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Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU

Jan Broulík*

This article explores whether there is a risk that competition policy on both sides of the Atlantic could be distorted by cultural capture. This type of capture differs from traditional regulatory capture operating through self-interest of public officials. It instead arises when policy-relevant views of the officials are subject to disproportionate social influence exerted by representatives of the private sector. The question here is hence whether social interactions enabling this influence take place between competition officials and practitioners. The article answers in the affirmative, finding that many competition officials seem to self-identify with a community dominated by competition practitioners, hold the practitioners in high regard, and have interpersonal relationships with the practitioners. These risk factors are especially pronounced in the United States. There is thus a possibility that competition policy could be designed and enforced in a way that furthers interests of big business to the detriment of consumers and small businesses. The article also discusses preventive measures to limit cultural capture of competition policy such as promotion of diversity and reduction of revolving door, cautioning nevertheless that difficult trade-offs may need to be made in their implementation.

Keywords: agency independence, anti-interventionism, competition community, competition policy, cultural capture, Antitrust Division, DG Competition, Bureau of Competition, regulatory capture, revolving door, social influence

1 INTRODUCTION

As an important tool to achieving prosperity, competition policy must not become captured by interests of those whom it is supposed to constrain. To be sure, it is relatively unlikely that such regulatory capture would arise in the

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traditional manner whereby public officials serve a special interest for their personal gain.[1] This is because – unlike in the case of sectoral regulation – addressees of competition rules are not particularly homogenous and their interactions with public officials are not extremely frequent.[2] Yet, respected commentators have even so been recently observing that competition officials on both sides of the Atlantic may actually be subject to a certain degree of capture.[3] Its suspected root is more insidious than quid pro quo arrangements: competition officials are instead supposed to be facing a disproportionate influence of anti-interventionist ideas on their worldview.[4]

Against this backdrop, the present article explores the risk that US and EU competition policies might be distorted through a capture of officials' thinking about market competition and its regulation. It focuses on a specific source of pressure on officials' views: their social interaction with competition practitioners as representatives of the private sector. While social interaction is clearly not the only force shaping the worldview of public officials, it has been argued to belong among the decisive ones.[5] The most developed framework to investigate the risk of this so-called cultural capture has been proposed by Kwak, who distinguishes three channels of influence exerted by representatives of the private sector on public officials: self-identification, status differential, and interpersonal relationships.[6] This article applies Kwak's framework to social interaction of competition officials with competition practitioners in the United States and the European Union.

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1 Edward M. Graham, *Internationalizing Competition Policy: An Assessment of the Two Main Alternatives*, 48 Antitrust Bull. 947, 963 (2003).

2 Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25(16) World Competition 361, 366 (2002); Stephen Wilks & Lee McGowan, *Competition Policy in the European Union: Creating a Federal Agency?*, in *Comparative Competition Policy: National Intitutions in a Global Market* 242 (G. Bruce Doern & Stephen Wilks eds, Clarendon Press 1996).

3 Asher Schechter, *What We Have Is Capture of the Regulators' Minds, A Much More Sophisticated Form of Capture Than Putting Money in Their Pockets*, ProMarket (26 Mar. 2016), https://promarket.org/what-we-have-is-capture-of-the-regulators-minds-a-much-more-sophisticated-form-of-capture-than-putting-money-in-their-pockets/; *Regulators Across the West Are in Need of a Shake-up: Trustbusters Are Too Cosy with Their Industries and Lack Bite*, The Economist (15 Nov. 2018), https://www.economist.com/special-report/2018/11/15/regulators-across-the-west-are-in-need-of-a-shake-up; David Cohen, *The DOJ Antitrust Division: Regulatory Capture at the Expense of US Interests*, IPWatchdog (10 Jun. 2021), https://www.ipwatchdog.com/2021/06/10/doj-antitrust-division-regulatory-capture-expense-u-s-interests/.

4 Schechter, *supra* n. 3; *Regulators Across the West Are in Need of a Shake-up*, *supra* n. 3.

5 Steven M. Davidoff, *The Government's Elite and Regulatory Capture*, Dealbook, The New York Times (11 Jun. 2010), https://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/.

6 James Kwak, *Cultural Capture and the Financial Crisis*, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Daniel Carpenter & David A. Moss eds, Cambridge University Press 2014).

The focus of the article is on people working at the US federal level and EU union level of competition law.[7] The officials include people working on competition matters mainly for the Antitrust Division of the US Department of Justice (DoJ), US Federal Trade Commission (FTC), and Directorate-General for Competition of the European Commission (DG Competition), and to some extent also for the US federal courts and the Court of Justice of the European Union. The practitioners are then competition experts who advise and represent private parties that do or eventually could participate in competition enforcement proceedings brought or held by the mentioned public bodies; their hubs are the cities of Washington and Brussels.

The article finds that the application of Kwak's framework to available information about interactions between these groups shows that preconditions for cultural capture seem to be present especially in the United States. There is thus a risk that the views of the officials – and consequently the competition policy itself – may be shaped in a way favourable to actual and potential defendants. While the applied framework does not allow determining whether the risk has actually materialized and, thus, additional research is necessary, it may still be prudent to adopt actions preventing that eventuality.

The article is organized as follows. Section 2 places cultural capture in the broader context of defendants' influence on competition policy. Section 3 explains why competition practitioners may be expected to hold mainly anti-interventionist views. Section 4 shows that there is a risk that competition officials receive these views through their social interaction with the practitioners. Section 5, while recognizing the risk as to some extent inevitable, discusses several potential preventive measures to limit it. Section 6 concludes by highlighting the most important findings and setting them in the context of current developments in competition policy.

2 BACKGROUND: BIG BUSINESS INFLUENCE ON COMPETITION POLICY

The primary objective of this part is to introduce cultural capture of competition policy as its excessive lenience caused by competition officials receiving anti-interventionist views from representatives of the private sector through processes of cultural influence. Before engaging cultural capture as such, it will nevertheless be helpful to consider the broader context of big business influence on competition policy. As we will see, when this influence grows disproportionate, the policy becomes captured. It will be further shown that – by concerning genuine views of

[7] As opposed to the level of (member) states.

competition officials – cultural capture differs from the traditional regulatory capture operating through officials' incentives. Cultural capture will also be contrasted with other types of capture operating through officials' views. The actual concept of cultural capture will then be examined in the last section.

2.1 Big business preference for lenient competition policy

Competition policy is a branch of regulatory policy aiming to protect market competition through legal rules prohibiting and sanctioning generally defined categories of market conduct and corporate transactions. It has three main pillars, each embodying a different prohibition. First, businesses are not allowed to cooperate in a way that would restrict competition to exclude competitors or exploit business partners. Such a prohibition forms the core of section 1 of the US Sherman Act[8] as well as Article 101 of the Treaty on the Functioning of the European Union (TFEU). Second, such exclusion and/or exploitation is unlawful also when carried out unilaterally by a single business. This is provided for by section 2 of the Sherman Act[9] and Article 102 TFEU. And, third, businesses may not merge together if that would significantly lessen competition in the market. The relevant legislation here is section 7 of the US Clayton Act[10] and EU Regulation 139/2004.[11] What all the three pillars have in common is that they are addressed to businesses that do or would enjoy – whether jointly or alone – a substantial extent of market power because that is exactly what a lack of competition happens to bring about. The addressee of US and EU competition rules is thus big business; companies comprising it are the – potential or even actual – infringers of the rules and, hence, defendants in the eventual enforcement proceedings.[12]

There is a conflict between how interventions to protect competition are viewed by the society and by big business. The society protects competition to avoid creation and exercise of market power because the latter leads to harmful societal effects. The prevailing understanding of these effects is informed by neoclassical economics and revolves around efficiency and consumer welfare. If there is substantial power in a market, the economic learning teaches us, this may

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8 Sherman Antitrust Act of 1890, s. 1, 15 U.S.C. 1.

9 Sherman Antitrust Act of 1890, s. 2, 15 U.S.C. 2.

10 Clayton Antitrust Act of 1914, s. 7, 15 U.S.C. 18.

11 Council Regulation (EC) No. 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L24/1, 29 Jan. 2004.

12 Another possible way to put it is that big business is the 'regulated industry'. To be sure, this term is most commonly used in the context of sectoral regulation. For instance, all telecommunication companies may be said to constitute an industry regulated by telecommunication laws. In a broader sense, however, it is possible to say that also big business as the addressee of competition rules forms a distinct 'industry'. This industry will of course cut across different business sectors.

generate a societal deadweight loss in the form of decreased output and consequently consumption.[13] It is also being increasingly often pointed out that exercise of market power amplifies economic inequality in the society: consumers pay more and employees earn less than they would in competitive markets. By contrast, big business – and hence also its owners and high managers – profits from market power. As a matter of fact, market power amounts to the ability to *profitably* raise product prices above competitive levels[14] or, analogically, decrease wages below such levels.[15] It is thus clear that interventions against market power jeopardize the interests of those who do or would like to hold it.[16] To put it bluntly, big business prefers competition policy that is lenient.

An important feature of competition policy is that big business is well positioned to influence it. This is because its interests are much more concentrated than interests of other stakeholders such as consumers and small businesses. To be sure, the fact that competition policy cuts across the entire economy instead of dealing with a particular business sector means that addressees of competition rules may not coordinate their actions easily. However, the mere fact that infringements of competition policy typically generate significant profit to a single player whereas the harm is dispersed over a large number of isolated actors[17] means that interests of potential and actual infringers are more concentrated than those of their victims. The effect of the associated 'economies of scale'[18] is that 'big business is often the best-represented faction present'[19] at discussions about competition policy whereas '[c]ompetition has no lobby'.[20]

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13 For example, Massimo Motta, *Competition Policy: Theory and Practice* 39–89 (Cambridge University Press 2004).

14 For example, Damien Geradin, Anne Layne-Farrar & Nicolas Petit, *EU Competition Law and Economics* 79 (Oxford University Press 2012).

15 The effect of market power on prices (including wages) is one most commonly considered but definitely not exclusive. Holders of market power may profit also from other actions harming their business partners, such as lowering the quality of their products.

16 Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* 4 (Harvard University Press 2019).

17 Fred S. McChesney, Michael Reksulak & William F. Shughart II, *Competition Policy in Public Choice Perspective*, in *The Oxford Handbook of International Antitrust Economics* 162 (Roger D. Blair & D. Daniel Sokol eds, Oxford University Press 2015).

