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Interlocking

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LETTER FROM THE EDITOR

Dear Readers,

Minority shareholdings and interlocking directorships between competitors are, and have always been, a widespread practice in certain industries. Given that, on their face, such links may influence companies' competitive behavior, they naturally attract the attention of competition authorities, litigants, and courts worldwide. The articles in this Chronicle address the current thinking of the antitrust communities across these bodies as they grapple with this phenomenon in a contemporary context. In particular, in the U.S., this debate plays out within the context of section 8 of the Clayton Act.

Florence Thépot leads off this edition of the CPI Antitrust Chronicle with an article highlighting the potential anticompetitive risks on both sides of the Atlantic raised by interlocking directorates between competitors, as facilitating collusion, and possibly reducing the intensity of competition, especially if combined with financial links. The winds of enforcement may be picking up.

Yaron Nili provides a short overview of horizontal directors from corporate and antitrust perspectives and concludes with a discussion of recent FTC and DOJ enforcement showing the increased attention to the topic by both regulators and academics.

Nana Wilberforce, Leon B. Greenfield, & Álvaro Mateo Alonso open by noting how the U.S. Department of Justice and Federal Trade Commission both have recently announced an aggressive approach to enforcing Section 8 of the Clayton Act, which (with some exceptions) absolutely prohibits director or officer interlocks between competing corporations. Their prescient article describes Section 8's statutory text and considers the harms to competition Section 8 seeks to prevent; outlines the U.S. agencies expanded approach to enforcement; describes how the statute's boundaries may be tested and some recurring unsettled issues; and contributes thoughts regarding the future of Section 8 enforcement. Although a more aggressive approach to Section 8 enforcement can bring benefits in some circumstances, it is important that the agencies respect the limits of the statute and do not overreach.

Nandu Machiraju, Darley Maw & Daniel Gao follow up with a similar article. 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, in the authors' view, the 1990 amendments to the statute make it ill-suited as a tool to address elements of the administration's ambitious agenda.

William H. Rooney, Wesley R. Powell, Jeffrey B. Korn, Agathe M. Richard, E. Claire Brunner & Colin J. Lee develop further on this theme. In recent months, the Department of Justice has said that it will ramp up efforts to investigate what it considers to be anticompetitive board overlaps in various industries. The authors expect the Federal Trade Commission to follow suit in the current enforcement environment. In light of these recent developments, their article explores some ambiguities that exist in the application of Section 8 and discuss steps that may help avoid possible allegations of collusion that could arise from board or officer links between competitors.

Taking a slightly broader perspective, **Michelle Hale & Jake Philipoom** discuss how the Department of Justice Antitrust Division has recently been investigating public companies for possible violations of Section 8 of the Clayton Act, 15 U.S.C. § 19, based on information listed in the Risk Factors section of their annual and quarterly SEC filings. The article seeks to address who is a "competitor"?

Section 8 prohibits "interlocking directorates," situations in which an individual or entity serves as a director or officer of two corporations that are "competitors." So far, the Departments efforts have appeared to focus on interlocks in which one company named the other as a competitor in a public filing. In this article, the authors explain that the "competitors" listed in a public company's SEC filings are not necessarily competitors within the meaning of Section 8. This is nonetheless an open question from the point of view of regulators or courts.

All of the above articles touch on very timely themes that are once again on enforcers' radar screens. This is a vital debate that will play out directly over coming weeks, months, and years.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

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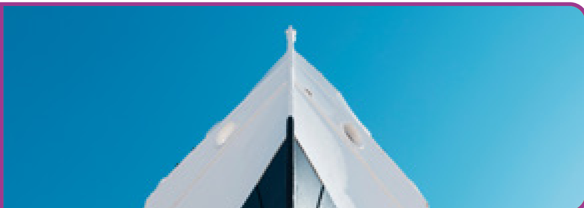

TRANSATLANTIC PERSPECTIVES ON INTERLOCKING DIRECTORATES

By Florence Thépot

This article highlights the potential anticompetitive risks raised by interlocking directorates between competitors, as facilitating collusion, and possibly reducing the intensity of competition, especially if combined with financial links. In the U.S, interlocking directorates among competing firms have long been prohibited by Section 8 of the Clayton Act, but until very recently, absent of enforcers radars. In the EU, there is no such prohibition. This article explains that anti-competitive issues raised by interlocking directorates have not attracted the attention they deserve, across both sides of the Atlantic. Yet the (enforcement) winds seem to be changing, at least in the U.S.

