions in the financial services and health-related markets; subsequently he became Associate Director with a public affairs consultancy providing services concerning competition policy.

Professional organizations

Another indication of the fact that competition officials and practitioners form join profession-based communities may be seen in the existence of their common professional organizations. Such an organization exists for European competition economists, carrying the name Association of Competition Economics. Established in 2003, this association brings together economists working in government, the private sector, and also academia to discuss the use of economics in competition cases and competition policy developments. One of its explicit objectives is '[c]reating a community of economists working in competition across Europe' (Association of Competition Economics undated). The three-person executive committee of the association currently includes a DG Competition official and a director of an economic consultancy's Brussels office, who had herself spent ten years at DG Competition.

Communities of competition lawyers and economists

It can be summarized that competition officials and competition practitioners do form joint profession-based communities. That is to say that one community spanning the public and private sectors is formed by competition lawyers (cf. van Waarden and Drahos: 928) and another by competition economists. Both of these communities are dominated by practitioners. While Neven (2006: 751) reported that DG Competition hosted 184 officials with a background in law, a recent edition of Global Competition Review's ranking of the Brussels competition bar counts 526 competition experts in only 25 major law firms. Similarly, as regards economists, there are now over 25 of them in the EU Chief Competition Economist's team (European Commission Undated), but many more work

in Brussels offices of economic consultancies.[15] The prototypical views of the professional communities that EU competition officials identify with are therefore shaped primarily by the practitioners.

Status

Another channel of social influence identified by Kwak (2014: 85-89) as relevant for regulatory capture concerns status. Status generally refers to one's rank within a group hierarchy or, in other words, to the prestige he or she is granted. Social psychology research has found that high-status individuals exert influence on our views and behaviour because we act as if people enjoying greater prestige have better ideas than those with lower prestige (Thye and Witkowski 2005: 795). The research has also revealed that we often associate status with characteristics that do not reflect actual competence; for instance, male members of a certain profession will often tend to enjoy higher status – and thus also greater influence – than its equally or even more competent female members (e.g. Carli 2017).

EU competition officials appear to consider private practice prestigious, as evidenced for instance by their frequent transfers to it. Kwak (2014: 87) argues that one of the most important characteristics that provide status in the context of market regulation is 'wealth and business success.' This is in line with studies showing that people receiving higher level of rewards are ranked higher and presumed to be more competent than those receiving lower levels of rewards (Thye and Witkowski 2005: 795). To relate this to the context of competition policy, competition practitioners – both lawyers and economics – earn much more than competition officials. Eisinger and Elliott (2016) for instance document that an economic consulting group containing the biggest competition consultancy in the world Compass Lexecon billed at an average hourly rate of $512 in 2015. They also report that one of Compass Lexecon's economist charges at least $1,350 an hour, and estimate that he has made about $100 million during his consulting career.

[15] Compare this with Stigler (1982: 7) observing that there were 'possibly twenty times' more US economists serving as competition practitioners than competition officials at the beginning of 1980s.

The views of EU competition officials may hence be subject to influence by competition practitioners also due to these income-driven status differences.

Relationships

The last element of social capture concerns what Kwak (2014: 89-93) calls relationships or social networks. The two previously discussed channels of social influence may to some extent work even if competition officials do not know the practitioners in person. Meeting and talking to the practitioners will further shape the officials' views, with the intensity of influence likely increasing with relational closeness and frequency of interaction (cf. Yeoh 2019: 141). This is why 'repeated interaction between regulators and the financial industry could contribute to align the way in which regulators think about problems with the view of the industry they regulate' (Pagliari 2012: 16). Davidoff (2010) then more specifically says that the worldview of US financial regulators has been affected by people from the industry because the regulators 'play squash with them and dine with them.'

Social interaction is commonplace also between EU competition officials and practitioners. As described by Neyrinck and Petit (2014: 1), in the community of EU competition experts,

> personal ties between lawyers, consultants, civil servants, lobbyists, and judges are inevitable. Expatriates in the small constituencies of Brussels or Luxemburg meet regularly in the professional context (at the Court, at the Commission, at professional meetings, and conferences) often end up developing nonprofessional relationships.

Decker (2009: 113) reports that some people in fact understand the possibility of interaction with the DG Competition officials as the reason 'why all the law firms have offices in Brussels.' A common setting to meet and network is provided by conferences and similar events. There are many

> high-level conferences where professionals and academics like to meet and network, like those organised by the Global Competition Review, the International Bar Association, and the American Bar Association Section of Antitrust Law. Very well known by the industry are also the IBC legal conference, the Charles Rivers Associate (CRA) Annual Conference, and the annual European Competition Forum. Beyond

> that, opportunities to discuss antitrust cases and regulatory developments can be organised – by firms as well as by associations of professional antitrust experts [...] – in multiple ways, eg breakfast meetings, lunch debates, hearings in the European Parliament, and academic workshops. (Mariani and Pieri 2014: 429)

Existence of strong social networks between the officials and practitioners is further reinforced by the mentioned revolving door. Is sum, EU competition policy hence displays also this element of social capture.