18 Adi Ayal, *The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail It*, 1 J. Antitrust Enf't 221, 225 (2013).

19 Christopher Townley, *A Framework for European Competition Law: Co-ordinated Diversity* 155 (Hart Publishing 2018).

20 Frederic Jenny et al., *Competition Policy Objectives Panel Discussion*, in *European Competition Law Annual 1997: The Objectives of Competition Policy* 24 (Claus-Dieter Ehlermann & Laraine L. Laudati eds, Hart Publishing 1998).

2.2 Influence and regulatory capture

When discussing influence on competition policy, it is customary to distinguish between making of general rules for instance in the form of legislation or guidelines on the one hand, and enforcement of these rules in individual cases on the other.[21] The former type of decision-making is sometimes suggested to be more susceptible to stakeholders' interests[22] because officials designing competition rules tend to be less constrained by existing law than their colleagues enforcing those rules.[23] However, also enforcement of the rules is in reality often associated with considerable discretion[24] – including for instance considerable prosecutorial discretion of agencies not to run a case[25] – and thus not immune to influence.[26] Therefore, unless specified otherwise, this article understands distortion of competition policy as distortion of either type of decision-making.

At any rate, before focusing on the distortion, it should be acknowledged that not all interactions of competition rules' addressees with the decision-making process are undesirable. To be able to perform their tasks effectively, public officials need to gather relevant factual information, and addressees may serve as one of its sources.[27] This holds not only for enforcement proceedings, in which defendants are expected to advance arguments and present evidence. Also the design of the policy relies on external input, as reflected by US and EU competition agencies regularly consulting interested stakeholders, including potential infringers.[28]

Still, the influence of big business interests on competition policy may be distortive, eventually bringing about *regulatory capture*. This term of art describes situations in which those who are supposed to be constrained by the regulatory

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21 For example, Cristina Mariani & Simone Pieri, *Lobbying Activities and EU Competition Law: What Can Be Done and How?*, 5 J. Eur. Competition L. & Prac. 423, 426 (2014).

22 For example, Gail Orton, *When Lobbying DG COMP Makes Sense: European Competition Officials are Policy-Makers as Well as Regulators*, 7 Competition L. Int'l 50, 53 (2011).

23 Stephen Wilks, *Understanding Competition Policy Networks in Europe: A Political Science Perspective*, in *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* 74 (Claus-Dieter Ehlermann & Isabela Atanasiu eds, Hart Publishing 2004); Jonathan B. Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in The Communications Sector*, 9 Competition Pol'y Int'l 1, 2–3 (2013).

24 Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 Antitrust L.J. 241, 256 (2012).

25 David Freeman Engstrom, *Corraling Capture*, 36 Harv. J.L. & Pub. Pol'y 31, 36 (2013).

26 Christopher Decker, *Economics and the Enforcement of European Competition Law* 113 (Edward Elgar 2009); Baker, *supra* n. 23, at 6; Andrew I. Gavil & Harry First, *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century* 22–25 (MIT Press 2014); Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition* 245–246 (Harvard University Press 2016).

27 Kwak, *supra* n. 6, at 76; Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 Wake Forest L. Rev. 569, 595 (2012).

28 Townley, *supra* n. 19, at 104.

policy have acquired persistent influence that is disproportionate in degree.[29] The respective policy does not need to be subverted in its entirety. A partial distortion is also possible – the public benefits of regulation will then not be eliminated but still reduced.[30] This is to say that a captured competition policy does not necessarily manifest itself through no interventions against market power whatsoever: The most harmful types of cases such as secret price cartels or mergers to monopoly will likely always be enforced against. At the same time, however, influence of competition rules' addressees may lead to an unwarranted tolerance towards anti-competitive practices that are less unequivocal or to a general slowing down of enforcement activity.

Regulatory capture need not be a result of an intentionally pursued strategy. To be sure, some scholars do reserve the term only for settings in which regulated interests exert disproportionate influence through deliberate action.[31] Others, however, extend it also to situations where this occurs inadvertently.[32] The current article follows the latter approach because – as elaborated below – the processes animating cultural capture may be in operation regardless of whether anyone intends them to.

2.3 Mechanisms of capture

Even though the mechanism underlying cultural capture is distinct from the traditional economic account of how regulatory policy gets captured, it may still be helpful to introduce the latter at least briefly. Made famous by Stigler,[33] this account assumes that what makes public officials disproportionately responsive to the desires of the regulated entities is their proclivity to seek private gains and avoid private costs.[34] For example, an official may act in favour of the

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[29] Lawrence G. Baxter, *'Capture' in Financial Regulation: Can We Channel It toward the Common Good*, 21 Cornell J.L. & Pub. Pol'y 175, 176 (2011); Rachel E. Barkow, *Explaining and Curbing Capture*, 18 N. C. Banking Inst. 17, 17–22 (2013).

[30] Nicholas Bagley, *Agency Hygiene*, 89 Tex. L. Rev. *See Also* 1, 5 (2010); Barkow, *supra* n. 29, at 17; Daniel Carpenter & David A. Moss, *Introduction*, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 9 (Daniel Carpenter & David A. Moss eds, Cambridge University Press 2014); Kwak, *supra* n. 6, at 74; Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture*, 14 Regul. & Governance 271, 273 (2020).

[31] Carpenter & Moss, *supra* n. 30, at 14; Samuel McPhilemy, *Formal Rules Versus Informal Relationships: Prudential Banking Supervision at the FSA Before the Crash*, 18 New Pol. Economy 748, 753 (2013).

[32] Kwak, *supra* n. 6; Gerry Cross, *Addressing the Problem of Cyclical Capture*, in *The Making of Good Financial Regulation: Towards a Policy Response to Regulatory Capture* 180 (Stefano Pagliari ed., Grosvenor House Publishing 2012).

[33] George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. of Econ. & Mgmt. Sci. 3 (1971).

[34] Carpenter & Moss, *supra* n. 30, at 18.

regulated entities expecting that she will in return receive a better-paying job.[35] While this incentives-based capture might theoretically contribute to a distortion of competition policy, it is usually believed to play a rather limited role in this area.[36]

The type of capture considered by this article is different. It concerns public officials' policy-relevant views rather than incentives.[37] Its working has been expressed in various formulations: For one commentator, the capture obtains when 'officials' actions, interpretations and perceptions of reality come into alignment with those of the actors they are supposed to be regulating',[38] and for others it entails 'institutionalization of industry views as the regulator's view',[39] respectively 'align[ing] the way in which regulators think about problems with the view of the industry they regulate'.[40] Others still say that the officials 'come to see the world the way that [the] regulated entities do',[41] 'end[] up sharing the views of the industry',[42] or start to 'think like it'.[43] As mentioned in the introduction, the present article is concerned with capture of this sort: it considers a potential distortion of competition officials' views, whereas the scope of the inquiry is narrowed down to social influence of representatives of the regulated entities as the particular transmission mechanism behind the distortion.

With a bit of simplification, it is possible to identify two opposing broad worldviews concerning competition policy: pro-interventionism and anti-interventionism. Pro-interventionists are convinced that government interference with the market is warranted relatively often. For anti-interventionists, in contrast, such situation arises comparatively rarely. While adherence to either worldview may to some extent follow from the goal(s) that one ascribes to the given competition system,[44] let us stick to the prevailing paradigm under which competition policy is

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35 For example, Joseph E. Stiglitz, *Ethics, Economic Advice, and Economic Policy*, in *The Oxford Handbook of Professional Economic Ethics* 500 (George F. DeMartino & Deirdre N. McCloskey eds, Oxford University Press 2016).

36 Graham, *supra* n. 1, at 963.

37 Note that the terminology is not settled – different varieties of views-based capture have been called cognitive, cultural, deep, intellectual or social. E.g., Mathilde Poulain, *Are Financial Regulators Insulated from Regulatory Capture?* (working paper 2016), https://www.researchgate.net/publication/309734401_Are_Financial_Regulators_Insulated_from_Regulatory_Capture.

38 McPhilemy, *supra* n. 31, at 753.

39 Deniz Igan & Thomas Lambert, *Bank Lobbying: Regulatory Capture and Beyond*, in *The Political Economy of Financial Regulation* 131 n. 6 (Emilios Avgouleas & David C. Donald eds, Cambridge University Press 2019).

40 Stefano Pagliari, *How Can We Mitigate Capture in Financial Regulation?*, in *The Making of Good Financial Regulation: Towards a Policy Response to Regulatory Capture* 16 (Stefano Pagliari ed., Grosvenor House Publishing 2012).

41 Bagley, *supra* n. 30, at 5.

42 Poulain, *supra* n. 37, at 6.

43 Engstrom, *supra* n. 25, at 32.

44 For instance, those who believe that competition policy ought to protect 'economic freedom' of market actors will likely advise more intervention than those who endorse efficiency.

supposed to protect competition that generates efficiency and consumer welfare. Even if this goal is accepted as given, there may still be considerable disagreement about what exactly competition policy ought to do in order to achieve it. This is because people's opinions in this respect may be based on different positive beliefs, i.e., beliefs about how the world works.

It is in this context possible to distinguish between two pairs of beliefs.[45] On the one hand, there are the pro-interventionist beliefs that markets are often imperfect and public institutions competent to mitigate these imperfections. On the other hand, according to the anti-interventionist beliefs, markets tend to be self-correcting and public intervention counter-productive; these beliefs are strongly associated with the so-called Chicago school of competition thinking. With big business defendants clearly profiting from competition policy being based on anti-interventionist views, an eventual competition officials' disproportionate adherence to such views would amount to their minds being captured by regulated interests.

Public officials' views may be shaped in favour of big business through numerous ways. Next to the insidious processes of social influence, on which we will focus in the remainder, an important role can be played also by the scholarly debate. It is therefore hardly surprising that big business has been generously funding articles, academic initiatives and think tanks concerning competition policy.[46] To give an example, a report exposed that Google sponsored 331 research papers on competition and other matters related to its activities published between 2005 and 2017.[47] The problem has become so wide-spread that the leading association of competition scholars ASCOLA adopted a declaration of ethics addressing it.[48] While distortion of competition policy through academia goes beyond the scope of this article, big business' readiness to invest heavily into activities shaping competition experts' – as well as laymen's – views demonstrates the enormous stakes that big business has in those views.

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45 Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 Antitrust L.J. 649, 667–669 (2014).