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THE PECULIAR CASE OF HORIZONTAL DIRECTORS

By Yaron Nili

Directors wield increasing influence in corporate America, making pivotal decisions regarding corporate affairs and management. A robust literature recognizes directors' important role and examines their incentives and performance. In particular, scholars have worried that "busy directors" — those who serve on multiple corporate boards — may face time constraints that affect their performance. Director service on multiple boards leads to what has been termed as "director interlocks," or the connection between different companies sharing the same director. While existing literature has dealt with the concept of director interlocks, little attention has been paid to the prevalence of what I term as "horizonal directors": directors who serve on multiple corporate boards within the same industry. Horizontal directors stand at a unique intersection of antitrust law and corporate governance. Antitrust laws are meant to prevent competitors from colluding at the expense of consumers, while corporate governance is mostly focused on increasing shareholder welfare. Horizontal directors strain this subtle distinction between consumers and shareholders to its fullest extent. These directors may leverage their position to enable companies to coordinate or collude at the consumers' expense. Yet, the same horizontal directors may confer benefits to the shareholders of these companies, from providing industry specific expertise and connections to allowing companies to increase profits by demanding higher prices from consumers and therefore helping company performance, and improving shareholder value. This article provides a short overview of horizontal directors from corporate and antitrust perspectives and concludes with a discussion of recent FTC and DOJ enforcement showing the increased attention to the topic by both regulators and academics.

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INTERLOCKING DIRECTORATES UNDER SECTION 8 OF THE CLAYTON ACT: DRIVING A 100-YEAR-OLD STATUTE PAST ITS LIMITS?

By Nana Wilberforce, Leon B. Greenfield, Álvaro Mateo Alonso

The U.S. Department of Justice and Federal Trade Commission have recently announced an aggressive approach to enforcing Section 8 of the Clayton Act, which (with some exceptions) absolutely prohibits director or officer interlocks between competing corporations. This article describes Section 8's statutory text and considers the harms to competition Section 8 seeks to prevent; outlines the U.S. agencies expanded approach to enforcement; describes how the statute's boundaries may be tested and some recurring unsettled issues; and contributes a few thoughts regarding the future of Section 8 enforcement. Although a more aggressive approach to Section 8 enforcement can bring benefits in some circumstances, it is important that the agencies respect the limits of the statute and do not overreach.

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

By Nandu Machiraju, Darley Maw & Daniel Gao

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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SECTION 8 INTERLOCKS: MANAGING INCREASING ENFORCEMENT CHALLENGES

By William H. Rooney, Wesley R. Powell, Jeffrey B. Korn, Agathe M. Richard, E. Claire Brunner & Colin J. Lee

Section 8 of the Clayton Act prohibits interlocking directorates and officerships in various circumstances. In recent months, the Department of Justice has said that it will ramp up efforts to investigate what it considers to be anticompetitive board overlaps in various industries. We can expect the Federal Trade Commission to follow suit in the current enforcement environment. In light of these recent developments, we explore below some ambiguities that exist in the application of Section 8 and discuss prophylactic steps that may help avoid possible allegations of collusion that may arise from board or officer links between competitors.

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WHO IS A COMPETITOR UNDER SECTION 8?

By Michelle Hale & Jake Philipoom

The Department of Justice Antitrust Division has recently been investigating public companies for possible violations of Section 8 of the Clayton Act, 15 U.S.C. § 19, based on information listed in the Risk Factors section of their annual and quarterly SEC filings. Section 8 prohibits "interlocking directorates," situations in which an individual or entity serves as a director or officer of two corporations that are "competitors." So far, the Departments efforts have appeared to focus on interlocks in which one company named the other as a competitor in a public filing. In this article, we explain that the "competitors" listed in a public company's SEC filings are not necessarily competitors within the meaning of Section 8.

WHAT'S NEXT?

For April 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Junk Fees**; and (2) **Essential Facilities**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2023, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

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For May 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Healthcare**; and (2) **Foreign Subsidies**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

TRANSATLANTIC PERSPECTIVES ON INTERLOCKING DIRECTORATES

BY FLORENCE THÉPOT[1]

1 Lecturer in Law, University of Strasbourg. This article is an updated and adapted version of F. Thépot, Interlocking Directorates in Europe: An Enforcement Gap? In M Corradi and J Nowag (eds) *Intersections Between Corporate and Antitrust Law* (Cambridge University Press, 2023).

