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Abstract

Against the background of growing discontent over excessive leniency of US and EU competition policy, this article argues that the policy displays characteristics corresponding to those that brought about the social capture of financial policy co-responsible for the late 2000s global crisis. The prevailingly anti-interventionist worldview of competition practitioners working as industry representatives threatens to disproportionately affect the mindset of competition officials through three channels of social influence concerning self-identification, social status, and interpersonal relationships. Regardless of whether these channels have been actively shaped by the industry, their existence poses a risk that competition policy might be designed and enforced in a way that furthers industry interests to the detriment of consumers and small businesses, which risk might have already materialised in the excessive leniency of the policy. The article also discusses measures to prevent social capture 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, antitrust, anti-interventionism, competition policy, regulatory capture, revolving door, social influence

JEL classifications: H83, K21, K42, L40, Z18

I. Introduction

A growing number of respected commentators consider competition policy on either side of the Atlantic as dissatisfactory. In the United States, competition rules and their administration are often being characterised as overly lax.[1] This is a result of a 40-year

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[1] Lina M. Khan, 'The Ideological Roots of America's Market Power Problem' (2018) 127 The Yale Law Journal Forum 960; Steven C. Salop, 'Invigorating Vertical Merger Enforcement' (2018) 127 Yale Law Journal 1962; Jonathan Tepper and Denise Hearn, *The Myth of Capitalism: Monopolies and*

"experiment of enforcing the antitrust laws a little bit less each year".[2] Also the European Union has been repeatedly criticised for under-enforcing its competition policy.[3] Despite EU competition enforcers showing more activity than their US counterparts, "[t]he impression is of a scattergun approach, with long delays and fines that are a tolerable cost of doing business".[4] This policy leniency[5] has enabled market power and its abuse to rise, which has in turn stifled economic efficiency[6] and significantly contributed to the growing societal inequality.[7]

One account of why competition policy has become excessively lenient is that it is being distorted by interests of businesses whom it is supposed to constrain.[8] Endorsing this account, The Economist draws a compelling comparison with the regulatory capture that was co-responsible[9] for the global financial crisis of 2007-2009.[10] This capture entailed a substantial share of financial officials developing anti-

the Death of Competition (Wiley 2018); Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019).

[2] Fiona Scott Morton, 'Modern U.S. Antitrust Theory and Evidence amid Rising Concerns of Market Power and Its Effects: An Overview of Recent Academic Literature' (Washington Center for Equitable Growth, 2019) 6 <https://equitablegrowth.org/rbakeresearch-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/> accessed 25 October 2019.

[3] Anne C. Witt, 'The Enforcement of Article 101 TFEU: What Has Happened to the Effects Analysis?' (2018) 55 Common Market Law Review 417, 447; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (European Commission, 2019) 3 <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1> accessed 31 January 2021; Rupprecht Podszun, 'Conference Debriefing (11): ASCOLA Conference, Aix-en-Provence, June 2019' (*D'Kart,* 2 July 2019) <https://www.d-kart.de/blog/2019/07/02/ascola-conference-aix-en-provence-2019/> accessed 25 October 2019.

[4] 'Regulators Across the West Are in Need of a Shake-up: Trustbusters Are Too Cosy with Their Industries and Lack Bite' *The Economist* (15 November 2018) <https://www.economist.com/special-report/2018/11/15/regulators-across-the-west-are-in-need-of-a-shake-up> accessed 15 June 2020.

[5] See the conclusion of this article for a discussion on a stricter approach to digital markets that appears to have recently gained a footing.

[6] Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (see above); John Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (The MIT Press 2015); American Antitrust Institute, 'The State of Antitrust Enforcement and Competition Policy in the U.S.' (American Antitrust Institute, 2020) <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf> accessed 2 January 2021.

[7] 'Too Much of a Good Thing' *The Economist* (26 March 2016) <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing> accessed 15 June 2020; Joseph E. Stiglitz, 'The New Era of Monopoly Is Here' *The Guardian* (13 May 2016) <https://www.theguardian.com/business/2016/may/13/-new-era-monopoly-joseph-stiglitz> accessed 14 July 2020; Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (see above); Scott Morton, 'Modern U.S. Antitrust Theory and Evidence amid Rising Concerns of Market Power and Its Effects: An Overview of Recent Academic Literature' (see above).

[8] Wouter P. J. Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 World Competition 405, 432; Tepper and Hearn, *The Myth of Capitalism: Monopolies and the Death of Competition* (see above) 162.

[9] "The list of sinners who contributed to the crisis is long and the culprits are housed in a broad array of sectors, both private and public. There were both market and regulatory failures." George G. Kaufman, 'The Great Financial Crisis of 2007–2010: The Sinners and their Sins' in James R. Barth and George G. Kaufman (eds), *The First Great Financial Crisis of the 21st Century: A Retrospective* (World Scientific 2016) 4.

[10] 'Regulators Across the West Are in Need of a Shake-up: Trustbusters Are Too Cosy with Their Industries and Lack Bite' (see above). For discussions on the capture behind the financial crisis see Andrew Baker, 'Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance' (2010) 86 International Affairs 647; Daniel Carpenter and David A. Moss, 'Introduction' in Daniel Carpenter and David A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 1; Eva

interventionist views.[11] They came to genuinely believe that financial markets serve the society best if they are scarcely interfered with by public bodies,[12] which helped to generate circumstances that eventually brought about the big crash. While this pro-market mindset was most certainly a product of several complementary factors,[13] one of the critical ones was likely the influence exerted on financial officials by representatives of the finance industry through their social interaction.[14] This distortion of financial policy was aptly designated by Davidoff as its *social capture*.[15]

The question addressed by the current article is whether US and EU competition policy possess attributes comparable to those that led to the social capture of pre-crisis financial policy. The analysis carried out to answer this question relies on a framework proposed by Kwak, which distinguishes three relevant channels of social influence exerted by representatives of the private sector on public officials: self-identification, status differential, and interpersonal relationships.[16] Application of this framework to available information about contemporary competition policy shows that the policy does share remarkable similarities with pre-crisis financial policy as regards conditions enabling all the three channels through social interaction of competition officials with competition practitioners working for the industry; there is thus a risk that the views of the officials – and consequently the competition policy itself – are being shaped in a way favourable to the industry. In other words, the lack of competition policy's bite introduced above might have been caused by its social capture.[17] In addition, while recognizing that the conditions enabling social capture of competition policy are to some extent inevitable, the article also discusses measures that could potentially mitigate it.

The article is organised as follows. Part II places social capture in the broader context of industry influence on competition policy. Part III explains that competition practitioners working for the industry happen to hold prevailingly anti-interventionist views. Part IV shows that there is a risk that competition officials receive these views

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Becker, *Knowledge Capture in Financial Regulation: Data-, Information- and Knowledge-Asymmetries in the US Financial Crisis* (Springer 2016).

[11] Lawrence G. Baxter, '"Capture" in Financial Regulation: Can We Channel It toward the Common Good' (2011) 21 Cornell Journal of Law and Public Policy 175; Simon Johnson, 'The Quiet Coup' *The Atlantic* (May 2009) <https://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/307364/> accessed 24 July 2019. Some sources describe a more traditional – i.e. quid pro quo – type of capture: "If you work for the enforcement division of the S.E.C. you probably know in the back of your mind, and in the front too, that if you maintain good relations with Wall Street you might soon be paid huge sums of money to be employed by it." Michael Lewis and David Einhorn, 'The End of the Financial World as We Know It' *The New York Times* (3 January 2009) <https://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html> accessed 31 December 2020. See also text accompanying footnotes 43-46 below.

[12] James Kwak, 'Cultural Capture and the Financial Crisis' in Daniel Carpenter and David A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 93; Samuel McPhilemy, 'Formal Rules versus Informal Relationships: Prudential Banking Supervision at the FSA Before the Crash' (2013) 18 New Political Economy 748, 752.

[13] Another cause of the mindset might have been scholarly publications sponsored by the financial industry. See also text accompanying footnotes 56-58 below.

[14] Kwak, 'Cultural Capture and the Financial Crisis' (see above).

[15] Steven M. Davidoff, 'The Government's Elite and Regulatory Capture' *Dealbook, The New York Times* (11 June 2010) <https://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/> accessed 7 July 2019.

[16] Kwak, 'Cultural Capture and the Financial Crisis' (see above)

[17] Please note that this article substantiates why this hypothesis is plausible rather than tests its actual validity.

through their social interaction with the practitioners. Part V discusses several potential counter-measures. Part VI highlights the most important findings.