46 Ezrachi & Stucke, *supra* n. 26, at 247; Ariel Ezrachi, *Sponge*, 5 J. Antitrust Enf't 49, 70–71 (2017); Cyril Ritter, *Corporate Funding for Antitrust Academics Can Be a Problem*, Medium (20 Jul. 2017), https://medium.com/@CyrilRitter/corporate-funding-for-antitrust-academics-can-be-a-problem-9efa604170a.

47 *Google Academics Inc.*, Campaign for Accountability (11 Jul. 2017), https://www.techtransparencyproject.org/sites/default/files/Google-Academics-Inc.pdf. It ought to be added that the report itself has been heavily criticized due to an involvement of Google's rivals.

48 *Prof Lianos Leads Effort to Promote Disclosure Rules for Corporate Sponsorship of Academic Research*, University College London (16 Jul. 2018), https://www.ucl.ac.uk/laws/news/2018/jul/prof-lianos-leads-effort-promote-disclosure-rules-corporate-sponsorship-academic.

2.4 Cultural capture

Let us finally proceed to cultural capture itself. The idea that public officials' views can be shaped by their social interaction with representatives of the private sector has been brought up by a number of scholars, in particular in the context of the global financial crisis. For instance, Stiglitz has observed that because 'mindsets can be shaped by people you associate with', financial officials who had close ties to representatives of the finance industry came to think that what was good for the industry was good also for the society at large.[49] Similarly, Davidoff has noted that people regulating and supervising the finance industry 'look to that industry for their social interactions', and that 'their worldview is affected by the people they interact with'.[50] And according to Buiter, financial officials did 'internalise and adopt, as if by osmosis, the objectives, interests, fears, hopes and perception of reality of [those] they [were] meant to regulate'.[51]

These initial intuitions have however been hardly further elaborated on, perhaps due to the analytical tractability of the issue proving unusually challenging. A notable exception is Kwak's theorization of cultural capture,[52] which provides the conceptual framework on which the current article is based. Kwak explains that cultural capture 'operates through a set of … understandings about the world'[53] held by public officials, which are being shaped in favour of the regulated entities through insidious psychological processes associated with the officials' interaction with representatives of these entities.[54] Kwak contrasts these processes with rational persuasion,[55] with traditional capture based on material self-interest,[56] as well as with other processes shaping officials' views.[57] Most crucially, Kwak identifies three distinct – albeit mutually related – channels through which social interaction with representatives of the private sector may have bearing on the views of public officials: public officials socially identifying with the representatives, perceiving them as having higher status, and developing professional and personal relationships with them.

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49 Jo Becker & Gretchen Morgenson, *Geithner, Member and Overseer of Finance Club*, The New York Times (26 Apr. 2009), https://www.nytimes.com/2009/04/27/business/27geithner.html.

50 Davidoff, *supra* n. 5.

51 Willem H. Buiter, *Lessons from the Global Financial Crisis for Regulators and Supervisors*, in *The Crisis and Beyond* 79 (Henning Klodt & Harmen Lehment eds, Kiel Institute for the World Economy 2009).

52 Kwak, *supra* n. 6.

53 *Ibid*., at 79.

54 It is not clear why Kwak calls capture arising through social interaction *cultural* capture. It might seem more fitting to use the term *social* capture as Davidoff. *See* Davidoff, *supra* n. 5. For consistency, however, this article sticks to Kwak's terminology.

55 Kwak, *supra* n. 6, at 80–81.

56 *Ibid*., at 75.

57 *Ibid*., at 94.

Before examining the channels in greater detail, two general comments are in order about Kwak's account of how public officials take over views from representatives of regulated entities. First, while the sources that Kwak draws on tend to be mainly (behavioural-)economic studies, the phenomena that he builds into his framework are quintessentially social-psychological.[58] For this reason, the present article emphasizes the lens of social psychology,[59] focusing on the issue of *social influence*. This is a term used by social psychologists for a range of processes whereby one's views – and for that matter also actions – are shaped by his or her social environment,[60] i.e., social interactions in a broad sense. Each of the three channels identified by Kwak hence represents a different modality of social influence.

Second, the representatives of the private sector with whom public officials socially interact do not need to be internal employees of the regulated businesses. Kwak points out that cultural capture may as well arise through public officials' social interaction with external agents of these businesses.[61] In so far as these agents hold policy-relevant views favouring the businesses, their eventual social influence on the officials through any of the identified channels will bring about the same effect. This will turn out relevant for our purposes because, as we will see below, representatives of businesses subjected to competition policy are often lawyers and consultants hired externally.

Let us now nevertheless return to Kwak's general framework, proceeding to the actual channels of influence. It was already mentioned that the first one has to do with self-identification.[62] As shown by research, we all identify with some social groups and this shapes our mindset. Having reviewed dozens studies on this issue, Gaffey and Hogg summarize that '[w]hen people claim group membership and identify strongly with a group, they take on the attitudes, behaviours, and

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58 This has been recognized for instance by Hudson. William C. Hudson, *When Influence Encroaches: Statutory Advice in the Administrative State,* 26 Wm. & Mary Bill Rts. J. 657, 673 (2018).

59 The suitability of the social-psychological lens for cultural capture has been recognized by Kwak himself in private correspondence with the author. A social-psychological approach to capture has been endorsed by a number of other commentators. *See,* for example, Willem H. Buiter, *The Financial System Ten Years After The Financial Crisis: Lessons Learnt* 17 (working paper 2018), https://willembuiter.com/NAEC.pdf; Dennis Veltrop & Jakob de Haan, *I Just Cannot Get You Out of My Head: Regulatory Capture of Financial Sector Supervisors*, DNB Working Paper No. 410 (2014), https://ssrn.com/abstract=2391123.

60 For example, Robert H. Gass, *Sociology of Social Influence*, in *International Encyclopedia of the Social & Behavioral Sciences* 348 (James D. Wright ed., Elsevier 2d ed. 2015).

61 Kwak, *supra* n. 6, at 83.

62 *Ibid.*, at 81–85. The general possibility of capture based on this process has been argued also by other authors. *See* Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. Pub. Pol'y 61, 61 (1992); Igan & Lambert, *supra* n. 39, at 131 n. 6.

norms of the group as their own'.[63] Such effects have been argued also with regard to public officials.[64] Their eventual feelings of kinship towards representatives of the private sector could hence lead to distortion of regulatory policy.[65]

An important phenomenon associated with officials' self-identification is the revolving door. When there are many people who have worked in the public office as well as in the private practice, it indicates the existence of a common social group. As Kwak puts it, the officials and the representatives of the private sector are then 'really the same people, only at different points in their careers'.[66] The normalcy of the revolving door may in addition reinforce the sense of common identity, even as regards officials who have not turned the cloak themselves: If many of my colleagues move to the private sector and many people from the private sector become my colleagues, I must have a lot in common with people working in the private sector.

Another channel of influence identified by Kwak as relevant for cultural capture concerns social status.[67] Status generally refers to one's rank within a group hierarchy or, in other words, to the prestige he or she enjoys. 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.[68] Applying this lesson to the context of regulation, Kwak argues that the mindset of public officials may be shaped towards positions favourable to the private sector when they hold its representatives in great esteem.[69]

One of the most important sources of status for professionals active in the context of economic policy is economic success.[70] This is in line with studies showing that people earning a larger income tend to enjoy a higher position in the social hierarchy and, consequently, be perceived as better at their job than their poorer colleagues.[71] Clearly, the level of income does not necessarily reflect how

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63 Amber M. Gafey & Michael A. Hogg, *Social Identity and Social Influence*, in *The Oxford Handbook of Social Influence* 259 (Stephen G. Harkins, Kipling D. Williams & Jerry Burger eds, Oxford University Press 2017).

64 For example, Giuliano G. Castellano & Geneviève Helleringer, *The Social Psychology of Financial Regulatory Governance*, in *The Political Economy of Financial Regulation* 172 (Emilios Avgouleas & David C. Donald eds, Cambridge University Press 2019).

65 For instance, a higher (self-reported) identification of financial officials with the finance industry turned out to be associated with a poorer performance of supervisory tasks. Veltrop & de Haan, *supra* n. 59.

66 Kwak, *supra* n. 6, at 83.

67 *Ibid*., at 85–89.

68 Shane Thye & Christine Witkowski, *Status Relations*, in *Encyclopedia of Social Theory* 795 (George Ritzer ed., Sage 2005).

69 Kwak, *supra* n. 6, at 85–89.

70 *Ibid*., at 87.

71 Thye & Witkowski, *supra* n. 68.

good one is at what he or she does. Research nevertheless reveals that we often associate status with characteristics that do not reflect actual competence.[72] Along these lines, Kwak argues that where economic prosperity is seen as evidence of merit, working in the private sector – full of 'very successful, very rich people talking about economic efficiency'[73] – tends to be associated with great prestige. As a result, public officials responsible for economic policy may attribute an elevated status to people who succeed and make a fortune in the private sphere.[74]

The last channel of influence concerns interpersonal relationships.[75] The two former channels may to some extent operate even if public officials do not know the representatives of the private sector in person. Actual meeting and talking to them nevertheless further intensifies the social influence.[76] The intensity may be expected to increase with frequency of interaction because '[r]epeated interactions can motivate both parties to get along and develop an affinity for one another'.[77] In short, when people from the public and private sectors spend a lot of time together, 'they develop common ways of seeing the world, a common language, norms and ideas'.[78]

Kwak notes two ways through which the interpersonal relationships between public officials and representatives of the private sector may develop. First, they may begin through the process of revolving door.[79] People who come to the private sector from the government often maintain contact with their former fellow officials and, conversely, those who move in the opposite direction stay in touch with people in the private world. Second, relationships between the officials and the representatives start and build up as they interact professionally in the course of their work.[80]

Having reviewed the framework of cultural capture, we should now be able to appreciate its usefulness. It allows one to adopt a perspective different from that based on the traditional incentives-based theory of capture and, thus, to pay attention to potential distortions of policy that are invisible to the traditional theory. What is particularly helpful is that the framework carefully disentangles

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72 Linda L. Carli, *Social Influence and Gender*, in *The Oxford Handbook of Social Influence* (Stephen G. Harkins, Kipling D. Williams & Jerry Burger eds, Oxford University Press 2017).

73 Asher Schechter, *The Lobbyists and the Regulators Were Really, Socially and Culturally, the Same People*, ProMarket (1 Jun. 2016), https://promarket.org/2016/06/01/promarket-interview-james-kwak-on-the-causes-of-cultural-capture/.