"We have […] launched the broadest enforcement program in the history of Section 8 of the Clayton Act, which prohibits interlocking directorates on corporate boards." declared Jonathan Kanter, head of the U.S. DOJ Antitrust Division, in March 2023.[2] In the U.S., Section 8 of the Clayton Act prohibits interlocking directorates among competing companies. Interlocking directorates refer to situations in which companies have one or more members of their boards in common. To give an example, Eric Schmidt, CEO of Google stepped down from the board of Apple in 2009, to comply with the ban on interlocking directorates. Although the U.S. ban on interlocking directorates has never particularly been contentious, (or enforced), Jonathan Kanter's statement marks a change.[3] In the EU, as well in the different Member States[4] there is no such express prohibition of interlocking directorates between competitors. Some economies have even been characterised by very dense networks of companies owing to multiple links among their boards.[5]

Interlocking directorates may harm competition and create conflicts of interests for individuals who "serve two masters."[6] The independence of directors may also be undermined. The anti-competitive effects stem both from the increased ability to collude enabled by interlocks, as well as the reduced incentive to compete fiercely on markets characterised with numerous social and corporate links. Combined with financial ownership links, interlocking directorates pose a greater threat to competition: they may provide corporate channels of influence for investors who would wish to direct the target's behaviour on the market. Issues raised by interlocking directorates have not attracted the attention they deserve, across both sides of the Atlantic. Interlocks have been notably absent from discussions on financial ownership links in the EU, although they raise similar issues.[7] In the U.S. and elsewhere, the heated "common ownership" debate is now starting to pick up on interlocking directorates, just as new evidence suggest they are prevalent, and that both issues may be related.[8]

I. ANTI-COMPETITIVE EFFECTS OF INTERLOCKING DIRECTORATES

When held among competing companies, interlocking-directorates, may give rise to unilateral and coordinated effects.[9] As Jonathan Kanter put it simply, "competitors sharing officers or directors further concentrates power and creates the opportunity to exchange competitively sensitive information and facilitate coordination."[10] Indeed, board members have access to strategic, accounting, and commercial information as well as information regarding the appointment and compensation of executives.[11] All this may be in "the hands" of any competitor with a common director.

2 Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy (March 2023) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone.

3 See also: Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (October 2022) https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

4 Apart from Italy in the financial sector since 2011.

5 See e.g. F. Ferraro & others, "Structural Breaks and Governance Networks in Western Europe" in B. Kogut (ed), *The Small Worlds of Corporate Governance* (MIT Press 2012); Brullebaut, B., Allemand, I., Prinz, E. & Thépot, F. Persistence in corporate networks through boards of directors? A longitudinal study of interlocks in France, Germany, and the United Kingdom (2022) 6 *Review of Managerial Science* 1743–82.

6 LD Brandeis, Other People's Money and How Bankers Use it (Seven Treasures Publications 1914) 51.

7 Unless attached to minority interests, the issue of interlocks was absent from discussion around Merger control reform in 2014 (that was later abandoned). Renewed interest for issues of structural links at EU level (but no discussion of interlocks) M Vestager, 'Competition in Changing Times' (FIW Symposium, Innsbruck, February 16, 2018) https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en; Commission, Management Plan 2017 of DG Competition, Ref Ares(2016)7130280 16; Recent European Parliament study: S Frazzani & others, "Barriers to Competition through Common Ownership by Institutional Investors" (European Parliament 2020) Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies.

8 A 2018 speech shows that joint effect of common ownership and interlocks are clearly acknowledged. A Finch, "Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation" (Tech, Media, and Telecom Competition Conference, Washington DC, December 14, 2018) https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-keynote-address-capitol; Empirical studies on intra-industry interlocks in the U.S. and correlation between common ownership and interlocks: Y. Nili, "Horizontal Directors" 114 NWUL Rev 1179 (2020) and Y. Nili, Horizontal Directors Revisited; J. Azar, Common Shareholders and Interlocking Directors: The Relation Between Two Corporate Networks, in A Fletcher, M Peitz, F Thépot (eds) Special Issue on Common Ownership and Interlocking Directorates (2022) *Journal of Competition Law & Economics* 18.

9 E.M. Fich & L.J. White, "Why do CEOs Reciprocally Sit on Each Other's Boards?" (2005) 11 Journal of Corporate Finance 175; M.S. Mizruchi, "What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates" (1996) 22 Annual Review of Sociology 273; e.g. H. Buch-Hansen, "Interlocking Directorates and Collusion: An Empirical Analysis" (2014) 29 International Sociology 253; V. Petersen, "Interlocking Directorates in the European Union: An Argument for Their Restriction" (2016) 27 EBL Rev 821–864; F Thepot, F Hugon, and M Luinaud, 'Cumul de mandats d'administrateur et risques anticoncurrentiels: Un vide juridique en Europe?' (2016) 1 Concurrences 1-11; Nili (n 8).