Throughout, the focus is on people working as competition officials and practitioners primarily at the US federal level and EU union level of competition policy. 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 discussed social dynamics may nevertheless be expected to be often at play in – and the lessons learnt thus hold also for – US federal states, EU member states, as well as other competition systems.

II. Background: Industry influence on competition policy

The primary objective of this part is to introduce social capture of competition policy as its excessive lenience caused by competition officials receiving anti-interventionist views from industry representatives through processes of social influence. Before engaging social capture as such, it will nevertheless be helpful to consider the broader context of industry 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 competition officials – social capture differs from the traditional regulatory capture operating through officials' incentives. Social capture will also be contrasted with other types of capture operating through officials' views. The actual concept of social capture will then be explored in the last section.

Industry 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[18] 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[19] and Article 102 TFEU. And, third, businesses may not merge if that would significantly lessen competition in the market. The relevant legislation here is Section 7 of the US Clayton Act[20] and EU Regulation 139/2004.[21] 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. Such powerful businesses are thus addressees – i.e. potential

[18] Sherman Antitrust Act of 1890, Section 1, 15 U.S.C. 1.
[19] Sherman Antitrust Act of 1890, Section 2, 15 U.S.C. 2.
[20] Clayton Antitrust Act of 1914, Section 7, 15 U.S.C. 18.
[21] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

infringers – of competition rules; to put it yet differently, they are the *regulated industry*.[22]

There is a conflict between how interventions to protect competition are viewed by the society and the regulated industry. 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 neo-classical economics and revolves around efficiency and consumer welfare. If there is substantial power in a market, the economic learning teaches us, this may generate a societal deadweight loss in the form of decreased output.[23] 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, the industry – 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[24] or, analogically, decrease wages below such levels.[25] It is thus clear that interventions against market power jeopardise the interests of those who do or would like to hold it.[26] To put it bluntly, the industry prefers competition policy that is lenient.[27]

The industry has a significant advantage in asserting its competition-policy preferences: 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 not well organised actors[28] means that interests of potential and actual infringers are more concentrated than those of their victims. The effect of the associated "economies of scale"[29] is that "big business is often the best-represented

[22] The term "regulated industry" 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 all addressees of competition rules do form a distinct "industry". This industry (perhaps largely overlapping with what is often called "big business") will of course cut across different business sectors.

[23] Eg Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 39.

[24] Eg Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012) 79.

[25] 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.

[26] Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (see above) 4.

[27] Cf Justin Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (2020) 14 Regulation and Governance 271, 273.

[28] Fred S. McChesney, Michael Reksulak and William F. Shughart II, 'Competition Policy in Public Choice Perspective' in Roger D. Blair and D. Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics*, vol 1 (Oxford University Press 2015) 162.

[29] Adi Ayal, 'The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail It' (2013) 1 Journal of Antitrust Enforcement 221, 225.

faction present"[30] at discussions about competition policy whereas "[c]ompetition has no lobby".[31]

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.[32] The former type of decision-making is sometimes suggested to be more susceptible to stakeholders' interests[33] because officials designing competition rules tend to be less constrained by existing law than their colleagues enforcing those rules.[34] However, also enforcement of the rules is in reality often associated with considerable discretion[35] and thus not immune to influence.[36] Therefore, unless specified otherwise, this article understands distortion of competition policy as distortion of either type of decision-making.

Nevertheless, 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 the regulated entities may serve as one of its sources.[37] This holds not only for competition enforcement proceedings, in which the defendants are expected to advance arguments and present evidence. It concerns also the design of the policy, on which US and EU competition agencies regularly consult interested stakeholders, including potential infringers.[38]

Still, the influence of industry interests on competition policy may be distortive, eventually bringing about *regulatory capture*. This term of art describes situations in

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

[31] Frederic Jenny and others, 'Competition Policy Objectives Panel Discussion' in Claus-Dieter Ehlermann and Laraine L. Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing 1998) 24.

[32] Eg Cristina Mariani and Simone Pieri, 'Lobbying Activities and EU Competition Law: What Can be Done and How?' (2014) 5 Journal of European Competition Law and Practice 423, 426.

[33] Eg Gail Orton, 'When Lobbying DG COMP Makes Sense: European Competition Officials are Policy-Makers as Well as Regulators' (2011) 7 Competition Law International 50, 53.

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

[35] Joshua D. Wright, 'Abandoning Antitrust's Chicago Obsession: The Case for Evidence-based Antitrust' (2012) 78 Antitrust Law Journal 241, 256.

[36] Christopher Decker, *Economics and the Enforcement of European Competition Law* (Edward Elgar 2009) 113; Baker, 'Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in The Communications Sector' (see above) 6; Andrew I. Gavil and Harry First, *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century* (MIT Press 2014) 22; Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition* (Harvard University Press 2016) 245.

[37] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 76; Dorit Rubinstein Reiss, 'The Benefits of Capture' (2012) 47 Wake Forest Law Review 569, 595.

[38] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 104.

which the industry has acquired persistent influence that is disproportionate in degree.[39] The outcome does not need to be a subversion of the respective regulatory policy in its entirety. It suffices that it be distorted to some extent – the public benefits of regulation will then not be eliminated but still reduced.[40] For instance, while the captured pre-crisis financial policy was far from optimal, we likely would not have been better off without it. 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, industry influence 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 industry interests exert disproportionate influence through deliberate action.[41] Others, however, extend it also to situations where this occurs inadvertently.[42] The current article follows the latter approach because – as elaborated below – the processes animating social capture may be in operation regardless of whether anyone intends them to.

Mechanisms of capture

Even though the mechanism underlying social capture is distinct from the traditional economic account of how regulatory policy gets captured, it may be worth introducing the latter at least briefly. Made famous by Stigler,[43] this account assumes that what makes public officials disproportionately responsive to the desires of the industry is their proclivity to seek private gains and avoid private costs.[44] For example, an official may act in favour of the industry hoping that she will in return receive a better-paying job.[45] While this incentives-based capture is usually believed to play a limited role in competition policy,[46] it may contribute to its distortion.

The type of capture considered by this article nevertheless belongs to a category concerning public officials' policy-relevant views rather than incentives.[47] Its working

[39] Baxter, '"Capture" in Financial Regulation: Can We Channel It toward the Common Good' (see above) 176; Rachel E. Barkow, 'Explaining and Curbing Capture' (2013) 18 North Carolina Banking Institute 17, 17.

[40] Nicholas Bagley, 'Agency Hygiene' (2010) 89 Texas Law Review *See Also* 1, 5; Barkow, 'Explaining and Curbing Capture' (see above) 17; Carpenter and Moss, 'Introduction' (see above) 9; Kwak, 'Cultural Capture and the Financial Crisis' (see above) 74; Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (see above) 273.

[41] Carpenter and Moss, 'Introduction' (see above) 14; McPhilemy, 'Formal Rules versus Informal Relationships: Prudential Banking Supervision at the FSA Before the Crash' (see above) 753.

[42] Kwak, 'Cultural Capture and the Financial Crisis' (see above); Gerry Cross, 'Addressing the Problem of Cyclical Capture' in Stefano Pagliari (ed), *The Making of Good Financial Regulation: Towards a Policy Response to Regulatory Capture* (Grosvenor House Publishing 2012) 180.

[43] George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell Journal of Economics and Management Science 3.

[44] Carpenter and Moss, 'Introduction' (see above) 18.

[45] Eg Joseph E. Stiglitz, 'Ethics, Economic Advice, and Economic Policy' in George F. DeMartino and Deirdre N. McCloskey (eds), *The Oxford Handbook of Professional Economic Ethics* (Oxford University Press 2016) 500.

[46] Edward M. Graham, 'Internationalizing Competition Policy: An Assessment of the Two Main Alternatives' (2003) 48 Antitrust Bulletin 947, 963.

[47] Note that the terminology is not settled – different varieties of views-based capture have been called cognitive, cultural, deep, intellectual or social. Eg Mathilde Poulain, 'Are Financial Regulators Insulated from Regulatory Capture?' (2016)

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",[48] and for others it entails "institutionalization of industry views as the regulator's view",[49] respectively "align[ing] the way in which regulators think about problems with the view of the industry they regulate".[50] Others still say that the officials "come to see the world the way that [the] regulated entities do",[51] "end[] up sharing the views of the industry",[52] or start to "think like it".[53] As mentioned in the introduction, the present article is concerned with capture of this sort: it looks into parallels between pre-crisis financial policy and current competition policy with regard to potential capture of public officials' views, further narrowing the scope to social influence as the particular transmission mechanism behind the capture.

