UNIVERSIDAD ADOLFO IBÁÑEZ

ENFORCING CHILE'S BAN ON COMPETITOR INTERLOCKS: THE FNE'S FIRST ACTIONS UNDER ARTICLE 3-D) OF DL 211

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I. INTRODUCTION

Almost five years after Chile's prohibition against competitor interlocks in article 3, letter d), of the Competition Act, DL 211, went into effect, the *Fiscalía Nacional Económica* ("FNE") brought its first two complaints for alleged violations of the law. On December 30, 2021, the FNE announced the filing of an action before the *Tribunal de Defensa de la Libre Competencia* ("TDLC") against Hernán Büchi, Banco de Chile, Corsorcio Financiero S.A. ("Consorcio") and Falabella S.A. ("Falabella"), claiming that Mr. Büchi's simultaneous role as a director or relevant officer with these companies violated article 3-d)[1]. Less than a week later, the filing of a similar action against Juan Hurtado Vicuña, Consorcio and Larraín Vial SpA ("Larraín Vial") was made public[2]. The FNE is seeking fines and other relief in both matters against the individual directors and the companies that were part of the allegedly unlawful interlocks.

With the enactment of article 3-d) in 2016, Chile joined the United States as one of a handful of jurisdictions that explicitly prohibits competitor interlocks. As I have written more extensively elsewhere, strong policy reasons support targeted bans against competitor interlocks in order to head off the risks to competition from these practices[3].The addition of article 3-d) to Chile's Competition Act was, in my view, an encouraging development that added to the FNE's toolkit for combating anticompetitive conduct. However, the effectiveness of this provision in accomplishing its objectives ultimately will depend on how it is enforced. And that, in turn, will be guided by how the TDLC and Chilean Supreme Court interpret the law.

The FNE's theories in the two recently filed complaints present several important questions of first impression that could have a significant impact on the success of the law going forward. These include:

- First, does article 3-d) establish a *per se* prohibition on competitor interlocks that meet the thresholds established by the law, or must some actual or potential effect on competition also be shown?

- Second, does the prohibition reach "indirect" interlocks involving an individual serving as an officer or

1 Requerimiento FNE contra Hernán Büchi, Banco de Chile, Consorcio Financiero S.A. y Falabella S.A., Rol. No. C-436-2021 ("Büchi Requerimiento").

2 Requerimiento FNE contra Juan José Hurtado Vicuña, Consorcio Financiero S.A. y Larraín Vial SpA, Rol No. C-437-2021 ("Hurtado Requerimiento").

3 *See* Jacobs, Michael, "Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies," Fordham Int'l Law Journal, Vol. 37, No. 3 (2014) (recommending bright-line prohibitions on certain competitor interlocks); Jacobs, Michael, "El enforcement relativo a las participaciones minoritarias en la regulación norteamericana de competencia," and other selections, Reflexiones Sobre el Derecho de la Libre Competencia: Informes en Derecho solicitados por la Fiscalía Nacional Económica (2017).

director of two corporations that might not compete themselves, but that have subsidiaries in competition with one another?[4]

- Third, does article 3-d) apply only to the individual directors or relevant executives involved in a competitor interlock or are the firms involved also subject to the law?[5]

I will leave it to Chilean lawyers to debate whether the FNE's reading of article 3-d) is a correct interpretation of the legal text. In the following sections, I will instead discuss how I believe questions should be answered purely from a policy perspective based, at least in part, on the experience in the United States with enforcement of its analogous prohibition, section 8 of the Clayton Act. Those answers broadly support the FNE's view of the law[6].

II. CHILE'S LEGISLATIVE RESPONSE TO THE RISKS OF COMPETITOR INTERLOCKS

An interlocking directorate is a structural link that involves firms sharing a common board director or officer[7]. An interlock can be either "direct" or "indirect"[8]. A direct interlock is the most straightforward situation, which occurs when the same individual has responsibilities in two competing firms. By contrast, an indirect interlock can take various forms. One that is particularly relevant happens when a person serves as an officer or director of two corporations that do not compete themselves, but that have subsidiaries in competition with one another[9].

