

CONFLICTS OF INTERESTS AND ETHICAL RULES IN EUROPEAN COMPETITION LAW: A PRIMER

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“Entre ma mère et la Justice, je choisis ma mère”, Albert Camus

I. Introduction

In the European Union ("EU") competition literature, many papers have been written on "due process" issues. This thick body of scholarship, however, pays no heed to the legal framework applicable to conflicts of interests amongst lawyers, civil servants, legal secretaries and Members of the Court. This article seeks to fill this gap in the literature.

In our opinion, the issue is worth investigating. The EU competition enforcement system exhibits several features prone – at least in theory – to risks of conflict of interests.

First, the centralized geography – Brussels-Luxemburg – of EU competition policy has created an epistemic community of its own, where personal ties between lawyers, consultants, civil servants, lobbyists, and judges are inevitable. Expatriates in the small constituencies of Brussels or Luxemburg meet regularly in the professional context (at the Court, at the Commission, at professional meetings, and conferences) often end up developing non-professional relationships.³

Second, the impressive expansion of the market for expert competition law services in the past decades has paved the way to frequent revolving door practices (hereafter, "revolving doors"). In the course of their career, EU competition professionals move from the private sector – *ie*, law firms and economic consultancies – to the public sector – *ie*, the Commission or the Court – and vice versa. In general, private-public revolving doors concern young professionals at low career advancement levels, whilst public-private revolving doors involve more seasoned professionals.

Revolving doors have many merits and should be welcomed. First, they promote “*cross-fertilization*”. Revolving doors are an uncostly mechanism for the transfer of “*know-how*”, “*expertise*” and “*best practices*” from the private to the public sector and vice-versa. This, in turn, dissipates asymmetries between the regulator and the regulated. Second, revolving doors limit “*transaction costs*”. Personal connections help bypass red-tape and bureaucratic rigidities. A phone call to an insider friend may prove more effective than a formal letter to a

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³ See OECD_Guidelines on Managing Conflicts of interests: “*The potential for conflict-of-interest situations may be unavoidable. Particularly in smaller countries in case of positions requiring specific knowledge and experience (such as top management appointments) when only a few individuals may possess critical skills, and there is a high demand for them both in the public and the private sectors*”. And: “*It may be possible to managing a conflict of interest as the only solution when seeking to appoint such experts to a position in the public sector in order to obtain the benefit of their crucial knowledge and expertise in specialised areas*”.

generic EU mailbox. Third, and somewhat counterintuitively, revolving door practices contribute to the independence of public authorities. Expertise is a basic requirement for independent and legitimate institutions.⁴ Judges and civil servants must hold sufficient skills to be shielded from risks of regulatory "capture".⁵ This is all the more important in competition law, which is often described as an abstruse discipline.

This notwithstanding, revolving doors do not fare particularly well with the requirements of the European Convention on the protection of Human Rights ("ECHR"), and in particular that of personal (subjective) and functional (objective) impartiality of Article 6(1). For instance, the risk exists that officials use their positions as leverage to secure placement in the private sector. By the same token, lawyers and economists could be tempted to use their personal connections with officials in their dealings with agencies and courts. This risks steering decision-making away from the public interest.

With this background, the present contribution addresses conflicts of interest in competition law under a large interpretation. *First*, the kind of conduct we investigate may be intentional but consist, more generally, in the careless exercise of public duties.⁶ As will be seen below, conflicts of interest do not *necessarily* entail dishonesty. Rather, they entail conduct which may be contestable from an ethical point of view, such as deciding appointments – even where no irregularity is committed – not only on merit-based grounds, but also on other grounds, such as professional or personal ties. Unless addressed by appropriate rules, those conflicts plague citizen's confidence in public institutions.

Second, our study focuses both on actual conflicts of interests, but also on potential conflicts of interest. It is not because a civil servant finds himself in a situation of potential conflict, that he will necessarily adopt unethical conduct. This notwithstanding, the economic literature insists that potential (or apparent) conflicts of interests are almost equally as harmful as actual conflicts of interests.

The present paper aims at investigating how conflicts of interests are dealt with in EU competition law, and at assessing whether the existing legal framework is appropriate. To that end, we proceed in six steps. Following this introduction (I), we explain first why this issue is relevant by giving an overview of the literature on legitimacy theory in political sciences (II) and in economic theory (III). We then show that the issue is worth investigating in EU competition policy, by bringing qualitative evidence that conflicts of interests may have gained prominence in the past years, with the steady development of the EU competition market in the private sector (IV). Fourth, we propose a framework which describes the various types of conflict of interests, their source and the applicable remedies (V). Fifth, we give a full account of the legal framework adopted to address conflicts of interests in EU competition law (VI). Sixth, we compare this legal framework with the law applicable in other jurisdictions and make several suggestions for reform (VII). A last part concludes (VIII).

⁴ Skillfulness is a condition of the independence and the legitimacy of the competition authority, thus enhancing the acceptance of its decisions.

⁵ This entitled them to avoid "capture", i.e., the risk to lack the necessary distance and critical views on the arguments brought about by the parties. See Rapport sur les autorités administratives indépendantes : P. GELARD, Office parlementaire pour l'évaluation de la législation, Assemblée nationale/Sénat, Documents d'information de l'Assemblée nationale; Les Rapports du Sénat, Juin 2006, http://www.assemblee-nationale.fr/12/rap-off/i3166-tl.asp#P1030_153845

⁶ Fraud is not the core of our article, as it is a matter for criminal law.

Before turning to the analysis, we would like to make a last remark. Our purpose with this paper is not to antagonize the EU competition world (within which we have many colleagues and friends). Rather, we want to cast an objective and dispassionate eye on a topic that is often hostage to subjective considerations, personal biases, etc. A previous short paper published in 2013 by one of us has generated a stir. This, in our view is the best sign that the issue of conflicts of interests is not moot, irrelevant, vacuous, for no one would ever strongly react to an irrelevant academic piece. Rather, it is either sign that we were deceptively wrong or genuinely right in our intuitions. It is thus time to devote a longer research to the issue.

Of course, the point may be made that conflicts of interests in competition law are a necessary evil, the price to pay in a narrow “*relevant market*” where professionals are overly specialized, having studied and worked together. That said, this is no excuse to leave the issue unaddressed in law and, as will be seen later, a significant number of legal initiatives have already been adopted to this effect.

II. Literature review (1): political sciences

In political sciences, conflicts of interest are part of legitimacy theory. In brief, legitimacy theory studies citizen's confidence in public institutions. It professes that the legitimacy of public institutions is based on citizens' belief that they conform with their “*own sense of what is right and proper in the political sphere*”⁷. Deprived of citizens' support, public institutions are disregarded, and eventually replaced.

In so far as judicial institutions are concerned, citizens' support is particularly important. When citizens lack confidence in the judiciary, they are reluctant (i) to bring disputes before courts for resolution;⁸ and (ii) to comply with courts judgments.⁹ In turn, the risk exists that citizens resort to antidemocratic means to resolve their conflicts (war, corruption, etc.). Moreover, the economic costs of “*deficient justice*” (or “*no justice*”)¹⁰ in themselves justify improving the citizens' confidence in the judicial system: “*Fairness and economics demands that the cost of injury be borne by the responsible party. Anything less is a market distortion or protectionism that also perpetuates the harmful conduct and multiplies the resulting injuries*”.¹¹

⁷ D. EASTON, *A Systems Analysis of Political Life*, New York, John Wiley & Sons, Inc, 1965, p. 278. See also T. TYLER, “Psychological Perspectives on Legitimacy and Legitimation”, *Annual Review of Psychology*, Vol. 57, 2006, p. 375: “*Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward.*”

⁸ J. ROBERTS and Loretta J. STALANS, *Public Opinion, Crime, and Criminal Justice*, Boulder, Westview Press., 1997, p. 99.

⁹ W. MURPHY and J. TANENHAUS, “Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes.”, *Law and Society Review*, 2 (2), 1968, p. 357; T. TYLER, *Why People Obey the Law*, New Haven: Yale University Press, 1990.

¹⁰ To our best knowledge, we are left on this issue with qualitative economics only. Quantitative economics have not addressed this issue so far. “*We know civil justice has a cost; more troubling, we know there is a cost to the lack of access to civil justice — but we do not know what these costs are.*” The Canadian Forum on Civil Justice, *The Cost Of Justice. Weighing the Costs of Fair & Effective Resolution to Legal Problems*, 2012, p. 2 (available at: http://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA_background_doc.pdf).

¹¹ P. CARTER, “The Cost of No Justice”, *OnlineOpinion*, 15 July 1999, (available at: <http://www.onlineopinion.com.au/view.asp?article=906>).

Many factors influence citizens' confidence in courts. Studies on the United States Supreme Court ("SCOTUS") show that factors intrinsic to the judiciary itself, such as the judges' race, party affiliation or ideology affect confidence in the judiciary.¹² Even more remarkably, S. BENESH finds that three extrinsic factors affect citizens' confidence towards courts: "the experience a person has had with them, attitudes a person has regarding the fairness of the procedures employed by them, and the institutional designs of them"¹³. Using empirical data, he confirms that procedural fairness;¹⁴ and institutional designs¹⁵ matter and are positively correlated with citizens' confidence in the judiciary (in addition to knowledge¹⁶ and (certain types of) prior experience) with the courts' system.¹⁷

Given that impartiality is at the same time a symptom of procedural unfairness and the consequence of institutional design choices, those researches clearly warrant action against conflicts of interests, to keep trust of citizens in public institutions.

In addition to those general studies, J. GIBSON and G. CALDEIRA recently provided for the first time empirical evidence of individual-level attitudinal change towards the judiciary in case of revelations of possible conflicts of interest, and requests for recusal by the parties.¹⁸ This prolific study makes three general findings that deserve particular attention. *First*, quite surprisingly, recusal measures do not eliminate the entire harm caused to the legitimacy of a judge in a situation of conflict of interest. Recusal measures reinstate legitimacy, but do not restore it to the level that existed prior to the conflict of interest.¹⁹ *Second*, the refusal of a judge to recuse undermines the perceived legitimacy of the entire bench, and this even if this judge has no dispositive influence on the case outcome.²⁰ *Thirdly*, one third of the citizens seem insensitive to the most radical hypothesis of conflict of interest,²¹ and do not perceive them as a threat to the court's impartiality, fairness and legitimacy.²² GIBSON and

¹² K. DOLBEARE and P. HAMMOND, "The Political Party Basis of Attitudes Toward the Supreme Court", *Public Opinion Quarterly*, 32 (1), p. 16; J. KESSEL, "Public Perceptions of the Supreme Court.", *Midwest Journal of Political Science*, 10 (2), 1966, p. 167.

¹³ S. BENESH, "Understanding Public Confidence in American Courts", *The Journal of Politics*, Vol. 68, No. 3, 2006, p. 698.

¹⁴ V. BAIRD, "Building Institutional Legitimacy: The Role of Procedural Justice", *Political Research Quarterly*, 54 (2), 2000, p. 33; T. TYLER, J. CASPER and B. FISHER, "Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures", *American Journal of Political Science*, 33 (3), 1989, p. 629.

¹⁵ Regarding institutional designs, Mrs. S. BENESH's study focuses on the impact of independence of Courts versus political with regards to confidence of citizens. P. WEBSTER, "Selection and Retention of Judges: Is There One "Best" Method?", *Florida State University Law Review*, 23 (1), 1995, p. 1.

¹⁶ G. CASEY, "The Supreme Court and Myth: An Empirical Investigation", *Law and Society Review*, 8 (3), 1974, p. 85; J. GIBSON, G. CALDEIRA and V. BAIRD, "On the Legitimacy of National High Courts", *American Political Science Review*, 92, 1998, p. 343.

¹⁷ S. BENESH and S. HOWELL, "Confidence in the Courts: A Comparison of Users and Non-users", *Behavioral Sciences and the Law*, 19, 2001, p. 199; J. WENZEL, S. BOWLER and D. LANOUE, "The Sources of Public Confidence in State Courts: Experience and Institutions", *American Politics Research*, 31 (2), 2003, p. 191.

¹⁸ J. GIBSON and G. CALDEIRA, "Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Courts?", *The Journal of Politics*, Vol. 74, No. 1, 2012, p. 18.

¹⁹ *Ibidem*, p. 27.

²⁰ *Ibidem*, p. 27.

²¹ *Ibidem*, p. 24. The worst case scenario envisaged by the study echoes to the *Caperton* case and depicts a judge who (i) was offered financial support for his election (ii) accepted it (iii) thanks to what he won the election, (iv) later on refused to withdraw when his benefactor brought a case before his court and (v) broke a tie-vote in favor of the latter.

²² *Ibidem*, p. 32.

CALDEIRA explain this odd finding through framing effects *ie* the result of past positive experiences.²³ In the citizens' view, the judiciary would constitute a “*reservoir of goodwill*”.

What those findings tell us is twofold. Number one, conflicts of interests have viral effects within public institutions, for they throw a whiff of distrust at the entire organisation. In turn, this means that anti-conflict of interests policies should be applied at all stages, and not restricted to the apex of public administrations (eg senior management).²⁴ Number two, anti-conflict of interests policies should not be only of a corrective nature (eg, recusal), but also have a preventive dimension. This is because the goodwill people show towards the judiciary is not static, and may diminish in the long term, amidst repeated examples of conflicts of interest. Measures must thus be adopted to prevent conflicts of interests *a priori*.²⁵

III. Literature review (2): economic theory

In economic theory, the issue of conflicts of interests arises in principal agent relationships, where asymmetries of information between the principal and the agent entitle the later to act against the public interest mission delegated by the principal, in pursuit of his own private interest.

Conflicts of interests are thus a form of “*opportunism*”. There are several variants to agent’s opportunism. The agent can seek to increase his profits by making additional gains (by securing a revolving door placement, by receiving bribes, etc.). He can also seek to increase non-monetary profits: recognition with the public, notoriety, etc.

In economic sciences, Public Choice theory has probably best explained conflicts of interests (Bucchanan, ___); (Tullock, ___). The risk of conflicts of interests stems primarily from the fact that bureaucracies cannot increase the income they pay to agents.



IV. Context

Most conflicts of interests that have made the headlines in the EU are external to the world of competition law.²⁶ Should this be taken as evidence that the issue is moot in EU competition

²³ “Citizens judge the performance of institutions according to their expectations, and the satisfaction of expectations over time gives rise to a more general institutional loyalty” (...) “we can easily imagine a feedback loop through which attitudes would be shaped over time by accumulated experiences”

²⁴ These unique findings disqualify existing enforcement policies. There are OECD recommendations according to which ethics enforcement authorities should focus on “*policy-makers and public office holders working in the most senior positions*”. OECD study demonstrates that surveyed countries are mainly directing their respective conflict-of-interests policy towards high-ranking officials. For example, in the United Kingdom, Ministers are advised to provide their Permanent Secretary with a full list in writing of all interests (including those of a spouse or partner, of children, etc.) which might be thought to give rise to a conflict. See OECD Guidelines. See also First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission (15 March 1999), “The higher the office, the more demanding those standards are in requiring the holders to conduct themselves properly in appearance and behavior”.