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,[54] let us stick to the prevailing paradigm under which competition policy is 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.[55] 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 the industry clearly profiting from competition policy based on anti-interventionist views, an eventual competition officials' disproportionate adherence to such views would amount to their minds being captured by industry interests.

Public officials' views may be shaped in favour of the industry through numerous ways. Next to the insidious processes of social influence, on which we will

<https://www.researchgate.net/publication/309734401_Are_Financial_Regulators_Insulated_from_Regulatory_Capture> accessed 11 July 2020.

[48] McPhilemy, 'Formal Rules versus Informal Relationships: Prudential Banking Supervision at the FSA Before the Crash' (see above) 753.

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

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

[51] Bagley, 'Agency Hygiene' (see above) 5.

[52] Poulain, 'Are Financial Regulators Insulated from Regulatory Capture?' (see above) 6.

[53] David Freeman Engstrom, 'Corraling Capture' (2013) 36 Harvard Journal of Law and Public Policy 31, 32.

[54] 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.

[55] Marina Lao, 'Ideology Matters in the Antitrust Debate' (2014) 79 Antitrust Law Journal 649, 667.

focus in the remainder, an important role can be played also by the scholarly debate. Charles Ferguson's movie Inside Job exploring causes of the global financial crisis revealed that many prominent academic opponents of stringent financial regulation were paid by the industry. A similar funding of articles, academic initiatives and think tanks can be observed also in the context of competition policy.[56] To give an example, an NGO report exposed that Google sponsored 331 research papers on competition and other matters related to its business published between 2005 and 2017.[57] The problem has become so wide-spread that the leading association of competition scholars ASCOLA recently adopted a declaration of ethics addressing it.[58] While distortion of competition policy through academia goes beyond the scope of this article, the industry's great willingness to invest heavily into activities shaping competition experts' – as well as laymen's – views demonstrates the stakes that the industry has in those views.

Social capture

Let us finally proceed to social 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 commenting on financial policy in times of the 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.[59] 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".[60] 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".[61]

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 analysis of social capture,[62] which provides the conceptual

[56] Ezrachi and Stucke, *Virtual Competition* (see above) 247; Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49, 70; Cyril Ritter, 'Corporate Funding for Antitrust Academics Can Be a Problem' (*Medium,* 20 July 2017) <https://medium.com/@CyrilRitter/corporate-funding-for-antitrust-academics-can-be-a-problem-9efa604170a> accessed 15 July 2019.

[57] 'Google Academics Inc.' (Campaign for Accountability, 2017) <https://www.googletransparencyproject.org/sites/default/files/Google-Academics-Inc.pdf> accessed 18 June 2019. It ought to be added that the report itself has been heavily criticised due to an involvement of Google's rivals.

[58] 'Prof Lianos Leads Effort to Promote Disclosure Rules for Corporate Sponsorship of Academic Research' (*University College London,* July 16, 2018) <https://www.ucl.ac.uk/laws/news/2018/jul/prof-lianos-leads-effort-promote-disclosure-rules-corporate-sponsorship-academic> accessed January 3, 2021.

[59] Jo Becker and Gretchen Morgenson, 'Geithner, Member and Overseer of Finance Club' *The New York Times* (26 April 2009) <https://www.nytimes.com/2009/04/27/business/27geithner.html?pagewanted=2&dbk> accessed 7 July 2019.

[60] Davidoff, 'The Government's Elite and Regulatory Capture' (see above).

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

[62] Kwak, 'Cultural Capture and the Financial Crisis' (see above). Kwak does not speak about *social* capture but *cultural* capture. Due to the current article's focus on social influence (see below), it seems

framework on which the current article is based. Kwak explains that the capture "operates through a set of […] understandings about the world"[63] held by the public officials, which are being shaped in favour of the industry through insidious psychological processes associated with the officials' interaction with industry representatives. Kwak contrasts these processes with traditional capture based on material self-interest,[64] rational persuasion,[65] as well as other processes shaping officials' views.[66] Most crucially, Kwak identifies three distinct – albeit mutually related – channels through which social interaction with industry representatives may have bearing on the views of public officials: public officials socially identifying with industry representatives, perceiving them as having higher status, and developing professional and personal relationships with them. Each of these channels will be considered in detail in Part IV.

It ought to be mentioned that the perspective of this article on the mechanism at play diverges slightly from that employed by Kwak. While Kwak's account of how public officials take over views from industry representatives draws largely on (behavioral-)economic studies, it seems more fitting to understand this phenomenon through a social-psychological lens as based on *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,[67] i.e. social interactions in a broad sense. Such a social-psychological perspective on capture is explicitly endorsed for instance by Buiter.[68] All three channels constituting Kwak's framework are compatible with this perspective, and will thus below be treated as channels of social influence.

III. 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 why they hold such views. In competition policy, unlike for instance in financial policy, the professionals whose interaction with public officials might bring about social capture are not the core staff of the regulated industry. These people's tasks have usually very little to do with the job of competition officials,[69] which is why their social interaction is rare. There is nevertheless a group of experts who form a link socially connecting the industry with the officials: competition practitioners.[70] As elaborated below, due to providing the

more appropriate to follow Davidoff in using the former term. See Davidoff, 'The Government's Elite and Regulatory Capture' (see above).

[63] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 79.

[64] Ibid 75.

[65] Ibid 80.

[66] Ibid 94.

[67] Eg Robert H. Gass, 'Sociology of Social Influence' in James D. Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences*, vol 22 (2nd edn, Elsevier 2015) 348.

[68] Willem H. Buiter, 'The Financial System Ten Years After The Financial Crisis: Lessons Learnt' (2018) 17 <https://willembuiter.com/NAEC.pdf> accessed 12 December 2020.

[69] Stephen Wilks and Lee McGowan, 'Competition Policy in the European Union: Creating a Federal Agency?' in G. Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy: National Intitutions in a Global Market* (Clarendon Press 1996) 242.

[70] Angela Wigger and Andreas Nölke, 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: the Case of Antitrust Enforcement' (2007) 42 Journal of Common Market Studies 487, 504.

bulk of their services to businesses desiring to avoid competition liability, these practitioners may be expected to hold prevailingly anti-interventionist views.

Industry as the main client 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.[71] 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.[72] Provision of these services can be organised in two different ways. First, they may be provided through the market. In that case the experts work as freelancers or within professional services companies including law firms, economic consultancies, and agencies specialised in lobbying also known as public or governmental affairs consultancies.[73] 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[74] or lobbying through practitioners employed not only in individual companies but often also in their associations.[75]

The main clients of competition practitioners are big firms facing the threat that their market practices or acquisitions will be found in breach of competition rules.[76] No estimates are unfortunately available on the actual share with which work for different client groups contributes to the 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.[77] Lianos argues the same with respect to economists working in competition practice: "[T]here are many more defence experts than plaintiff experts."[78] Also a look at the profiles of law firms and economic consultancies featured in the GCR 100, a ranking

[71] Ioannis Lianos, ''Judging' Economists: Economic Expertise in Competition Law Litigation: A European View' in Ioannis Lianos and Ioannis Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2010) 244.

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

[73] Stephen Kinsella, 'Antitrust and Lobbying' (2011) 7 Competition Law International 42, 42; Orton, 'When Lobbying DG COMP Makes Sense: European Competition Officials are Policy-Makers as Well as Regulators' (see above) 51; Mariani and Pieri, 'Lobbying Activities and EU Competition Law: What Can be Done and How?' (see above) 426.

[74] Wilks and McGowan, 'Competition Policy in the European Union: Creating a Federal Agency?' (see above) 243; Baker, 'Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in The Communications Sector' (see above) 5.

[75] Mariani and Pieri, 'Lobbying Activities and EU Competition Law: What Can be Done and How?' (see above) 424; Wilks and McGowan, 'Competition Policy in the European Union: Creating a Federal Agency?' (see above) 242.

[76] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 151; Wouter P. J. Wils, 'Independence of Competition Authorities: The Example of the EU and Its Member States' (2019) 42 World Competition 149, 161.

[77] Albert A. Foer and Robert H. Lande, 'The Evolution of United States Antitrust Law: The Past, Present, and (Possible) Future' (1999) 16 Nihon University Comparative Law Journal 147.

[78] Lianos, ''Judging' Economists: Economic Expertise in Competition Law Litigation: A European View' (see above) 231.