While interlocks generally are not considered to be harmful to competition (and could even be beneficial in certain circumstances)[10], horizontal interlocks between rival firms can pose serious risks to competition. Those include facilitating collusion or otherwise contributing to the establishment or maintenance of tacit or oligopolistic coordination[11]. While that is not to suggest that competitor interlocks necessarily result in anticompetitive harms, there are good reasons to avoid these risks. Collusive conduct is often difficult and costly to detect and can impose significant social costs when it does occur. Avoiding opportunities to engage in such behavior therefore is important. Moreover, there is reason to believe that the competitive risks posed by horizontal interlocks could be particularly acute in smaller economies like Chile, where markets are highly concentrated and tend to have weaker self-correcting tendencies than in larger economies[12].

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4 Another issue that could arise is whether the subsidiaries are actually "competitors" with one another. *See, e.g.,* Büchi Requerimiento, at ¶¶ 66-67 ("[T]wo companies can be considered competitors when they offer products or services that generically perform the same functions or have similar characteristics.") (author's translation). While that is beyond the scope of this paper, I will briefly note that some US courts have applied the market definition analyses generally used under the Sherman and Clayton Acts in analyzing that issue. Others, however, have employed a more flexible "qualitative analysis." *See* Jacobs, "Combating Anticompetitive Interlocks," at 668-670.

5 The Büchi matter might also shed some light on the meaning of "relevant executive," another question that is beyond the scope of this paper. *See* Büchi Requerimiento, at ¶ 58 (discussing the meaning of "relevant executive").

6 I also want to be clear that I am not providing any views on the merits of the FNE's claims themselves. While I am familiar with the public allegations the agency has made against Messrs. Büchi and Hurtado and the firms involved, they are just that—allegations. The defendants are entitled to present their cases before the TDLC.

7 *See* OECD, "Antitrust Issues Involving Minority Shareholding and Interlocking Directorates," DAF/COMP(2008)30 (June 23, 2009).

8 *See id.*, at 48.

9 Jacobs, "Combating Anticompetitive Interlocks," at 649-650.

10 Spencer Weber Waller, "Corporate Governance and Competition Policy," 18 Geo. Mason L. Rev. 833, 858 (2011).

11 *Id.*, at 858.

The ban on competitor interlocks in article 3-d) of DL 211 was a response to these dangers[13]. As the Minister of the Economy stated when the proposed law was under consideration, "the fact that a person might simultaneously act as an executive or director of two or more competing companies presents a serious risk of collusion, so the legislation must prohibit [the conduct] in order to avoid [the risk]"[14]. Similarly, an advisor to the Ministry of Economy explained that interlocks represent "a flagrant violation of free competition, because the director or executive in question, by virtue of his position, has access to competitively relevant information and will have the natural tendency to choose courses of action that coordinate the behavior of the competitors involved"[15].

> Article 3-d) states as follows:
>
> The following shall be considered, among others, as facts, acts or conventions that prevent, restrict, or hinder free competition or that tend to produce such effects: …
>
> d) The simultaneous participation of a person in relevant executive or director positions in two or more competing companies, provided that the business group to which each of the aforementioned companies belongs has annual income from sales, services and other business activities that exceed one hundred thousand development units in the last calendar year[16].

The law is similar in many critical respects to section 8 of the US Clayton Act. The purpose of the latter, as one US federal district court remarked, is "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates"[17]. The same undoubtedly can be said of article 3-d) based on the history cited above. To that end, the Chilean law (like its US counterpart) is intended to capture the most competitively suspect interlocks, namely those involving horizontal competitors that exceed certain size thresholds. Unfortunately, the text of article 3-d) does not clearly address many important questions about the law's reach, which has led to some uncertainty since its enactment[18].

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12 *See* Jacobs, "Combating Anticompetitive Interlocks," at 653-58; Michal S. Gal, Competition Policy for Small Market Economies (2003).