Policy implications

The question suggests itself whether and eventually how the described channels through which competition officials' views get shaped ought to be addressed. On the one hand, it needs to be acknowledged that it is extremely difficult to empirically prove the extent to which design or enforcement of competition policy is being distorted through social influence (c.f. Dal Bó 2006: 216; Veltrop and de Haan 2014: 3). As a matter of fact, the situation is probably far from critical with EU competition rules still being enforced against some of the most powerful companies in the world.[16] It is also the case that some of the circumstances that facilitate social capture, such as the existence of revolving door, may at the same time enhance effectiveness of competition policy.[17] On the other hand, social psychology research shows that the considered channels of social influence do lead to changes in one's views. What is more, the European Commission itself has recently expressed concern that EU competition policy might be subject to influence by private interests when it proposed a directive requiring Member States to shield national competition agencies from being influenced by any public or *private* entity.[18] Given the increasing intensity of big business's overall efforts – e.g. through lobbying or sponsored

[16] That is to say that the social capture of EU competition policy is at worst 'weak,' reducing but not eliminating the benefits of the policy and, thus, not warranting its abandoning (see Kwak 2014: 12).

[17] Revolving door helps bring – at least for a while – good people into public office (e.g. Baker 2013: 2; Neyrinck and Petit 2014: 1-2).

[18] Articles 4(2)(a) and 4(2)(b) of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, *Official Journal of the European Union, L* 11: 3–33.

research – to shape EU competition policy to its liking, also the possibility of social capture should thus not be taken lightly.

Promoting competition officials' public-official identity

A possible response to competition officials' identification with the (non-interventionist) practitioners might consist in promoting their public-official identity (see, e.g., Yeoh 2019: 143). As shown by social psychology research, people tend to have several social identities and it is possible to affect which one of them prevails (e.g. Cohen 2012: 391-397). Applying this approach to financial policy, Veltrop and de Haan (2014: 24) propose that the public-official identity of financial regulators could be reinforced through attendance of formative courses or membership in suitable associations. Also EU competition officials could be stimulated to identify themselves more as public officials, e.g. through training or initiatives to bring them together with other EU public officials (mainly from other departments of the European Commission) or with competition officials working at the level of EU Member States. In the latter case, development of a strong competition-official identity might become an additional goal of the European Competition Network, a cooperation between the European Commission and the national competition authorities so far aimed mainly at exchange of information. The stronger identification of lawyers and economists working at DG Competition and other EU institutions with their role as competition policy designers and enforcers should then mitigate the non-interventionist effects of the rival identification with competition practitioners.

Improving competition officials' status

Social influence of competition practitioners following from their relatively higher status could be reduced by increasing the prestige of working as competition official. Even though EU public officials apparently enjoy higher reputation than their US counterparts, many EU competition officials will still afford their colleagues working in private practice higher status, especially due to the large differences in salary. One could therefore pay more money to the officials (cf. Baxter 2011: 195), which would also attract more qualified competition experts and limit their public-to-private transfers. It is nevertheless doubtful

that the public sector salaries could ever compete with those in law firms and economic consultancies. That is why we need to exploit also other sources of prestige associated with being involved in design and enforcement of competition policy (cf. Baxter 2011: 195), regarding for instance the ensuing public benefits. In that way, competition officials could stop looking up to their (non-interventionist) practicing colleagues.

Preventing too close relationships

Perhaps the most difficult question is what can be done about the existence of relationships between competition officials and practitioners. One difficulty arises from countervailing public benefits: 'Personal connections help bypass red-tape and bureaucratic rigidities. A phone call to an insider friend may prove more effective than a formal letter to a generic EU mailbox' (Neyrinck and Petit 2014: 1-2). In addition, eventual regulation of officials' relationships would be very intrusive on their private life. Still, I am wondering whether it would be too much to ask that competition officials at least do not regularly spend free time with representatives of the entities that they regulate. Even such basic restriction might lessen the influence that the representatives' non-interventionist views exert on the officials.

Conclusion

There is a risk that EU competition policy is becoming more lenient due to the effect exerted by competition officials' social environment on their policy-relevant views. Unlike in financial policy, where social capture has been theorised most extensively, the critical component of the environment is not to be seen in the regulated entities but in competition practitioners as their representatives. The fact that competition practice serves mostly big corporate defendants means that it predominantly hires experts with suitable – i.e. non-interventionist – views and/or that the experts acquire such views throughout their career. These views may then be expected to make their way into the minds of competition officials because the officials tend to identify socially with the

community of competition practitioners, afford higher status to the practitioners, and maintain relationships with them.

The possibility of competition officials being socially captured is alarming especially in view of the increasing efforts by big business to sway competition policy in a direction that suits it through avenues such as lobbying or sponsored research (see, e.g., Ezrachi and Stucke 2016: 244-247). In order to sustain an effective EU competition policy, we need to look for comprehensive solutions that would address all kinds of influence, including the subtle – and typically inadvertent – one behind social capture. At the same time, however, one ought to keep in mind that some of the circumstances contributing to social capture, such as revolving door or relationships between competition officials and practitioners, may as well bring policy benefits, which need to be balanced against the costs.

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