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."[79] In short, competition practitioners are mostly busy with defence-side activities such as advising their clients on how to structure their contracts with suppliers and customers so that these agreements 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 reason why competition practitioners assist mainly with avoiding liability is that the clients simply demand such assistance the most. It has been pointed out that certain types of services are in fact required virtually only by – actual or potential – infringers; these include services concerning mergers, compliance and lobbying.[80] 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.[81] To be sure, some competition practitioners do specialise 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. These are however just drops in the ocean of competition practitioners' work.

Advocating and believing

There are two ways in which the fact that the bread and butter of competition practitioners is mainly to serve large corporate defendants makes the practitioners prevailingly anti-interventionist. First, the conviction that market interventions are warranted only rarely may be prevalent already among newcomers. This is because 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 realise 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 welcomes primarily people with anti-interventionist views.[82]

Second, views against market intervention may develop or be further reinforced in the practitioners' minds over the course of their career. This will happen not only

[79] Charles E. Mueller, 'Step 1 in Reforming US Antitrust: Abolish the Economics Units at Justice and the FTC' (1992) 24 Antitrust Law and Economics Review 1, 10.

[80] Lianos, ''Judging' Economists: Economic Expertise in Competition Law Litigation: A European View' (see above) 231.

[81] William F. Shughart II, 'Public-Choice Theory and Antitrust Policy' in Fred S. McChesney and William F. Shughart II (eds), *The Causes and Consequences of Antitrust: The Public-Choice Perspective* (The University of Chicago Press 1995) 12; Wigger, 'Towards a Market-based Approach: The Privatization and Micro-Economization of EU Antitrust Law Enforcement' (see above) 112; Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (see above) 432.

[82] Lianos, ''Judging' Economists: Economic Expertise in Competition Law Litigation: A European View' (see above) 231.

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",[83] and "economists have learned to be advocates of the interest of their clients, just as lawyers have learned to do so".[84] This would be unproblematic if people's views were immune from the positions that they prevailingly advocate in their professional capacity; it would then make little sense to speak about an anti-interventionist bias of the competition practitioners' community – the fact that the practitioners mostly happen to argue against competition law 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.[85] A person experiencing inconsistency between the two becomes psychologically uncomfortable, and so is motivated to reduce the cognitive dissonance by adjusting the views to the actions. In the context of legal practice, this phenomenon has been observed by Eisenberg:

> 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.[86]

A similar point has been made also 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.[87]

In the context of competition policy, it is moreover not all that difficult to convince oneself that pro-defendant views are justifiable because there is a great body of scholarship presenting minimal intervention as highly beneficial to the society. Competition practitioners regularly working for defendants are therefore likely to absorb anti-interventionist teachings.[88]

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[83] Susan N. Herman, 'Balancing the Five Hundred Hats: On Being a Legal Educator/Scholar/Activist' (2006) 41 Tulsa Law Review 637, 638.

[84] Jenny and others, 'Competition Policy Objectives Panel Discussion' (see above) 24.

[85] Eg Eddie Harmon-Jones and Judson Mills (eds), *Cognitive Dissonance: Reexamining a Pivotal Theory in Psychology* (2nd edn, American Psychological Association 2019).

[86] Rebecca S. Eisenberg, 'The Scholar as Advocate' (1993) 43 Journal of Legal Education 391, 393.

[87] Rory Little, K., 'Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation' (2001) 42 South Texas Law Review 345, 369 (footnote omitted).

[88] Mueller, 'Step 1 in Reforming US Antitrust: Abolish the Economics Units at Justice and the FTC' (see above) 10.

To summarise, working mainly for clients who wish to avoid competition liability likely makes the community of competition practitioners lean toward anti-interventionism. Such alignment of the practitioners' views with preferences of their clients is hardly surprising.[89] It is an outcome of hiring people with compatible views as well as of their views being shaped by their work. To be sure, not all competition practitioners are affected by the said bias; some will be less vulnerable to the pressures of cognitive dissonance and others – such as representatives of plaintiffs in competition damages litigation – will even be biased in the opposite direction. On average, however, due to the sheer prevalence of their pro-defendant work, one may expect most practitioners to hold strong anti-interventionist views.

IV. Competition officials receiving anti-interventionism

Having established that competition practitioners' views lean towards anti-interventionism, we shall now examine the risk of these views being received by competition officials. This examination will rely extensively on insights provided by literature on capture of pre-crisis financial policy. As mentioned above, a number of authors have argued that financial officials received pro-industry views from representatives of the private sector, and Kwak identified three channels of social influence through which this happened.[90] The present part considers in turn whether the features enabling each of these channels are present also in competition policy. The first section thus discusses shaping of views held by competition officials through their self-identification with practitioners. The second section considers the effect of officials' and practitioners' social status. And the third section looks at the personal relationships between them. The last section summarises that contemporary competition policy – albeit not necessarily due to anyone's intentional action – indeed very much resembles pre-crisis financial policy in all these respects.

Identity

The first channel of influence is identification of public officials with representatives of the private sector.[91] Social-psychological studies show that we all identify with some social groups and that this shapes our mindset. Having reviewed dozens of such studies, Gaffney and Hogg summarise that "[w]hen people claim group membership and identify strongly with a group, they take on the attitudes, behaviors, and norms of the group as their own".[92] With public officials not being immune therefrom,[93] self-identification may lead to distortion of regulatory policy.

Kwak argues that the pre-crisis financial officials saw themselves as peers of financiers, substantiating the argument with the phenomenon of revolving door: "[T]he

[89] Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (see above) 239 n.56.

[90] Kwak, 'Cultural Capture and the Financial Crisis' (see above).

[91] Ibid 81. The general possibility of capture based on this process has been argued also by other authors. See Toni Makkai and John Braithwaite, 'In and out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12 Journal of Public Policy 61, 61; Igan and Lambert, 'Bank Lobbying: Regulatory Capture and Beyond' (see above) 131 n.6.

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

[93] Eg Giuliano G. Castellano and Geneviève Helleringer, 'The Social Psychology of Financial Regulatory Governance' in Emilios Avgouleas and David C. Donald (eds), *The Political Economy of Financial Regulation* (Cambridge University Press 2019) 172.

normalcy of moving from an administrative agency to the financial sector and the sheer number of people making the transition imply that the regulators and the representatives of financial institutions are really the same people, only at different points in their careers."[94] As a consequence, the officials took over the financiers' conviction that financial markets do not need much regulation to work well, and pursued a lenient financial policy. This conclusion is supported by a study on Dutch financial officials, which found that a higher (self-reported) identification with the industry is associated with a poorer performance of supervisory tasks.[95]

Also competition officials tend to strongly self-identify with representatives of the private sector. Unlike their colleagues responsible for financial policy, however, they do not feel kinship towards the very industry which they are supposed to regulate. Addressees of competition rules are too varied, which is why they do not share a common identity. Social capture may however arise also through officials' identification with specialised agents – e.g. lobbyists – representing the industry before public authorities.[96] In the context of competition policy, it is competition practitioners who act as such agents and whom competition officials tend to associate themselves with. As discussed in detail below, the officials "identify […] with and end up feeling accountable to a competition expert community".[97] As members of this community, they may then internalise its anti-interventionist views.[98]

Competition experts form a community with an identity of its own. While issues pertaining to competition used to be just one of multiple areas in the portfolio of lawyers and economists, many now specialise in competition policy as the main or even exclusive subject of their careers.[99] These specialists tend to share the same background[100] and "often have an allegiance to competition [policy] as a discipline isolated from other areas".[101] This then leads to the existence of "a social community for competition experts, both lawyers and economists",[102] whose members "enjoy a feeling of kinship" with one another.[103]

Many commentators have noted the emergence of a trans-Atlantic competition community.[104] While competition experts based in the United States and Europe – and

[94] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 83.

[95] Dennis Veltrop and Jakob de Haan, 'I Just Cannot Get You Out of My Head: Regulatory Capture of Financial Sector Supervisors' (2014) DNB Working Paper No 410, <https://ssrn.com/abstract=2391123> accessed 14 June 2019.

[96] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 83.

[97] Wils, 'Independence of Competition Authorities: The Example of the EU and Its Member States' (see above) 160.

[98] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 151; Wils, 'Independence of Competition Authorities: The Example of the EU and Its Member States' (see above) 160.

[99] Frans van Waarden and Michaela Drahos, 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (2002) 9 Journal of European Public Policy 913, 928; Ioannis Lianos, 'The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis' (2012) CLES Working Paper No 5, 18 https://ssrn.com/abstract=2197025 accessed 10 June 2019; Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 230.

[100] Wilks, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective' (see above) 74.

[101] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 230.