10 n 3.

11 UK Office of Fair Trading (OFT), "Minority Interests in Competitors: A Research Report prepared by DotEcon Ltd." (2010) OFT Economic Discussion Paper Series, OFT1218, 11; J.P. Schmidt, "Germany: Merger Control Analysis of Minority Shareholdings - A Model for the EU?" (2013) 2 Concurrences 16.

What may be the impact of such information on prices and collusion? Information and communication between competitors have been shown to facilitate collusion, even when not specifically related to prices and quantities. Information flows may help in reaching a collusive agreement and also provide monitoring tools for competitors to prevent deviation from the collusive agreement.[12] As an example, a network of interlocking directorates has helped stabilise a number of cartels, including the international uranium and diamond cartels.[13] Accordingly, the purpose of the U.S. prohibition of interlocking directorates is expressly to "avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors."[14] Anticompetitive agreements can also be facilitated by indirect interlocks where competitors sit on the board of a third party. Information exchanges can be more discrete with indirect rather than direct interlocks.[15] The few existing empirical studies draw contrasting conclusions regarding the actual effectiveness of interlocks as a collusive device.[16]

Interlocks may also affect unilateral incentives to compete. Social ties created by the attendance of common board meetings may discourage aggressive commercial strategies towards rivals. If interlocks are widespread within industries this may reduce the overall intensity of competition.[17] When attached to financial interests, interlocking directorates may provide the ability to influence a competitor's conduct. The remuneration schemes in place may also affect the incentive to compete, especially if closely tied to the firm's performance.[18]

Nevertheless, interlocking directorates may improve business decision-making and create efficiencies. The presence of the board member of a competitor offers the benefit of his expertise and experience which may improve decision-making. Moreover, the exchange of information can help reduce uncertainty, and may create synergies in the control and management of companies facing similar technical and economic issues. A business can also benefit from the reputation of an independent board member for various purposes, including in obtaining financing from banks or investors. Similarly, the expertise and reputation of the board member of a competitor can facilitate contractual negotiations with suppliers and customers - especially in small businesses.[19]

II. THE REACH OF EU COMPETITION LAW OVER INTERLOCKING-DIRECTORATES

Various studies highlighted that corporate networks, across industries, based on common directors, have been particularly dense in continental Europe; although networks have tended to become less dense and more diffuse over the past decades.[20]

In the EU, a corporate or financial link between companies is scrutinised under the Merger Regulation if it is part of an acquisition that confers a "lasting change in the control of the undertaking."[21] Interlocking directorates which are not part of an acquisition conferring control can

12 K.U. Kühn, "Fighting Collusion by Regulating Communication Between Firms" (2001) 16 Economic Policy 167; X Vives, *Oligopoly Pricing: Old Ideas and New Tools* (MIT Press 1999) in P. Buccirossi & G. Spagnolo, "Corporate Governance and Collusive Behavior," W.D. Collins (ed), *Issues in Competition Law and Policy 1* (American Bar Association 2008) 10.

13 V. Petersen, "Interlocking Directorates in the European Union: An Argument for Their Restriction" (2016) 27 (6) EBL Rev 821, 842.

14 *Square D Co v. Schneider SA* 760 F Supp 362 (SDNY 1991). Nonetheless, directors may still belong to a close network of business elites, linked via common educations or social values through which they can somehow coordinate business decisions. For a discussion of interlocks and business elites See e.g. W.K. Carroll and J.P. Sapinski, "Corporate Elites and Intercorporate Networks," in John Scott and Peter Carrington (eds), *The Sage Handbook of Network Analysis* (SAGE Publishing 2011) 180.

15 Buch-Hansen (n9).

16 See e.g. T.A. Gonzales and M. Schmid "Corporate Governance and Antitrust Behavior" (2012) Swiss Institute of Banking and Finance, University of St Gallen Working Paper. https://www.efmaefm.org/0efmameetings/efma%20annual%20meetings/2012-Barcelona/papers/ArtigaGonzalezSchmid.pdf; H. Buch-Hansen (n 9) and for a discussion of empirical evidence, see F. Thépot (n 1).

17 L. Flochel, "The Competitive Effects of Acquiring Minority Shareholdings" (2012) (1) Concurrences 16-17; D Spector, "Some Economics of Minority Shareholdings" (2011) (3) *Concurrences* 14.

