INTERPRETING COMPETITION IN INTERLOCKING DIRECTORATES: WHY THE 1990 AMENDMENTS MAY EXCLUDE THE BROADER APPLICATION OF SECTION 8

BY NANDU MACHIRAJU, DARLEY MAW & DANIEL GAO[1]

1 Nandu Machiraju is a partner in Baker McKenzie's North America Antitrust & Competition Practice Group, based in Washington, D.C. Darley Maw and Daniel Gao are associates in Baker McKenzie's Antitrust & Competition Practice Group based in New York.

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Consistent with the Biden administration's push for vigorous antitrust law enforcement, enforcers have begun to employ Section 8 to target interlocking directorates. Upon closer review, however, the 1990 amendments to the statute make it ill-suited as a tool to address elements of the administration's ambitious agenda. In particular, the addition of safe-harbor thresholds, which directed the focus of Section 8 to downstream, revenue-generating competition, preclude the statute's application to competition to purchase inputs (e.g. labor markets) and non-revenue generating competition (e.g. early innovation competition), all of which have been identified as priorities of enforcement.

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I. INTRODUCTION

Rewind the clock five, 10, or even 15 years: The odds of predicting that Section 8 of the Clayton Act, which prohibits interlocking directorates, would be a major beachhead in the U.S. antitrust agencies' push for renewed vigorous enforcement of the antitrust laws would seem slight. But the present-day Biden administration has shown a penchant for reinvigorating areas of antitrust enforcement that otherwise have been sparsely used, have been used in a more reactionary manner, or, quite frankly, haven't been used at all. In the aforementioned examples, as well as its recent announcement to initiate a competition rulemaking under its unfair methods of competition authority to ban most non-compete clauses, the U.S. Federal Trade Commission ("FTC") has vocalized its objective to disinter these provisions from the graves of non-enforcement.

But the U.S. Department of Justice ("DOJ") announced through several speeches by senior-level officials that it would be aggressively investigating companies for violations under Section 8 of the Clayton Act. Section 8 prohibits interlocking directorates. Section 8 ostensibly was intended to "nip in the bud" the conditions that invite the kinds of information exchanges that might occur at the senior executive level that ultimately may lead to anticompetitive coordination.[2] As an enforcement tool, however, Section 8 is a blunter instrument that applies the strict liability *per se* standard for any interlocking directorate that does not meet the statutory exemptions. Tellingly, while the antitrust agencies previously have flexed in speeches about their intention to aggressively enforce Section 8 of the Clayton Act, their posture generally remained more reactive than proactive. But the DOJ under the Biden administration has taken a new tack. It has proactively looked for companies and board members who are violating Section 8 and has proactively initiated enforcement actions.

These areas of vigorous enforcement broadly dovetail with the Biden administration's agenda to use all tools at its disposal to aggressively enforce the antitrust laws. In particular, the administration has shown a heightened interest in refreshing enforcement activity affecting labor markets, innovation, and more broadly, markets evincing greater monopsony power. But to the extent U.S. antitrust enforcers want to use Section 8 to tackle those areas, they face serious limitations. In particular, the 1990 amendments to Section 8 transformed the statute in ways that ultimately curbed the ability to use Section 8 as a tool to expressly target purchasing activities or non-revenue generating activities that may nonetheless be competitive. In this article, we will briefly discuss the legislative history behind Section 8 (with particular attention to the 1990 amendments), analyze the safe-harbor exemptions included in Section 8, and explore the manner in which these exemptions added under the 1990 amendments severed whole swaths of enforcement areas that are a focal point today.

II. HISTORY OF SECTION 8 OF THE CLAYTON ACT

To curb the growing "bigness" of railroad companies and financial institutions, Section 8 was enacted in 1914, prohibiting individuals from serving as a director of two or more competing corporations. Since then, the statute has been amended seven times, with the latest and most significant amendment passed in 1990. These amendments resulted in three major changes: (1) the elevation of the jurisdictional threshold from $1 million to $10 million; (2) the addition of corporate officers as individuals who are barred from serving on the boards of competing companies; and (3) the introduction of *de minimis* exceptions. Under the *de minimis* exceptions, if any of the following exceptions exist, Section 8 is not triggered:

- Either corporation's competitive sales are less than $4,525,700 (adjusted annually by the FTC per the gross national product);
- Either corporation's competitive sales are less than 2 percent of that corporation's total sales; or
- Each corporation's competitive sales are less than 4 percent of its total sales.

The inclusion of *de minimis* safe-harbor exemptions represented an important reform at the time as certain members of Congress recognized that, without affording such an exemption, qualified individuals would be prevented from serving on boards and contributing their unique perspectives.[3] Additionally, for Section 8 to apply to an interlocking directorate, each corporation must have capital, surplus, and undivided profits exceeding $45,257,000.[4]

2 See *U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

3 See, e.g. 136 Cong. Rec. 10,425 (1990); S. Rep. No. 101-286, at 7 (1990).

4 Federal Trade Commission, *Revised Jurisdictional Thresholds for Section 8 of the Clayton Act*, 87 FR 3540 (Jan. 23, 2023), available at https://www.ftc.gov/legal-library/browse/federal-register-notices/revised-jurisdictional-thresholds-section-8-clayton-act-2023.