13 *See* "Common ownership by institutional investors and its impact on competition - Note by Chile," DAF/COMP/WD(2017)21 (December 6, 2017), at ¶ 13 ("The legislator assumed that a dual presence in relevant positions might conduce to anticompetitive conducts, such as sensitive commercial information exchange, but limited the prohibition to larger firms due the effects they could have in the market, in comparison to smaller firms."); Büchi Requerimiento, at ¶¶ 54-55.

14 History of Law No. 20,945, available at https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/5311/ (last visited January 9, 2022), at 186 (author's translation).

15 *Id.*, at 533 (author's translation).

16 Article 3, letter d), DL 211 (author's translation).

17 Judge Weinfeld stated more fully on the purpose of section 8:

> [T]he broad purposes of Congress are unmistakably clear. Section 8 was … intended to strengthen the Sherman Act, which, through the years, had not proved entirely effective …. Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or to foster joint action against third party competitors. The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.

United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

18 I discussed many of these uncertainties during a presentation at the FNE's 2016 Día de la Competencia. See Michael Jacobs, "Interlocking Directorates: U.S. Experience Under Section 8 of the Clayton Act" (November 16, 2016), available at https://www.fne.gob.cl/wp-content/uploads/2018/03/Interlocks-FNE-Dia-de-la-Competencia-2016_2.pdf.

III. THE COMPLAINTS

As 2021 came to a close, the FNE brought its first two enforcement actions before the TDLC involving alleged violations of article 3-d). Both complaints arose from an *ex oficio* investigation begun by the agency in September 2019 regarding structural ties in the banking and finance industry[19].

In the first action, announced on December 30, 2021[20], the FNE charged Hernán Büchi, Banco de Chile, Consorcio and Falabella with infringing article 3-d) based on Mr. Büchi's simultaneous role as a director or relevant executive in two or more firms that compete in offering banking and insurance products and services (in the case of Banco de Chile, Consorcio and Falabella) and securities brokerage services (in the case of Banco de Chile and Consorcio)[21]. According to the FNE, Mr. Büchi's participation in these companies began before the law went into effect in February 2017 and continues to the present[22].

An important wrinkle in the case—and one that has generated considerable interest in the legal community[23]—is that Mr. Büchi served on boards of firms that do not compete directly with one another but rather through subsidiaries[24]. The interlocks, in other words, can be considered "indirect." As an example, the FNE alleges that Banco de Chile, Consorcio and Falabella compete in a market for general banking services. However, while Banco de Chile provides those services itself[25], Consorcio participates in the market through its Banco Consorcio subsidiary and Falabella through Banco Falabella[26]. All of the subsidiaries involved are wholly owned (or almost wholly owned), directly or indirectly, by the parent firms[27].

According to the FNE, Mr. Büchi's participation on the boards gave him access to sensitive commercial information about the business groups' activities in the markets at issue[28]. The agency has asked the TDLC to impose fines on Mr. Büchi of CLP $357 million (550 UTA or about $430,000 USD); on Banco de Chile of CLP $ 2,899 million (4,460 UTA or about $3.5 million USD); on Consorcio of CLP $ 2,678 million (4,120 UTA or $3.2

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19 *See* Büchi Requerimiento, at ¶ 1.

20 *See* FNE press release, "FNE presentó primer requerimiento por participación simultánea de un director en empresas competidoras contra Hernán Búchi, Banco de Chile, Consorcio y Falabella" (December 30, 2021) ("Büchi Press Release").

21 Büchi Requerimiento, at ¶¶ 7-18.

22 *Id.*, at ¶ 6.

23 *See, e.g.*, "Rut a rut o como *holding*: La discusión que abrió la denuncia de la FNE por prohibición de *interlocking* contra Hernán Büchi y Juan Hurtado Vicuña," *El Mercurio* (January 9, 2022).

24 *See*, *generally*, Büchi Requerimiento, at ¶¶ 7-18.

25 *Id.*, at ¶ 7.