²⁵ See our proposals for reform *infra* under section III. C.

²⁶ See the fall of the Santer Commission in 1999 following revelations in the press about acts of favoritism in the hiring of advisers constitutes the most visible and memorable case of conflicts of interest to date. S. GREY, “Tackling fraud and mismanagement in the European Union”, *** Voir aussi D. GEORGAKAKIS, « La démission de la Commission européenne : scandale et tournant institutionnel (octobre 1998 – mars 1999) », Cultures & Conflits, 38-39 (2000). Yet, recent scandals illustrate that conflicts of interests issues are not past

policy? In this section, we answer this question in the negative. First, several high profile conflicts of interests cases have garnered considerable media exposure in the past years (A). Second, beyond those high profile cases, we recount a tale of 5 revolving doors practices which have not made the headlines, but which in our view, are worth discussion (B).

A. High Profile Conflicts of Interests Cases

In EU competition policy, suspicions of conflicts of interests have punctually made the news. To date, most public attention has been channeled towards cases involving high level officials. The appointment of Neelie KROES as Competition Commissioner in 2004 gave rise to criticisms from the European Parliament. In her previous career, Mrs. Kroes served on the board of several large corporations (including McDonalds' Netherlands, Nedlloyd, etc.). Following a rather intensive review of Ms. Kroes' connections with the private sector, her appointment was made conditional on a pledge to step aside and delegate decisions to another Commissioner in cases where there could be suspicions of conflicts of interest. In practice, Ms. Kroes had to step out of several important cases.²⁷

More recently, Commissioner Almunia has been in the eye of the storm, with the opening of an investigation by EU Ombudsman Emily O'Reilly. The Ombudsman is concerned about "apparent" conflicts of interest in the handling of State Aid cases by the Competition Commissioner. This case follows a complaint of Spanish football clubs against the Spanish government. A number of their competitors have arguably received exceptional tax cuts. The complaint has rested dormant for four years. No Commission decision has yet been adopted on whether to initiate or abandon proceedings, whilst such decisions must normally be made within 12 months. Commissioner Almunia is a well-known Bilbao fan and was previously the

history. Echoing to this, the recent *Dalligate* – named after the forced resignation of EU Commissioner for Health and Consumer Affairs John DALLI following a tobacco industry cash-for-influence scandal – reminds that careful examination of official profiles is a major issue for the EU institutions as a whole. EU Press release, "Press statement on behalf of the European Commission", 16 October 2012, MEMO/12/788 (available at: http://europa.eu/rapid/press-release_MEMO-12-788_en.htm); *Le Monde*, "Le Parlement européen renonce à enquêter sur le "Dalligate"", 12 April 2013 (available at: http://www.lemonde.fr/europe/article/2013/04/12/le-parlement-europeen-renonce-a-enqueter-sur-le-dalligate_3159114_3214.html). Along the same line, a fresh report from the European Court of Auditors on the handling of conflict of interests by EU agencies abruptly concludes that the selected agencies do not adequately manage conflict of interest situations – notably regarding revolving doors issues. The findings are all the more alarming considering that the agencies under review apply the same rules than those of application for Commission staff. European Court of Auditors. "Management of conflict of interest in selected EU Agencies", Special Report No 15/2012, p. 35, para 88 (available at: http://www.eca.europa.eu/Lists/ECADocuments/SR12_15/SR12_15_EN.PDF).

²⁷ Consequently, the start of Commissioner Kroes' mandate was characterized by repeated departs from conflicted cases. A few days into her new mandate as competition commissioner, Neelie Kroes had to drop her first competition cases due to potential conflicts of interest. The first case on which Kroes did not rule was a bid by P&O Nedlloyd NV and Europe Container Terminals to take control of a terminal in the port of Rotterdam, as Kroes had served a number of years on the board of P&O Nedlloyd. Intervention on an alleged bitumen cartel and a competition case investigating mobile phone roaming charges were also matter of contention. *EurActiv*, "Kroes delegates competition cases", 25 November 2004 (available at: <http://www.euractiv.com/future-eu/kroes-delegates-competition-case-news-212803>)

Minister who signed off on the tax exemption bill. The EU Ombudsman has stepped in to require a timely resolution of the matter.²⁸

But conflicts of interests cases also involve lower ranking officials. In 2012, several NGOs have lodged a complaint with the Ombudsman. They argue that the Commission has failed to adequately implement the 'revolving door rules set forth in the Statut. The issue is thus not so much about the existence of rules, but about their practical enforcement. Interestingly, the complaint specifically concerns three former officials from DG Comp now working in public affairs consultancies (or "lobbies"). The first worked at DG Competition for six years, dealing with mergers and then became Associate Director for Competition at a well-known public affairs agency. The second worked as an assistant case handler (temporary agent) at DG Competition for 6 years before she became a senior consultant at the same lobby. In so far as those two cases are concerned, the complaint laments that both had applied for authorization of their new position retrospectively, in response to an access to document request introduced by the NGO Corporate Europe Observatory and a subsequent letter addressed by DG-HR. Following this, those two individuals were requested to avoid "*avoid any situation of conflicts of interest in their new function*" and a list of potentially sensitive cases was established. The complaint argues that the imposition of a cooling-off period would have been more appropriate in this case.²⁹

The third case for criticisms is the screening of Jean-Philippe Monod de Froideville when he left his position as personal advisor and member of Competition Commissioner Neelie Kroes' cabinet. Whilst at DG Competition he advised on mergers and acquisitions in the financial services and health-related markets. His portfolio of responsibilities included technology & development, environment, energy, communications and trade. In 2009, he was appointed Associate director with the consultancy organization Interel to provide support to clients "*in the often overlapping legal, economic and political field of anti-trust, state aid, mergers and general competition policy for clients across many sectors*". Interel's Managing Director of the Brussels office promoted Jean-Philippe Monod de Froideville's "*strong network within the EU institutions and personal insight into the formal and informal European decision making process*" as a tremendous asset to Interel's clients. The complaint to the Ombudsman underlines that Commission's inquiries were too limited and that no external information was gathered on the precise content of the future activities of the advisor – neither from the Transparency Register nor from Interel directly. The complaint deplors that the Commission

²⁸ EU Ombudsman Press release, "Ombudsman commends Commission for opening an investigation into funding of Spanish football clubs", 18 December 2013, Press release no. 23/2013, 18 December 2013 (available at: <http://www.ombudsman.europa.eu/en/press/release.faces/en/52901/html.bookmark>)

²⁹ Complaint from the Corporate Europe Observatory, Greenpeace EU Unit, LobbyControl and Spinwatch to the EU Ombudsman, 16 October 2012, pp. 29 and 41 (available at: http://corporateeurope.org/sites/default/files/publications/ombudsmancomplaint_commission_revolvingdoors.pdf). Moreover, no additional inquiry was allegedly made by the Commission despite the fact that the first former official had previously worked on a case involving Sumitomo Chemicals that was then listed on Avisa Partners' Transparency Register entry as a client. The complaint considers that the Commission should have been more systematic in its approach and at least should have asked if this official or someone in his team was working directly for Sumitomo. Likewise, the Complaint regrets that extremely brief depictions of the activities of the departees were not followed with demand for clarification by the Commission. Furthermore, the complaint emphasizes that the departees' work at Avisa Partners was unregulated and unscrutinised during months before Corporate Europe Observatory and DG-HR stepped in and that conflicts of interest could have arisen during this time. Yet, no sanctions were implemented for this breach in the rules; That said, the Commission acknowledged failing to send specific reminders of their obligations when the agents had left.

was not more probing and holds that, considering the seniority of the advisor and his previous influential role, probing should have led to restrictions and/or a cooling-off period³⁰.

In total, the complaint highlights that there have been at least 343 cases in four years in which the Commission has examined possible conflicts of interest. But in only one case was an outgoing Commission employee prohibited from taking a job in the private sector, while conditions were imposed in four cases³¹. This rather low track record is seen as a failure by the Commission to effectively enforce regulation on conflicts of interest.

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Whatever the steadiness of the enforcement policy of the Commission, our own researches tend to confirm that revolving door practices are common in the European competition law cenacle. A review of the community news of a well-known antitrust gazette indicates that 14% of the professional moves that have been publicized involve public-private transfers³³. This rather important number may be explained either because revolving door practices *are* widespread, or because revolving doors practices are a source of amazement for the community itself. In both cases, this would justify that more attention is brought to the law governing conflicts of interests.

B. A tale of 5 revolving doors practices, and 1 conflict of interest

As explained by Wils, the "*fundamental difficulty*" of adducing empirical evidence to assess a given issue of EU competition law should by no means represent an obstacle to passing judgment on the basis of "reasonable argument", informed by publicly available information.³⁴ In this section, we thus draw inspiration from Wils' methodology, by recounting the tale of 6 persons, which represent situations which can realistically arise, and which any public policy with regard to ethical rules and conflicts of interests programmes should take into account:

- Mr. A has made a full career with the EU Commission since 1979. In 2001, he is appointed Director General of the Legal Service of the Commission, a service under the authority of the President of the Commission, entrusted with the provision of legal advice to the Commission and its representation before the Court. The Legal service

³⁰ *Ibidem*, p. 38.

³¹ *Ibidem*, p. 12.

³² *Ibidem*, p. 12.

³³ We review three years of community news published on *Global Competition Review*, from January 2011 to December 2013. 32 news out of the 227 news dealing with transfers of EU Competition law specialists are public-to-private or private-to-public transfers. Interestingly, news report much more public-to-private transfers (28) than private-to-public moves (4), what could be explained by the perception that returns to private practice after a time in public service is more transgressive than the other way around (and, in turn, is more susceptible of being published). Transfers of economists are also highly represented. We identify 15 transfers of economists and 17 transfers of lawyers. Only 8 news deal with EU institutions-private practice transfers while the other 24 news deal with national transfers and involve ex or future NCAs agents.

³⁴ <http://ssrn.com/author=456087>

has a right of veto over all formal decisions of the EU Commission, including those of DG COMP. In 2008, Mr. A joins the law firm 1 as partner to work on anti-trust, competition, trade, litigation and dispute resolution issues. In 2009, Mr. A is appointed a member of the Commission ad hoc ethical committee to rule on revolving doors practices of former Commissioners.

- Mr. B has started his career as the Germany's Federal Cartel Office in 1975, and then moved to the European Commission in 1981, where he worked as coordinator for distribution and franchising cases and assistant to the Director General. Between 1995 and 2004, Mr. B has been the Director of the defunct Merger Task Force, a division of DG COMP tasked with the review of all proposed EU merger transactions. With this function, he scrutinized many merger transactions. In 2006, he joined the US law firm 1, where he advised primarily on mergers. He joined in 2012 another US law firm.
- Following the completion of his studies in prestigious universities and a PhD, Mr. C has been a legal secretary at the Court of Justice of the EU for a number of years. He moved to the EU Commission in 1994, to work for its Legal Service. In this capacity, Mr. C defended the Commission in approximately 300 cases before the EU courts, ie the General Court and the Court of Justice. Many of those cases involved appeals from DG COMP decisions by firms guilty of competition infringement. In brief, Mr. C has for some time been DG COMP's internal lawyer. In 2010, Mr. W took a new position with the Commission, as Hearing Officer. The Hearing Officers' main roles are to organize and conduct the oral hearing and act as an independent arbiter where a dispute on the effective exercise of procedural rights between parties and DG Competition arises in antitrust and merger proceedings.
- Mr. D, a lawyer by training, joined the EU Commission in 1996 and started working on competition cases in 2000, as a member of the Legal Service. In 2006, he was appointed Head of Unit "*Antitrust: IT, Internet and Consumer Electronics*". In this capacity he was instrumental in the biggest high profile cases of the decade, ie *Microsoft I and II*, *Qualcomm*, *Google*, *Samsung*, or the *Apple E-Books* settlement. Mr. D left this unit in June 2012 to become Head of Unit Mergers: Energy and Environment, but left quickly thereafter to join the Company Apple, as "*Senior Director, Competition Law & Policy, Government & Regulatory Affairs, EMEA*". In addition, Mr. D. is married to a partner with a Brussels based EU law firm who advises on competition cases.
- After his degree in law, Mr. E. joined in 1975 the EU Commission first for the DG Agri, and then as a member of its legal service until 1991. He later joined the Court as a legal secretary, and moved back to the Commission as an adviser to several Commissioners, as a Director and finally, as the Director of the Justice, Freedom and Security, Private Law and Criminal Law' Team at the Legal Service of the European Commission. In 2012, he was appointed judge at the general court. Mr. E has no experience from the private sector and never worked on competition cases.
- Mr. F is a well-known partner in the Brussels office of a non-US law firm. His main area of expertise is State aid law. Mr. F. is married to Ms. F, who is adviser within the cabinet of the President of the Commission. By way of reminder, the later has oversight over the Commission's Legal Service. Within her fields of competence, Ms. F. is in charge of "*Legal issues and infringements*" and of the "*European Group of Ethics*".

The above tales – there are many more – illustrate the very many facets of revolving doors practices. Importantly, its purpose is not to discuss the way the Commission dealt with such conflicts of interests which has been, at least in some cases, a bone of contentions with several

NGOs. Also, to build those anonymized stories, we have relied on information that is strictly available in the public domain, on websites (GCR online, M-Lex, etc.), social networks (Linkedin, Facebooks, etc.), etc.

They concern private to public and public to private sectors.

III. Analytical framework

The present section builds a simple analytical framework for the discussion of conflicts of interests in EU competition law. It starts with some definitions (A). It then describes the main possible sources of conflicts of interest in EU competition law (B). Third, it gives an overview of possible remedies used to avert, correct and punish them (C). Finally, it discusses the empirical findings of economic and political sciences on the topic (D).

A. Definition of conflicts of interests

The notion of “*conflict of interest*” is a broad concept, which is encountered in all the ramifications of the public sector: government, Parliament, administrative agencies, courts, etc. In addition, conflicts of interests have been studied by scholars of all branches: law, sociology,³⁵ economics³⁶ and political science.³⁷

To aid understanding, the OECD has attempted to reach a common definition of the concept of conflicts of interests, following a review of several legal systems:³⁸

“A conflict of interest involves a conflict between the public duty and the private interest of a public official, in which the official’s private-capacity interest could improperly influence the performance of their official duties and responsibilities ».

And Black Law’s Dictionary, defines conflicts of interests as

*“a real or seeming incompatibility between a person’s private interests and his or her public or fiduciary duties”.*³⁹

Those definitions share in common the idea that public decisions should be segregated from the “*influence*” of private interest considerations. Moreover, they both resort to the broad and open-ended notion of “*private*” interests, understandably to cover a wide array of interests, including personal, commercial, familial, political, ideological, etc. interests. Finally, and even more importantly, pursuant to those definitions, the concept of conflict of interest is “*objective*”. A situation of conflict of interest exists as soon as an objective potentiality of private influence exists, regardless of whether it actually comes into “*effect*”. Conflicts of

³⁵ REF***

³⁶ Most of economists which have been studying the conflicts of interests have envisioned the problematic through the principal/agent lense. REF***

³⁷ See Kenney ?