74 Kwak, *supra* n. 6, at 87.

75 *Ibid*., at 89–93.

76 Peter Yeoh, *Capture of Regulatory Agencies: A Time for Reflection Again*, 40 Bus. L. Rev. 134, 141 (2019).

77 Rex, *supra* n. 30, at 286.

78 Townley, *supra* n. 19, at 256.

79 Kwak, *supra* n. 6, at 91.

80 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 Int'l Affs. 647, 653 (2010); Kwak, *supra* n. 6, at 91–92; Igan & Lambert, *supra* n. 39, at 131 n. 6.

different channels of social influence. As illustrated, it for instance shows that the revolving door may impact officials' mindset through two different channels: self-identification and relationships. This nuance may prove essential when searching for eventual solutions to the problem of cultural capture.

3 COMPETITION PRACTITIONERS LEANING TOWARDS ANTI-INTERVENTIONISM

Before the next part considers the channels through which competition officials may acquire anti-interventionist views from representatives of the private sector, the current one focuses on who these representatives are and whether it is possible that they hold such views. In competition policy, unlike for instance in financial policy, the professionals whose interaction with public officials might bring about cultural capture are not the core staff of the regulated entities. The tasks of managers running potential and actual infringers of competition rules have usually very little to do with the job of competition officials,[81] which is why their social interaction is rare. There is nevertheless a group of experts who do form a link socially connecting the private sector with the officials: competition practitioners.[82] As elaborated below, due to most of them providing the bulk of their services to businesses desiring to avoid competition liability, these practitioners may hold prevailingly anti-interventionist views.

3.1 Defendants as the main clients of practitioners

For the purposes of this article, competition practitioners are to be understood as experts on competition matters who provide their services in the private sector. They are primarily comprised by two professions: lawyers and economists.[83] Their services most often concern liability under existing competition rules, be it consultation and representation with respect to actual competition proceedings or advice on compliance issues, but they may also consist in lobbying, i.e., private influence on competition policy through other channels than regular pleading in proceedings.[84] Provision of these services can be organized in two different ways. First, they may be provided through the market. In that case the experts work as

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81 Wilks & McGowan, *supra* n. 2, at 242.

82 Angela Wigger & Andreas Nölke, *Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement*, 42 J. Common Mkt. Stud. 487, 504 (2007).

83 *See infra* text accompanying nn. 116–119.

84 Angela Wigger, *Towards a Market-Based Approach: The Privatization and Micro-Economization of EU Antitrust Law Enforcement*, in *The Transnational Politics of Corporate Governance Regulation* 105 (Henk Overbeek, Bastiaan van Apeldoorn & Andreas Nölke eds, Routledge 2007).

freelancers or within professional services companies including law firms, economic consultancies, and agencies specialized in lobbying also known as public or governmental affairs consultancies.[85] Second, the experts may be directly employed by those who demand their services. Such internalization of competition practitioners' services may concern for instance compliance counselling or litigation supervision through in-house lawyers[86] or lobbying through practitioners employed not only in individual companies but often also in their associations.[87]

The main clients of competition practitioners are big firms facing the threat that their market practices or corporate transactions will be found in breach of competition rules.[88] No estimates are unfortunately available on the actual share with which work for different client groups contributes to practitioners' revenues. Still, it is obvious that assignments from those who want to avoid liability prevail largely. For instance, Foer and Lande observe that the US defence bar is much larger than the plaintiffs' bar.[89] Lianos argues the same with respect to economists working in competition practice: '[T]here are many more defence experts than plaintiff experts'.[90] Also a look at the profiles of law firms and economic consultancies featured in the GCR 100, a ranking of the world's top competition practices put together by the Global Competition Review, reveals that these top players provide their services mostly to such clients. This is confirmed by Mueller: 'Big private law firms … are, for the most part, engaged in the defense of large enterprises charged with antitrust violations'.[91] In short, competition practitioners are mostly busy with defence-side activities such as advising their clients on how to structure their contracts with business partners so that they do not violate competition rules, pleading to enforcers that acquisitions of other companies by their clients should be allowed under the rules, or convincing policy-makers that the rules should be made less strict.

The apparent reason why competition practitioners assist mainly with avoiding liability is that the clients simply demand such assistance the most. Certain types of services are in fact required virtually only by – actual or potential – infringers;

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85 Stephen Kinsella, *Antitrust and Lobbying*, 7 Competition L. Int'l 42, 42 (2011); Orton, *supra* n. 22, at 51; Mariani & Pieri, *supra* n. 21, at 426.

86 Wilks & McGowan, *supra* n. 2, at 243–244; Baker, *supra* n. 23, at 5.

87 Mariani & Pieri, *supra* n. 21, at 424, 432; Wilks & McGowan, *supra* n. 2, at 242–243.

88 Townley, *supra* n. 19, at 151; Wouter P. J. Wils, *Independence of Competition Authorities: The Example of the EU and Its Member States*, 42 World Competition 149, 161 (2019).

89 Albert A. Foer & Robert H. Lande, *The Evolution of United States Antitrust Law: The Past, Present, and (Possible) Future*, 16 Nihon U. Compar. L.J. 147 (1999).

90 Ioannis Lianos, *'Judging' Economists: Economic Expertise in Competition Law Litigation: A European View*, in *The Reform of EC Competition Law: New Challenges* 231 (Ioannis Lianos & Ioannis Kokkoris eds, Kluwer Law International 2010).

91 Charles E. Mueller, *Step 1 in Reforming US Antitrust: Abolish the Economics Units at Justice and the FTC*, 24 Antitrust L. & Econ. Rev. 1, 10 (1992).

these include services concerning mergers, compliance and lobbying.[92] The dominance of demand for defence assistance has largely to do with the above-mentioned concentration of the interests concerned. Unlike those who have market power, its victims are frequently not willing or able to hire anyone to protect their interests.[93] To be sure, some competition practitioners do specialize in representation of consumers and small businesses. It is also true that even the big players themselves sometimes act as plaintiffs or complainants in competition proceedings. This however represents a mere fraction of competition practitioners' work, whereas for most part they are – as argued by one of the most prominent European competition lawyers – 'incentivised, by huge fees, to participate in [protecting monopoly profits]'[94] rather than protecting competition and its beneficiaries.

3.2 Advocating and believing

The fact that the bread and butter of competition practitioners is mainly to serve large corporate defendants may make the practitioners prevailingly anti-interventionist in two different ways. First, the conviction that market interventions are warranted only rarely could be prevalent already among newcomers. This would be a consequence of the obvious fact that one is more likely to find a job in practice if his or her views are congenial to the needs of the clients. Such selection of competition experts on the basis of competition-related views is often argued to happen with respect to economists who give testimonies in competition proceedings. This claim is usually advanced in order to dispel concerns that expert witnesses might be partial to the party that hired them: if the testimony is based on genuine pre-existing views, the argument goes, no impropriety occurs. It is however important to realize that such dynamics may still lead to an aggregate bias of the practitioners' community: since there is much more work to be carried out for defendants, the community may be expected to welcome primarily people with anti-interventionist views.[95]

Second, views against market intervention may develop or be further reinforced in the practitioners' minds over the course of their career. This is likely to

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92 Lianos, *supra* n. 90, at 231.

93 William F. Shughart II, *Public-Choice Theory and Antitrust Policy*, in *The Causes and Consequences of Antitrust: The Public-Choice Perspective* 12 (Fred S. McChesney & William F. Shughart II eds, The University of Chicago Press 1995); Wigger, *supra* n. 84, at 112; Wouter P. J. Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 37 World Competition 405, 432–433 (2014).

94 Richard Whish, *Do Competition Lawyers Harm Welfare?*, Concurrentialiste (11 May 2020), https://leconcurrentialiste.com/richard-whish-welfare/.

95 Lianos, *supra* n. 90, at 231.

happen not only through daily interaction with colleagues and business clients, but also due to their job being to 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',[96] and also 'economists have learned to be advocates of the interest of their clients'.[97] This would pose no problem if people's views were immune from the positions that they prevailingly advocate in their professional capacity; it would then make little sense to expect an anti-interventionist bias of the competition practitioners' community – the fact that the practitioners mostly happen to argue against liability would not influence the distribution of their actual views.

It however turns out that it is not 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 their actions and views.[98] A person experiencing inconsistency between the two becomes psychologically uncomfortable and, hence, is motivated to reduce the cognitive dissonance by adjusting the views to the actions.[99] This phenomenon has been observed by Eisenberg also with regard to legal practice:

> 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.[100]

A similar point has been made by Little:

> 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.[101]

In the context of competition policy, it may moreover not be all that difficult to convince oneself that various pro-defendant views are justifiable because there is a great body of scholarship presenting minimal market intervention as highly

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96 Susan N. Herman, *Balancing the Five Hundred Hats: On Being a Legal Educator/Scholar/Activist*, 41 Tulsa L.J. 637, 638 (2006).

97 Jenny et al., *supra* n. 20, at 24.

98 For example, *Cognitive Dissonance: Reexamining a Pivotal Theory in Psychology* (Eddie Harmon-Jones & Judson Mills eds, American Psychological Association 2d ed. 2019).

99 Scott Plous, *The Psychology of Judgment and Decision Making* 30 (McGraw-Hill 1993).

100 Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. Legal Educ. 391, 393–394 (1993).

101 Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. Tex. L. Rev. 345, 369–370 (2001) (footnote omitted).

beneficial to the society. As a result, competition practitioners regularly working for defendants may easily happen to absorb anti-interventionist teachings.[102]

All in all, it thus appears quite possible that working mainly for clients who wish to avoid competition liability makes the community of competition practitioners lean at least slightly toward anti-interventionism. To be sure, it would be pertinent to validate this inference empirically; yet, until such studies are available, it appears to be a reasonable one. In fact, as argued by Baker, the alignment of the practitioners' views with preferences of their clients is hardly surprising.[103] It is an outcome of who is likely to get hired as well as of the how our work shapes what we think. Clearly, not all competition practitioners are to be expected to be affected by the said bias. People on both sides of the divide obviously benefit from the very existence of competition rules and their enforcement, which may lessen one's attachment to anti-interventionism. In addition, some practitioners will display greater resistance to the pressures of cognitive dissonance and others will even show a bias in the opposite direction. On average, however, the sheer prevalence of pro-defendant work may easily make anti-interventionist sentiments widespread among competition practitioners.