26 *Id.*, at ¶¶ 9, 11. Similar competition through subsidiaries is alleged in markets for stock brokerage services, insurance brokerage services, and insurance. *Id.*, at ¶¶ 15-18.

27 *Id.*, at ¶¶ 7, 9, 11 & Figures 1-3.

28 *Id.*, at ¶ 80. The complaint alleges, specifically:

> For example, at the Consorcio board meeting in January 2017, information was disclosed about its pricing policy for commercial loans. In turn, at a Banco de Chile board meeting in October 2017, a presentation was made about its product pricing model for personal banking and SME banking, while in an April 2019 session, information was revealed about consumer credit spreads. For its part, in a presentation to Falabella's board of directors, held in March 2018, the interest rates and commissions of the CMR card and Banco Falabella's consumer loans were compared with those of other banks, including Banco de Chile.

Id., at ¶ 81 (author's translation).

million USD); and on Falabella of CLP $ 2,632 million (4,050 UTA or about $3.2 million USD)[29]. In addition, the FNE has requested that the alleged interlock be terminated and that the TDLC make whatever orders are necessary "to avoid any use of the sensitive information obtained by [Mr. Büchi] in the exercise of his position as director of [the defendant firms] in any competitor"[30].

On January 4, 2022, a second complaint was announced, this one against Juan Hurtado Vicuña, Consorcio Financiero and Larraín Vial[31]. The case has many similarities with the Büchi matter, including the "indirect" nature of the alleged interlock involving securities brokerage services provided through the firms' subsidiaries[32]. According to the complaint, Mr. Hurtado's participation began prior to the entry into force of article 3-d) and ended in April 2019 with his resignation from the board of Larraín Vial[33]. The FNE alleges that Mr. Hurtado had access to commercially sensitive information regarding the subsidiaries' business plans[34]. The agency is asking the TDLC to impose fines on Mr. Hurtado of CLP $162 million (250 UTA or about $195,000 USD), on Consorcio Financiero of CLP $1,287 million (1,980 UTA or about USD $1.56 million) and on Larraín Vial of CLP $1,852 million (2,850 UTA or about USD $2.24 million)[35].

IV. QUESTIONS OF FIRST IMPRESSION FACING THE TDLC REGARDING INTERLOCKS

The FNE's complaints present some interesting questions of first impression that the TDLC, and perhaps ultimately the Chilean Supreme Court, will be called on to answer. As previewed above, those include (a) whether the law imposes a *per se* prohibition on competitive interlocks above a certain size threshold; (b) if the prohibition applies to "indirect" interlocks; and (c) whether the firms involved in the interlock, as well as the individual directors, can be sanctioned.

A. Does Article 3-d) Impose a *Per Se* Ban on Competitor Interlocks Above the Set Threshold?

According to the FNE, establishing a violation of article 3-d) does not require proof that an interlock affected competition or that the firms had market power[36]. Instead, the agency views the law as enacting a *per se* ban.

29 *Id*., at ¶ 82.

30 *Id*., at ¶¶ 83-85 (author's translation).

31 *See* FNE press release, "FNE presentó requerimiento por par!cipación simultánea de un director en empresas compe!doras contra Juan Hurtado Vicuña, Consorcio y Larraín Vial" (January 4, 2022).

32 In the case of securities brokerage services, Consorcio participates in that market together through its subsidiary, Consorcio Corredores de Bolsa S.A, which is wholly owned by Consorcio through different companies. Larraín Vial participates in the market through Larraín Vial S.A. Corredora, in which it has a 100% ownership interest in directly and through another subsidiary. Hurtado Requerimiento, at ¶¶ 6-12.

33 *Id*., at ¶ 5.

34 *Id*., at ¶ 50. The complaint provides as a specific example:

> Through both boards of directors, Mr. Hurtado had access to the commercial goals and objectives of both Consorcio and Larraín Vial. Thus, at the Consorcio board meeting on May 31, 2017, the general manager of Consorcio Corredores de Bolsa S.A. spoke about upcoming challenges and next steps of the company; while in the Larraín Vial board meeting on December 18, 2017, the budget for the year 2018 was presented (which would be sent to the board members with the breakdown of expenses), as well as the 4-year plan for the company.