18 UK OFT (n11) 60-63.

19 K.U. Kühn & X. Vives, *Information Exchanges among firms and their impact on Competition* (Office for Official Publications of the European Communities 1995). For a comprehensive analysis of the impact of board interlocks on the firms' performance, see e.g. E Prinz, *Les effets des liens personnels interconseils sur la performance de l'entreprise : une analyse comparée entre France et Allemagne* (Peter Lang 2011).

20 P. Windolf, *Corporate Networks in Europe and the United States* (OUP 2002); S. Chabi & J. Maati (2005), « Les réseaux du CAC40 » (2005) 153 *Revue du Financier* 45-65 ; Brullebaut & others (n 5). Among the possible reasons for the reduced density may be the limits set by corporate law or governance codes on the number of board seats individuals may hold. For example, in France or Germany, gender diversity requirements may explain that companies appoint directors from a greater pool of individuals.

21 EU Merger Control Regulation, Recital 20.

be captured by Article 101TFEU only to the extent there is an agreement or concerted practice between undertakings, or by Article 102 TFEU if there is dominance.

A. EU Merger Control

According to the EU Merger regulation, "control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."[22] Therefore, the existence of "decisive influence" is central to the existence of control triggering the application of merger review. Interlocking directorates that confer influence are therefore theoretically part of merger control scrutiny. In addition, the Commission notice on remedies specifically addresses the removal of structural links, including financial or board links, to remedy possible competition concerns raised by a merger.[23] The termination of interlocking directorships are thus examples of remedies imposed in the context of a merger raising competitive issues.[24] While the Commission and courts grasp the potential anti-competitive effects of corporate links that do not confer control, such effects are unchallenged on a stand-alone basis.[25] The existence of an enforcement gap results from the reliance of EU merger review on the concept of control – which excludes from its scope relationships between undertakings that do not confer control.

B. Article 101 TFEU

The main obstacle to the application of Article 101 TFEU to capture the effects of interlocking directorates is distinguishing a unilateral from a joint conduct, through the finding of an agreement or a concerted practice. If the nomination of a board member emanates from an appointment by the general assembly of shareholders, this will not constitute an agreement between undertakings. Yet, if the right to nominate a board member is part of a shareholding agreement, the board nomination may constitute an agreement between undertakings and therefore fall within the Article 101(1) TFEU prohibition. [26]

A relevant question is whether flows of information stemming from interlocking directorates could fall within the scope of Article 101 TFEU. The mere exchange of information between competitors can be an object restriction of competition, if the information relates to individualized and future price information.[27] In practice, to what extent could strategic information received at a board meeting, be in breach of Article 101 TFEU? In *Suiker Unie,* the Court established that Article 101 TFEU "preclude[d] any direct or indirect contact between [competitors], the object or effect whereof is either to influence the conduct on the market [. . .] or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."[28] In addition, *Hüls* provides that the presumption that competitors take into account the information in determining their conduct is even greater "where the undertakings concert together on a regular basis over a long period."[29] Therefore the nature of the contact is irrelevant as long as such contact produces an anti-competitive effect. A concerted practice may exist even in the event of a passive reception of information, provided that there is reciprocity of acceptance. Interlocking directorates may amount to a direct and close contact between undertakings. Depending on the nature of the information disclosed at the occasion of board meetings, and the manner in which it is circulated within the companies, such conduct can in principle meet the requirements of a concerted practice.

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22 *Ibid.* art 2.

23 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJC 267/1, para 58.

24 E.g. in *AXA/GRE* (Case COMP/M.1453), para 34: one of the undertakings to address the competitive issues raised by the merger was that members of the board of directors nominated by GRE would resign upon their replacement by an individual, approved by the Commission, and not employed by AXA. Para 34. Other cases: *Thyssen/Krupp* (Case COMP/M.1080) *Nordbanken/Postgirot* (Case COMP/M.2567), *Generali/INA* (Case COMP/M.1712).

25 G.D. Pini, "Passive – Aggressive Investments : Minority Shareholdings and Competition Law" (2012) 23 EBL Review 575, 653.

26 F. Caronna, "Article 81 as a Tool for Controlling Minority Cross Shareholdings Between Competitors" (2004) 29 EL Rev 494; E. Elhauge, "Tackling Horizontal Shareholding: An Update and Extension to the Sherman Act and EU Competition Law," (OECD Competition Policy Roundtable, November 2017) Background Paper for 128th meeting of the OECD Competition Committee, OECD DAF/COMP/WD(2017)95 Elhauge takes the view that the requirement of agreement or concerted practice is no obstacle to the application of Article 101 TFEU.