4 COMPETITION OFFICIALS RECEIVING ANTI-INTERVENTIONISM

Having established that policy-relevant views of competition practitioners' may lean towards anti-interventionism, we shall now examine the risk of these views eventually being received by competition officials. As mentioned above, Kwak has identified three channels through which social interaction between representatives of the private and public sector may shape the latter's mindset.[104] The present part looks into whether the preconditions enabling each of these channels are present in US and EU competition policy. The first section thus discusses competition officials' self-identification with practitioners, the second one the gap between the officials' and practitioners' social status, and the third one the personal relationships between them. The last section then summarizes that especially US competition policy – albeit not necessarily due to anyone's intentional action – shows conditions that could be conducive to cultural capture.

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[102] Mueller, *supra* n. 91, at 10.
[103] Baker, *supra* n. 16, at 239 n. 56.
[104] Kwak, *supra* n. 6.

4.1 Self-identification

We have seen that representatives of the private sector may exert social influence on the views of public officials if the officials self-identify as belonging to the same ingroup.[105] What thus interests us in this section are potential indications that competition officials see themselves as peers of competition practitioners. And, as will be elaborated, there are a number of such indications.

A growing number of people specialize in competition matters. While these matters used to be just one of multiple areas in one's portfolio, many professionals now pursue them as the main or even exclusive subject of their careers.[106] These specialists tend to share the same background[107] and 'often have an allegiance to competition [policy] as a discipline isolated from other areas'.[108] This then leads to the existence of a tight-knit competition community whose members 'enjoy a feeling of kinship'[109] with one another. Some commentators have then in particular noted that the last decades have seen the emergence of a joint trans-Atlantic community.[110]

The competition community encompasses officials as well as practitioners.[111] It is true that, on a full account, it includes also academics. Addressing the phenomenon of cultural capture, this article nevertheless focuses only on social interaction between experts occupying the former two roles. A special focus on these two roles is warranted because they stand closer to each other than to academics. As a matter of fact, due to the character of their work, competition experts working in public office and private practice could be and have been from a certain perspective both seen as 'practitioners'[112]: they both work on enforcement cases and shaping the policy.[113] The similarity between the roles is reflected not least in how often experts move from one to the other (see below). In contrast,

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105 *See supra* text accompanying nn. 62–65.

106 Frans van Waarden & Michaela Drahos, *Courts and (Epistemic) Communities in the Convergence of Competition Policies*, 9 J. Eur. Pub. Pol'y 913, 928 (2002); Ioannis Lianos, *The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis*, CLES Working Paper No. 5, at 18 (2012), https://ssrn.com/abstract=2197025; Townley, *supra* n. 19, at 230.

107 Wilks, *supra* n. 23, at 74.

108 Townley, *supra* n. 19, at 230.

109 Edwin S. Rockefeller, *The Antitrust Religion* 15 (Cato Institute 2007).

110 Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 Cardozo L. Rev. 1111, 1125 (1996); Stephen Wilks, *Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement*, 3 Eur. Competition J. 437, 453 (2007); Hussein Kassim & Kathryn Wright, *Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control*, 32 W. Eur. Pol. 738, 750 (2009).

111 Townley, *supra* n. 19, at 96.

112 For example, Malcolm B. Coate & A. E. Rodriguez, *The Economic Analysis of Mergers* (Center for Trade and Commercial Policy, Monterey Institute of International Studies 1997); Seth B. Sacher & John M. Yun, *Twelve Fallacies of the 'Neo-Antitrust' Movement*, 26 Geo. Mason L. Rev. 1491, 1523 (2019).

113 Wigger, *supra* n. 84, at 114.

academic tasks tend to be somewhat different.[114] Moreover, competition academics have a rather limited relevance for the general social dynamics in the competition community because of their relatively low count. That is not to say that academics have no influence on officials' policy-relevant views through other routes[115]; those nevertheless lie beyond the scope of this article.

A closer look at the competition community reveals that it comprises distinct sub-communities. One dividing line is disciplinary, reflecting the two major competition professions: lawyers and economists.[116] To be sure, these professions closely cooperate with one another[117] and share the broader competition community.[118] Nevertheless, the different type of expertise that they carry reflects in each of them also having a distinct sub-community of its own.[119] Another division is geographical. As mentioned, competition experts based in the United States and Europe – and for that matter around the whole globe – do increasingly often talk to each other. Still, however, not many of them move across the Atlantic in the course of their careers, and their professional identities thus remain largely associated with the jurisdiction of their training. Nonetheless, the social dynamics concerned by this article seem to play out largely the same within either profession on either side of the Atlantic.

As mentioned, a possible indicator of a common identity is the revolving door.[120] And having worked for the government as well as in the private sector is fairly common among competition experts. Let us start with transfers from public office to the private sector. Such transfers are quite frequent: for instance, of the seventy-three officials who left the FTC's Bureau of Competition between 2014 and April of 2020 for another job and could be tracked down, fifty-two turned private practitioners.[121] Such career trajectory is very common as regards junior officials, for whom public office is often only a temporary stop on a way to a position in the private sector, where insider agency experience is highly valued.[122]

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114 Douglas H. Ginsburg & Eric M. Fraser, *The Role of Economic Analysis in Competition Law*, in *Intellectual Property, Competition Law and Economics in Asia* 41 (R. Ian McEwin ed., Hart Publishing 2011).

115 Academics may have influence on policy-relevant views held by members of the competition community through their teaching and writing.

116 Lianos, *supra* n. 90, at 244; Townley, *supra* n. 19, at 96.

117 Lianos, *supra* n. 106, at 17.

118 Townley, *supra* n. 19, at 96, 151.

119 Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 Or. L. Rev. 1383, 1445 (1998); van Waarden & Drahos, *supra* n. 106, at 928; Lianos, *supra* n. 106.

120 *See supra* text accompanying n. 66.

121 *The Top Revolving Door Jobs for Ex-FTC Lawyers and Economists*, The Revolving Door Project (28 May 2020), https://therevolvingdoorproject.org/the-top-revolving-door-jobs-for-ex-ftc-lawyers-and-economists/.

122 Waller, *supra* n. 119, at 1444; Richard A. Posner, *Antitrust Law* 285 (The University of Chicago Press 2d ed. 2001); Lola Avril, *Lobbying and Advocacy: Brussels' Competition Lawyers as Brokers in European Public Policies*, 54 Czech Socio. Rev. 859, 875 (2018).

As Makkai and Braithwaite put it, '[l]awyers 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'.[123] The same holds also for DG Competition, and for many competition economists working at junior government positions.[124] Transfers to the private sector are nevertheless not unusual also for higher ranking officials and, as we will see in the following section, even for those most senior among them.

The destination of departing officials tends to be a service firm – i.e., a law firm, economic consultancy or lobbying agency – rather than a company itself subjected to competition policy. For example, of the fifty-two above-mentioned experts who left the FTC's Bureau of Competition for the private sector, forty-one joined a law firm and only eleven a corporation,[125] with the main corporate poachers being Amazon and Facebook. A study into 455 competition lawyers working for Brussels law firms showed that 18% of them had served in EU institutions, about a half of whom specifically in DG Competition.[126] And while Europe has also seen transfers to – actual and potential – competition defendants such as Apple,[127] their share in hired ex-officials is probably even smaller than in the United States.

Competition experts may move also in the opposite direction, i.e., leave the private sector in order to become officials. Transfers of this sort are seen regularly in the United States, including with regard to positions high in the government hierarchy.[128] They nevertheless virtually always result in only temporary stints, after which the person returns back to the private sector.[129] To illustrate both these points, seven most recent ex-directors of the FTC's Bureau of Competition worked for a law firm both before and after their

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123 Makkai & Braithwaite, *supra* n. 62, at 62.

124 William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 Econ. Inquiry 294, 297 (1992); Lawrence J. White, *Economic Analysis in Antitrust Litigation Support: The Federal Trade Commission's 1986 Challenge to the Proposed Merger of Coca-Cola and Dr Pepper*, in *The Role of The Academic Economist in Litigation Support* 13 (Daniel J. Slottje ed., North-Holland 1999); Ginsburg & Fraser, *supra* n. 114, at 41.

125 *The Top Revolving Door Jobs for Ex-FTC Lawyers and Economists*, *supra* n. 121. The share of corporations may nevertheless be increasing. *See* Cecilia Kang & David McCabe, *Boom Times for Lawyers as Washington Pursues Big Tech*, The New York Times (29 Jun. 2021), https://www.nytimes.com/2021/06/29/technology/boom-times-for-lawyers-as-washington-pursues-big-tech.html.

126 Avril, *supra* n. 122, at 869, 875. Additional 25% had an internship in an EU institution.

127 *Per Hellström*, Corporate Europe Observatory (2 Nov. 2015), https://corporateeurope.org/en/revolvingdoorwatch/cases/hellstrom.

128 Waller, *supra* n. 119, at 1445; David J. Gerber, *Global Competition: Law, Markets, and Globalization* 138 (Oxford University Press 2010); Jonathan Tepper & Denise Hearn, *The Myth of Capitalism: Monopolies and the Death of Competition* 162–163 (Wiley 2018).

129 Waller, *supra* n. 119, at 1445; Gerber, *supra* n. 128, at 138.

term.[130] In Europe, in contrast, practitioners-turned-officials are less frequent.[131] Geradin even says that '[t]he revolving door goes only in one direction with Commission officials leaving the Commission to monetise their expertise' in the private sector.[132] This is to say that, in comparison with their EU counterparts, US competition officials are provided with an additional stimulus to see themselves as peers of practitioners.[133]

Given all the indications that competition officials belong to the same community as practitioners, the question remains how the shared worldview is determined.[134] And the answer appears to be that it is dictated by the practitioners, who – to put it in blunt terms – enjoy an overwhelming dominance in the community.[135] Not only have they access to unmatched resources, which can be used to establish and maintain clout, but also happen to form the by far most numerous constituency within the community. On the latter point, the Global Competition Review reports that the DoJ's Antitrust Division and the FTC employ below 400, respectively 300 competition lawyers and economists.[136] Now compare this with over 9000 members of the American Bar Association (ABA) Antitrust Section,[137] as an institution bringing together US competition

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130 Rick Claypool, *The FTC's Big Tech Revolving Door Problem*, Public Citizen (23 May 2019), https://www.citizen.org/article/ftc-big-tech-revolving-door-problem-report/; *D. Bruce Hoffman*, Cleary Gottlieb, https://www.clearygottlieb.com/professionals/bruce-hoffman; *Ian R. Conner*, Latham and Watkins, https://www.lw.com/people/ian-conner. For information about the current director, *see infra* text accompanying n. 212.