³⁸ The Council of Europe’s definition plays a comparable role. The Recommendation n° R (2000)10 of the Committee of Ministers to Member States on Code of conducts for public officials: « *Un conflit d’intérêts naît d’une situation dans laquelle un agent public a un intérêt personnel de nature à influencer ou paraître influencer sur l’exercice impartial et objectif de ses fonctions officielles. L’intérêt personnel de l’agent public englobe tout avantage pour lui-même ou elle-même ou en faveur de sa famille, de parents, d’amis ou de personnes proches, ou de personnes ou organisations avec lesquelles il ou elle a ou a eu des relations d’affaires ou politiques. Il englobe également toute obligation financière ou civile à laquelle l’agent public est assujéti.* ».

³⁹ See Black Law’s Dictionary, Garner, 1999, p. 295

interest are thus a situation and not a conduct.⁴⁰ They may be (i) actual or potential, (ii) existent or apparent. The definition of conflict of interest has an objective concept is understandable. As R. Mc KOSKI puts it, “*appearance and perception often triumph over substance and reality*”.⁴¹ The mere existence of such an interest may give rise to an appearance of conflict and undermine public confidence in the civil service (e.g. through negative media coverage), despite the high moral standard of the decision-maker.⁴²

Yet, along with *public to private* or *private to public* transfers, *public-public* movements should also be screened to avoid all risk of conflicts of interest. For instance, media recently interrogated the move of former Director-General of Competition Philipp Lowe to the new British Competition and Markets Authority (CMA) Board. Classical revolving-door suspicions were raised as Lowe already was in frequent contacts with various British competition authorities when still responsible for sanctions on member states for violation of EU competition laws in his earlier position. Yet, this did not alarmed the Commission, not the fact the fact that Lowe began working for the British agency (i) before leaving his current position and (ii) without complying with the two-month period of notice required for approval of additional work. News report that Lowe received an additional fee of €4,500 for his work for the British agency through the end of the year in addition to the monthly base salary of €19,000 he earns as Director-General⁴³, hence putting him in a situation where his loyalty could have been challenged by both public bodies in case of a policy disagreement would have arisen between the Commission and the UK authority.

Along the same line, *public-public* conflicts of interest may appear where intra-EU institutions movements take place and risk undermining the internal system of checks and balances. For instance, the move of Guido Berardis from the Commission’s legal service to the bench of the General Court of the European Union⁴⁴ may raise suspicions regarding the neutrality of the judiciary for cases the new judge already worked on. Regarding the dual role of the Commission – prosecutor and judge – such transfer could be analyzed both as a loss of impartiality of the bench or as loss of the double degree of jurisdictions.

Hence, conflicts of interest may arise not only where the private interest of an agent conflicts with his public duties but under any circumstances where the role and missions of a public body are or could be impaired by the personal history of its agents.

B. Sources of conflicts of interests

The literature generally distinguishes three types of conflicts of interests: criminal (corruption or bribery), institutional (independence of the administration vis a vis politics), and personal

⁴⁰ Voir B. GIORGIO MATTARELLA, « Le régime juridique du conflit d'intérêts éléments comparés », ***

⁴¹ See R. Mc KOSKI, “Judicial Discipline And The Appearance Of Impropriety: What The Public Sees Is What The Judge Gets”, ***: “*After losing the first-ever televised presidential debate because of his less-than-photogenic appearance (especially compared to the adroitly coffered, tanned John Kennedy), Richard Nixon candidly admitted that in preparing for the debate he should have spent more time on appearances and less on substance*”. The author also quotes President Abraham Lincoln, according to whom the one who wishes maintaining credibility in his political life “*must not only be chaste but above suspicion*”.

⁴² See DG COMP Code of Ethics.

⁴³ C. SCHULT and C. PAULY, “Conflicts of Interest: Brussels' Revolving Door for Top EU Officials”, *Spiegel*, 9 October 2013 (available at: <http://www.spiegel.de/international/europe/european-commission-officials-and-potential-conflict-of-interests-a-926792.html>).

⁴⁴ Press Release of the General Court of the European Union, “Taking of the oath by a new judge at the General Court of the European Union”, 12 Luxembourg, 17 September 2012, Press Release No 117/ (available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-09/cp120117en.pdf>).

conflicts. The later concern situations where the “*private*” interest of an agency – understood as an administrative body – overrides the public interest:⁴⁵ take a situation in which a public organization is both regulator and service provider;⁴⁶ or one in which an administrative agency is funded by the financial penalties it imposes;⁴⁷ or the abundantly discussed conflict faced by antitrust agencies who must investigate, decide and punish cases (so-called “prosecutorial bias”).

In our study, we focus on this last type of conflicts of interests, but from a specific angle. Rather than focusing on conflicts of interests at “*agency*” level, we discuss conflicts of interests at the “*agent*” level, ie officials, be they judges, Commissioners, civil servants, law clerks, etc. Moreover, in line with the above definition we make a broad interpretation of the concept of conflict of interests, that covers all the possible facets of personal and professional ties.

At a higher degree of granularity, the literature brings illustrations of five types of situations which raise potential conflicts-of-interest. A first problematic situation is the combination of overlapping professional activities. Civil servants may be conflicted because they exercise an ancillary activity (not just materially, but intellectually). Of course, all ancillary activities are not a source of conflict; for instance, academic functions have less conflicting potential than business activities-. In contrast, activities close to the agency’s or court’s functions are more problematic, for they affect public confidence in the administration or the agent’s performance. Such situations are primarily targeted by incompatibility rules. Alternative measures may also be set to prevent conflicts of interests (obligation of disclosure, ban from taking decisions, recusal, limitation of freedom to invest, etc.).

A second source of conflicts are “*gifts*”, in any form whatsoever. As a matter of principle, public officials are not allowed to accept any kind of gifts, presents, or other disguised remuneration. Yet, most legal systems set value thresholds. According to such a rule, any gift whose value exceeds the threshold must be declined – where “*gifts*” cover money, goods, lunches, invitations to sports or artistic events, hospitality, travels, etc.

A third source of conflicts of interests are “*ties*”, be they professional or personal, between civil servants and third parties. In so far as professional ties are concerned, those include for instance commercial ties (a civil servant holding shares in a regulated entity). In so far as personal ties are concern, those include family ties, marriage, friendship bonds, etc.

Nepotism – Nomination on the merits instead of nomination of political affiliation or personal relationships.

Nepotism refers to favoritism shown towards relatives or friends for appointment to public functions, disregarding the respective merits of the competing applicants.

Insider dealing

Insider dealing issues refer to private-capacity actions which could generate an improper advantage from “inside information” obtained in the course of official duties.

⁴⁵ Réf article on insitutional conflicts

⁴⁶ The case of judges who are asked to rule on legal provisions regarding the age of judge’s pension is another example of institutional conflict of interests situations.

⁴⁷ US police is also sometimes entitled to keep the price of the selling of the goods it seized Voir B. GIORGIO MATTARELLA, « Le régime juridique du conflit d'intérêts éléments comparés », ***

Revolving doors

A last source of conflicts are “revolving doors” practices. Those practices refer to horizontal movements of personnel between public and private sectors. In recent year, this phenomenon has escalated. In competition proceedings, “*revolving doors*” from DG COMP to law firms are now quite common. Those practices concern generally senior DG COMP officials moving to law firms at Partner or Counsel level. They are also very frequent in competition economics. The staff of Chief Economist Team often leaves DG COMP after a few years, to join economic consultancy firms. Revolving doors are good to stimulate the development of skills and competencies. However, they also raise the risk of post-public employment conflict-of-interests situations. When civil servants leave public office – either permanently or temporarily – to work in the private sector, concerns of inappropriate conduct (such as the misuse of “insider information”) can endanger trust in the public service. The knowledge of commercially sensitive information, for example, can provide unfair advantage over competitors. Conflict of interests can also occur before civil servants leave public office. For instance, a serving official can give complacent treatment to a firm with a view to secure employment with that firm after leaving the agency.⁴⁸

In the other sense, “reverse revolving doors” are movements from the private to the public sector. Public organisations face a growing challenge to attract the “*best and brightest*” workforce.⁴⁹ Competition agencies thus increasingly recruited officials from the private sector, and in particular from law firms. Those reverse revolving doors movements generally concern junior lawyers, whose compensation levels in the administration remain slightly comparable but with expectations and pressure time-wise. Those revolving door practices look less problematic from the outset, though they may create a pro-business bias in policy enforcement.

C. Remedies for conflicts of interests

Two types of remedial measures can be used to clear conflicts of interests: ex ante remedies that aim at preventing conflicts of interests (1.) and ex post remedies that aim at solving existing conflict (2.). Both types of remedies apply to actual or potential conflicts of interests. Importantly, none of those remedies can deliver without an appropriate amount of publicity (3).

1. *Ex-ante* remedies

There are two main types of ex ante remedies: disclosure obligations (1.1.) and incompatibilities (1.2.)

1.1. Disclosure obligations

In economic theory, disclosure obligations seek to reduce asymmetry of information between principal and agent. In a standard disclosure system, an “*initial disclosure*” is requested at the

⁴⁸ This offence is often described as “going soft” on particular clients in the performance of one’s official responsibilities. See OECD Guidelines; Political analysts claim that an unhealthy relationship can develop between the private sector and government, based on the granting of reciprocated privileges to the detriment of the nation and can lead to regulatory capture. See OECD_Post public employment

⁴⁹ Even in countries that traditionally have relatively closed career-based systems, e.g. Belgium, France and Ireland, the recruitment of large parts of senior-level positions has been opened up to applicants from the private sector.

entry into function and/or when taking up a new position. Subsequently, disclosure should occur as soon as there is a change in the situation (“*in-service disclosure*”). The disclosure declaration shall be updated regularly (every year, for instance). Financial disclosure is of primary importance: shares held in profit making organisations, alternative income sources, private investments, etc. But disclosure should in principle bear upon all the sources of conflicts of interests: gifts, ties of a professional or private nature, participation to a political party, etc. Upon disclosure, the hierarchy should determine whether a risk of actual or potential conflict of interest is material.⁵⁰

In some legal orders, disclosure requirements are accompanied by a "whistle-blowing" duty. Civil servants must report to the hierarchy suspicions of serious failures to disclose from their colleagues. Disclosure obligations coupled with a whistle-blowing duty are usually very effective in the detection of conflicts of interests.⁵¹

1.2. Incompatibilities

A system of incompatibilities forces a natural person to choose between a position in public service and another position that presents a risk of conflict of interests. For instance, one cannot be a lawyer and a judge at the same time. In a system of incompatibility, the conflicted civil servant can be forced to resign from the other position; sell its participations in the conflicting line of business;⁵² assign them to a "blind trust",⁵³ etc.).

Incompatibilities can also extend before and after time in public office. For example, the World Bank sets limitations on the type of work a former staff member can perform upon leaving or retiring.

2. *Ex-post* remedies

Ex-post remedies apply to existing conflicts of interest. They may be sorted in two categories: neutralization purports to clear an existing conflict of interest (2.1.); sanctions seek to punish existing and deter future conflict of interests (2.2.).

2.1. Neutralization

Neutralization measures are cease-and-desist remedies. They take many forms: (i) exfiltration of the conflicted civil servant from the conflicted matter; (ii) restriction of access to non-public information; and/or (iii) re-arrangement of the conflicted civil servant's functions. Neutralization can occur following a complaint from third parties, whistle blowing by colleagues, etc. It can also occur at the initiative of the conflicted civil servant. A civil servant may disqualify himself from intervening in a case in which he or she may have an interest⁵⁴ (“*obligation de déport*”),⁵⁵ professional or personal, past (eg., a previous client) or future (eg., a prospective employer). Along the same line, officials must recuse themselves from involvement in matters related to a prospective employer.

⁵⁰ From the standpoint of officials, disclosure is a positive sum game: it does not imply forfeiture of privacy since internal disclosure suffices for efficient results; once disclosed and authorized, no further criticism may be directed at the case handler who benefits from a safe-harbor for his situation.

⁵¹ []

⁵² The members of the French energy commission are subject to such a prohibition.

⁵³ In this later case, investing and disinvesting decisions are taken by a third-party ignoring the decisions of the authority.

⁵⁴ See OECD Guidelines.

⁵⁵ Legislation must put emphasis on personal accountability of every civil servant.

With respect to revolving doors practices, “*cooling-off*” periods can be imposed:⁵⁶ former civil servants can be contractually requested to keep away from matters dealt with by their former employer for a certain period of time.⁵⁷

2.2. Sanctions

Breach of disclosure obligations or of other ethical rules may lead to the imposition of disciplinary sanctions: warning, reprimand, fines, reduction in compensation, reassignment of duties, delay in career, termination of employment, loss of retirement benefits, etc.⁵⁸ Other types of sanctions (criminal, for instance) may also be applicable. Like in other areas, sanctions imposed on individuals must be clear, proportionate, timely, and non-discriminatory. Due process should also be observed.⁵⁹

II. Antitrust laws and Conflicts of Interests

The present section compares existing EU law on conflicts of interest with the main features of the law on ethics and impartiality in other jurisdictions. We use comparisons as a benchmark to assess the rigor of EU law on the matter and suggest possible path for reform.

We proceed as follows. First, we offer a description of the current state of EU law on conflict of interest at both Commission and CJ levels (A). Second, we turn to a review of the main rules on impartiality in four jurisdictions selected for their prominent role in the enforcement of antitrust laws (B). Finally, drawing inferences from these comparisons we come back to EU law and suggest several ethics improvements in the handling of antitrust cases (C).

A. State of EU law on conflicts of interests

Multiple instruments govern conflicts of interests at the EU level. Many of them being unknown, we provide a brief review of these in the following paragraphs. We distinguish the rules applicable before DG Competition (1.) from the rules applicable before the EU Court of Justice (2.).

1. Rules on Conflicts of interests before the Commission and DG Competition

Some fundamental principles of impartiality are enshrined in primary law. Article 245 of the Treaty on the functioning of the European Union requires Commissioners to maintain their independence from any national government and other body and specifically limit their outside activities, requirements. Since then, these principles have been detailed in a *Code of Conduct of Commissioners*⁶⁰ that obliges Commissioners to make a public declaration on their

⁵⁶ For example, within two years of separation from the World Bank, a staff member is not allowed to perform services for any entity related to an activity in which the World Bank has an interest

⁵⁷ For instance, Board officials of the World Bank are requested to recuse themselves from involvement in matters related to a prospective employer; within a period of one year after leaving the Board, former board officials should recuse themselves from matters related to World Bank dealings with their future employers. Réf

⁵⁸ See OECD Guidelines

⁵⁹ See Rapport Commission de réflexion pour la prévention des conflits d'intérêts, « Pour une nouvelle déontologie de la vie publique », 26 janvier 2011.