27 Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance OJ C 11/1 ("Horizontal Guidelines") General Principles on the competitive assessment of information exchange.

28 Case 40/73 *Suiker Unie v. Commission* [1975] ECR 1663 para 174.

29 Case C-199/92 *P Hüls* [1999] ECR I-4287 para 162.

Having a common board member does not bring the two companies within the same economic entity. Therefore, information exchange between those two companies cannot be considered as an intra-corporate relation precluding the application of Article 101 TFEU.[30] It is however difficult to consider that the mere exchange of information during a board meeting, which is internal to the company, can be sufficient to establish a concerted practice. To my knowledge, there is no case where a concerted practice was identified in such context, reflecting the practical difficulty for competition authorities to produce tangible evidence of a concerted practice based on the mere existence of structural links.[31] In sum, Article 101 TFEU theoretically applies to an information exchange related to structural links, but the establishment of an agreement or concerted practice between undertakings may prove difficult.[32]

C. Article 102 TFEU

In addition, anti-competitive effects could be reviewed in the context of collective dominance, the abuse of which may also be in breach of Article 102 TFEU. Collective dominance can exist when economic links between undertakings make them together hold a dominant position vis-à-vis other competitors on the same market.[33] In *Irish Sugar*, a situation of collective dominance was established based on a combination of economic and corporate ties between two companies, including interlocking directorates.[34] Therefore, anti-competitive effects of structural links falling short of Article 101 TFEU could theoretically be reviewed under Article 102 TFEU even if undertakings are individually not dominant, provided there is an "abuse" of this collective dominance. The main difficulty would be, however, to establish an abuse of that position of collective dominance. To date, there are only very few cases of collective dominance. One of the reasons is that anti-competitive issues raised in such cases may not fit the analytical framework and legal standards developed in cases of single undertaking abuses, more focused on exclusionary conduct. Cases of collective dominance based on structural links would, instead, be exploitative types of abuses, typically involving higher prices, which are far more difficult to establish.[35]

To sum up, limits to applying Article 101 TFEU relate to the difficulty of finding an agreement between undertakings as the corporate relation may not be reciprocal. Coordinated effects stemming from information flows may be caught, but to date, there is no case of violation based on the type of information usually communicated within the private remit of a board. Article 102 TFEU potentially enabling an extension of the concept of influence to capture non-coordinated effects only applies in the context of dominance. Collective dominance may provide a better avenue to control the negative impacts of structural links in concentrated markets; this would however require a certain willingness from the Commission to conduct excessive prices line of cases.

III. INTERLOCKING DIRECTORATES IN OTHER JURISDICTIONS

A. In the U.S.: A Per Se Prohibition

In the U.S., interlocking directorates are subject to a specific provision. Although there has been little litigation in recent times, the wind of "enforcement" is changing, with recent announcements and actions by both agencies. Section 8 of the Clayton Act prohibits any "person" from simultaneously serving as a director or officer of two competing corporations. The degree of competition required for the application of Section 8 is such that its elimination "by agreement between [the companies] would constitute a violation of any antitrust laws."[36] Section 8 prohibition

30 T. Staahl Gabrielsen, E. Hjelmeng, & L. Sorgard, "Rethinking Minority Share Ownership and Interlocking Directorships - The Scope for Competition Law Intervention" (2011) 36 EL Rev 839, 84.

31 F. Thépot, F. Hugon, & M. Luinaud (2016) (n 9) .

32 Elhauge clearly states that the requirement of concerted practice or agreement is no obstacle in the case of structural links. Although he's right in theory, in practice the obstacles presented complicate the reach of Article 101 TFEU to structural links. E. Elhauge (n 26).

33 O Okeoghene, "Collective Dominance Clarified?" (2004) 63(1) CLJ 44.

34 *Irish Sugar* (Case COMP 97/624) Commission Decision 7/624/EC [1997] OJ L 258/1, para 112.

35 A. Jones, B. Sufrin, N. Dunne, EU Competition Law: Text, Cases, and Materials (7th edn, OUP 2019) 696. Elhauge, however, argues that a case of excessive pricing could have better substantial grounds where high prices result from structural links rather than from monopoly power or tacit collusion. See Elhauge (n 26) 2.