131 Norman Neyrinck & Nicolas Petit, *Conflicts of Interests and Ethical Rules in European Competition Law: A Primer* 8 (working paper 2014), www.emulation-innovation.be/wp-content/uploads/2013/09/Conflicts-of-interests-and-Ethical-Rules-A-Primer-29-08-2014-N.-NEYRINCK-and-N.-PETIT-Working-Paper.pdf.

132 Nicolas Petit, *The Friday Slot – Damien Geradin*, Chillin'Competition (27 Apr. 2012), https://chillingcompetition.com/2012/04/27/the-friday-slot-9-damien-geradin/ (internal quotation marks omitted).

133 The existence of private-to-public transfers may lead to competition officials holding anti-interventionist views also through another mechanism than social influence of current competition practitioners on current competition officials. Public officials coming from the private sector 'tend to have their perspective coloured by their experiences there that they bring forth to the agencies where they now work'. Yeoh, *supra* n. 76, at 141. Hence, when former competition practitioners start making and enforcing competition rules, they are likely to bring their anti-interventionist mindset with them.

134 van Waarden & Drahos, *supra* n. 106, at 928.

135 Waller, *supra* n. 119, at 1446; Gerber, *supra* n. 128, at 138; David J. Gerber, *Comparative Competition Law*, in *The Oxford Handbook of Comparative Law* 1176 (Mathias Reimann & Reinhard Zimmermann eds, Oxford University Press 2d ed. 2019).

136 *United States' Department of Justice*, Global Competition Review, https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197081/united-states-department-of-justice; *United States' Federal Trade Commission*, Global Competition Review, https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197082/united-states-federal-trade-commission.

137 Robert Connolly, *A Plug for the Section of Antitrust Law of the American Bar Association*, Cartel Capers (14 Aug. 2018), http://cartelcapers.com/blog/a-plug-for-the-section-of-antitrust-law-of-the-american-bar-association/. Also consider Stigler's observation that there were 'possibly twenty times' more economists serving as competition practitioners than officials in the United States at the beginning of 1980s. George J. Stigler, *The Economists and the Problem of Monopoly*, 72 Am. Econ. Rev. 1, 7 (1982).

experts.[138] And as for the 500 competition experts working at DG Competition,[139] they cannot by far match the respective number of practitioners either. What is more, the greatest influence within the community is enjoyed by practitioners who work for (actual or potential) infringers and who are thus most likely to espouse anti-interventionism.[140] All in all, it can be concluded that competition officials seem to identify with a community whose views are shaped primarily by practitioners.

4.2 Status differential

We have seen that social influence of people from the private sector on public officials may further be associated with social status.[141] The essential question here is whether competition officials look up to their colleagues working for private parties. And, as we will see, this seems quite possible.

Take for instance the fact that even the most senior competition officials regularly leave the government for jobs in the private sector. Namely, eleven most recent former Directors of the FTC's Bureau of Competition moved directly to private practice after their term. Similarly, four out of five most recent former Directors General for Competition at the European Commission immediately found a job in a big law firm. The fifth one joined the Court of Justice of the European Union, some of whose former judges and their assistants now also work for leading European law firms on competition law agenda.

The appeal of the private sector is clear also when it comes to high-ranking economists. A brief look at Pautler's list of affiliations held by ex-directors of the Bureau of Economics after they have left the FTC reveals that many of them put their enforcement experience to work in economic consultancies.[142] Similarly, of the twenty most recent DoJ's Deputy Assistant Attorneys General for Economic Analysis, seventeen went on to work for an economic consultancy.[143] And as regards the five former Chief Competition Economists of the European

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138 Waller, *supra* n. 119, at 1445.

139 *European Union's Directorate-General for Competition*, Global Competition Review, https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197056/european-unions-directorate-general-for-competition.

140 Albert A. Foer, *Toward Independent Competition Advocacy in the Mediterranean World: Learning from the AAI Model*, Mediterranean Competition Bull. 117, 124–125 (2010); Emily Birnbaum, *Big Tech Defenders Dominate the Country's Top Group of Antitrust Lawyers*, Protocol (29 Mar. 2021), https://www.protocol.com/policy/big-tech-antitrust-legal-association.

141 *See supra* text accompanying nn. 67–69.

142 Paul A. Pautler, *A History of the FTC's Bureau of Economics*, AAI Working Paper No. 15–03, ICAS Working Paper 2015–3, at 140–143 (2015), https://ssrn.com/abstract=2657330.

143 Andrea Beaty, *Closing the Revolving Door in Antitrust*, The American Prospect (16 Sep. 2021), https://prospect.org/economy/closing-the-revolving-door-in-antitrust/.

Commission, information about subsequent consulting work can be found for all but one.

As mentioned, status may be attached to economic success.[144] And both competition lawyers and economists working in the private sector do make significantly more money than their counterparts employed by the government. Namely, a law graduate starting at a Washington law firm earns two to three times more than her peers who take up a job at the competition agencies. The gap gets even greater for more senior experts,[145] with top attorneys often billing USD 1,000 to 2,000 an hour.[146] Also competition officials in the European Union earn less than their colleagues in private practice, as recognized for instance by a Director General for Competition:

> DG Competition is focusing on very specific staff, i.e. lawyers specializing in competition law and economists specializing in industrial organisation. For both of these categories, DG Competition is competing on the labour market with law firms and economic consultancies which are offering salary packages much higher than the Commission can do.[147]

The economic success of competition practitioners is moreover often easily apparent because many of them do not shy away from displaying it, e.g., through the spectacular premises that they occupy.[148]

Given all this, it seems quite possible that competition practitioners enjoy a higher status than competition officials. The gap is then likely larger in the United States. This is due to the generally greater discrepancy in relative remuneration and social status between work in public and private sector in comparison with Europe. As noted by Kwak, a common US perception of people working for the government is that '[i]f they were really talented, they would work for the private sector and make ten times as much of money'.[149] And Geoghegan goes even so far as to say that 'civil service is ridiculed' in America.[150] The risk of cultural capture through the channel of status thus appears greater in the United States.

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144 *See supra* text accompanying nn. 70–74.

145 Charles Smitherman, *Transatlantic Merger Cases: United States – European Community Merger Review Cooperation* 185 (Cameron May 2007).

146 Kang & McCabe, *supra* n. 125.

147 Philip Lowe, *The Design of Competition Policy Institutions for the 21st Century – The Experience of the Europan Commission and DG Competition*, in *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* 11 (Xavier Vives ed., Oxford University Press 2009).

148 Kovacic, *supra* n. 124, at 297 n. 9.

149 Schechter, *supra* n. 73.

150 Thomas Geoghegan, *Were You Born on the Wrong Continent? How the European Model Can Help You Get a Life* 75 (The New Press 2011).

4.3 Interpersonal relationships

The last channel through which people from the private sector may exert social influence on public officials is through interpersonal relationships with them.[151] We should thus want to know how common such relationships are between competition officials and practitioners. It appears that fairly common.

Competition officials and practitioners may get to know each other personally well before assuming these roles. Some connections are formed already while getting ready for a career in competition law or economics. With these being highly specialized fields, many future experts pursue the same university programmes and thus get acquainted during their studies. Later, one's social network further expands in the course of employment. As discussed above, it is common that competition experts move between the public and private sector. And their personal ties with ex-coworkers from the other side of the barricade frequently continue even after such a turn of a coat.[152]

Another possibility is that the relationship develops between current competition officials and practitioners. Their jobs often bring them together, which 'personifies their counterparts, breaking down the sense of "other" '.[153] There are two typical settings for such encounters. First, the experts meet face to face on the occasion of individual enforcement cases[154] and of rule-making initiatives,[155] be it at official hearings[156] or in less formal contexts. Second, numerous professional events are intended for officials as well practitioners.[157] These include not least policy discussions taking place under the auspices of the International Competition Network or the Organisation for Economic Co-operation and Development.

These social dynamics bring about a 'a dense fabric of professional linkages'[158] between competition officials and practitioners. As Neyrinck and Petit describe the scene, 'personal ties between lawyers, consultants, civil servants, lobbyists, and judges are inevitable [and they] often end up developing nonprofessional relationships'.[159] In fact, it is not uncommon to even come across (married[160])

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151 *See supra* text accompanying nn. 75–78.
152 *Compare* Neyrinck & Petit, *supra* n. 131, at 1.
153 Townley, *supra* n. 19, at 255.
154 Wigger, *supra* n. 84, at 114; Neyrinck & Petit, *supra* n. 131, at 1.
155 Mariani & Pieri, *supra* n. 21; Orton, *supra* n. 22.
156 Avril, *supra* n. 122, at 875.
157 Wigger, *supra* n. 84, at 114; Neyrinck & Petit, *supra* n. 131, at 1.
158 Wigger, *supra* n. 84, at 114.
159 Neyrinck & Petit, *supra* n. 131, at 1.
160 Eleanor Eagan, *Watchdog Requests Correspondence Concerning Senior DOJ Officials' Recusals*, The Revolving Door Project (7 Dec. 2021), https://therevolvingdoorproject.org/watchdog-requests-correspondence-concerning-senior-doj-officials-recusals/.

couples comprising an official and a practitioner. It is thus possible that competition policy may be affected also through the third channel of cultural capture.

4.4 Preconditions present: Intent not necessary

Sections 4.1–4.3 have suggested that circumstances identified by Kwak as possibly giving rise to cultural capture seem to show in US and EU competition policy: there are indications that competition officials identify with practitioners, accord them a high status, and have ongoing relationships with them. These preconditions then appear on two accounts more pronounced in the United States. First, US competition agencies often hire – even the most senior – officials from the private sector, which may reinforce identification of competition officials with practitioners. Second, US civil service enjoys a lower socio-economic status, so the possibility that competition officials look up to practitioners is higher. To reiterate, this article does not aim at measuring the actual intensity of officials' identification with, esteem for, and relationships with practitioners. Nor does it intend to opine on the actual effect that these factors may have on officials' policy-relevant views. [161] It rather draws attention to the fact that preconditions for channels of influence bringing about this effect seem to be present and, thus, that there is at least some risk of cultural capture of – especially US – competition policy.

