Of conflicts of interests in EU competition proceedings

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Civil servants; Competition law; Conflict of interest; EU law; Judges; Lawyers; Right to independent and impartial tribunal

The debate over the compatibility of EU competition enforcement with art.6 ECHR is far from over. Whilst there have been a great—some would say excessive—deal of papers on due process issues, less, or even no attention has been paid to the rules and remedies that govern conflicts of interests amongst lawyers, civil servants, legal secretaries and Members of the Court. This short paper seeks to open the discussion on this issue.

In specialised journals, papers on EU competition procedure sell like hotcakes. With the anticipated accession of the European Union (EU) to the European Convention on Human Rights (ECHR), the question whether EU competition procedure is Strasbourg-compliant has unsurprisingly been a best-seller in contemporary competition scholarship. Until now, the bar has been the primary contributor to this debate. Lawyers have brought most, if not all, aspects of the competition enforcement system to the test bench: integration of investigative and decisional functions, parental liability doctrine, rules on access to the file and hearings, standard of judicial review, duration of judicial proceedings, adequacy of fines over corporations, etc.

But one stone still remains unturned. Albeit a burning issue in EU news lately—think of the various scandals surrounding the “Dalligate”—conflicts of interests have been wholly absent from discussions on due process in EU competition policy. And whilst the focus is currently on the role of lobbyists in EU affairs, there is no obvious reason to leave lawyers, competition officials and judges immune from similar scrutiny.

In Brussels and Luxembourg, the practice of competition law looks a bit like a family business. Beyond working hours, antitrust lawyers, civil servants and judges entertain social relationships. This is inevitable. In all constituencies that harbour important decisional powers in specific policy areas, professionals from the same epistemic community end up sharing personal ties.

Besides this, revolving door practices are not uncommon on the Brussels market. In the past years, several high-ranking officials have closed their careers with a stint in “big law”. Large contingents of young(er) lawyers also regularly join the EU institutions, as Commission officials, contract agents or Legal Secretaries. Not to mention economists’ moves across the public-private sector boundary; or of the appointment, in the EU judicature, of former competition officials and private practitioners.

This, of course, has many merits, and should thus be welcomed. First, there is much worth in “cross-fertilisation”, when seasoned officials who have amassed knowledge in the public sector bring their expertise to the private sector, and vice versa. In addition, personal connections mitigate the heavy costs of bureaucratic rigidities. Often, a phone call to an insider friend is more effective than a formal letter to a generic EU mailbox.

Yet, those connections may threaten the personal (subjective) and functional (objective) impartiality requirements set forth by art.6(1) ECHR. Behind those concepts lie the well-known issues of biases, nepotism, and other aspects of corporatism which steer decision-making away from the public interest.

In EU law, the issue of conflicts of interest is not left in a state of regulatory void. In addition to the general Staff Regulations that apply to the EU civil servants, the Directorate General for Competition (DG COMP) initially adopted in June 2010 a comprehensive internal document entitled “Code on Ethics and Integrity of DG COMP staff”, which was recently upgraded on January 14, 2013. This has also adopted an “Ethics Compliance Officer”, whose job is to monitor the implementation of the code. The Court of Justice also abides by ethical rules. The Protocol on the Statute of the CJEU appended to the EU Treaties imposes on its members (i.e. the Judges and Advocates General) a general duty of impartiality. And again, those rules are supplemented by a specific Code

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2 And, to a lesser extent, by Commission officials.
5 To be more concrete, some lawyers may use their connections inside the administration as a selling argument before potential clients. And officials may use their current position as leverage for securing a good future position in the private sector.
of Conduct. Finally, a Decision of February 17, 2009 sets rules of good conduct in relation to Legal Secretaries (the judges’ advisors, also known as “Référendaires”).

With this regulatory arsenal, where is the beef? In our opinion, a first puzzling feature of those texts is that whilst “public”, most are only accessible upon request. So far, ethical rules seem to be considered to be measures of internal organisation. And practically, short of external publicity, those texts may evade enforcement. How indeed can victims of conflicts of interest ever invoke those rules to their benefit, if they are unaware of their existence?

The content of those documents also lends itself to criticism. We have in vain explored them in search of a standard ex post withdrawal procedure for the disqualification of Judges, Advocates General, Legal Secretaries and Commission officials on grounds of prejudice or conflict of interest (continental lawyers talk of “recusation”). And we were a little confounded when we realized that under the law as it stands, conflicts of interest seem to be only dealt with ex ante, on the basis of self-discipline: civil servants, Legal Secretaries and members of the court must disclose or report any personal (e.g., financial or family bonds) or professional (previous business activity for one of the parties) conflict of interest to their “appointing authority”.

This notwithstanding, parties willing to disqualify a participant to the proceedings can always invoke a breach of the duty of impartiality, and seek protection under the General Principles of EU law, the Charter of Fundamental Rights of the European Union, and the ECHR. But lawyers know all too well that a right is moot absent a remedy. In this context, the fact that no rule organises disqualification proceedings is a cause of concern: where, when and how can such arguments be invoked? In the belated context of standard annulment proceedings before the court … a court that may actually be the organ where prejudice is encountered? Moreover, given that the identity of those working on a case in DG COMP or at the court (with the exception of judges) is not publicised, how can disqualification proceedings ever be effective?

A last remark: the EU ethical rules are possibly incomplete and appear inconsistent. Judges and Advocates General are barred from appearing before the EU courts for a period of three years following the end of their term. But no such prohibition applies to the Legal Secretaries, who are the ghostwriters of most EU judgments. Similarly, whilst Judges and Advocates General leaving the court are subject to a strict incompatibility regime, civil servants on leave from DG COMP benefit from a looser authorisation procedure. Finally, the influential Legal Service of the Commission does not have any ethical code. Upon inquiry, we have been told that it applies, mutatis mutandis, DG COMP’s ethical code and that a specific code may be in the pipeline.

To conclude with appeasing words, this short opinion does not purport to create a whiff of distrust of the EU institutions. Rather, its ambition, or hope, is to spur research on what has to date, incomprehensibly, been a wholly unchartered issue.

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8 See Décision de la Cour du février 17, 2009 portant adoption des règles de bonne conduite des Référendaires.
9 We do not suggest to extend to them the three years incompatibility period, but to make some thinking on this issue. Judges and Advocates General may be subject to a longer period, simply because most of them are at the climax of their career when appointed, and thus will no longer need to find a further position afterwards. This is not the case of Legal Secretaries who are often younger than Judges and Advocates General. Applying to them a strict incompatibility regime may create disincentives to take up such positions in the first place.