36 15 USC §19 (a)(1) (A) and (B).

only applies to companies of a certain size.[37] In addition the section does not apply when the overlap between the competing companies is *de minimis*.[38]

The U.S. has a particular approach to interlocking directorates. A specific provision on the issue of interlocking directorates only exists in very few jurisdictions.[39] In addition, those jurisdictions usually enable the interlock to be justified based on a lack of competitive injury, which contrasts with the *per se* prohibition in Section 8.[40] A brief historical background sheds some light on the U.S. antitrust peculiarity. The introduction of Section 8 in 1914 is closely related to concerns about monopolies in a period of broad public mistrust in business. Following a proposal by the Democratic Party in 1908, all three political parties called for legislation on interlocking directorates in 1912. In that context, several reports were issued to publicise the scope of interlocking directorates in sectors such as the railroad and steel markets, as well as in financial institutions.[41] Section 8 is the outcome of a political and legislative process, largely influenced by the work of Louis Brandeis.[42]

Section 8 of the Clayton Act is enforced by counsels to corporations, and there has been very little litigation.[43] Private litigation cases to date show that Section 8 has usually been closely related to issues of corporate governance. Claims have typically been lodged by corporations in order to prevent an acquisition or proxy fight, or to remove an interlocked director; they have also been brought by shareholders of an alleged interlocked company to reject a merger or in support of a derivative action.[44]

Over the recent period however, both antitrust agencies have signalled their renewed interest for issues raised by interlocking directorates. Following Jonathan Kanter's announcements regarding the revived enforcement of Section 8, the DOJ announced that 7 directors from 5 companies resigned from their positions upon concerns of violation of Section 8.[45] Among other steps taken by directors to comply with Section 8, we can recall the resignation from the board of Google of Arthur Levinson, a member of Apple's board, as well as Google's CEO Eric Schmidt, who was director of both companies, stepped down from Apple's board.[46] Finally, in 2016, the DOJ obtained the restructuring of a transaction that would have given a company the right to appoint a member on its competitor's board.[47]

In addition, anti-competitive effects of interlocking directorates that may not be reached by Section 8 can be reviewed under Section 1 of the Sherman Act as well as under Section 5 of the Federal Trade Commission Act.[48] In November 2022, the FTC issued a policy statement

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37 The Act applies if each of the corporations has capital, surplus and undivided profits of more than $10,000,000, adjusted for inflation. Updated thresholds for 2023: https://www.ftc.gov/system/files/ftc_gov/pdf/p859910-secn_8-new-hsr-thresholds-2023.pdf.

38 'A) the competitive sales of either corporation are less than $1,000,000, adjusted for inflation; Updated thresholds for 2023: https://www.ftc.gov/system/files/ftc_gov/pdf/p859910-secn_8-new-hsr-thresholds-2023.pdf (B) the competitive sales of either corporation are less than 2 per centum of that corporation's total sales; or (C) the competitive sales of each corporation are less than 4 per centum of that corporation's total sales'.

39 Chile expressly prohibits interlocking directorates through Art 3, Letter d) of the Decree Law 211 https://www.fne.gob.cl/en/antitrust/interlocking-directorates/ Japan, Act on Prohibition of Private Monopolization and Maintenance of Faire Trade, Act No 54 of 1947, ch IV, Art 13; Indonesia: Indonesia Competition Law No 5 of 1999, Art 26; Italy for the financial sector: Art 36 of Decree Law No 201 of December 6, 2011, converted into Law No 214/2011: "Protection of competition and personal cross-shareholdings in credit and financial markets."

40 American Bar Association (ABA) Section of Antitrust Law, *Interlocking Directorates: Handbook on Section 8 of the Clayton Act* (ABA Publishing 2011) 94-96. Except for Chile which has a similar "per se" prohibition; and Italy, which prohibits interlocks in the financial sector.

41 See for example the Stanley Committee and Pujo Committee reports*, ibid.* 3.

42 For further discussion see F. Thépot (n 16)

43 *Ibid.* 2. Cases include *U.S. v. WT Grant* Co 345 U.S. 629 (1953); *SCM Corp v. FTC* 565 F2d 807 (1977); *TRW, Inc v. FTC* 647 F2d 942 (9th Circ 1981); *Borg-Warner Corp v. FTC* 746 F2d 108 (2nd Circ 1984).

44 ibid 22-23: e.g. *Charming Shoppes v. Crescendo Partners* II 557 T Supp 2d 621 (ED Pa 200): attempt to prevent an acquisition or proxy fight; *Protectoseal Co. v. Barancik* 484 F2d 585 (7th Circ 1973): or to remove an interlocked director.