⁶⁰ Commissioners may not have any outside engagement in any professional activity, whether paid or non-paid, may not hold any public office of any kind and may be active members of political parties or trade unions if it

outside activities (for example, teaching activities), financial interests and spouse's professional activity. Moreover, they shall inform the Commission on their post-employment engagement in the year after leaving office whether this is at the end of their term or upon resignation. Timely informed, the Commission will decide whether the planned occupation is compatible with the Treaty. Finally, Commissioners may not accept any gift of a value exceeding 150 €.

The Charter of Fundamental Rights also enshrines several relevant provisions. Article 41 enshrines the right to a good administration; Article 43 contains the right to refer cases of maladministration in the activities of EU institutions or bodies to the EU Ombudsman.

Inside the European Commission, public agents are subject to a wide range of rules related to conflicts of interests. At least five documents are dedicated to this issue: (i) the Guidelines on the use of social media 2011, (ii) the Code of Good administrative behaviour;⁶¹ (iii) the Commission Decision on outside activities and assignments; (iv) the Communication of 5 March 2008 on ethics⁶² and (v) the New guidelines on gifts and hospitality of 2012.⁶³ In addition, the Staff Regulations is the official document describing the rules, principles and working conditions of the European civil service.⁶⁴⁻⁶⁵

To implement the above general rules, each General Direction is required to set its own Code of conduct. DG Competition adopted a *Code of Ethics and Integrity*. The Code does not establish new substantive rules. Its purpose is to set out and clarify via a single document, in the specific context of working in DG COMP, the rules concerning ethics that are applicable in the Commission.⁶⁶ It applies to all DG COMP staff in active service, including all officials, temporary agents, contract agents and Seconded National Experts (SNEs). It also applies to the cabinet of the Commissioner for Competition.⁶⁷ Despite an apparent rigor, the rules of the Code allow wide areas of discretion for the Commission.

does not disrupt their work at the Commission. See Code of Conduct for Commissioners, adopted by the Barroso Commission on 24 November 2004.

⁶¹ In addition to the Staff regulations, the Code of Good administration behaviour has been approved by the European Parliament on 6 September 2001, which shall be respected by European officials in their relations with the public. The Ombudsman, acting as an external mechanism of control, investigating complaints about maladministration and recommending corrective action where necessary, relies on the European Code of Good Administrative Behaviour when he examines cases. It equally serves as a useful guide and a resource for civil servants, encouraging the highest standards of administration.

⁶² See Commission's Communication on enhancing the environment for professional ethics (Communication of 5 March 2008, SEC (2008) 301 final).

⁶³ http://ec.europa.eu/civil_service/index_fr.htm

⁶⁴ In 2004, the European Union reformed these rules entirely. Currently, Staff Regulations are being reviewed again, in order to generate even more efficiency gains and savings in administrative expenditure.

⁶⁵ Article 11 of the Staff Regulations contains the main principle related to conflicts of interests. Pursuant to this provision, an official shall carry out his duties and conduct himself solely with the interests of the Union in mind, with objectivity, impartiality and loyalty. He shall neither seek nor take instructions from any government, authority, organization or person outside his institution. See also Article 12 of the Staff Regulations: "*An official shall refrain from any action or behaviour which might reflect adversely upon his position*". In addition to those duties, officials have also rights. First, they have the right to freedom of expression, with due respect to the principles of loyalty and impartiality. See Article 17a) of Staff Regulations.

⁶⁶ The Code was adopted after the Internal Audit on ethics carried out in 2008/2009. It has been drafted by the Task Force on Ethics, Security and Procedures, in close co-operation with DG COMP's Ethics Compliance Officer (the ECO). The ECO is Benjamin Desurmont

⁶⁷ There are frequent references in the text to the "Appointing Authority" (AA), who has the power to decide on ethical issues. In general terms the Appointing Authority's powers are exercised by the Directorate General. In some cases, mainly for staff members above the level of director, these powers are exercised by DG HR.

Four main principles emerge from the Code. First, officials must behave with independence, loyalty and impartiality in their daily work. Second, they shall always uphold public interest. Third, they are subject to a duty of dignity in their professional as well as private life. Fourth, officials are obliged to safeguard Commission's resources and assets.

As a principle, DG COMP's staff has a duty to avoid situations of conflict of interest in the performance of their duties. Conflict of interest exists, therefore, where there is a risk that policy recommendations, decisions or negotiations might be influenced as a result of the existence of a direct or indirect interest in one of the parties involved. This conception of conflict of interest comprises not only real and potential but also apparent conflicts of interests. The most relevant situations in DG COMP in this regard are personal interests deriving from financial interests in companies involved in the competition investigation; activities of the staff member's spouse/partner who might be involved in the case on behalf of the company concerned, a law firm, consultancy firm, government body deciding on aid, etc; or because the staff member has been involved in the case in his previous employment.

The assessment as to whether a personal interest is of such magnitude as to impair the official's independence does not rest solely with the staff member. This assessment exercise will be carried out together with his/her management and in close coordination with DG COMP's Ethics Compliance Officer. Ultimately, the Director General is responsible for deciding whether there is a conflict of interest situation within the meaning of Article 11a of the Staff Regulations and if so whether the staff member concerned may continue to deal with the matter and under what conditions. To prevent infringement to be committed negligently, officials are trained to react to situations of conflicts of interests.

Disclosure – The Code of Ethics edicts a duty to disclose interests that might be potentially conflicting. Management – from the level of directors and staff not dealing with cases but with horizontal matters – sign an annual declaration. All members of a case team (including the case manager and case secretary/assistant) need to make a case specific declaration of conflict of interest when they are assigned to a case.⁶⁸ Furthermore, participants in antitrust and merger inspections are required to make a specific conflict of interest declaration.⁶⁹

As a general ethical rule, any staff member whose spouse works in a company should not deal with any cases involving that same company.⁷⁰ However, the mere fact that a staff member's spouse/partner works in a law firm, a consultancy or a Member State's administration involved in EU competition or State aid matters is not *as such* a situation that creates a conflict of interest that requires the staff member concerned to be moved to another post.⁷¹

As Article 11a (3) of the Staff Regulations only refers to an “*interest of such kind or magnitude as might impair his independence in the performance of his duties*”, there is room for interpretation of what constitutes a substantial interest and the Commission enjoys a certain margin of discretion. Some of the factors that have to be taken into account are (i) the nature of the financial interest, (ii) the effect that the Commission decision may potentially

⁶⁸ See §31 of DG COMP's Code of Ethics. An automated procedure via the case management applications (Natacha for antitrust, CMS for mergers and ISIS for state aid) has been developed in this regard. Under the automated system all members of the case team receive an automatic e-mail alert when they are assigned to a case, with a link to the relevant case application.

⁶⁹ See §31 of DG COMP's Code of Ethics.

⁷⁰ This obligation applies also to non-married couples.

⁷¹ See DG COMP's Code of Ethics.

have on that interest, (iii) the magnitude of the financial interest,⁷² (iv) the role of the member of staff in the decision-making process in the case. In cases which do not appear to raise a clear-cut conflict of interest situation, operational criteria may also have to be taken into account, such as whether the staff member is indispensable to handle the case or whether he could be replaced by a colleague, taking account of language requirements, experience etc.

Previous employment – According to the Code of Ethics, new staff members are screened in accordance with a specific conflict of interests check-list. As a basic ethical rule staff members should not deal with cases it worked on for a previous employer. No cut-off date exists. The rule applies as long as the case is pending (including before the General Court and the Court of Justice). To facilitate the assessment, new staff members produce a list containing all pending EU competition cases on which they were previously involved.

Insider dealing – DG COMP staff shall in no circumstances make a profit from confidential or unpublished information he comes across in the performance of his duties.⁷³ Inside information is defined in Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse).

Gifts and Hospitality – If an official is offered gifts of value of more than 50€ he must apply for permission from the Director General for Competition if he wants to accept it. Invitations to lunch, dinner or other events count as favours, and the ceiling of 50€ applies too. Thus, it would for example be inappropriate to accept invitations to leisure events offered in the framework of a conference (e.g. an invitation to a sporting event or other favour that bears no relationship with the mission of the staff member) without prior formal authorisation to accept it. Participation of a companion, who is not a Commission official, is clearly not in the interest of the Commission and this offer should in any case be rejected.

Ancillary Activities – Detailed rules governing external activities are laid down in the Commission Decision on outside activities and assignments.⁷⁴ Ancillary activities are not *a priori* considered negative by the Staff Regulations which states that authorisation shall be denied “*only if the activity or assignment in question is such as to interfere with the performance of the official’s duties or is incompatible with the interests of the institution*”. Each case shall be assessed on its own merits with regard to the type of work proposed. The maximum annual ceiling for net remuneration, including any fees, which DG COMP’s staff may receive in connection with all outside activities is € 4.500.

Ethical Obligations For Former Staff – Former officials remain under the obligation to refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public. According to the Code of Ethics, the situation of former staff members who left DG COMP and continue their career as lawyers, consultants or lobbyists is of special interest. If a former official, temporary or contract agent decides to engage himself in a professional activity before the expiry of a two years period after he left the Commission, he must ask for prior authorisation to do so from the Appointing Authority.⁷⁵

⁷² Obviously, the higher the value of the financial interest the bigger the risk of undue influence; no fixed thresholds are established.

⁷³ See §69 of DG COMP’s Code of Ethics.

⁷⁴ See C(2004) 1597/10 of 28 April 2004

⁷⁵ See §152 of the Code of Ethics. See also Article 16(2) of the Staff Regulations and Article 18 of Commission Decision on outside activities and assignments. This rule applies to contract agents only if they have had access to sensitive information

If the proposed activity is related to work the former official has carried out during the last three years of service, the appointing authority may either forbid the former official from undertaking the proposed activity or may impose specific conditions. As a general rule, DG COMP considers that former officials should not handle in the course of their new authorized activities pending competition cases on which they have worked as part of the case-team or otherwise have been directly responsible.

Sanctions – An official may be required to make good, in whole or in part, any damage suffered by the Communities as a result of serious misconduct on his part in the course of or in connection with the performance of his duties.⁷⁶ Infringements can be subject to disciplinary sanctions and, possibly, to personal financial responsibility.⁷⁷

2. Conflicts of interests before the EU Court of Justice

European judges are also subject to potential conflicts of interests. Both the Rules of procedure of the Court of Justice and the Statute of the court of justice of the European Union set various behavioral obligations in this regard. First of all, judges are obliged, before taking up their duties, to take an oath to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.⁷⁸ This obligation counts also after the term of their office.⁷⁹

Second, Article 4 of the Statute prohibits judges to hold any political or administrative office. This is a radical difference with the rule applicable to civil servants. Judges may not engage in any ancillary occupation, whether gainful or not, unless exemption is exceptionally granted by the Council. After they have ceased to hold office, judges are still required to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.⁸⁰ Furthermore, no Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, or in any other capacity.⁸¹

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall inform the President. Somewhat astonishingly, no recusal procedure is foreseen by the Rules of procedure. Following Article 5 of the Statute the duties of a Judge shall only end when he resigns (apart from normal replacement, or death). Article 6 of the Rules of procedures adds that the Court decides whether a Judge or Advocate General no longer fulfills the requisite conditions or no longer meets the obligations arising from his office. Thus, privileged by immunity from legal

⁷⁶ See S. GREY, “Tackling fraud and mismanagement in the European Union”. According to the author, disciplinary measures are not sufficient to ensure proper internal accountability. Proceedings would lack credibility, be long and cumbersome, and thus fail to act as a deterrent: “One senior Commission official has noted: “In the ‘culture of the house’ disciplinary measures are widely considered as reserved for situations of gross dishonesty and/or criminal behaviour or flagrantly unprofessional conduct (e.g. insulting a diplomat or making public statements which are disloyal to the institution). This is in large part due to the fact that the Commission has rarely taken disciplinary measures of any significance in situations of serious but noncriminal financial irregularity.” Disciplinary action for incompetence has almost never been used.

⁷⁷ See § 160 and 164 of the Code of Ethics

⁷⁸ See Article 2 of the Statute. See, for the full oath, article 4 of the Rules of Procedure.

⁷⁹ See Article 4(3) of the Statute

⁸⁰ Any doubt on this point shall be settled by decision of the Court of Justice.

⁸¹ See Article 18 of the Statute

proceedings,⁸² judges are judged by peers. A judge may be deprived from his office or of his right to a pension or other benefits only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfills the requisite conditions or meets the obligations arising from his office.⁸³

Next to the judges sit the law clerks.⁸⁴ Those officials, whose statute is indefinite, are submitted to a specific *Code of conduct*. This Code states that the law clerks are submitted to the same obligations as civil servants. It also states that it is overcome by the relationship that may exist between the judge and its law clerk.⁸⁵ Conflicts of interests are addressed by Article 2 of the Code, which only establishes that when a law clerk has been involved in a case before its entry into function, he shall inform the judge. The authorization of exerting an external activity is granted by the president of the Court.⁸⁶ Law clerks have also a duty of discretion and must refrain from disclosing any confidential information (as well after the end of their functions).⁸⁷

B. Benchmarking

In order to assess the appropriateness of current EU rules, we review the law applicable to conflicts of interest in three jurisdictions, selected for their relevancy for the enforcement of antitrust law. Hence, we turn to an exposé of the impartiality obligations imposed under the European Convention on Human Rights (hereinafter: “ECHR”) (1), before analyzing existing equivalent rules in France (2), and in the USA (3).

1. ECHR

Admittedly, the study of ECHR may be regarded as an odd pick for benchmarking EU antitrust practices on conflict of interests as the European Court of Human Rights (hereinafter “ECtHR”) is no antitrust authority. This may be all the more unexpected than the EU has not accessed to the ECHR to date. Yet, the predominant influence played by the ECtHR on the case law of national Courts – which are endowed to apply Articles 101 and 102 TFUE concurrently with the Commission and NCAs⁸⁸ – justifies we cast light on its rulings as a relevant benchmark.

A second objection to the taking into account of the ECtHR case law resides in the fact that Article 6 ECHR which establishes a right to a fair trial does not apply to proceedings before the EU Commission. Indeed, according to settled case law of the CJEU, the EU competition authority is not a “*tribunal*” in the meaning of Article 6 ECHR, so that impartiality

⁸² See Article 3 of the Statute

⁸³ See Article 6 of the Statute

⁸⁴ See S. KENNEY, « Beyond Principals and Agents: Seeing Courts as Organizations by Comparin Référendaires at the Court of Justice and Law Clerks at the U.S. Supreme Court », *Comparative Political Studies*, 2000, Vol. 33, n°5. See also Audition de P. Léger et JP. PUISSOCHET, *Amicale des référendaires et des anciens référendaires de la Cour de justice, du Tribunal et du Tribunal de la fonction publique de l'Union européenne* : <http://www.amicuria.org/>

⁸⁵ See Article 1 of Règles de bonne conduite des référendaires

⁸⁶ See Article 3 of Règles de bonne conduite des référendaires

⁸⁷ See Article 5 and 6 of Règles de bonne conduite des référendaires

⁸⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, 4.1.2003, L1/1, Article 6.

requirements do not apply to it⁸⁹. However, as the Commission is bound to respect general principles of Union law which follow from the common constitutional traditions of the Member States⁹⁰, in time, ECtHR findings may infuse EU administrative procedural guarantees. This is especially likely since impartiality is an essential procedural requirement, with which compliance is a matter of public policy⁹¹.