[102] Ibid 151.

[103] Edwin S. Rockefeller, *The Antitrust Religion* (Cato Institute 2007) 15.

[104] Spencer Weber Waller, 'National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law' (1996) 18 Cardozo Law Review 1111, 1125; Stephen Wilks, 'Agencies, Networks, Discourses and the Trajectory of European Competition

for that matter around the whole globe – do indeed increasingly often talk to each other, not many move across the Atlantic in the course of their careers. With their professional identities still remaining largely associated with the jurisdiction of their training, one can clearly recognise a distinct US and European sub-community. If we zoom in on the United States, competition experts come together primarily under the banner of the American Bar Association (ABA) Antitrust Section.[105] Although Europe has no similar overarching association, its competition experts are also closely interconnected.

As mentioned, there are two major competition professions: lawyers and economists.[106] These professions closely cooperate with one another[107] and share the broader competition community.[108] Nevertheless, the different type of expertise that they carry reflects in each of them also having a distinct sub-community of its own.[109] This can be illustrated by the existence of a separate organization for European competition economists called the Association of Competition Economics, a goal of which is "[c]reating a community of economists working in competition across Europe".[110] Notwithstanding, the social dynamics concerned by this article play out largely the same within either profession on either side of the Atlantic.

On a full account, the community of competition experts consists not only of public officials and private practitioners, but also academics. This article nevertheless focuses only on social interaction between experts occupying the former two roles. These roles stand much closer to each other than to that of competition academics. As a matter of fact, due to the character of their work, competition experts working in public office and private practice could from a certain perspective both be seen as "practitioners"[111]: they both work on – the same – actual competition law cases.[112] The similarity between the roles is reflected not least in how often experts move from one to the other (see below). In contrast, academic tasks tend to be somewhat different.[113] Moreover, competition academics have a rather limited relevance for the general social dynamics in the competition community because of their very low count.[114]

Enforcement' (2007) 3 European Competition Journal 437, 453; Hussein Kassim and Kathryn Wright, 'Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control' (2009) 32 West European Politics 738, 750.

[105] Spencer Weber Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (1998) 77 Oregon Law Review 1383, 1445.

[106] Lianos, ''Judging' Economists: Economic Expertise in Competition Law Litigation: A European View' (see above) 244; Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 96.

[107] Lianos, 'The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis' (see above) 17.

[108] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 96.

[109] Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (see above) 1445; van Waarden and Drahos, 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (see above) 928; Lianos, 'The Emergence of Forensic Economics in Competition Law: Foundations for a Sociological Analysis' (see above).

[110] <https://www.competitioneconomics.org/about_ace/>.

[111] Eg Malcolm B. Coate and A. E. Rodriguez, *The Economic Analysis of Mergers* (Center for Trade and Commercial Policy, Monterey Institute of International Studies 1997); Seth B. Sacher and John M. Yun, 'Twelve Fallacies of the "Neo-Antitrust" Movement' (2019) 26 George Mason Law Review 1491, 1523

[112] Wigger, 'Towards a Market-based Approach: The Privatization and Micro-Economization of EU Antitrust Law Enforcement' (see above) 114.

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

[114] It is true that academia may have significant influence on policy-relevant views held by members of the competition community through their teaching and scholarly work (rather than through social

To understand how public officials may receive anti-interventionism through their identification with the competition community, it is essential to appreciate the position of practitioners within it. To put it in blunt terms, practitioners enjoy an overwhelming dominance.[115] They have not only access to unmatched resources, which they can use to establish and maintain their clout, but also happen to form the by far most numerous constituency of competition experts. 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.[116] Compare this with over 9000 members of the ABA's Antitrust Section.[117] Also the 500 competition experts working at DG Competition[118] cannot by far match the number of practitioners working on competition issues at the union level of the EU. The community is – because of the reasons discussed above – in particular dominated by practitioners who work for (actual or potential) infringers and who, thus, adhere to anti-interventionism.[119] The worldview shared by the community[120] will thus be primarily determined by such practitioners.

The fact that public officials belong to the same community as representatives of the industry can be clearly illustrated – and is also co-determined – by the frequency with which people switch these roles. As mentioned, revolving door has proven to be a big problem in the field of finance. It was for instance reported that almost 150 former employees of US financial regulatory agencies registered as lobbyists between 2009 and mid-2010[121] and, conversely, that about a half of the officials supervising the financial industry in the Netherlands have come from the industry.[122] As this section will discuss, doors revolve a great deal also when it comes to competition policy. Kwak's abovementioned remark that financial officials and private financiers "are

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influence). Even so, however, while some academics might be considered relatively pro-interventionist, there is also a great number of practitioners who teach and publish on the side.

[115] Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (see above) 1446; David J. Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford University Press 2010) 138; David J. Gerber, 'Comparative Competition Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 1176.

[116] Global Competition Review, 'United States' Department of Justice' <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197081/united-states-department-of-justice> accessed 1 December 2019; Global Competition Review, 'United States' Federal Trade Commission' <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197082/united-states-federal-trade-commission> accessed 1 December 2019.

[117] Robert Connolly, 'A Plug for the Section of Antitrust Law of the American Bar Association' (*Cartel Capers,* 14 August 2018) <http://cartelcapers.com/blog/a-plug-for-the-section-of-antitrust-law-of-the-american-bar-association/> accessed 3 January 2021. 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' (1982) 72 American Economic Review 1, 7.

[118] Global Competition Review, 'European Union's Directorate-General for Competition' <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2019/1197056/european-unions-directorate-general-for-competition> accessed 1 December 2019.

[119] Albert A. Foer, 'Toward Independent Competition Advocacy in the Mediterranean World: Learning from the AAI Model' (2010) Mediterranean Competition Bulletin 117, 124.

[120] van Waarden and Drahos, 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (see above) 928.

[121] Eric Lichtblau, 'Ex-Regulators Get Set to Lobby on New Financial Rules' *The New York Times* (27 July 2010) <https://www.nytimes.com/2010/07/28/business/28lobby.html> accessed 3 January 2021.

[122] Veltrop and de Haan, 'I Just Cannot Get You Out of My Head: Regulatory Capture of Financial Sector Supervisors' (see above) 10.

really the same people, only at different points in their careers"[123] will thus be shown to hold also for competition officials and practitioners.

Let us first look at competition experts moving from public office to the private sector. Such transfers are relatively common: for instance, of the 73 officials who left the FTC's Bureau of Competition between 2014 and April of 2020 for another job and could be tracked down, 52 were headed to the private sector.[124] Such career trajectory is very common for 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.[125] 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."[126] The same holds also for DG Competition, and for many competition economists working at junior government positions.[127] 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 52 abovementioned experts who left the FTC's Bureau of Competition for the private sector, 41 joined a law firm and only 11 a corporation,[128] with the main corporate poachers being Amazon and Facebook. While Europe has also seen transfers to – actual and potential – competition defendants such as Apple,[129] 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 relatively common in the United States, including positions high in the government hierarchy.[130] They nevertheless virtually always result in only temporary stints, after which the person returns back to work for the industry.[131] To illustrate both these points, the currently sitting director of the FTC's Bureau of Competition joined the agency from private

[123] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 83.

[124] The Revolving Door Project, '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/> accessed 3 January 2021.

[125] Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (see above) 1444; Richard A. Posner, *Antitrust Law* (2nd edn, The University of Chicago Press 2001) 285.

[126] Makkai and Braithwaite, 'In and out of the Revolving Door: Making Sense of Regulatory Capture' (see above) 62.

[127] William E. Kovacic, 'The Influence of Economics on Antitrust Law' (1992) 30 Economic Inquiry 294, 297; 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 Daniel J. Slottje (ed), *The Role of The Academic Economist in Litigation Support* (North-Holland 1999) 13; Ginsburg and Fraser, 'The Role of Economic Analysis in Competition Law' (see above) 41.

[128] The Revolving Door Project, 'The Top Revolving Door Jobs for Ex-FTC Lawyers and Economists' (see above).

[129] Corporate Europe Observatory, 'Per Hellström' (*Corporate Europe Observatory*, 2 November, 2015) <https://corporateeurope.org/en/revolvingdoorwatch/cases/hellstrom> accessed 3 January 2021.

[130] Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (see above) 1445; Gerber, *Global Competition: Law, Markets, and Globalization* (see above) 138; Tepper and Hearn, *The Myth of Capitalism: Monopolies and the Death of Competition* (see above) 162.