The social developments underlying this risk may well be occurring without anyone intending so. As explained by Kwak, they may for example arise as 'a side effect to the lobbying advantage' of a certain interest group.[162] They could thus be a by-product of the above-discussed easier access of actual and potential infringers of competition rules to competition practitioners. Yet, the possibility cannot be excluded that an interest group is actually actively using the discussed channels of social influence to 'subtly influence the priors that will affect the judgments that the decision makers will have to make'.[163] Kwak in particular suggests that the 'industry might consciously set out to induce its regulators to identify with industry members and their interests'[164] or 'might try to have more social interactions with regulators'.[165] Be that as it may, the risk of one-sided influence on officials' views should warrant attention in any case, regardless of whether based on deliberate action or not.

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[161] On the effect of (some of) these factors on competition policy *see,* for example, D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 Geo. Mason L. Rev. 1055, 1074 (2010); Townley, *supra* n. 19, at 151; Wils, *supra* n. 88, at 160.

[162] Schechter, *supra* n. 73.

[163] Mario Mariniello, Damien Neven & A. Jorge Padilla, *Antitrust Regulatory Capture and Economic Integration*, Breugel Pol'y Contribution 1, 3 (2015).

[164] Kwak, *supra* n. 6, at 79.

[165] Schechter, *supra* n. 73.

5 POSSIBLE SOLUTIONS

The question is what can be done about the risk of competition policy's cultural capture. In answering this question, one needs to recognize that no easy solutions are unfortunately available.[166] Some of the social influence concerned happens to be an 'unavoidable byproduct of … interactions between human beings' that are necessary for the operation of any regulatory policy.[167] In addition, as further discussed below, the factors that contribute to the risk of cultural capture may at the same time provide substantial countervailing policy benefits, which means that measures aimed against the capture will often be associated with inherent trade-offs.[168] One should also realize that cultural capture develops only gradually over extended periods of time[169] and may take similarly long to disappear.

Still, the present part proposes a number of actions to mitigate the risk of competition officials' views being swayed towards pro-defendant positions through social influence. As with other types of regulatory capture, the most effective approach is *ex ante* prevention.[170] The proposed actions are thus preventive in nature, aiming to 'create conditions in which [cultural capture] is unlikely to flourish'.[171] It is worth noting that once the captured views achieve a certain critical mass, they start propagating among public officials on their own. As Ayal puts it, 'influence is contagious, spreading among agents within government'.[172] This is because the processes of social influence that were discussed above with respect to the interaction between competition officials and practitioners operate also among the officials themselves: yearning to fit in among colleagues, officials internalize their worldviews.[173] The measures against cultural capture should thus primarily ensure that the critical mass is not reached.

5.1 Raising awareness

A relatively simple action to take is to make competition officials aware of the risk of cultural capture. As mentioned, the colonization of minds through social influence may be happening sub-consciously, without the officials noticing

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166 Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. Pa. L. Rev. 129, 345 (2003); Davidoff, *supra* n. 5; Baxter, *supra* n. 29, at 190; Rex, *supra* n. 30, at 280.

167 Kwak, *supra* n. 6, at 95.

168 Rex, *supra* n. 30, at 278.

169 Barkow, *supra* n. 29, at 24–25.

170 Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Texas L. Rev. 15, 23 (2010).

171 Bagley, *supra* n. 30, at 1.

172 Ayal, *supra* n. 18, at 226.

173 *Ibid*.

anything. Debiasing trainings or campaigns that would allow the officials to recognize these subtle pulls on their worldview might not only in themselves make the officials more resistant but also pave the way for other interventions.

5.2 Promoting diversity

Another possibility is to prevent a disproportionate role of pro-defendant thinking by enhancing the plurality of arguments, views and stakeholders present in the decision-making process. A wide range of arguments and views should be considered internally within competition-policy bodies and/or stakeholders whose voice is not sufficiently heard should be empowered to play a greater role.

Internal diversity can be promoted in two different ways. First, it is possible to enhance variety within the body of competition officials with regard to their views.[174] A certain share of the officials could for instance be deliberately picked from people less likely leaning towards pro-defendant positions,[175] including practitioners working for plaintiffs, representatives of consumer organizations or associations of small and medium-sized enterprises (SMEs), or critical academics. Second, one may create organizational units specifically instructed to advocate interests deemed insufficiently represented,[176] such as those of consumers and SMEs. These so-called proxy or devil's advocates[177] would then inject rule-making as well as enforcement processes with corresponding reasoning and ideas. An advantage might be in this respect evidently enjoyed by agencies entrusted with both competition policy and consumer policy.[178]

An alternative option is to empower underrepresented stakeholder groups to be able to promote their interests on their own.[179] This will not only make the stakeholders 'capable of bringing different ideas and perspectives'[180] into the decision-making process. By facilitating a more frequent interaction between representatives of these stakeholders and competition officials, it will also dilute the social influence of experts working for big business. It is nevertheless not enough to just invite the stakeholders to take a greater part. To balance big business' inherently stronger position, the empowerment of other

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174 Kwak, *supra* n. 6, at 98.
175 Barkow, *supra* n. 29, at 23.
176 Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence From Insurance Regulation*, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 389–392 (Daniel Carpenter & David A. Moss eds, Cambridge University Press 2014).
177 Pagliari, *supra* n. 40, at 25–26; Kwak, *supra* n. 6, at 98.
178 Barkow, *supra* n. 29, at 23.
179 Schwarcz, *supra* n. 176, at 392–395.
180 Pagliari, *supra* n. 40, at 22.

stakeholders needs to take the shape of an affirmative action.[181] It is for instance possible to create an organizational unit dedicated to a permanent dialogue with consumers such as the Consumer Liaison Office at DG Competition.[182] To be effective, however, such a unit needs to be properly staffed and funded, whereas the said office 'was recently relegated to a single official and its resources were taken away'.[183] Another option is to grant underrepresented stakeholders with special procedural rights.

5.3 Reducing the revolving door

As discussed, a major factor behind the risk of cultural capture is the revolving door. A possible way of mitigating the risk is hence slowing the rate at which the door spins. It is necessary to 'develop career paths and educational opportunities for … key personnel that are more autonomous' from the regulated entities.[184] Mainly the most senior officials ought to have a strong track record within the public sector and ideally stay loyal to it until the end of their career.

There are several options how to slow down the revolving door. One is to adjust hiring policies in order to limit the number of practitioners – especially those specializing in pro-defendant work – who turn into civil servants.[185] The fact that US competition agencies tend to appoint their top officials from outside the government not only directly moves people between the private and public sector, but moreover incentivizes others who have the ambition to once follow in their steps to revolve back and forth already now. On a similar note, private-sector experience should not count as an important factor when deciding on officials' promotions as that provides similar incentives.[186] It is also not desirable that governmental positions be only temporary[187] because that creates unnecessary

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[181] *Ibid*., at 24.

[182] Juan Antonio Rivière y Martí, *Competition Enforcement and Consumers*, in *Handbook of Research in Trans-Atlantic Antitrust* (Philip Marsden ed., Edward Elgar 2006).

[183] Firat Cengiz, *Bringing the Citizen Back into EU Democracy: Against the Input-Output Model and Why Deliberative Democracy Might Be the Answer*, 19 Eur. Pol. & Soc'y 577, 587 (2018).

[184] Nolan McCarty, *Complexity, Capacity, and Capture*, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 119–120 (Daniel Carpenter & David A. Moss eds, Cambridge University Press 2014).

[185] Limiting the inflow of former practitioners addresses also the concern discussed *supra* in n. 133. As established by Veltrop and de Haan, cooling-off periods are not an effective solution because people coming to the government from the private sector do not stop identifying with it even after extended periods of time. Veltrop & de Haan, *supra* n. 59, at 25.

[186] Jeff Hauser, Max Moran & Andrea Beaty, *Better Policy Ideas Alone Won't Stop Monopolies*, Washington Monthly (18 Jul. 2020), https://washingtonmonthly.com/2020/07/18/better-policy-ideas-alone-wont-stop-monopolies/.

[187] This is unfortunately increasingly common in the European Commission. Decision of the European Ombudsman of 28 Feb. 2019 in her strategic inquiry OI/3/2017/NF on how the European Commission manages 'revolving doors' situations of its staff members, at para. 4.

traffic in both ways. Next, to retain skilled staff, the salary and other employment conditions need to be appropriate; this issue will be discussed separately in the following section.

Another measure often mentioned in the context of revolving door are restrictions on subsequent employment of former officials.[188] Such restrictions do exist on both sides of the Atlantic. They are however primarily meant to address more or less clear-cut conflict-of-interest situations and, as such, tend to be relatively narrow in scope and short in duration. Such limited restrictions will likely prove ineffective against the channels of cultural capture associated with revolving door. For instance, the fact that ex-officials are not allowed to work for two years on cases which they were engaged in during their service hardly has any major impact on self-identification of current officials with competition practitioners, or on the existence of relationships between the departed officials and their former colleagues. To curb these channels of cultural capture, the restrictions would need to be so strict as to actually reduce the frequency of transfers between the public and private sector.

It however needs to be added that there are also arguments in favour of these transfers. They are said to bring at least three types of benefits to competition policy. First, the movement of personnel enhances competition officials' expertise.[189] People who have spent some time working for market actors will arguably bring with them a solid understanding of markets.[190] Moreover, it is often argued that the possibility to acquire government experience attracts – albeit only for a limited period – highly talented people ultimately headed to the private sector, for whom the public-service salaries would otherwise not be sufficient.[191] Second, relationships between former colleagues who ended up on the opposite sides of the barricade facilitate communication and thus help to cut red tape.[192] Third, it is desirable that some officials have come from the private sector due to the diversity concerns discussed above. The existence of all these benefits suggests that it will likely not be optimal to stop the door from revolving entirely, but that some – limited – movement from and to the private sector ought to be accepted.[193]

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[188] For example, Barkow, *supra* n. 29, at 23.

[189] Alison Jones & William E. Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of US Competition Policy*, 65 Antitrust Bull. 227, 250 (2020); Rex, *supra* n. 30, at 278.

[190] Baker, *supra* n. 23, at 2; Decision of the European Ombudsman of 28 Feb. 2019 in her strategic inquiry OI/3/2017/NF on how the European Commission manages 'revolving doors' situations of its staff members, at para. 3.