Lengthy developments have been made by the ECtHR on the impartiality of the European judge. According to it, it is of fundamental importance in a democratic society that tribunals be impartial in order to “*inspire confidence in the public*”⁹². In the same vein, “*The higher demands of justice and the elevated nature of judicial office*” imposes a duty of discretion and the preservation of an image of impartiality⁹³.

Under Article 6 ECHR, impartiality is not only a moral or ethical consideration but involves true legal requirements. These are twofold. First, the legislator must establish procedural guarantees – notably rules regarding the composition of the jurisdiction, appointment of judges and rules regulating the withdrawal of judges⁹⁴. Second, any judge must check its own impartiality when challenged and must withdraw when there is a legitimate reason to fear a lack of impartiality from his part⁹⁵.

The ECtHR traditionally holds that impartiality denotes absence of prejudice or bias whose existence can be tested in various ways. The Court thus distinguishes between a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether the judge offers sufficient guarantees to exclude any legitimate doubt in this respect⁹⁶.

⁸⁹ Trib.EU, 11 July 2007, *Jose Maria Sison v Council*, Case T-47/03, ECR, 2007, p. II-73, para. 142; CJEU, 29 October 1980, *Fedetab*, 209/78 to 215/78 and 218/78, para. 80-81:

“*In answer the Commission observes that when it is applying the rules of the Treaty on competition it is not a tribunal within the meaning of the said provisions, pointing out that one of the criteria for the existence of a “Tribunal” laid down by the European Court of Human Rights is its independence of the executive (cf. the judgment in Ringeisen, series a, no 13, p. 39, paragraph 94), the Commission observes that since the executive power of the community is in fact vested in it is at least doubtful whether, not being independent of that power, it can constitute a tribunal within the above-mentioned sense.*

The arguments of Fedetab are irrelevant. The Commission is bound to respect the procedural guarantees provided for by community law and has done so, as is apparent from what has gone before ; it cannot, however, be classed as a tribunal within the meaning of article 6 of the European convention for the protection of human rights.”

⁹⁰ Trib. EU, 14 May 1998, *Enso Española SA v Commission*, Case T-348/94, ECR, 1998, p. II-1875, para. 60; Trib.EU, 1 July 2008, *Chronopost SA and La Poste v UFEX*, C-341/06 P and C-342/06 P, ECR, 2008, p. I-04777, para. 44- 45:

“*The right to a fair trial, which derives inter alia from Article 6(1) of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU.*

That right to a fair trial means that everyone must be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Such a right is applicable in the context of proceedings brought against a Commission decision”.

⁹¹ Trib.EU, 1 July 2008, *Chronopost SA and La Poste v UFEX*, op. cit., para. 48.

⁹² ECtHR, 16 January 2007, *Warsicka v. Poland*, 2065/03, para. 35.

⁹³ ECtHR, 16 September 1999, *Buscemi v. Italy*, 29569/05, para. 67.

⁹⁴ ECtHR, 15 October 2009, *Micallef v. Malta*, 17056/06, para. 99.

⁹⁵ ECtHR, 16 January 2007, *Farhi v. France*, 17070/05, para. 25 to 27; ECtHR, *Micallef v. Malta*, op. cit., para. 98.

⁹⁶ ECtHR, 1 October 1982, *Piersack v. Belgium*, 8692/76 para. 30; ECtHR, 16 January 2007, *Warsicka v. Poland*, 2065/03, para. 35.

Subjective (or personal) impartiality implies that the judge does not exhibit bias or prejudice against or in favor of a specific party. In applying the subjective test, the ECtHR consistently holds that the personal impartiality of a judge must be presumed until there is proof to the contrary⁹⁷. The ECtHR expressly acknowledges that it may be difficult to provide evidence with which to rebut the presumption⁹⁸. Consequently, decisions sanctioning breaches of subjective impartiality are pretty rare. Public interventions of judges in media are the most likely circumstances under which personal, subjective biases are revealed⁹⁹.

As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are “*ascertainable facts*” which may raise doubts as to his impartiality. In other words, “*justice must not only be done, it must also be seen to be done*”¹⁰⁰. In such context, “*What is decisive is whether this fear can be held to be objectively justified*”¹⁰¹.

Among the various factors identified by the case law of the ECtHR as susceptible to create an appearance of impartiality, we pinpoint those two that are the most relevant for our analysis, namely the publicity of the composition of the bench and the relationship of the judge with the parties¹⁰².

Regarding the composition of the bench, the ECtHR emphasizes the need for disclosure of the identity of the members of the jurisdiction in the very text of the ruling. The composition of the jurisdiction must be made transparent in a timely manner. Any impossibility to get access to the exact composition of the jury that makes the deliberation precludes parties from verifying the impartiality of the bench and infringes Article 6 ECHR¹⁰³. Correlatively, the existence of a procedure for ensuring impartiality – namely, rules regulating the withdrawal of judges – is a necessity. In addition to ensuring the absence of actual bias, such procedure is necessary to remove any appearance of partiality and serves to promote public confidence in the judiciary¹⁰⁴.

Regarding an objective personal relationship of the judge with one of the parties the ECtHR holds that a close degree family relationship between judge and advocate – such as a sibling relationship, but also a relationship of a lesser degree such as those of uncles or aunts in respect of nephews or nieces – should lead to the automatic withdrawal of the judge¹⁰⁵. On the

⁹⁷ ECtHR, 24 May 1989, *Hauschildt v. Denmark*, 10486/83, para. 47.

⁹⁸ ECtHR, 5 February 2009, *Olujić v. Croatia*, 22330/05, para. 58. The Court also stresses there is no watertight division between the two notions, since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer.

⁹⁹ ECtHR, 16 September 1999, *Buscemi v. Italy*, 29569/95, para. 67; ECtHR, 28 November 2002, *Lavents v. Latvia*, 58442/00, para. 118 and 119. The creation of “*press judges*” in charge of public relations for cases they do not work on are said to be a proper remedy to avoid conflicted declarations. P. GILIAUX, *Droit(s) européen(s) à un procès équitable*, Bruxelles, Bruylant, 2012, p. 496.

¹⁰⁰ ECtHR, 26 October 1984, *De Cubber v. Belgium*, 9186/80, para. 26.

¹⁰¹ ECtHR, *Micallef v. Malta*, *op. cit.*, para. 96. See also ECtHR, 21 December 2000, *Wettstein v. Switzerland*, no. 33958/96, para. 44 and ECtHR, 7 August 1996, *Ferrantelli and Santangelo v. Italy*, 19874/92, para. 58.

¹⁰² Hence, we put aside case law relative to the fact that the judge already delivered several decisions involving the same parties, or similar questions, or issued a preliminary ruling, etc. On all this, see P. GILIAUX, *Droit(s) européen(s) à un procès équitable*, *op. cit.*, pp. 490 and ff.

¹⁰³ ECtHR, 20 January 2011, *Vernes c. France*, 30183/06, para. 42.

¹⁰⁴ ECtHR, *Micallef v. Malta*, *op. cit.*, para. 100.

¹⁰⁵ *Ibidem*.

contrary, a past collegial, academic relationship does not seem to suffice to create an appearance of impartiality¹⁰⁶.

Concerning professional relationships, ECtHR case law distinguishes between cases where the judge was previously consulted by one party as an expert or a lawyer *for the same matter* and cases where the judge was consulted by one party *on another matter*. Under the first scenario, the judge is irremediably precluded to rule on the matter. The marginal character of the consultation, its brevity or the elapsing of a significant amount of time since then do not moderate such a proscription. The dual role of a judge in a single set of proceedings ineluctably raises legitimate doubts as to the impartiality of the tribunal¹⁰⁷.

On the other hand, where a judge was previously hired as counsel by one of the parties to work on another, distinct matter, the impartiality of the tribunal must be scrutinized according to the specific circumstances of the case. Under such scenario, regard must be given to the existence of any “*overlap in time*” of the functions of counsel and judge and to “*the remoteness in time and subject matter of the first set of proceedings in relation to the second*”¹⁰⁸.

The *Ouolitaival and Oirttiaho* case is illustrative of this line of reasoning. In this, the ECtHR pinpoints that two sets of proceedings overlapped for almost one year but were simultaneously pending in the Court of Appeal for two to three months only. As a counsel, the judge had limited herself to drafting and signing the notice of appeal and another lawyer dealt with the subsequent stages of the proceedings. The ECtHR further stresses that the judge’s personal involvement in the second set of proceedings began approximately three and a half years after the above-mentioned period of overlap and five years after signing the notice of appeal. Following these observations, the ECtHR concludes that the judge’s prior involvement was remote in time and that the subject matter of the two sets of proceedings was completely different so that her prior involvement as counsel in the first set of proceedings gave no reasonable grounds for fearing that she might have a preconceived attitude against the applicant in the second set of proceedings¹⁰⁹.

This case is remarkable for various reasons. Interestingly, both majority and dissenting opinions expressly regret the lack of use of a database or system to ensure that judges were reminded of their prior involvement in particular cases or with former clients and detect any conflict of interest as is sometimes the case in private firms. According to the Court, “*there is a risk of problems arising in a system where such matters are left entirely to the judges' own assessment, which may, inevitably, suffer from a lack of recollection of a particular instance of prior involvement*”¹¹⁰.

¹⁰⁶ ECtHR, 8 February 2007, *Švarc and Kavnik v. Slovenia*, 75617/01, para. 44. In this case, the Court assessed the consequences of a past academic relationship between one judge and another whose impartiality was open to doubt. According to the Court, no ‘transitivity of impartiality’ could be found as long as the first judge had not collaborated on the writing of the opinion for which the second was disqualified.

¹⁰⁷ *Ibid.*, para. 40-44; ECtHR, 15 July 2005, *Mežnarić v. Croatia*, 71615/01: “*It is true that Judge M.V.'s previous involvement was minor and remote, as he represented the applicant's opponents for only two months, almost nine years before the decision of the Constitutional Court of 18 December 2000; and his activity was limited to drafting and signing a single set of submissions to the court (...) However (...) the present case concerns the dual role of a judge in a single set of proceedings*”.

¹⁰⁸ ECtHR, 23 November 2004, *Ouolitaival and Oirttiaho v. Finland*, 54857/00, para. 54.

¹⁰⁹ *Ibid.*, para. 46-54.

¹¹⁰ *Ibid.*, para. 44.

More, the ECtHR remarkably underlines that in *Walston* – a case where the judge had formerly served as employee of one of the parties – it had regard to the fact that a period of five years had elapsed from the time when the judge's previous employment had ended to the point at which the judge's participation in subsequent civil proceedings was contested¹¹¹. Considering that in *Ouolitaival and Oirtiaho*, the ECtHR pinpointed that a similar period of time took place between the last act accomplished as a counsel and the involvement of the judge in the second set of proceedings, one may consider that the ECtHR regards the five years period as a reasonable cooling-off period during which a judge should withdraw from cases where a former client is involved.

Finally, as competent antitrust judges are a scarce resource, we conclude this review with two considerations on the feasibility of recusal. First we remind that under Article 6 ECHR even where a judge must recuse himself, the ECtHR does not consider that other judges would *ipso facto* be contaminated by his opinions so that the obligation to withdraw ordinarily does not extend to the other members of the bench¹¹². Second, we note that the ECtHR inflexibly refuses to consider shortage of judges as a sound justification for failure to withdraw as the national authority is under an obligation of result to provide a fair hearing¹¹³.

2. France

An overview of French law reveals that no general legal framework has been drafted for regulating conflicts of interest. At most, several disseminated dispositions may be spotted (2.1.). More interestingly, a specific regime governs prevention and resolution of conflicts of interest situation in competition law (2.2.).

2.1. Absence of a general regime for governing conflicts of interest

French law does not define the concept of conflict of interests. Pursuant to certain authors, this dearth of interest on the issue is due to a certain disregard to a notion that has been made up in the United-Kingdom¹¹⁴. In France, favoritism, insider influence and the unlawful use of a public position to gain an undue advantage (“*prise illégale d'intérêt*”) are criminally reprehensible, along with corruption, extortion and misappropriation of public funds¹¹⁵. Apart from these criminal infringements, no general-reaching legislation addresses the problem of situations where the impartiality of an agent is impaired by its private interests without any intent to distort the objectivity of the decision-making process.

However, France has however gradually become aware of the harmful potential stemming from a lack of a clear-cut conflicts-of-interests policy and the inefficiency of having uniquely

¹¹¹ ECtHR, 11 December 2001, *Walston v. Norway*, 37372/97.

¹¹² ECtHR, 24 September 2009, *Procedo Capital Corporation v. Norway*, 3338/05, para. 65 and ff.

¹¹³ ECtHR, *Walston v. Norway*, *op. cit.* and ECtHR, *Micallef v. Malta*, *op. cit.*, para. 102 and 103, where the Court repeatedly held that the smallness of the country or the desertification of geographical districts and the correlative shortage of judges that come with these was no justification for failure to withdraw.

¹¹⁴ See *Les hauts fonctionnaires et la politique*, Seuil, 1976

¹¹⁵ Article 432-12 of the French Criminal Code. See OECD Guidelines, that provides for a translation in English: “*The act, by a person entrusted with public authority, charged with a public service mission or holding an elective public office, of obtaining, accepting or retaining, directly or indirectly, an advantage of any kind from an enterprise or an operation for which, at the time of the act, he is responsible, either wholly or in part, for ensuring the monitoring, administration, liquidation or payment, shall be punishable by five years' imprisonment and a fine of 500 000FF.*” These provisions are applicable to anyone to whom public decision-making power over persons and assets has been delegated; to anyone who, without having decision-making power or supervisory authority, performs duties in the public interest and to local and national elected officials.

the possibility to prosecute infringement in a criminal way. Additional provisions have been introduced to target specific issues. Besides, each administrative authority is subject to a specific regulation.¹¹⁶

“Pantouflage” - The French context presents a particular feature, namely the regime of former officials who move to the private sector, a practice commonly known in France as “pantouflage”.¹¹⁷ This practice may be tracked back since the 19th century, when State-owned French companies needed engineers to support the industrialization movement. A special status was created for public servants wishing to work in industry, allowing them leave of absence before returning to their original public function or resigning to stay in the private sector. After World War II, the practice went a step further with public officials often managing the state-owned companies responsible for the reconstruction of the country. The law enabled senior civil servants to retain membership of their original public service function, thus forging close ties between enterprises and the political/administrative machinery. The outflow was particularly high in the 1980s when several major enterprises, notably in banking and insurance, were nationalized while retaining some private activities.¹¹⁸ However, by the end of the 1990s, most of these state-owned companies returned to the competitive private sector. The concern of public officials accepting positions in companies in which they had been involved while being public officials arose.