[131] Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (see above) 1445; Gerber, *Global Competition: Law, Markets, and Globalization* (see above) 138.

practice,[132] and all six most recent ex-directors worked for a law firm both before and after their term.[133] In Europe, in contrast, practitioners-turned-officials are less frequent.[134] 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.[135] That is to say that, in comparison with their EU counterparts, US competition officials are provided with an additional stimulus to self-identify with practitioners.[136]

Status

Another channel of influence identified as relevant for social capture concerns social status.[137] 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.[138] In the light of this, Kwak argues that pre-crisis financial officials revered greatly to representatives of the finance industry, and that this contributed to shaping the officials' mindset towards pro-industry positions.[139]

Also competition officials tend to perceive their colleagues in the private practice as enjoying a very high and likely even superior status. This can be illustrated for instance by the fact that even the most senior competition officials regularly go for jobs in the private sector. Namely, in the United States, all ten most recent former Directors of the FTC's Bureau of Competition moved directly to private practice. 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.

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[132] Federal Trade Commission, 'Inside the Bureau of Competition' (*Inside the Bureau of Competition,* August 2020) <https://www.ftc.gov/system/files/attachments/inside-bureau-competition/inside_the_bureau_of_competition_updated_august_2020.pdf> accessed 3 January 2021.

[133] Rick Claypool, 'The FTC's Big Tech Revolving Door Problem' (Public Citizen, 2019); Cleary Gottlieb, 'D. Bruce Hoffman' <https://www.clearygottlieb.com/professionals/bruce-hoffman> accessed 3 January 2021.

[134] Norman Neyrinck and Nicolas Petit, 'Conflicts of Interests and Ethical Rules in European Competition Law: A Primer' (2014) 8 <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> accessed 14 June 2019.

[135] Nicolas Petit, 'The Friday Slot – Damien Geradin' (*Chillin'Competition,* 27 April 2012) <https://chillingcompetition.com/2012/04/27/the-friday-slot-9-damien-geradin/> accessed 10 July 2020.

[136] It should be acknowledged that 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". Peter Yeoh, 'Capture of Regulatory Agencies: A Time for Reflection Again' (2019) 40 Business Law Review 134, 141. Hence, when former competition practitioners start making and enforcing competition rules, they are likely to bring their anti-interventionist mindset with them.

[137] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 85.

[138] Shane Thye and Christine Witkowski, 'Status Relations' in George Ritzer (ed), *Encyclopedia of Social Theory*, vol 2 (Sage 2005) 795.

[139] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 85.

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.[140] Likewise, if we look at the five former Chief Competition Economists of the European Commission, information about subsequent consulting work can be found for all but one. There is thus no doubt that competition officials afford the practitioners a high status, and that they desire their recognition.[141]

One of the most important source of status for professionals active in the context of economic policy is wealth and business success.[142] 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.[143] Clearly, the level of income does not necessarily reflect how 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; for instance, male members of a certain profession will often tend to enjoy a greater prestige – and thus also influence – than their equally or even more competent female members.[144] Kwak is convinced that the comparatively lower income of government's employees makes people think: "If they were really talented, they would work for the private sector and make ten times as much of money."[145] And against this background, he argues that the great prestige of pre-crisis financiers in the eyes of financial officials largely followed from their tremendous business success and the vast sums of money that they were making.[146]

Differences in income and wealth seem to play an important role also in the social dynamics of the community of competition experts. More specifically, the considerable prestige of competition experts – both lawyers and economists – working in the private sector is to a large extent given by the fact that they earn much more than competition officials. 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, and the gap is even greater for more senior experts.[147] Also EU competition officials earn significantly less than their colleagues in private practice, as recognised 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."[148] These differences are moreover easily apparent because competition practitioners do not shy away from exhibiting their

[140] Paul A. Pautler, 'A History of the FTC's Bureau of Economics' (2015) AAI Working Paper No 15-03, ICAS Working Paper 2015-3, 140 <https://ssrn.com/abstract=2657330> accessed 10 June 2019.

[141] D. Daniel Sokol, 'Antitrust, Institutions, and Merger Control' (2010) 17 George Mason Law Review 1055, 1074.

[142] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 87.

[143] Thye and Witkowski, 'Status Relations' (see above).

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

[145] Asher Schechter, 'The Lobbyists and the Regulators Were Really, Socially and Culturally, the Same People' (*ProMarket*, 1 June 2016) <https://promarket.org/2016/06/01/promarket-interview-james-kwak-on-the-causes-of-cultural-capture/> accessed 24 October 2020

[146] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 87.

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

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

business success, e.g. through the spectacular premises that they occupy.[149] In an environment in which economic prosperity is seen as evidence of merit, it is then no surprise that working in the private sector – full of "very successful, very rich people talking about economic efficiency"[150] – tends to be associated with greater prestige than civil service.

The status differential appears to be 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. In the context of financial policy, Baxter notes that European regulators enjoy greater societal prestige than their US counterparts.[151] Geoghegan goes even so far as to say that in the United States "civil service is ridiculed".[152] US competition officials are thus likely facing an even higher risk of their views being influenced through the channel of status than EU competition officials.

Relationships

The last channel of influence concerns what Kwak calls ongoing relationships or social networks.[153] The two previously discussed channels may to some extent operate even if public officials do not know the representatives of the private sector in person. Meeting and talking to them nevertheless further intensifies their social influence.[154] The intensity may be expected to increase in relational closeness, i.e. whether the given person is perceived as a stranger, acquaintance or friend. This closeness is in turn co-determined – as well as evidenced – by frequency of interaction because, as it has been noted with regard to public officials and the regulated industry, "[r]epeated interactions can motivate both parties to get along and develop an affinity for one another".[155] In short, when policy experts spend a lot of time together, "they develop common ways of seeing the world, a common language, norms and ideas".[156]

Kwak argues that the 2000s social capture of financial policy was co-generated by the strong position of financiers in the social networks of financial officials.[157] There are two factors that contributed to this position. First, many relationships between financial officials and financiers had begun through the process of revolving door.[158] 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 the industry. Second, financial officials had much more contact with representatives of the industry than with other interest groups also in the course of their work.[159] These two factors then made financial officials "likely to share more social

[149] Kovacic, 'The Influence of Economics on Antitrust Law' (see above) 297 n.9.

[150] Schechter, 'The Lobbyists and the Regulators Were Really, Socially and Culturally, the Same People' (see above).

[151] Baxter, '"Capture" in Financial Regulation: Can We Channel It toward the Common Good' (see above) 194.

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

[153] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 89.

[154] Yeoh, 'Capture of Regulatory Agencies: A Time for Reflection Again' (see above) 141.

[155] Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (see above) 286.

[156] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 256.

[157] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 91.

[158] Ibid.

[159] Baker, 'Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance' (see above) 653; Kwak, 'Cultural Capture and the Financial

networks with financial institutions and their lawyers and lobbyists than with competing interest groups such as consumers".[160] This in turn facilitated the industry representatives' influence on the worldview of the officials. Put bluntly, the officials aligned their thinking with the views of industry representatives because they "play[ed] squash with them and dine[d] with them".[161]

Professional and personal relationships are commonplace also between competition officials and practitioners. Some get formed very early on. With competition law and economics being highly specialised fields, many future experts pursue the same university programs and thus get to know each other already during their studies. Further connections are built in the course of the experts' employment. As discussed above, it is usual that competition lawyers and economists move between the public and private sector. And their close personal ties with ex-coworkers tend to continue even after such a turn of a coat.[162] Relationships can nevertheless be established also between contemporaneous competition officials and practitioners. Their jobs often bring them together, which "personifies their counterparts, breaking down the sense of 'other' ".[163] There are two typical settings for such meetings. First, the experts see each other within the frame of individual enforcement cases[164] and of rule-making initiatives,[165] be it at official hearings or in less formal contexts. Second, numerous professional events are intended for officials as well practitioners.[166] These include also policy discussions taking place under the auspices of the International Competition Network or OECD. Due to all these factors, "a dense fabric of professional linkages"[167] emerges, and "personal ties between lawyers, consultants, civil servants, lobbyists, and judges are inevitable [and they] often end up developing nonprofessional relationships".[168] In fact, it is not uncommon to come across even (married) couples comprising an official and a practitioner.

The social context of current competition policy is thus again very much resembling that of pre-crisis financial policy: there are close professional and personal ties between the officials and industry representatives. And there is a risk that these ties will contribute to competition officials seeing the policy through a pro-industry, anti-interventionist perspective.

Crisis' (see above) 91; Igan and Lambert, 'Bank Lobbying: Regulatory Capture and Beyond' (see above) 131 n.6.