Id., at ¶ 51 (author's translation).

35 *Id*., at ¶ 52.

36 *See* Büchi Requerimiento, at ¶ 69. As the FNE stated when announcing its first complaint:

> The law establishes that the mere fact of having simultaneous participation in competitors is sufficiently risky to warrant an absolute prohibition and, therefore, it is enough to prove this situation for legal sanctions to proceed, without having to prove whether they produced adverse effects, such as price increases, quantity reduction, quality reduction or innovation, among others. Nor is it a requirement that the companies in which the participation takes place have market power or dominant position.

Büchi Press Release (author's translation).

In support of this position, the complaints rely on the text of the provision[37] as well as the important policy considerations that motivated passage of the law. On that latter point, the FNE argues:

> [D]ue to the very nature of horizontal interlocks, which involve the participation of a person in two or more competing companies, the current regulation seeks to avoid the creation of risks that result from such a situation, *through an absolute prohibition of this arrangement*. In other words, *the simple materialization of the risk for free competition*, derived from the mere simultaneous participation in two or more competing companies, *is enough to materialize and sanction the infringement*[38].

In my view, the FNE is clearly correct, at least from a policy perspective[39]. The *per se* approach not only appears to be more consistent with the history of the law, but also more likely to protect competition from the risks associated with these interlocks.

The FNE's understanding of article 3-d) is consistent with the approach taken in the US with section 8 of the Clayton Act. For almost 70 years, US courts here have concluded that a bright-line approach—which does not require any showing of actual or potential market effects to establish a violation—is most consistent with the underlying purpose of the statute. In *United States v. Sears, Roebuck & Co*.[40], for instance, the district court rejected the argument that section 8 required some showing of an actual or potential effect on competition[41]. The court concluded that, because "[t]he legislation was essentially preventative," a heightened standard "would defeat the Congressional purpose 'to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation'"[42]. The *per se* rule, in contrast, "permits the prohibitory features of § 8 to be administered with the full scope which the legislators must have contemplated"[43].

As I have argued elsewhere, an absolute ban on competitor interlocks (with certain *de minimus* exceptions) appropriately acknowledges the idea that these structural links can pose serious risks to competition,

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37 The FNE argues on this point:

> Likewise, article 3, first paragraph of DL 211 contains the general description of the anti-competitive offense, whose scope is justified by the dynamism of the markets and the complexity of the behaviors that violate free competition. However, in the second paragraph of the same article, specific cases -not exhaustive- of infringements of free competition are enshrined, in respect of which it is enough that the elements of each literal are verified to configure the illicit described. Within these, it is precisely the prohibition of horizontal interlocking, with respect to which it is enough that the three copulative requirements described above are verified for the infraction to be configured. The foregoing contrasts with the behaviors described in subparagraphs b) and c) of the second paragraph of article 3 of DL 211, which require a dominant position, and with the behaviors referred to agreements on marketing conditions or exclusionary provisions of subparagraph a) of the same law, that require market power for their configuration.

Büchi Requerimiento, at ¶ 71 (author's translation).

38 *Id*., at ¶ 70 (author's translation).

39 The FNE's argument on this point, however, also strikes me (a non-Chilean lawyer) as a better reading of the law. *See, e.g*., Büchi Requerimiento, at ¶ 71.

40 111 F. Supp. 614 (S.D.N.Y. 1953).

41 The defendant in *Sears* advocated for a standard that would have required a showing that the interlock involved firms with a sufficient market presence that a hypothetical merger between them would violate Clayton Act § 7, which prohibits mergers between firms only when "the *effect* of such acquisition may be substantially to lessen competition, or to tend to create a monopoly".

42 *Sears*, 111 F. Supp. at 617 (quoting Senate Report No. 698 (63d Cong., 2d sess.)).

43 *Id*.