To address this concern, the legislation has been revamped, enforcement stepped up and new institutions established to play a preventive role. Article 432-13 of the Criminal Code now enshrines a rule aiming at avoiding any suspicion of partiality and to prevent any conflict of interest¹¹⁹. This provision targets public servants but not elected officials and occasional collaborators. Public officials who leave the public service permanently or temporarily may not work for an enterprise which, during the previous five years, they have controlled or supervised, or with which they have negotiated or signed contracts on behalf of the public authorities. The prohibition applies for five years following an official’s permanent departure from the civil service. In the case of temporary leave of absence, it applies for the full duration of that leave.

For an offence to be committed, the official concerned must have been responsible for the monitoring, administration, liquidation or payment of the company at the time of the offence. While the three latter cases are relatively precisely defined, since they are closely related to the definition of the duties of the person concerned, the first is much broader and has always

¹¹⁶ In September 2010, a commission has been put in place for the formulation of a set of recommendations to improve the current legislation (“*commission de réflexion sur la prévention des conflits d’intérêts*”).¹¹⁶ On 27 July 2010, the French Government presented a legal project to the Parliament. Though the then President of the Republic, N. Sarkozy rose up against “immoral” political practices, resting on a survey establishing that 72% of French people were judging politicians as corrupted,¹¹⁶ the legal project has never been enacted, due to political resistance. Commission chaired by Jean-Marc Sauvé, Vice-Président of the French Conseil d’Etat and established by the Decree n° 2010-1072 of 10 September 2010. See “*Pour une nouvelle déontologie de la vie publique*”, 26 janvier 2010. See also P. ROGER, « Conflits d’intérêt : un projet de loi aux oubliettes », *Le Monde*, 02.12.2011.

¹¹⁷ “Pantouflage” can be defined as movement from public to private sector.

¹¹⁸ In the banking sector the law was amended to allow civil servants who showed financial skills to contribute to the expansion of French private banking.

¹¹⁹ “If a public servant or employee of a public administration who has been directly responsible for ensuring the control or monitoring of a private enterprise, for concluding contracts of any kind with a private enterprise or for expressing opinions on operations carried out by a private enterprise later becomes associated with any of these enterprises by working for them, advising them or owning capital in them before a period of five years following the termination of these public duties has elapsed, this act shall be punishable by two years’ imprisonment and a fine of 200 000 FF”. Translation provided by OECD Guidelines.

been interpreted broadly by criminal courts. It is irrelevant whether the person in question had independent personal decision-making power or only played a minor role in preparing decisions that were later made by a hierarchical superior or a separate body.¹²⁰ Consequently, this offence may be applicable to technical civil servants responsible for carrying out the day-to-day monitoring of public work sites or approving invoice, even if they have no decision-making power or signing authority.

The offence has a preventive nature. To be convicted, the former official concerned need not to have gained any advantage from the prohibited operation nor to have harmed the society in any way. Similarly, no intent to commit a crime is required. The sole use of an official position to obtain an undue advantage is punishable. Anyone who assist in committing the offence may be prosecuted despite these provisions concerning public officials. In addition to criminal sanctions, a bunch of disciplinary sanction can also be used in the public service: (i) warnings, (ii) striking off from the promotion list, reduction in rank, temporary suspension from duty for a maximum of 15 days, transfer of duty, (iii) dismissal.

Prohibition against engaging in private activity – Civil servants have the obligation to devote their professional activity exclusively to their duties. The current regulation prohibits them to engage a gainful private professional activity of any kind.¹²¹ Officials may not become involved in commercial activities that might lead them to enter into commercial relations with their administration, nor may they assist a third part in taking action contrary to the interests of their administration. Only a decree of the Council of State may establish exceptions to this prohibition.¹²²

The sanctions applicable in the event of failure to comply with these provisions are disciplinary sanctions, ranging from a simple warning to dismissal. It is difficult to obtain statistics on the number of disciplinary cases that have arisen in this field. The reduction in working time and the low levels of pay in certain administrations increase this risk of staff engaging in outside activities of which their superiors may be unaware or that they may not be willing to punish.

Duty of disinterestedness – Another statutory principle is the requirement of disinterestedness. Public servants may not have, either directly or through a third party, interests in an enterprise subject to the supervision of the administration to which they belong, or related to this administration that are liable to compromise their independence.¹²³ This provision reiterates the prohibition contained in the criminal code. Yet, as French disciplinary law allows public servants to be sanctioned by their administration even if they have not been criminally prosecuted for these acts, it introduces more flexibility for retaliation.

Ethics Commissions – The French public service is led by three Ethics Commissions, set up in 1995 which examine whether private activities that a civil servant foresees to endorse after his departure from an independent administrative authority are compatible or not with his previous functions.

¹²⁰ See OECD Guidelines.

¹²¹ See OECD Guidelines

¹²² Translation provided by OECD Guidelines.

¹²³ See Article 25 Loi no 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires : « I. - Les fonctionnaires et agents non titulaires de droit public consacrent l'intégralité de leur activité professionnelle aux tâches qui leur sont confiées. Ils ne peuvent exercer à titre professionnel une activité privée lucrative de quelque nature que ce soit ».

Files are referred to the commission by the appointing authority employing the official who wishes to exercise a professional activity in the private sector (on leave of absence or upon permanent departure).¹²⁴ Discussions take place between the members of the commission and the official. If these discussions reveal that the conditions under which the official is planning to exercise its next activities might compromise the functioning of the department – by generating conflict of interest situations – the Commission’s rapporteur requests the official to amend his project.

In most cases, opinions concern applications from public officials who have controlled or monitored the enterprises they are planning to join, or who have negotiated or signed contracts with them. When such a case does come before the Ethics Commission, it always confirms incompatibility.¹²⁵ The cooling-off period lasts three years. To define the functions prohibiting recruitment by a private company the commission looks at whether the official’s actual duties required them to control or monitor the enterprise, and whether they were involved in procurement.

The commission frequently gives favorable opinions subject to conditions. In practice, conditions prohibit officials from exercising functions in the areas falling within the competence of their former department or requiring contacts with their former department. This is especially true when the authority is confronted to officials wishing to set up their own consultancy: the commission often prohibits these from dealing in the same type of activity as when in public service in order to prevent attempts to build up a client base during periods of public service.

The above observations lead to the conclusion that French law on conflicts-of-interests policy is quite underdeveloped. Only the specific issue of pantouflage and post-public employment is appropriately addressed. The system presents several holes. Astonishingly, the French legislation does not foresee any general provision on gifts that may be offered to public officials. More, citizens confronted to the administration have no possibility to ask for the recusal of a public agent.¹²⁶ Generally, the French system is characterized by a lack of a global strategy against conflicts of interests and a vague and relatively unsung legislation.¹²⁷

2.2. Conflicts of interest before French antitrust authorities

Under French law, competition rules are enforced by an independent administrative authority, under the judicial review of an ordinary court (the Paris Court of Appeal). In the following paragraphs, we provide a brief overview of the two set of rules applicable before the Autorité de la concurrence (a) and before the judiciary (b).

a. *Conflicts of interests before the French Autorité de la concurrence*

¹²⁴ Exceptionally, however, officials may also refer their own cases to the commission in order to prevent any delay due to conflict with their department regarding the appropriateness of their departure.

¹²⁵ See OECD Guidelines

¹²⁶ Article 341 of the Code de procédure civile only foresees the recusal of judges.

¹²⁷ This has been highlighted in the Rapport de la Commission de réflexion pour la prévention des conflits d’intérêts dans la vie publique, remis au Président de la République le 26 janvier 2011 : « *Il n’existe pas de dispositions législatives ou réglementaires prescrivant de manière générale aux personnes qui concourent à l’exercice d’une mission de service public de s’abstenir de tout comportement qui les placerait en situation de conflit d’intérêts ou de mettre fin à de tels conflits, s’ils surviennent, ni, a fortiori, de dispositions leur expliquant la marche à suivre pour ce faire* ».

Under French law, independent administrative authorities are bound by strict rules of incompatibility (professional activity, other public employment, elected mandate) aiming at preserving an appearance of impartiality. Additional rules aiming at preventing conflicts of interests in the national competition authority are encapsulated in Article L. 461-2 of the French Code de Commerce, which edicts rules of incompatibility, duties of disclosure and self-resignation (“déport”) rules.¹²⁸

The Code states that any member of the competition authority shall inform the President of the authority of the functions it exerts or the financial interests it possesses in undertakings active in the supervised sector. The members of the authority which have interests or have exerted functions in an undertaking which is indicted are prohibited from taking part to the deliberative process. Interestingly, these rules have already delivered some results. Rather recently, a member of the decisional College of the Authority took the initiative to temporarily step down from his functions when a complaint was introduced before the Authority by two firms he presided.¹²⁹ Initial disclosure of personal interests not only helps the Authority monitoring the behavior of its members but also contributes to self-awareness.

Furthermore, the national competition authority additionally bound itself with a Code of Ethics (“*Charte de déontologie*”).¹³⁰ This Code reiterates classical principles that are mostly enshrined in the legislation: professional secrecy, duty of discretion, duty of reserve, insider dealing¹³¹, prohibition of exerting external activities (accepted upon written authorization) and conflicts of interests¹³².

The case law also provides interesting insight. For instance, decisions appointing a third party for monitoring commitments traditionally requires that the trustee be exempt from conflicts of interests¹³³. On very different topic, the French Autorité stated upon the fact that the CEO of an indicted company’s competitor, who also was member of the former Collège de la concurrence, send incriminating documents to the Authority.¹³⁴ The indicted company draws from this fact the conclusion that the CEO knew the rapporteur, had informal contacts with him. The rapporteur was the in a blatant situation of conflict-of-interests. Nevertheless, the

¹²⁸ « *Le président et les vice-présidents exercent leurs fonctions à plein temps. Ils sont soumis aux règles d’incompatibilité prévues pour les emplois publics. Tout membre de l’autorité doit informer le président des intérêts qu’il détient ou vient à acquérir et des fonctions qu’il exerce dans une activité économique. Aucun membre de l’autorité ne peut délibérer dans une affaire où il a un intérêt ou s’il représente ou a représenté une des parties intéressées. Le commissaire du Gouvernement auprès de l’autorité est désigné par le ministre chargé de l’économie* »

¹²⁹ Autorité de la concurrence, « 27 janvier 2011 : M. Denis Payre, membre de l’Autorité de la concurrence, se met temporairement en retrait de l’institution pour raisons personnelles » (available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=408&id_article=1665).

¹³⁰ See décision du 30 mars 2009 portant adoption de la charte de déontologie de l’Autorité de la concurrence et décision du 14 mars 2012 portant modification de la charte de déontologie de l’Autorité de la concurrence.

¹³¹ See article 465-1 du Code monétaire et financier.

¹³² See article 461-2 du Code de commerce.

¹³³ See Engagements de Tereos dans le cadre de la prise de contrôle exclusif de la Société Sucrière du Quartier Français, 20 May 2010 (available at: http://www.autoritedelaconcurrence.fr/pdf/engag/engagements_versionpublication.pdf).

¹³⁴ See *Aut. conc., déc. n° 10-D-08 du 3 mars 2010 relative à des pratiques mises en oeuvre par Carrefour dans le secteur du commerce d’alimentation générale de proximité*. Voir C. LEMAIRE, S. NAUDIN, « Hearing officer: The French Competition Authority renders a first decision following a report from the hearing officer and rules on the transmission of documents by the CEO of a competitor of the company prosecuted, who was also a member of the decision-making body of the former Conseil de la concurrence (*Carrefour*) », *Concurrences* N° 2-2010, p. 139

Authority rejected this argument on the ground that the transmitted documents were non decisive and that the CEO exerted no competence in the new Autorité de la concurrence.

b. Conflicts of interests before the French judiciary

Turning to the situation of judges, the Conseil supérieur de la magistrature is in charge of the professional discipline.¹³⁵ Upon whistle-blowing or request of the chairmen of the superior courts, it is competent to impose disciplinary sanctions.¹³⁶ Since 2008, a citizen may also introduce a request aiming at sanctioning the judge in charge of his case. Three commissions are in charge of the screening of the complaints.¹³⁷ If the complaint is deemed admissible, it is not a cause of recusal for the concerned judge.

The Conseil de la magistrature elaborated a Compendium of the Judiciary's Ethical Obligations.¹³⁸ This code is public.¹³⁹ Its publication is designed to reinforce public confidence in the independent and impartial functioning of the French judicial system. The rules it contains are designed to support and guide the judges rather than being a disciplinary code. It also enhances the legitimacy of the judiciary, as disregarding the imperatives it contains would compromise public confidence. The Compendium contains classical principles. The first is the absolute duty of impartiality. Impartiality when discharging judicial functions is not restricted to an apparent absence of prejudice, it also requires a genuine absence of bias. When returning to judicial activities after working outside the judiciary, members of the judiciary must ensure that their impartiality cannot be questioned. Furthermore, members of the judiciary shall not accept any gifts or donations liable to undermine their impartiality, in particular those offered at professional events.

Second, citizens and persons under a court's jurisdiction have a constitutional right to the independence of judicial authority. Members of the judiciary shall preserve their independence by refraining from all inappropriate relations with representatives of the legislative and executive powers and guard themselves against any undue influence.

Third, by their integrity, members of the judiciary must demonstrate that they are worthy of deciding how individuals may exercise their fundamental rights. More than any others, they are bound to demonstrate probity, integrity and loyalty. In their professional practice and in their private lives, members of the judiciary shall demonstrate such qualities as to render them worthy of discharging their mission. As the guardians of individual freedoms, judges have a duty to be competent and diligent.

Like any citizen, members of the judiciary have a right to privacy. They shall however refrain from any overt relationships and refrain from public behavior liable to cast doubt on the independence with which they discharge their duties.

3. United States of America

The US regime of conflicts of interests applied to antitrust law is twofold. On the first hand, “Standards of Ethical Conduct for Employees of the Executive Branch” comprehensively

¹³⁵ See article 64 of the French constitution.

¹³⁶ See <http://www.conseil-superieur-magistrature.fr>

¹³⁷ See loi du 22 juillet 2010

¹³⁸ See loi organique du 5 mars 2007

¹³⁹ And available at <http://www.conseil-superieur-magistrature.fr/recueil-des-obligations-deontologiques-des-magistrats>.

regulate the functioning of all Federal agencies, including US Federal Trade Commission (hereinafter “FTC”) and the Antitrust Division of US Department of Justice (hereinafter: “Antitrust DOJ”) (3.1.); on the other hand, State and Federal statutes rule on the functioning of the judiciary (3.2.). We review their substantive content one after the other.

3.1. Ethical standards as applied to US Antitrust agencies

The ethical regime applicable to Executive Branch employees lies in Part 2635 of Title 5 of the *Code of Federal Regulations*. It outlines seven types of conduct that are prohibited or regulated for Federal Employees in office. We briefly describe those rules (a) before turning to the study of their enforcement in the field of antitrust law (b).

a. Overview of US ethical standards

Gifts – Under the US Standards of Ethical Conduct, employees of the Executive Branch are generally prohibited from – directly or indirectly – accepting gifts (i) from a prohibited source or (ii) given because of the employee official position¹⁴⁰. A gift is defined broadly to include nearly anything of market value¹⁴¹. A “*prohibited source*” is a person or organization whose interests may be substantially affected by performance or nonperformance of the employee's official duties¹⁴². In this context, a gift is improperly offered if it wouldn't have been given if the employee had not been working for the Government¹⁴³.