[160] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 91.

[161] Davidoff, 'The Government's Elite and Regulatory Capture' (see above).

[162] Cf Neyrinck and Petit, 'Conflicts of Interests and Ethical Rules in European Competition Law: A Primer' (see above) 1.

[163] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 255.

[164] Wigger, 'Towards a Market-based Approach: The Privatization and Micro-Economization of EU Antitrust Law Enforcement' (see above) 114; Neyrinck and Petit, 'Conflicts of Interests and Ethical Rules in European Competition Law: A Primer' (see above) 1.

[165] Mariani and Pieri, 'Lobbying Activities and EU Competition Law: What Can be Done and How?' (see above); Orton, 'When Lobbying DG COMP Makes Sense: European Competition Officials are Policy-Makers as Well as Regulators' (see above).

[166] Wigger, 'Towards a Market-based Approach: The Privatization and Micro-Economization of EU Antitrust Law Enforcement' (see above) 114; Neyrinck and Petit, 'Conflicts of Interests and Ethical Rules in European Competition Law: A Primer' (see above) 1.

[167] Wigger, 'Towards a Market-based Approach: The Privatization and Micro-Economization of EU Antitrust Law Enforcement' (see above) 114.

[168] Neyrinck and Petit, 'Conflicts of Interests and Ethical Rules in European Competition Law: A Primer' (see above) 1.

All conditions present: Intentionality?

We have seen that all three conditions identified by Kwak to have generated the social capture of pre-crisis financial policy occur also in today's competition policy: officials identify with industry representatives, accord them a high status, and have ongoing professional and personal relationships with them. There is thus a risk that industry interests are bringing disproportionate influence to bear on competition officials' policy-relevant views. The mentioned features, and hence also the risk, seem to be somewhat more prominent in the United States than in Europe due to the US competition agencies often hiring – even the most senior – officials from the private sector and to the lower socio-economic status of US civil service.

It is worth noting that all the underlying social developments may well be occurring even without anyone intending so. In financial policy, according to Kwak, they might well have arisen as "a side effect to the lobbying advantage that the banks have".[169] The same may be the case with regard to actual and potential infringers of competition rules and their access to competition practitioners. On the other hand, it is possible that industry interests are indeed actively trying to use the discussed channels of social influence to "subtly influence the priors that will affect the judgments that the decision makers will have to make".[170] Kwak for instance suggests that the "industry might consciously set out to induce its regulators to identify with industry members and their interests"[171] or "might try to have more social interactions with regulators".[172] The risk of disproportionate industry influence on officials' views should nevertheless warrant attention under any circumstances, regardless of whether it came to existence through deliberate action or not.

V. Possible solutions

The question is what can be done about the risk of competition policy's social capture. In answering this question, one needs to recognise that no easy solutions are unfortunately available.[173] 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.[174] As further discussed below, the factors that contribute to the risk of social 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.[175] Moreover, social capture develops

[169] Schechter, 'The Lobbyists and the Regulators Were Really, Socially and Culturally, the Same People' (see above).

[170] Mario Mariniello, Damien Neven and A. Jorge Padilla, 'Antitrust Regulatory Capture and Economic Integration' (2015) Breugel Policy Contribution 1, 3.

[171] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 79.

[172] Schechter, 'The Lobbyists and the Regulators Were Really, Socially and Culturally, the Same People' (see above).

[173] Jon Hanson and David Yosifon, 'The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture' (2003) 152 University of Pennsylvania Law Review 129, 345; Davidoff, 'The Government's Elite and Regulatory Capture' (see above); Baxter, '"Capture" in Financial Regulation: Can We Channel It toward the Common Good' (see above) 190; Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (see above) 280.

[174] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 95.

[175] Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (see above) 278.

only gradually over extended periods of time[176] and may take similarly long to disappear.

Still, inspired mainly by post-crisis financial-policy scholarship, the present part proposes a number of actions to mitigate the risk of competition officials' views being swayed towards pro-industry positions through social influence. These actions are preventive in nature, aiming to "create conditions in which [social capture] is unlikely to flourish".[177] It is in this context worth noting that once 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".[178] 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 internalise their worldviews.[179] The measures should thus primarily ensure that the critical mass is not achieved.

Raising awareness

A relatively simple action to take is to make competition officials aware of the risk of social capture. As mentioned, the colonization of minds through social influence may be happening sub-consciously, without the officials noticing anything. Debiasing trainings or campaigns that would allow the officials to recognise these subtle pulls on their worldview might not only in themselves make the officials more resistant but also pave the way for other interventions.

Promoting diversity

Another possibility is to prevent a disproportionate role of pro-industry thinking by enhancing the plurality of arguments, views and stakeholders present in the decision-making process. Having found that a major weakness in the run-up to the financial crisis was a lack of intellectual challenge to the officials' excessive faith in rational and self-correcting markets, the influential Turner Review has recommended that such a challenge be actively promoted.[180] A similar recommendation can be put forward also in the context of competition policy: 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.[181] A certain share of the officials could for instance be deliberately picked from people less likely leaning towards pro-industry positions,[182] including practitioners working for plaintiffs, representatives of consumer NGOs or SME associations, or critical

[176] Barkow, 'Explaining and Curbing Capture' (see above) 24.
[177] Bagley, 'Agency Hygiene' (see above) 1.
[178] Ayal, 'The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail It' (see above) 226.
[179] Ibid.
[180] 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (Financial Services Authority, 2009) 85 <https://www.actuaries.org/CTTEES_TFRISKCRISIS/Documents/turner_review.pdf> accessed 3 January 2021.
[181] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 98.
[182] Barkow, 'Explaining and Curbing Capture' (see above) 23.

academics. Second, one may create organizational units specifically instructed to advocate interests deemed insufficiently represented,[183] such as those of consumers and SMEs. These so-called proxy or devil's advocates[184] would then inject rule-making as well as enforcement processes with corresponding reasoning and ideas. An advantage might be in this respect enjoyed by agencies entrusted with both competition policy and consumer policy.[185]

An alternative option is to empower underrepresented stakeholder groups to be able to promote their interests on their own.[186] This will not only make the stakeholders "capable of bringing different ideas and perspectives"[187] 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 the industry. It is nevertheless not enough to just invite the stakeholders to take a greater part. To balance industry's inherently stronger position, the empowerment of other stakeholders needs to take the shape of an affirmative action.[188] 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.[189] 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".[190] Another option is to grant stakeholders with special procedural rights. It is for instance a welcome development that the European Union is following suit of the United States and will soon make it possible for victims of competition infringements to litigate their claims collectively.[191]

Reducing the revolving door

As discussed, a major factor behind the risk of social 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 industry."[192] Mainly the most senior officials ought to have a strong track record within the public sector and ideally stay loyal to it all the way until their retirement.

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[183] Daniel Schwarcz, 'Preventing Capture Through Consumer Empowerment Programs: Some Evidence From Insurance Regulation' in Daniel Carpenter and David A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 389.

[184] Pagliari, 'How Can We Mitigate Capture in Financial Regulation?' (see above) 25; Kwak, 'Cultural Capture and the Financial Crisis' (see above) 98.

[185] Barkow, 'Explaining and Curbing Capture' (see above) 23.

[186] Schwarcz, 'Preventing Capture Through Consumer Empowerment Programs: Some Evidence From Insurance Regulation' (see above) 392.

[187] Pagliari, 'How Can We Mitigate Capture in Financial Regulation?' (see above) 22.

[188] Ibid 24.

[189] <https://ec.europa.eu/competition/consumers/liaison_en.html>.

[190] Firat Cengiz, 'Bringing the Citizen Back into EU Democracy: Against the Input-Output Model and why Deliberative Democracy Might Be the Answer' (2018) 19 European Politics and Society 577, 587.

[191] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November on representative actions for the protection of the collective interests of consumers [2020] OJ L409/1.

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

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.[193] 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 incentivises 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.[194] It is also not desirable that governmental positions be only temporary – as is unfortunately increasingly common in the European Commission[195] – because that creates unnecessary 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.[196] 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 social 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 social 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.[197] People who have spent some time working in the economy will arguably bring with them a solid understanding thereof.[198] 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

[193] Limiting the inflow of former practitioners addresses also the concern discussed in footnote 136. 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 and de Haan, 'I Just Cannot Get You Out of My Head: Regulatory Capture of Financial Sector Supervisors' (see above) 25.