In *Protectoseal* Co. v. *Barancik*, the US Court of Appeals for the Seventh Circuit came to a similar conclusion that the language of section 8 "establishes *rather simple objective criteria* for judging the legality of the interlock," and that "a market-wide analysis of competition [was] unnecessary" under the statute. 484 F.2d 585, 589 (7th Cir. 1973).

particularly in a small economy like Chile's[44]. A *per se* ban that does not look at the actual or potential competitive effects of a particular interlock certainly sweeps more broadly than a case-by-case analysis would, and is likely to prohibit some instances of interlocks that might be otherwise benign or even socially beneficial. However, those situations can be limited by including exceptions for interlocks that are less likely to affect competition, as article 3-d) does. While it might be possible to further refine any prohibition by requiring an analysis of competitive effects, that risks sacrificing the benefit of clarity from a bright-line approach. Moreover, whatever incremental gains might be achieved for the sake of further precision would come at a high cost in terms of corporate governance and competition policy. Those costs include not only increased expenses for the government to enforce the prohibition in specific cases, but also general social costs if the prophylactic nature of the statute is undermined and an increase in interlocks results in increased instances of anticompetitive conduct that harms consumers. In the Chilean context, the *per se* approach sought by the FNE is the most sensible option.

B. Does the Prohibition Against Competitor Interlocks Extend to Certain "Indirect" Interlocks?

As discussed above, the interlocks challenged in the Büchi and Hurtado complaints can be characterized as "indirect." This leads to the question whether, under article 3-d), the ban only applies to the firms for which someone serves as a director or relevant executive, or if it also reaches subsidiaries and other members of a business group. The FNE takes the position that, for purposes of defining a "company," the law is concerned not simply with the legal definition of a firm but rather considers where competition occurs in the market. It is possible, therefore, that a "company" could be made up of a group of diverse entities, whether natural or legal persons, so long as they exercise a single competitive force in the market. "In this sense, what is relevant is the verification of an economic unit, an essentially functional definition that is not related to the legal form"[45]. The agency asserts that the absolute (or near absolute) ownership by the holding companies of their subsidiaries allows them and their boards of directors to adopt business strategies regarding the offer of products and services in the markets at issue, to have access to sensitive business information, to monitor the business performance of its affiliates, and to articulate or veto decisions that are adopted by the subsidiaries[46]. Under this view, the concept of competing enterprise includes all of the entities controlled by the same central decision maker—in these cases, the parent firms on which Messrs. Büchi and Hurtado served[47].

The FNE's understanding of article 3-d) is generally consistent with the approach to indirect interlocks under section 8 of the US Clayton Act. Both the US Department of Justice and the FTC have taken enforcement actions premised on indirect interlocks[48]. For instance, in *Borg-Warner Corp*., which considered whether a parent company should be regarded as a "competitor" of a subsidiary's competitors, the FTC concluded that the relevant inquiry under section 8 in these circumstances was whether an interlocked director is able to exercise control or substantially influence decision making at the director level so as to dampen competitive

44 Jacobs, "Combating Anticompetitive Interlocks," at 653-58.

45 *See, e.g.*, Büchi Requerimiento, at ¶ 61 (author's translation).

46 *See, e.g., id.*, at ¶ 12; Hurtado Requerimiento, at ¶ 9.

47 *See, e.g.*, Büchi Requerimiento, at ¶¶ 63-64; Hurtado Requerimiento, at ¶¶ 33-34.

48 *See* ABA, Antitrust Law Developments (Sixth) at 429-30; ABA, Interlocking Directorates: Handbook on Section 8 of the Clayton Act ("Interlocking Directorates") at 70-71 (discussing the FTC's challenge of the interlock between Borg-Warner and Bosch GmbH).

relationships between divided corporate interests[49].