Conflicting financial interests – Any employee is prohibited from participating “*personally and substantially*” in any “*particular matter*” in which, to his knowledge, he or any person whose interests are imputed to him – his spouse, minor child, employer,... – has a financial interest, if the particular matter will have a “*direct and predictable effect*” on that interest¹⁴⁴. Under such rule, a financial interest exists when, as the result of development in the matter, there is a real – as opposed to speculative – possibility of gain or loss¹⁴⁵. A “*particular matter*” is one “*that involves deliberation, decision, or action that is focused upon the interests of specific persons*”¹⁴⁶, by opposition to broad policy matters; a participation that is both “*personal and substantial*” must involve a direct participation of the employee or the employee's direct and active supervision of a subordinate in the matter¹⁴⁷. Faced with such a situation, the government employee must obtain a statutory waiver to continue to perform specific official duties. In the opposite, he must either withdraw from the matter or divest the conflicting interest.

Impartiality – Two scenarios are covered under the command of impartiality. First, any Government employee is prohibited from participating in matters that are likely to have either (i) a direct and predictable effect on the financial interest of a member of his household, or (ii) that involve – as a party or his representative – a person with whom the employee has a very

¹⁴⁰ 5 C.F.R. § 2635.202 (b).

¹⁴¹ 5 C.F.R. § 2635.203 (b).

¹⁴² 5 C.F.R. § 2635.203 (d).

¹⁴³ 5 C.F.R. § 2635.203 (e). Moreover, infringement of the gift restriction may lead to criminal prosecutions for bribery or illegal gratuities (18 U.S.C.A. § 201).

¹⁴⁴ 18 U.S.C. 208(a). For example, an agency purchasing agent could not place an agency order for computer software with a company owned by his wife..

¹⁴⁵ US v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986) quoted in J. TILLIPMAN and R. MAHINI, “Government Lawyering”, *Briefing Paper* n°11-3, *GWU Legal Studies Research Paper No. 2012-117*, February 2011, p. 7 (available at: www.ssrn.com).

¹⁴⁶ 5 C.F.R. § 2635.402 (b)(3).

¹⁴⁷ 5 C.F.R. § 2635.402 (c).

close business or personal relationship¹⁴⁸, where “*the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter*”¹⁴⁹.

Under the second scenario, government employees are disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment – i.e. any item with a value in excess of \$10,000 –, from that person after it became known to the former employer that the individual was being considered for or had accepted a Government position¹⁵⁰.

Seeking employment – Regulations also prohibit employees from participating to any particular matters that have a direct and predictable effect on the financial interests of persons with whom they are “seeking employment” or with whom they have an arrangement concerning future employment. The government employee must then disqualify himself from participating in such matter. The term “*seeking employment*” encompasses actual employment negotiations as well as more preliminary efforts to obtain employment, such as sending an unsolicited resume. It does not include requesting a job application or rejecting an unsolicited employment overture. An employee continues to be “*seeking employment*” until the prospective employer rejects the possibility of employment and all discussions end¹⁵¹. However, an employee is no longer “*seeking employment*” with the recipient of an unsolicited resume after two months have passed with no response¹⁵².

Revolving door practices – In order to reduce revolving-door practices, US Federal law restricts post-employment activities. Hence, both present and former federal employees are prohibited from accepting any fee for representational services rendered by themselves or another before the government during the employee’s government service¹⁵³. In the same vein, opportunities for former government employees to switch sides are restricted. Three regimes are in force, with varying levels of restrictions according to the grade of the former employee and his degree of involvement in the matter at stake:

- *Permanent ban for personal participation*: Former government employees are permanently banned from representing a private party in a particular matter in which they participated “*personally and substantially*” as government employee¹⁵⁴; additionally, regarding former FTC employees, the ban is extended to the whole firm that he joined in order to avoid privileged “*behind-the-scene*” advising¹⁵⁵;
- *Two year ban for official responsibility*: A two year ban applies to participations in a matter that was pending under the government employee “*official responsibility*” during the year prior leaving government service¹⁵⁶.

¹⁴⁸ The legal provision refers here to a “*covered relationship*”.

¹⁴⁹ 5 C.F.R. § 2635.502 (a) and (b).

¹⁵⁰ 5 C.F.R. § 2635.503.

¹⁵¹ Rejections must be clear; a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture 5 C.F.R. § 2635.603 (b)(3).

¹⁵² 5 C.F.R. § 2635.601 to § 2635.603. Also: *US Office of Government Ethics*, “5 C.F.R. Part 2635: Standards of ethical conduct for employees of the executive branch”, (available at: <http://www.oge.gov/Laws-and-Regulations/OGE-Regulations/5-C-F-R--Part-2635---Standards-of-ethical-conduct-for-employees-of-the-executive-branch/>).

¹⁵³ 18 U.S.C. section 203. This restriction is of particular concern to former employees who become partners in firms that appear before government agencies. These must take care that their compensation does not include income that the firm earned by representing parties before the government during the time they were employed.

¹⁵⁴ 18 U.S.C. section 207 (a)(1).

¹⁵⁵ 16 C.F.R. § 4 (b)(1).

¹⁵⁶ 18 U.S.C. section 207 (a)(2).

- *One year cooling-off period for senior employees:* “Senior” personnel of the Executive branch are prohibited during one year after the termination of their service, from knowingly making, with the intent to influence, any communication to or appearance before its former department or agency, in order to seek official action on behalf of another¹⁵⁷.

Alia – Additionally to the above standards, US regulation rules the offering of gifts between employees¹⁵⁸, the simultaneous exercise of outside activities which are necessarily subordinated to the agency prior approval¹⁵⁹, and prohibits misuses of position, which include use of public office for private gain, use of nonpublic information, use of Government property and use of official time¹⁶⁰⁻¹⁶¹.

b. Ethics enforcement in antitrust enforcement

The implementation of ethical standards in the US Federal administration is mostly in the hands of the US Office of Government Ethics (hereinafter: “OGE”) that is in charge of promulgating and maintaining enforceable standards of ethical conduct, overseeing a financial disclosure system for Federal employees¹⁶² and providing education and training on ethics¹⁶³.

A decentralized enforcement system is put in place where each agency has a designated agency ethics official who, on the agency's behalf, is responsible for coordinating and managing the agency's ethics program¹⁶⁴. Whenever ethics officials have information concerning a possible violation of a criminal statute the agency refers to the DOJ, which decide whether to pursue the violation with criminal charges. If DOJ declines prosecution, it is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases.

Depending on the circumstances and the legal provision that has been infringed, an executive branch employee may be imprisoned, fined, demoted, or fired for violating an ethics provision¹⁶⁵. Yet, disciplinary action for violating ethics standards will not be taken against an employee who has engaged in conduct in good faith by relying upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be

¹⁵⁷ 18 U.S.C. section 207 (c).

¹⁵⁸ 5 C.F.R. § 2635.301 to 2635.304.

¹⁵⁹ 5 C.F.R. § 2635.801.

¹⁶⁰ 5 C.F.R. § 2635.701.

¹⁶¹ Supplemental standards of ethical conduct for employees are also enacted for the DOJ (5 CFR Part 3801) and the FTC (5 CFR Part 5701)

¹⁶² OGE is responsible for implementing the public (5 U.S.C. app. 4 §§ 101-111) and confidential financial disclosure systems (5 U.S.C. app. 4 § 107) for the executive branch. The purpose of both financial disclosure systems is to prevent conflicts of interest and by providing for a systematic review of the financial interests of both current and prospective employees. *US Office of Government Ethics*, “Financial Disclosure” (available at: <http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=35>)

¹⁶³ Ethics officials organize annual training with role playing games in order to educate the agency's employees to the ethics. See for instance, the organization of an “Ethics Da Vinci Code” game. OGE, Ethics Program Review, Federal Trade Commission, February 2007 Report, p. 5 (<http://www.oge.gov/Program-Management/Program-Review/Program-Review-Reports/Federal-Trade-Commission-Program-Review-Report/>).

¹⁶⁴ 5 C.F.R. § 2635.107.

¹⁶⁵ *US Office of Government Ethics*, “Enforcement”, (available at: <http://www.oge.gov/Topics/Enforcement/Enforcement/>).

prosecuted under that statute but is a factor that may be taken into account by DOJ in the selection of cases for prosecution¹⁶⁶.

To our best knowledge, assessments of conflicts of interest undertaken at the FTC or at the Antitrust DOJ are not publicly disclosed¹⁶⁷. It is only where such decisions have been leaked to the public¹⁶⁸ that one can get information on such issues¹⁶⁹. The decision taken in the Google-DoubleClick merger on the conflict of interest of FTC Chairman MAJORAS is one of those rare decisions. In this case, the Electronic Privacy Information Center (hereinafter: "EPIC") introduced a recusal petition against FTC Chairman MAJORAS on the motive that her spouse was partner with the firm Jones Day which was representing Doubleclick at the time of the merger. Recusal was thought for alleged conflict of interest¹⁷⁰. In accordance with FTC ethics official, FTC Chairman MAJORAS refused to withdraw. Two allegations of ethics infringements were examined and then rejected. Concerning allegations of financial conflicts, FTC Chairman retorted there were none. Her husband not being an equity partner with Jones Day the matter was said not to have a "*direct and predictable*" effect on their financial situation. Concerning the risk that a reasonable person with knowledge of the relevant facts would question her impartiality, FTC Chairman's answer was twofold. One the first hand, she stressed the fact that Jones Day did not represent Doubleclick before the FTC but only before the EU Commission. On the second hand, she emphasized that FTC ethics official had authorized her to pursue with her duty in compliance with ethical rules¹⁷¹. According to these, participation may be authorized if, based on the relevant circumstances, the interest of the Government in the employee's participation outweighs the concern that a reasonable person might question the integrity of the agency's programs and operations. "*Factors to be considered include, inter alia, the nature of the relationship involved, the nature and importance of the employee's role in the matter, and the difficulty of reassigning the matter to another employee. Critical to that analysis was the fact that the decision making authority of an FTC Commissioner cannot be transferred to any other person*"¹⁷². A balance of interests is thus operated prior to any recusal to preserve the best interests of the Government. If such safety measure must be welcomed, yet one could prefer that the analysis was done by an external instead of an internal ethics official. (In our appreciation, reference to the very nature of the Commissioner function as a justification for a refusal to withdraw is all

¹⁶⁶ 5 C.F.R. § 2635.107 (a)(b).

¹⁶⁷ "Under applicable ethics rules, there is no requirement or, as I understand it, even expectation, that Commissioners publicly reveal that they are not recusing themselves on matters; indeed that has not been the practice". FTC Press Release, "FTC Issues Statements Regarding Recusal Petition for Review of Proposed Acquisition of Hellman & Friedman Capital Partner V, LP (DoubleClick, Inc.) By Google, Inc.", Statement of Chairman Deborah Platt Majoras, footnote 2 (available at: <http://ftc.gov/opa/2007/12/google.shtm>). See also US OGE, *Ethics Program Review. Federal Trade Commission*, February 2007 Report, p. 6 (available at: <http://www.oge.gov/Program-Management/Program-Review/Program-Review-Reports/Federal-Trade-Commission-Program-Review-Report/>) which states that most ethics advice are sent via email before being archived.

¹⁶⁸ Press releases sometimes relate conflict of interest issues but only when the agency sees it fit. Official reports are often concise to the point that no lesson may be drawn from it.

¹⁶⁹ To one of our request for information, Antitrust DOJ replied that these were only available if we introduced a formal Freedom of Information Act ("FOIA") request.

¹⁷⁰ EPIC.org, "EPIC v. Federal Trade Commission. Conflict of Interest in Google-DoubleClick Merger Review" (available at: <http://epic.org/privacy/ftc/foia/>).

¹⁷¹ 5 C.F.R. § 2635.502(d).

¹⁷² FTC Press Release, "FTC Issues Statements Regarding Recusal Petition for Review of Proposed Acquisition of Hellman & Friedman Capital Partner V, LP (DoubleClick, Inc.) By Google, Inc.", *op. cit.*

the more startling since FTC Chairman MAJORAS recused herself several times in the 12 months that followed her own departure from Jones Day)¹⁷³.

All in all, the reports we reviewed reveal – even if remarkably concise – that conflicts of interest cases in the enforcement of antitrust law are not inexistent¹⁷⁴. Among the various cases that we spotted, one may appreciate that financial conflicts of interests repeatedly happen in a merger law context where a government employee or an employee’s relative holds stocks¹⁷⁵. Even where no financial enrichment takes place, failure to declare such a conflict may result in referrals to a Federal prosecutor¹⁷⁶.

3.2. Disqualification law applicable to US judiciaries in the enforcement of antitrust

US Federal and States legislature are competent to define disqualification law applicable to their respective judiciary. The various sets of rules that have been enacted are overall similar – and echoes to the ethics standards set for Government employees – but also exhibit disparities¹⁷⁷. These two features – broad similarities and marginal disparities – justify we limit ourselves to a short overview of conflict of interest rules as applied to US States judiciaries.

The more common and large ground for disqualification in the judiciary is Rule 2.11(A) of the ABA’s 2007 Model Code, according to which: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”¹⁷⁸ That general standard has been integrated into federal law and the judicial conduct codes of 47 states¹⁷⁹.

Most of Rule 2.11(A) on disqualification also apply nationwide¹⁸⁰: a judge should always recuse herself when he is biased against one of the parties¹⁸¹, previously served as a lawyer in the matter in controversy¹⁸², has an economic interest in the subject matter of greater than *de*

¹⁷³ *Ibidem*, footnote 3. FTC Chairman MAJORAS recused herself for a period of one year from any matter in which Jones Day represented a party on the basis that, under the applicable ethics rules, an employee has a “covered relationship” with “Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee” 5 C.F.R. § 2635.502(b)(1)(iv). See also FTC Press Release, “FTC Issues Statement on Closure of Federated/May Investigation”, Commission: Transaction Will Have “No Adverse Effects on Consumers as a Whole”, August 30, 2005 (available at: <http://www.ftc.gov/opa/2005/08/federatedmay.shtm>).

¹⁷⁴ FTC, Office of Inspector General's (OIG), Semiannual report to Congress, Report no. 48, Second Half FY 2012, pp. 6-7 (available at : <http://www.ftc.gov/oig/reports/semi1148.pdf>); FTC, Office of Inspector General's (OIG), Semiannual report to Congress, Report no. 47, First Half FY 2012, p. 8 (available at : <http://www.ftc.gov/oig/reports/semi1147.pdf>).