III. THE *DE MINIMIS* SAFE-HARBOR EXEMPTIONS AND THE FUNDAMENTAL REORIENTATION OF SECTION 8 OF THE CLAYTON ACT

While the safe-harbor exemptions made seemingly modest changes to Section 8, exempting competitive overlaps that represented miniscule "areas of competition" between companies, they actually reoriented the statute in a way that removes a broad swath of competitive activity between two companies. In particular, before the 1990 safe-harbor exemptions were incorporated, any actual competitive overlap may have been sufficient to trigger Section 8 liability. At the time the *de minimis* exceptions were under debate, some suggested to assess competitive overlap only where the combined market share of the interlocked companies was under ten percent.[5] If a company wanted to evaluate its Section 8 risk, traditional antitrust principles for defining relevant markets combined with the statute's broader policy principles typically guided the analysis. But the 1990 Amendments added a new restriction by directing focus on competitive sales and revenue-generation — areas that both suggest that companies must look to downstream competition to assess Section 8 risk. In fact, one court dissolved a Section 8 injunction against a company because the company's competitive sales fell below the newly established thresholds — even where the injunction had been imposed before 1990.[6]

Before the 1990 Amendments, if a company wanted to evaluate its Section 8 risk, traditional antitrust principles for defining relevant markets combined with the statute's broader policy principles typically guided the analysis. But the 1990 Amendments added a new restriction by directing focus on competitive sales and revenue-generation — areas that both suggest that companies must look to downstream competition to assess Section 8 risk. Congress also considered employing a merger review standard to evaluate interlocks, a proposal that was supported by the FTC and would exempt an interlocking directorate if the companies would survive merger clearance under Section 7 of the Clayton Act. However, this was rejected in favor of the current approach to evaluate downstream competition. Because the statute compels evaluation of competitive sales to assess whether a safe-harbor exemption applies, looking to competitive purchasing activities or non-sale-generating activities would not inform the question of whether the exemption is met or not. Nor would they shed light on whether competitive sales comprise a portion of revenue, which is another element of certain statutory exemptions.

Given that revenue-generating activities relate to downstream competition rather than purchasing activities or non-revenue generating activities, the safe-harbor exemptions entirely repositioned the statute around downstream competition that generates revenue.[7] Although this dynamic may hinder the enforcement agencies' efforts to revitalize Section 8 enforcement, particularly in high priority enforcement areas, under the plain language of the statutory exemption, which determines whether Section 8 applies, whole areas of competition simply are out of reach of the statute.

IV. MONOPSONY OR BUYER POWER (E.G. LABOR MARKETS)

In his 2021 Executive Order on competition, President Biden affirmed that "it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of . . . monopsony — especially as these issues arise in labor markets."[8] A monopsony occurs where there is only one buyer (or a small number of buyers) in a market, such that the buyer can force down the market price by restricting its purchases. Monopsonies may be tackled through a variety of other provisions of the antitrust statutes. But the safe-harbor exemption seemingly renders Section 8 edentulous as tool against buyer power. In particular, because upstream purchases do not generate "competitive sales," nor do they clearly align with any revenue-generating activities, there is no basis to evaluate whether competition for inputs would exceed the safe-harbor exemption's threshold for triggering Section 8 liability.

A. Labor Markets

As an example, let's consider how Section 8 applies to labor-market competition where two companies compete vigorously for labor market talent but do not sell competitive downstream products. In such a situation, the two companies would compete for talent, and it is very possible

5 *Increasing Sherman Act Criminal Penalties and Amending Clayton Act Interlocking Directorates: Hearing Before the Subcomm. on Econ & Commercial Law of the H. Comm. on the Judiciary*, 101st Cong. 61 (1989) (Serial No. 33).

6 See, *Protectoseal Co. v Barancik*, 1993 US Dist LEXIS 5512 [N.D. Ill. Apr. 5, 1993, No. 72 C 0079].

7 "Competitive sales means the gross revenues for all products and services sold [emphasis added] by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year." 15 U.S.C. § 19.