[191] Jones & Kovacic, *supra* n. 189, at 248.

[192] Neyrinck & Petit, *supra* n. 131, at 1; Rex, *supra* n. 30, at 278.

[193] András G. Inotai & Stephen Ryan, *Improving the Effectiveness of Competition Agencies Around the World – A Summary of Recent Developments in the Context of the International Competition Network*, Competition Pol'y Newsl. 27, 29 (2009).

5.4 Improving employment conditions and reputation

Another action that can be taken to address the risk of cultural capture is to improve the conditions and reputation of competition officials' employment. 'The straightforward … step would be to increase public sector salaries … to rates that can better compete with the private sector',[194] as it has been recently proposed with regard to US federal competition officials.[195] Higher income could attract competent personnel even without the promise of later transition to the private sector[196] and reduce the status differential between officials and practitioners. It is nevertheless doubtful that it will ever be possible for the public sector to entirely catch up with the private one in terms of remuneration. Attracting and retaining qualified staff should hence take full advantage of fringe benefits available in the public sector such as '[h]igh-quality training, opportunity to engage in academic work, work-life balance and career development advice'.[197] Competition officials should further be provided with other sources of prestige than just their income. This can perhaps best be done by boosting the prestige of the institution to which they are affiliated, both in the eyes of the general public and the competition community.

5.5 Promoting the public-official identity

It is further possible to promote the public-official identity of competition officials in order to curtail their self-identification with practitioners. As shown by social psychology research, people tend to have several social identities and we may be able to affect which one of them prevails.[198] For instance, Townley recounts decentralization of EU competition policy in the first decade of this century as a process in the course of which people who had earlier seen themselves primarily as (national) public officials started prioritizing their competition-expert identity.[199] It is possible to stimulate a similar transformation – albeit this time in the opposite direction – in order to avoid cultural capture.[200] Interventions reinforcing the public-official identity include for instance attendance of formative courses or membership in suitable organizations.[201] On the latter point, professional

[194] McCarty, *supra* n. 184, at 119.
[195] Jones & Kovacic, *supra* n. 189, at 248.
[196] Pagliari, *supra* n. 40, at 35–36; Jones & Kovacic, *supra* n. 189, at 248.
[197] Inotai & Ryan, *supra* n. 193, at 28.
[198] Geoffrey L. Cohen, *Identity, Belief, and Bias*, in *Ideology, Psychology, and Law* 391–397 (Jon Hanson ed., Oxford University Press 2012).
[199] Townley, *supra* n. 19, at 151–152.
[200] Yeoh, *supra* n. 76, at 143.
[201] Veltrop & de Haan, *supra* n. 59, at 24.

associations dedicated exclusively to competition officials could be established under the auspices of the US antitrust agencies or the European Competition Network, a cooperation of European Union's competition agencies.

5.6 Monitoring and curbing relationships

Measures can also be aimed directly at competition officials' interpersonal relationships with practitioners. As regards contacts between competition officials and practitioners taking place in a professional context, both the United States and Europe impose some restrictions on people who have recently left the government. Section 207(c)(1) of the US Code prohibits senior federal officials from making any communication to or appearance before their former colleagues in official matters within a year of their departure. The European Commission similarly imposes a 'cooling off period' during which ex-officials may not come into 'professional contacts' with their former colleagues.[202] Except these post-employment restrictions aimed primarily at – relatively clear – conflicts of interest, there appear to be no rules as regards for instance participation of competition officials in professional associations or at professional events run by competition practitioners. It may also be worth reassessing whether business representatives ought to be invited to meetings convened by the International Competition Network[203] and similar organizations.

A more sensitive question is what, if anything, can be done about relationships between competition officials and practitioners that are more personal in character, such as romantic and family ties or friendships. The existing rules concerning these relationships are again aimed at avoiding and managing imminent conflict-of-interest situations rather than addressing the insidious processes of cultural capture. One possibility might be to oblige employees of competition agencies to disclose internally their close personal relationships that could reasonably give rise to an actual or perceived conflict of interest, not only concerning specific decisions in which the employee is involved but also as regards his or her work more generally.[204] Surely, this information would again be gathered

[202] Commission Decision of 29 Jun. 2018 on outside activities and assignments and on occupational activities after leaving the Service, C(2018) 4048 final, para. 21(3)(b); Decision of the European Ombudsman of 28 Feb. 2019 in her strategic inquiry OI/3/2017/NF on how the European Commission manages 'revolving doors' situations of its staff members, at para. 45.

[203] Chris Townley, Mariana Tavares & Mattia Guidi, *Influence in the International Competition Network (ICN): Who Seeks It, How Do They Do This and Why?* 33 (working paper, 2019), https://ssrn.com/abstract=3415067; Wils, *supra* n. 88, at 164 n. 76.

[204] As far as the author is aware, neither US nor EU competition officials are subject to such reporting obligations, unlike for instance employees of the Bank of England. *See Personal Relationships: Policy*, Bank of England (2021), https://www.bankofengland.co.uk/-/media/boe/files/about/human-resources/personal.pdf.

primarily in order to manage conflicts of interest. Nevertheless, an obligation to report officials' close relationships with practitioners might provide public authorities with a better sense of how widespread such relationships are, as well as make the reporting officials pause for a moment to consciously think about the reported relationship and its policy implications. The most drastic, and hardly feasible, measure would be to ask – especially the most senior – competition officials to limit their non-professional contacts with colleagues from the private sector. An example has been set in this regard by the head of the UK competition agency Andrea Coscelli, who 'ceas[ed] social interaction' – albeit only for the duration of a specific investigation – with a friend working as a practicing competition lawyer.[205]

6 CONCLUSION

This article has shown that there is a risk of cultural capture of EU and especially US competition policy because the preconditions for this type of capture appear to be present. Namely, many competition officials to all appearance self-identify with a community dominated by competition practitioners as representatives of the private sector. Further, there are indications that the officials often hold the practitioners in high regard. And, finally, there seem to be common interpersonal relationships between the officials and practitioners. Regardless of whether being a result of anyone's deliberate strategy, this social interaction poses a risk of anti-interventionist positions exerting a disproportionate influence on the mindset of competition officials.

As mentioned in the introduction, some commentators have argued that the worldviews of competition officials on both sides of the Atlantic have been captured. The present article has however directly addressed neither the question whether such a capture indeed exists nor whether it has been caused by social influence of competition practitioners. A great amount of research is missing that would allow one to provide conclusive answers. For one, it would be useful to have detailed data on the work mix as well as policy-relevant views of competition practitioners. Further, one could undertake to quantify the extent to which officials actually identify with practitioners, look up to them, and have them in their social networks. And, perhaps most crucially, one could try to isolate the effects of these phenomena on the views and actions of competition officials.

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[205] Christopher Williams, *Top Competition Watchdog Forced to Cut Off Friendship with Murdoch Lawyer Over Sky Takeover*, The Telegraph (20 Sep. 2017), https://www.telegraph.co.uk/business/2017/09/20/top-competition-watchdog-forced-cut-friendship-murdoch-lawyer/.

Moreover, the article has focused only on cultural capture, thus excluding a multitude of other factors that shape the policy-relevant views and, for that matter, rule-making and rule-enforcing decisions of competition officials.[206] Even the author of the concept of cultural capture recognizes that its workings will hardly be the sole or primary reason for the eventual dominance of anti-interventionist views.[207] Some other determinants of the officials' mindset have been touched upon above briefly: people coming to public service from the private sector and bringing their mindset,[208] influence of – sponsored – scholarship,[209] and the role of university education.[210] Another major ingredient is the general intellectual climate of the time. And then there is influence on decision-making that goes beyond shaping of genuine officials' views, for example in the form of traditional regulatory capture[211] or political interference.

Neither the lack of precise empirical findings on competition practitioners' social influence nor the existence of other factors shaping competition policy should nevertheless discourage action against the risk of its cultural capture. While more information would clearly allow for a better fine-tuning, it seems advisable to regardless have measures preventing cultural capture in place. This article has proposed several such measures, for instance ensuring that arguments, views and stakeholders present in the decision-making process are more diverse, that the door between the public and private sector revolves at a slower rate, and that competition officials' employment conditions are sufficiently attractive. Implementation of the measures needs to be gauged as carefully as possible and recognize inherent trade-offs.

As a matter of fact, the current efforts to reinvigorate US competition policy have been associated with appointments curbing the risk of cultural capture. For instance, the recently installed director of the FTC's Bureau of Competition is the first true career official to hold this position in the last twenty years.[212] And the new head of the DoJ's Antitrust Division has a track record of a plaintiff's attorney and advocate for reining in market power.[213] Let

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[206] All these factors deserve more scholarly attention than they have received so far.

[207] Kwak, *supra* n. 6, at 94.

[208] *See supra* n. 133.

[209] *See supra* text accompanying nn. 46–48.

[210] *See supra* n. 115.

[211] *See supra* text accompanying nn. 33–35.

[212] *FTC Chair Lina M. Khan Appoints Directors of Bureau of Competition and Bureau of Consumer Protection*, Federal Trade Commission (28 Sep. 2021), https://www.ftc.gov/news-events/press-releases/2021/09/ftc-chair-lina-m-khan-appoints-bureau-directors.

[213] Lauren Hirsch & David McCabe, *Biden to Name a Critic of Big Tech as the Top Antitrust Cop*, The New York Times (published 20 Jul. 2021, updated 28 Oct. 2021), https://www.nytimes.com/2021/06/29/technology/boom-times-for-lawyers-as-washington-pursues-big-tech.html; Jeff Hauser & Eleanor Eagan, *Big Tech's Attacks on Biden's Anti-Monopoly Regulators Are a Joke*, The New Republic (1 Sep. 2021), https://newrepublic.com/article/163496/lina-khan-jonathan-kanter-monopoly.

us nevertheless not forget that the main moving forces behind the policy reinvigoration have been neither competition officials nor practitioners, but academics and the general public, who has only recently started paying closer attention to the effects of market power.[214] To ensure that the pro-interventionist trends do not get reversed again through the forces of cultural capture, the mentioned appointments should be only first steps on a path towards limiting social influence of pro-defendant practitioners.

[214] Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust*, 127 Yale L.J.F. 980, 984 (2018). Kwak notes that tightening of rules for financial markets was also possible only thanks to a public outrage (following the global crisis). Schechter, *supra* n. 73.