¹⁷⁵ See for instance FTC, Office of Inspector General's (OIG) Report, OIG Status Report - First Half FY 2000 (available at : <http://www.ftc.gov/oig/reports/igsemi00-1.shtm>). FTC, Office of Inspector General's (OIG) Report, OIG Status Report - First Half FY 1998 (available at : <http://www.ftc.gov/oig/reports/igsemi98-2.shtm>)

¹⁷⁶ FTC, Office of Inspector General's (OIG), OIG Status Report - First Half FY 2002 (<http://www.ftc.gov/oig/reports/igsemi02-1.shtm>).

¹⁷⁷ Compare 48 ABA Model Code of Judicial, February 2007 with 28 U.S.C. § 455 and 28 U.S.C. § 144. See also C. GEYH, *Judicial Disqualification: An Analysis of Federal Law*, 2nd Ed. Washington D.C.: Federal Judicial Center, 2010, 140 p. (available at: [http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/\\$file/judicialdq.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf)).

¹⁷⁸ 48 ABA Model Code of Judicial Conduct Canon 2, R. 2.11 (2007)

¹⁷⁹ J. SAMPLE, D. POZEN and M. YOUNG, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice, p. 17 (available at: <http://www.ajs.org/files/9713/6485/0170/Brennancenterrecusalreport.pdf>).

¹⁸⁰ *Ibidem*, p. 18.

¹⁸¹ 48 ABA Model Code of Judicial Canon 2, R. 2.11(A)(1).

¹⁸² 48 ABA Model Code of Judicial Canon 2, R. 2.11(A)(6)(a).

minimis value¹⁸³, is related to a party or lawyer in the proceeding within the third degree of kinship¹⁸⁴, has personal knowledge of disputed evidentiary facts¹⁸⁵, or has made improper *ex parte* communications during the course of the proceeding¹⁸⁶.

Likewise, certain recusal doctrines are widespread. The “*rule of necessity*” widely applies: when no other impartial judge is available, the original judge may take the case¹⁸⁷. Burden of proof always rest with the party who introduced the motion for disqualification.

However, judicial features related to conflicts of interests also vary substantially across U.S. jurisdictions. Remarkably, several States allow parties to disqualify a judge without showing cause, what is known as “*peremptory disqualification*”¹⁸⁸. In cases of disqualification for cause, some States require an immediate transfer of the disqualification motion to a colleague (e.g. a presiding judge); some others allow the challenged judge to decide on the motion by himself¹⁸⁹. In most cases, judges do not have to provide a comprehensive motivation for their decision on disqualification motions.

Regarding the enforcement of impartiality rules in the antitrust field, our researches cast to light that big, media-covered cases are susceptible to lead to improper communications during proceedings. For example, in *United States v. Microsoft Corp.* the D.C. Circuit ordered the recusal of a presiding district judge for exhibiting bias¹⁹⁰. Throughout the proceedings, the trial judge introduced issues out of the scope of either the complaint or the consent decree, and questioned the attorneys about commercial “vaporware” practices he had learned through external documentation¹⁹¹. The judge also accepted *ex parte* submissions, allowing one accuser to remain anonymous. Moreover, the judge made comments indicating dislike and distrust of Microsoft and Microsoft's attorneys¹⁹². The Court of appeals directed that a new trial judge be assigned to the case on remand. According to it, taken together, district judge's various comments were sufficient for a reasonable observer to question the judge's impartiality¹⁹³.

¹⁸³ 48 ABA Model Code of Judicial Canon 2, R. 2.11(A)(6)(a).

¹⁸⁴ 48 ABA Model Code of Judicial Canon 2, R. 2.11(A)(2).

¹⁸⁵ 48 ABA Model Code of Judicial Canon 2, R. 2.11(A)(1).

¹⁸⁶ 48 ABA Model Code of Judicial Canon 2, R. 2.9(A).

¹⁸⁷ *United States v. Will*, 449 U.S. 200, 213 (1980), quoting F. POLLACK, *A First Book of Jurisprudence* 270 (6th ed.1929): “*although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may, but must, do so if the case cannot be heard otherwise.*”

¹⁸⁸ R. FLAMM, *Judicial Disqualification: Recusal and Disqualification of Judges*, Aspen Pub, 1996, §§ 3.7-17, at 74-102, quoted by J. SAMPLE, D. POZEN and M. YOUNG, *op. cit.*, p. 18.

¹⁸⁹ L. ABRAMSON, “Deciding Recusal Motions: Who Judges the Judges?”, *Valparaiso University Law Review*, 28, 1994, pp. 545 and ff.

¹⁹⁰ P. BLANCK, “The Appearance of Justice Revisited”, *The Journal of Criminal Law and Criminology*, Vol. 86, No. 3, Spring, 1996, p. 920.

¹⁹¹ *Ibidem*, footnote 218. While the official complaints were actually limited to allegations that Microsoft had been using “per processor” licenses and restrictive nondisclosure agreements to deter competition, the judge interrogated the parties on the “vaporware” issues raised in the book *Hard Drive*. “Vaporware” describes Microsoft's alleged practice of publicly announcing new computer devices while in the production stages solely to deter consumers from purchasing competitor's products that are currently (or will be imminently) on the market.

¹⁹² The judge stated, for example, “[y]ou see, what you have to explain to me is why not if these other practices – say while we're cleaning up this mess, why don't we also take care of – you must agree that vaporware is a problem...” 56 F.3d 1453. (D.C. Cir. 1995).

¹⁹³ 56 F.3d 1465.

Much similarly, in *In re International Business Machines Corp (IBM)*¹⁹⁴, the district judge was ordered to recuse himself for the comments he made after the United States had agreed to a dismissal of the case: the judge criticized the government's dismissal decision; refused motions to dispose of copious pages of documents accumulated during the litigation; indicated that he might reject the dismissal pursuant to the provisions of the Antitrust Procedures and Penalties Act, and gave numerous interviews in the press concerning developments in the case. The Second Circuit granted IBM's recusal motion, concluding that a reasonable observer fully informed of these circumstances could question the judge's continuing ability to impartially handle the case¹⁹⁵.

The complexity of antitrust cases constitutes another special feature that may influence the handling of disqualification motions. Parties facing a refusal to withdraw have strong incentives to use a petition for a writ of mandamus as a vehicle for obtaining prejudgment appellate review instead of waiting for the final judgment of a biased judge. However, there is a wide spectrum of opinion among the various Courts of appeals on the admissibility of such accelerative petitions, with certain circuits conditioning their admissibility to the demonstration of "*exceptional circumstances*." Against this background, it has been found that the risk to retry a very complex antitrust case may be seen as an exceptional circumstance justifying an immediate mandamus decision¹⁹⁶. For instance, one judge reported that it took him "*several months*" to familiarize himself with an antitrust case that was transferred to him after a colleague had disqualified himself¹⁹⁷.

C. Reform proposals

It results from the above developments that EU law on conflicts of interest is already significantly well-built, with multifarious provisions and Codes of conduct, some of which set really high standards. For instance, the current legislation on gifts is remarkably strict; the prohibitions to share confidential information or to discuss case or policy matter which are not yet decided are sound and adequately preclude the transfer of privileged intelligence. EU Commission requirement to see officials submit *per file* a statement of any possible conflict of interest susceptible to exist also constitutes a remarkable step in the prevention of conflicts of interests.

Yet, we conclude from our review of the law on conflicts of interests in the main antitrust jurisdictions that there is still room for improvement of the EU rules on the matter. More precisely, we first hold that existing rules on conflicts of interests should be vigorously applied (1). Second, we state that (reverse) revolving door issues should be better addressed with stricter rules (2) and third, that citizens should be endowed to challenge the impartiality of those – official or judge – in charge of their case what, in turn, necessarily requires a higher level of transparency in the handling of files (3).

¹⁹⁴ *In re International Business Machines*, 45 F.3d at 642.

¹⁹⁵ P. BLANCK, "The Appearance of Justice Revisited", *The Journal of Criminal Law and Criminology*, Vol. 86, No. 3, 1996, p. 922.

¹⁹⁶ *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir. 1972). *Contra: In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961), where the court noted that if the possibility of retrial after terminal appeal of a judge's refusal to disqualify were deemed an exceptional circumstance, a mandamus petition would be an appropriate mode of review for every interlocutory disqualification decision. [NO AUTHOR], "Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. Section 455", *Michigan Law Review*, Vol. 71, No. 3, 1973, p. 549.

¹⁹⁷ *Ibidem*, p. 570.

1. Vigorous enforcement

Much more than any amendment of the texts already in force, the most decisive reform would probably consist in improving the enforcement track record of the Commission on its current policy on conflicts of interests. The complaint lodged before the EU Ombudsman primarily emphasizes a crucial lack of awareness on the existing rules and a lack of interest for their consistent application¹⁹⁸.

Consequently, the Commission should first develop proactive procedures to better inform staff of their regulatory obligations when changing job to avoid revolving door conflicts of interests. Simple, pragmatic steps would imply reforming internal ethics training, manuals and publicity, including by developing some related case studies, and to systematically send reminders to any agent leaving office as to his obligations under staff Regulation.

The Commission should also improve and strengthen its scrutiny and decision-making regarding revolving door practices. This would imply a revision of the authorization form used to elicit information on the content of the departee's next job, and the adoption of proactive strategies to follow up when the information provided is not clear or sufficient with more a systematic use of external sources of information such as the EU's Transparency Register. An adequate use of sanctions would also deter infringements to staff Regulation and contribute raising awareness within the institution.

2. (Reverse) revolving-doors and cooling-off requirements

To date, EU law requires from Commission's officials not to deal with pending cases in which they have been involved for a previous employer. There is no cut-off date: the rule applies as long as the case is pending. Strikingly, EU law remains silent about cases in which the official was not involved but that are related to a former client or that involve his former law firm or employer. It is our opinion that in such cases, the official should mandatorily withdraw from the matter, which would then be transferred to one of his colleague. Such additional prohibition would be applied during a period of five years running from the day of entry into office. This would be in line with the five years cooling-off period that the ECtHR case law suggests for judges and would be less strict than time-unlimited prohibition imposed under Article L 461-2 of the French Code de Commerce to members of the NCA regarding previously represented parties.

The solutions we preconize is pragmatic. Exactly as in the US – and contrary to ECtHR case law – a “*rule of necessity*” should apply, so that the original case handler may take the matter when no other impartial official is available. More accurately, we consider that the necessity exception should be applied in conformity with the principle of proportionality so that the original case handler may take the case when no other impartial official, *as competent as him*, is available. Such a flexible interpretation would help reconcile two conflicting fundamental principles that clash here – i.e. the principle of impartiality and the efficient administration of justice. Hence, to confirm an official in his attributions despite the existence of a conflict of interest, the Commission would then bear the burden of proof of a shortage of capable staff – what could be done, for instance, on the basis of the internal organigram¹⁹⁹. In the event the

¹⁹⁸ Complaint from the Corporate Europe Observatory, Greenpeace EU Unit, LobbyControl and Spinwatch to the EU Ombudsman, op. cit., p. 23.

¹⁹⁹ Officials versed in State aid law could not replace officials affected to antitrust, for instance. Possibly, one could even consider that officials affected to one sector could not replace those affected to another sector (Eg.:

confirmation of a particular staff member would not be properly motivated, litigants would find here a valid ground for challenging the legality of the Commission's decision.

Similar rules should apply to the EU Court of Justice. A permanent ban should be applied regarding special matters already dealt by judges in a different, prior position; a five years cooling-off period should apply transversally for clients or employers for which the judge previously worked. Regarding this last part, the principle of proportionality would result in a specific rule regarding transferees from the Commission to the Court. As it is good policy to enroll former Commission officials in the ranks of the Court but impossible to occasionally put them aside – the Commission being represented in each and every competition law case before the Court – an objective justification exists for differential treatment between former Commission officials and former private attorneys. Hence, Commission officials would only be subject to the permanent ban for similar matters rule but not to the five years cooling-off period.

Improvements could also be brought to the current legal framework on revolving door strategies. The current regime requires prior approval from the Appointing Authority for former officials who decide to enter into a new job before the expiry a two years period after departure from the Commission. As such, it is good policy, as it allows the EU to tailor case-by-case conditions for ulterior affectations of former staff members and avoid the imposition of overly-broad – and unnecessary – conditions that would impair the development of former official's professional career. However, we believe that the current regime should be amended and extended. It is of utmost importance that all members of a law firm joined by a former Commission official are equally prevented from intervening on cases to which the transferee had a privileged access. Any other solution would result in hypocritical circumventions of the rules, with former officials intervening behind-the-scene to pilot cases facially handled by colleagues. It would also allow law firms and companies to hire officials with the sole purpose to extract confidential information from them. A more inclusive ban, extended to all members of the joined law firm would raise the EU ethics standard to the level of those currently in force in France or before the FTC.

3. Empowering citizens subject to an antitrust jurisdiction

Additionally to the above suggestions, we consider that steps should be undertaken to allow citizens to challenge the impartiality of the decision maker. As acknowledged by the ECtHR case law, the possibility to challenge the neutrality of the arbiter is an essential component of the impartiality requirement. Consequently, withdrawal procedures should be elaborated and published at both the Commission and Court levels. These procedures would establish modalities as essential as the competent body – whether internal or external to the challenged authority – to judge claims of impartiality, the time frame, a possible procedure for appeal before ruling, etc. Likewise, Code of ethics and other legal documents should be published on the Internet website of the Commission with easy access to it to every citizen.

In line with this reasoning, the identity of the Commission official or the Court référendaire in charge of drafting the decision should be disclosed to the parties from the very first stage of the procedure. Because these are directly involved in the decision making process – even if without voting rights – and are in the position to influence the instruction of the file and the

Energy and Environment vs. Information, Communication and Media vs. Financial services vs. Basic industries, Manufacturing and Agriculture vs. Transport, Post and other services (organigram available at: http://ec.europa.eu/dgs/competition/directory/organi_en.pdf)

formation of the decision, it is only fair to submit them to the same recusal procedure than those who will facially make the decision. Alternatively, the impartiality of a référendaire could be challenged via a procedure directed against the judge to whom he relates, with a claim for recusal stressing that the judge's clerk is conflicted.

Finally, in line with the suggestions made in the ECtHR case law, measures should be taken to create a database or another kind of system ensuring that decision makers are reminded of their prior involvement in particular cases or with former clients. Such a system would dismiss *ex ante* the names of conflicted judges or officials from the list of available arbiters what would in turn diffuse unnecessary ulterior tensions. Such a measure would also be in line with the most recent empirical findings on judicial impartiality, which state that even timely recusal do not totally restore the perception of impartiality. Such an automated system would not only diffuse conflicts of interest *ex post* but would also prevent them *ex ante*. Possibly, the background of the staff involved in the case could also be published in order to permit to the parties to verify the impartiality of their judge themselves²⁰⁰.

²⁰⁰ For instance, names of judges and référendaires are available online (available at: <http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeid=13>). This information sheet would be updated with additional information on past professional affiliations, cases and clients. In order to limit privacy issues to the strict minimum necessary to increase transparency, one could imagine a coded access to these information via an intranet account only accessible to the parties to a pending case.