Federal courts in the US have also recognized that section 8 can reach indirect interlocks, provided the parent has sufficient control over the subsidiary[50]. *In United States v. Crocker Nat'l Corp*.[51], for instance, the Ninth Circuit concluded that when a parent "substantially controls the policies of its subsidiary," the "business and location" of the parent includes that of the subsidiary as well[52]. In another case involving an indirect subsidiary interlock, *United States v. Cleveland Trust Co*.[53], the federal district court was interested in the "control exercised by the two parent companies over the major policies of their respective subsidiaries"[54]. The court in that case refused to grant summary judgment for the government because it wanted a "clear[er] picture" of the issue after trial and on a more complete record so it could assess "the significance of that such control may have to the Government's section 8 case[.]"[55].

Interpreting a ban on competitor interlocks as reaching at least certain indirect interlocks is important. If the law does not apply, for instance, to a director who is serving simultaneously in two holding companies and is in a position to exercise meaningful control over subsidiaries that compete with one another, the prohibition could be easily evaded. Elevating the formalities of the corporate form over the realities of competition would undermine the objectives of the law. This rationale is particularly apt regarding article 3-d) and the underlying purpose of the law, which is prophylactic in nature. The prohibition might end up reaching some horizontal interlocks that do not negatively affect competition; however, the legislature has determined that the risks are too high. Where exactly the line between permissible and unlawful indirect interlocks should be drawn—if the law is interpreted as capable of reaching indirect interlocks—undoubtedly will take some time to figure out. And it may be that in the Chilean context an appropriate standard should be calibrated somewhat differently than in the US due to the realities of the national market. That said, the FNE's general theory regarding the potential reach of the prohibition to at least some indirect interlocks strikes me as reasonable[56].

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49 *In re Borg-Warner Corp*., 101 F.T.C. 863, 932, *modified*, 102 F.T.C. 1164 (1983), *rev'd on other grounds*, 742 F.2d 108 (2d Cir. 1984).

In *Borg-Warner*, the FTC challenged an interlock resulting from the acquisition of Borg-Warner stock by Bosch GmbH, a German corporation. Two directors sitting simultaneously on the boards of Bosch GmbH and Bosch U.S., the German company's wholly-owned American subsidiary, assumed positions on Borg-Warner's board. The theory espoused in the FTC complaint was that the arrangement constituted an illegal interlock insofar as Bosch U.S. competed directly with Borg-Warner.

On appeal, the Second Circuit characterized the question in this case as "a close and difficult" one. *Borg-Warner Corp*. v. F.T.C., 746 F.2d 108, 111 (2d Cir. 1984).

50 *See also*, ABA, Interlocking Directorates: Handbook on Section 8 of the Clayton Act at 67 ("In general, if the parent exercises close supervision of its subsidiary or has legal or managerial authority to direct its subsidiary—through the holding of voting securities or through managerial rights—sales of the subsidiary will be imputed to the parent, and Section 8 will prohibit interlocking directorates among firms that compete directly or through the operations of their subsidiaries").

51 656 F.2d 428, 450-51 (9th Cir. 1981), *rev'd on other grounds sub nom BankAmerica Corp. v. United States*, 462 U.S. 122 (1983).

52 656 F.2d at 450.

53 392 F. Supp. 699 (N.D. Ohio 1974).

54 *Id.* at 712.

55 *Id.*

The Second Circuit, in *Kennecott Copper Corp. v. Curtiss-Wright Corp*., 584 F.2d 1195 (2d Cir. 1978), overturned the "general rule" adopted by the district court that section 8 prohibits interlocking directorates between parent companies with subsidiaries that are competitors. *Id.* at 1205. In that case, however, the evidence was undisputed that no one ever directed the indirectly held and not wholly-owned subsidiary how to run its business.

56 Whether that would implicate these interlocks is a separate question. As I noted above, I am offering no view on the merits of the FNE's claims against any defendant in these cases.

C. Are Firms Also Responsible for Infringements of Article 3-d)?

The FNE is asking for sanctions and other relief against not only the Messrs. Büchi and Hurtado, but the firms involved in the alleged interlocks as well. The agency provides various rationales for its position that the individuals and the competing companies can be held legally responsible[57]. As the FNE notes, the firms are in a position to take measures to comply with the law and to put an end to an infraction once detected[58]. Moreover, it is the companies involved that would be the beneficiaries of any restriction in competition resulting from an unlawful interlock[59]. From a policy perspective, the agency's view makes complete sense and is consistent with decisions in the US holding that section 8 of the Clayton Act applies to corporations as well as the individual directors involved[60].