[194] Jeff Hauser, Max Moran and Andrea Beaty, 'Better Policy Ideas Alone Won't Stop Monopolies' (*Washington Monthly*, 18 July 2020) <https://washingtonmonthly.com/2020/07/18/better-policy-ideas-alone-wont-stop-monopolies/> accessed 3 January 2021.

[195] Decision of the European Ombudsman in Her Strategic Inquiry OI/3/2017/NF on How the European Commission Manages 'Revolving Doors' Situations of Its Staff Members' [2019] para 4.

[196] Barkow, 'Explaining and Curbing Capture' (see above) 23.

[197] Alison Jones and William E. Kovacic, 'Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy' (2020) 65 Antitrust Bulletin 227, 250; Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (see above) 278.

[198] Baker, 'Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in The Communications Sector' (see above) 2; Decision of the European Ombudsman in Her Strategic Inquiry OI/3/2017/NF on How the European Commission Manages 'Revolving Doors' Situations of Its Staff Members' [2019] para 3.

salaries would otherwise not be sufficient.[199] Second, relationships between former colleagues who ended up on the opposite sides of the barricade facilitate communication and thus help to cut red tape.[200] Third, it is desirable that some officials have come from the industry 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.[201]

Improving employment conditions and reputation

Another action that can be taken to address the risk of social 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",[202] as it has been recently proposed with regard to US federal competition officials.[203] Higher income could attract competent personnel even without the promise of later transition to the private sector[204] 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".[205] 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.

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 it may be affected which one of them prevails.[206] For instance, Townley recounts decentralization of EU competition policy in the first decade of this century as a process in the course of which

[199] Jones and Kovacic, 'Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy' (see above) 248.

[200] Neyrinck and Petit, 'Conflicts of Interests and Ethical Rules in European Competition Law: A Primer' (see above) 1; Rex, 'Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remedying Capture' (see above) 278.

[201] András G. Inotai and Stephen Ryan, 'Improving the Effectiveness of Competition Agencies around the World – A Summary of Recent Developments in the Context of the International Competition Network' (2009) Competition Policy Newsletter 27, 29.

[202] McCarty, 'Complexity, Capacity, and Capture' (see above) 119.

[203] Jones and Kovacic, 'Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy' (see above) 248.

[204] Pagliari, 'How Can We Mitigate Capture in Financial Regulation?' (see above) 35; Jones and Kovacic, 'Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy' (see above) 248.

[205] Inotai and Ryan, 'Improving the Effectiveness of Competition Agencies around the World – A Summary of Recent Developments in the Context of the International Competition Network' (see above) 28.

[206] Geoffrey L. Cohen, 'Identity, Belief, and Bias' in Jon Hanson (ed), *Ideology, Psychology, and Law* (Oxford University Press 2012) 391.

people who had earlier seen themselves primarily as (national) public officials started prioritizing their competition-expert identity.[207] It is possible to stimulate a similar transformation – albeit this time in the opposite direction – in order to avoid social capture.[208] Interventions reinforcing the public-official identity include for instance attendance of formative courses or membership in suitable organizations.[209] On the latter point, professional associations dedicated exclusively to competition officials could be established under the auspices of the ABA Antitrust Section or the European Competition Network, a cooperation of European Union's competition agencies.

Monitoring and curbing relationships

Measures can also be aimed directly at competition officials' interpersonal relationships with practitioners. While a close contact and repeat interactions between public officials and representatives of the regulated industry may promote information sharing and cooperation,[210] it is telling that the global crisis has made financial policy less enthusiastic about this interconnectedness.[211] 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 U.S. 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.[212] 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 industry representatives ought to be invited to meetings convened by the International Competition Network[213] 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 social capture. A source of inspiration may be the personal relationships policy of the Bank of England: Employees of the Bank are required to disclose through an internal information system when their close family members take on specified jobs, e.g. in firms regulated by the Bank, and

[207] Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (see above) 151.

[208] Yeoh, 'Capture of Regulatory Agencies: A Time for Reflection Again' (see above) 143.

[209] Veltrop and de Haan, 'I Just Cannot Get You Out of My Head: Regulatory Capture of Financial Sector Supervisors' (see above) 24.

[210] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 95.

[211] McPhilemy, 'Formal Rules versus Informal Relationships: Prudential Banking Supervision at the FSA Before the Crash' (see above) 764.

[212] Commission Decision of 29 June 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 in Her Strategic Inquiry OI/3/2017/NF on How the European Commission Manages 'Revolving Doors' Situations of Its Staff Members' [2019] para 45.

[213] Chris Townley, Mariana Tavares and Mattia Guidi, 'Influence in the International Competition Network (ICN): Who Seeks It, How Do They Do This and Why?' (2019) 33 <https://ssrn.com/abstract=3415067> accessed 3 January 2021; Wils, 'Independence of Competition Authorities: The Example of the EU and Its Member States' (see above) 164 n.76.

when other close personal relationships could reasonably give rise to an actual or perceived conflict of interest, not only with regard to specific decisions in which the employee is involved but also his or her work more generally. As far as the author is aware, neither US nor EU competition officials are subject to such reporting obligations. Surely, the information at stake would again be gathered primarily in order to manage conflicts of interest. Nevertheless, an obligation to report officials' close relationships with practitioners would 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 people 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.[214]

VI. Conclusion

This article has shown that current competition policy on both sides of the Atlantic remarkably resembles financial policy before the global crisis insofar as it displays three characteristics enabling social capture. First, competition officials self-identify with a community dominated by representatives of the private sector (competition practitioners). Second, the officials hold the practitioners in high regard. Third, there are close interpersonal relationships between the officials and practitioners. Regardless of whether induced deliberately or not, these characteristics pose a risk of pro-industry, anti-interventionist positions exerting a disproportionate influence on the mindset of competition officials. The risk can be expected to be higher in the United States, where some of the scrutinised characteristics appear to be more pronounced.

A challenging question is whether the risk has materialised, i.e. whether competition policy has actually been distorted. Our findings alone do not allow drawing a definite conclusion to that effect. It nevertheless does appear highly plausible that the lax policy of recent decades has at least to some extent been brought about through industry representatives' social influence on competition officials' views. As a matter of fact, some commentators have recognised an existing bias of these views in favour of the industry.[215] To be sure, this "colonization"[216] of officials' ideas may have occurred also through other mechanisms than just social influence. In fact, even Kwak's account of pre-crisis financial policy recognises that it was hardly "the sole or primary reason for the dominance of deregulatory ideas".[217] Both then and now, a mix of factors has been playing a role, some of them more within the reach of the industry, such as funded scholarship, whereas others less, such as the general intellectual climate

[214] Christopher Williams, 'Top Competition Watchdog Forced to Cut Off Friendship with Murdoch Lawyer over Sky Takeover' *The Telegraph* (20 September 2017) <https://www.telegraph.co.uk/business/2017/09/20/top-competition-watchdog-forced-cut-friendship-murdoch-lawyer/> accessed 3 January 2021.

[215] 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 March 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/> accessed 7 July 2019.

[216] Engstrom, 'Corraling Capture' (see above) 32.

[217] Kwak, 'Cultural Capture and the Financial Crisis' (see above) 94.

of the time.[218] Social capture may nevertheless well constitute a major ingredient of this mix.

It is true that we are currently witnessing an apparent increase in efforts to address the problem of market power in digital markets in the United States as well as in Europe. Even should these efforts persist, however, the forces animating social capture are not necessarily out of the picture: Social interaction between competition officials and practitioners may still be taking its toll on the former's views, with the effect only being presently outweighed by other factors. In particular, the major moving forces behind the contemporary reinvigoration of competition policy appear to be academics and the general public, which has just recently started paying closer attention to the effects of market power.[219] As a matter of fact, also financial policy could be according to Kwak tightened only thanks to the public outrage following the global crisis.[220] When the closer public attention to substantive competition rules and their enforcement fades, however, the processes of social capture may easily reverse the pro-enforcement trends.

To attain an undistorted competition policy, it is hence advisable to adopt measures addressing the risk of social capture. As with other types of regulatory capture, the most effective approach is *ex ante* prevention.[221] This article has proposed several such preventive measures, whose aim is to ensure for instance 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 nevertheless needs to be carefully gauged and recognise inherent trade-offs.

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

[219] Sandeep Vaheesan, 'The Twilight of the Technocrats' Monopoly on Antitrust' (2017-2018) 127 Yale Law Journal Forum 980, 984.

[220] Schechter, 'The Lobbyists and the Regulators Were Really, Socially and Culturally, the Same People' (see above).

[221] Rachel E. Barkow, 'Insulating Agencies: Avoiding Capture through Institutional Design' (2010) 89 Texas Law Review 15, 23.