8 The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021) ["Executive Order"].

that board members of both companies would be considering human-resource policies for attracting the best talent. If two such competing companies shared a director, that director may be able to leverage their position to coordinate hiring activities and policies, which could reduce the bargaining power of potential employees. This in turn could have the effect of causing harm to workers through lowered salaries or reduced benefits, which have been a focal point for enforcement agencies. For instance, FTC Chair Lina Khan stated that the "Clayton Act's purview applies to product and labor markets alike" and that the FTC plans to incorporate new understandings regarding "the scope of monopsony power in labor markets and the magnitude of its effects" into its work.[9]

But applying Section 8 to labor markets presents challenges in assessing whether an overlap exceeds the relevant safe-harbor thresholds. Where two companies compete for labor, there would be no competitive sale associated with hiring labor — there would just be the cost of wages, benefits, and other aspects of compensation. It also would require an apples-to-oranges comparison to estimate the cost of competitive labor as a portion of total gross revenue. As a result, there would be no basis to evaluate the safe-harbor exemptions, which rely on sales and sales as a portion of total gross revenue. Correspondingly, if there is no way to evaluate how certain competitive activities apply to the safe-harbor exemptions, there is no way to assess whether Section 8 liability should attach. While preventing interlocking directorates between competitors for labor may present an attractive tool to address the administration's competition agenda — for instance, avoiding inequalities in bargaining power that may arise through coordinated hiring activity, which may result in reduced salaries or benefits — the statute does not provide for a feasible method for doing so.

V. NON-REVENUE GENERATING COMPETITIVE ACTIVITIES (E.G. INNOVATION)

Apart from direct downstream competition, or upstream competition for inputs, businesses often compete against each other in multiple non-revenue generating activities. Among such activities, competition in innovation was of particular importance to the Biden administration. Enforcement officials have shared this sentiment and have called for increased focus on the importance of competition in innovation. For instance, FTC Commissioner Rebecca Slaughter remarked that "when multiple companies are racing to develop new technology, that innovation race in and of itself produces tangible benefits that may be at risk from a merger."[10]

A. Innovation Activities

For example, assume two companies do not compete through products that are available on the market, but instead, they invest in R&D and develop products that could compete in the future. The common board member causing the interlock may be asked to evaluate overlapping innovative activities for both companies as a part of their board duties. The board member may evaluate R&D spend, clinical trials, pilot projects, or other innovative activities. But addressing innovation competition in the Section 8 context poses challenges, particularly when there is no product for sale and therefore no competitive sales. In such a case, how would you know whether any safe-harbor thresholds apply? In this context, the only pecuniary exchange might be expenditures on R&D activities, which would yield yet another apples-to-oranges mismatch to apportion R&D spend as a portion of gross sales revenue. As with the possible approaches for assessing upstream competition for labor, there is no clear way to assess whether a potential interlock falls within a safe-harbor exemption.

VI. SECTION 8 LIMITATIONS AND APPLICABILITY OF OTHER STATUTES

In both the monopsony and non-revenue generating competitive scenarios described above, the threshold inquiry of safe-harbor exemptions likely cannot be analyzed. Because Section 8 exempts certain interlocks where "competitive sales" fall within one of three safe-harbor thresholds,[11] competitive activities that do not result in a sale or that generate revenue would be outside the reach of Section 8. The Biden administration's antitrust policy agenda thus cannot count on using Section 8 to force board members to leave company boards that compete for inputs or that compete in non-revenue-generating areas.

Of course, even without Section 8, there are other backstops. Section 1 of the Sherman Act assigns liability for information exchanges that might occur by a common director and create unlawful restraints of trade. Indeed, Section 1 arguably provides a more tightly attuned mechanism for prosecuting harmful coordination as it targets the anticompetitive exchange of information that is the gravamen of the competitive

9 Federal Trade Commission, Remarks of Chair Lina M. Khan at the Joint Workshop of the Federal Trade Commission and the Department of Justice (December 6, 2021).

10 Federal Trade Commission, Keynote Remarks of Commissioner Rebecca Kelly Slaughter at the FTC/DOJ Pharmaceutical Task Force Workshop (June 14, 2022).

11 See, 15 U.S.C. § 19(2)(b) and (c).

harm. Section 5 of the FTC Act broadly tracks Section 1 as well. Furthermore, in its Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, the FTC noted that it would pursue "conduct that violates the spirit of the antitrust laws [including] conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a 'gap' in those laws."[12] The FTC specifically noted that such conduct could include "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act."[13] While the FTC has yet to further clarify this point, it certainly can try to use Section 5 to "fill the gaps" left in Section 8. That said, to the extent antitrust agencies want to "nip in the bud incipient violations of the antitrust laws" associated with common directors sitting on the boards of company that compete for inputs or compete in non-revenue-generating activities, the 1990 Amendments seemingly left an expansive hole in the statute.

VII. CONCLUSION

While U.S. agencies are exploring new ways of prosecuting anticompetitive conduct and enforcing antitrust laws, Section 8 may ultimately prove to be of limited versatility, despite the agencies' rekindled enthusiasm towards the statute. The 1990 addition of safe-harbor exemptions created a threshold hurdle for the application of Section 8: It made downstream, revenue-generating competition the focal point of the statute. Correspondingly, it made it impractical to apply Section 8 in areas of focus for the current administration. Here, we have identified a few areas that generally are out of Section 8's reach, but that is not to say there aren't other categories that sit outside of its ambit. As the agencies continue to explore the broader usage of Section 8, they also will have to grapple with its significant limits.

12 Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (November 10, 2022).

13 *Id.*

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