A related, and probably more interesting, question involves the appropriate penalties for violations of a *per se* prohibition that does not require any showing that the interlock had actual anticompetitive effects. While this could be the subject of its own paper, I will briefly note that the FNE's requests that fines be imposed on the defendants in both cases is a far different approach than what is followed in the US. The typical remedy for a violation of section 8 of the Clayton Act involves the resignation of a director from one of the two corporations and, in some instances, an order prohibiting the corporations from engaging in future violations[61]. Private plaintiffs theoretically could recover damages, but I am not aware of any instances in which that has occurred. Fines, as the FNE has requested, are not an option in the US, but then again, we have a far different approach to penalties for civil violations of the antitrust laws than does Chile[62]. There are advantages and disadvantages to both approaches[63], and an important question is which will lead to more effective enforcement of article 3-d). The answers might even be different between the two cases when one interlock, involving Mr. Hurtado, has already ended[64]. There is simply not sufficient space here to properly address these issues.

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57 Büchi Requerimiento, at ¶ 72; Hurtado Requerimiento, at ¶ 42.

58 Büchi Requerimiento, at ¶ 74.

59 *Id*., at ¶ 75.

60 *See SCM Corp. v. FTC,* 565 F.2d 807, 810-11 (2d Cir. 1977). As the Second Circuit concluded, a firm otherwise could maintain an interlocking directorate and, if detected, just replace the director with another interlocking board member.

61 *See* Jacobs, "Combating Anticompetitive Interlocks," at 674.

62 *See* Harry First, "The Case for Antitrust Civil Penalties," 76 Antitrust L.J. 127 (2009).

63 *See* Büchi Requerimiento, at ¶¶ 76-82 (discussing the rationale for sanctions being sought by the FNE); Jacobs, "Combating Anticompetitive Interlocks," at 675-676, 680-681 (discussing Judge Easterbrook's characterization of section 8 enforcement as tending to follow an "amicable" path that rarely involves litigation).

64 *Compare* Hurtado Requerimiento, at ¶ 5 (interlock ended in April 2019 with Mr. Hurtado's resignation from the Larraín Vial board) *with* Büchi Requerimiento, at ¶ 6 (interlock continues to the present).

V. CONCLUSION

The Chilean prohibition against competitor interlocks that went into effect in 2017 was an important addition to the country's competition laws. Like section 8 of the Clayton Act, article 3-d) complements other provisions of the Competition Act that were already in place, and the recent complaints by the FNE suggest that the agency is taking enforcement of the ban seriously. Whether the FNE will succeed on the merits in these two cases, of course, remains to be seen. Regardless, the actions should allow the TDLC and Chilean Supreme Court to begin answering some pressing questions that will help determine whether article 3-d) can fulfill its purpose of restricting the most suspect horizontal interlocks and thereby avoid the risks those entail for the Chilean economy.

As I argue above, certain answers are likely to produce better outcomes (setting aside any debate over the legal text itself). First, article 3-d) should be understood as a bright-line, *per se* rule against horizontal competitor interlocks involving firms that exceed certain size thresholds. Grafting additional requirements beyond those will only increase enforcement costs and decrease the probability that anticompetitive interlocks are sanctioned. In the Chilean context, that would be a mistake. Second, the law should be understood as reaching at least some "indirect" interlocks, particularly when interlocked firms control or have the ability to exercise control over subsidiaries that are in competition with one another. Finally, it is important that the firms themselves be held accountable for violations of the law. Whether that accountability comes in the form of fines or simply behavioral remedies, the ultimate goal of article 3-d) is to prevent firms, not just individuals, from engaging in conduct that the Chilean legislature has determined to be harmful.

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