45 U.S. DOJ, (October 2022), Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates, https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

46 Federal Trade Commission, "Statement of FTC Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board" (October 12, 2009).

47 U.S. Department of Justice, "Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates" (July 14, 2016) https://www.justice.gov/opa/pr/tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses-concerns.

48 D. Feinstein, "Have a Plan to Comply with the Bar on Horizontal Interlocks" (*Federal Trade Commission*, January 23, 2017) https://www.ftc.gov/news-events/blogs/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks; FTC Commissioner J. Thomas Rosch, "Remarks before the University of Hong Kong: 'Terra Incognita: Vertical and Conglomerate Merger and Interlocking Directorate Law Enforcement in the United States'" (Hong Kong, September 11, 2009); s 5 of FTC Act prohibits "unfair methods of competition" 15 USC §45.

on its enforcement priorities, clarifying that Section 5 of the FTC would be used to tackle problematic interlocking directorates falling short of Section 8 of the Clayton Act[49].

Recent evidence shows that interlocking directorates persist (and even tend to increase) in spite of this far-reaching prohibition. Studies by Nili of 1500 S&P U.S. companies over the years 2007-2019 demonstrate that intra-industry links are very common, and even growing. Around 19 percent of all directors from the sample served on the board of more than one company from the same (broadly defined) industry in 2019. The studies also consider the data from the perspective of the company: for example, in 2016, 81 percent companies shared at least one board member with a company from the same (broadly defined) industry. To give a more precise sense of links between competing companies: in 2016, around 25 percent of companies shared at least one board member with a company operating in the same narrowly defined sector (corresponding to one code of the SIC/NAICS classification systems). The latter links may constitute potential Section 8 violations.[50]

B. Interlocking Directorates in EU Member States

In EU Member States, the problem of interlocking directorates is rather a matter of corporate law. In France, the Commercial Code governs different aspects of the composition and functioning of the board of directors of limited companies. The law limits the number of seat appointments held as top executive or board member to five. In addition, the "Macron law" has reduced that number to three appointments for publicly listed companies of more than 5,000 employees in France, or at least 10, 000 worldwide. [51] Italy is the only country having adopted a specific regulation entitled 'Protection of competition and cross corporate ties in the banking and finance industry' to deal with the anticompetitive effects of interlocks among competitors.[52] This regulation prohibits any person appointed as a manager, supervisor or auditor of a company operating in the financial and insurance industry, from holding a similar appointment with a competitor. Failure to comply leads to the termination of all appointments, either by the company or by the national regulator. Finally, various codes on Corporate Governance (non-binding) typically advise companies to limit the number of seats held for executives in particular.[53] With the exception of Italy in the banking and financial industry, limitations of interlocking directorates do not specifically target competitors. These tools, binding and non-binding, existing at the national level in a few EU Member States, offer a variety of different solutions and have, in practice, a limited impact on cross-border operations.

IV. CONCLUDING REMARKS

Although the U.S. prohibits expressly interlocks among competitors, there may be an enforcement gap around anti-competitive effects of interlocking directorates in Europe. Although Article 101 TFEU and EU Merger Control regulation theoretically apply to the coordinated and unilateral effects of interlocks, these provisions are of very limited use in practice. Company law in some Member States such as France limits the number of board appointments a director may hold, but such solutions are specific to certain types of companies and are largely insufficient to address the anti-competitive effects of interlocking directorates.

Issues raised by interlocking directorates do not attract the attention they deserve and are notably absent from discussions on possible issues raised by financial links at the EU level. In the U.S., the discussion about anti-competitive effects of common ownership should also grant more attention to interlocking directorates, particularly in the light of recent findings on the prevalence of interlocking directorates in the U.S. This is because financial ownership links and interlocking directorates raise similar concerns, critically at the edge of competition law and corporate governance.

49 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

50 Nili (n 8).

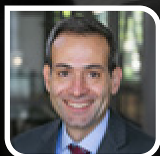
51 Article L225-94-1 of the French Commercial Code.

52 V. Falce, "Interlocking Directorates: An Italian Antitrust Dilemma" (2013) 9 JCL & E 457–472. F. Ghezzi & C. Picciau, Evaluating the Effectiveness of the Italian Interlocking Ban: An Empirical Analysis of the Personal Ties Among The Largest Banking and Insurance Groups in Italy (2022) 18 Journal of Competition Law & Economics 29-74

53 See e.g. German Code of Corporate Governance (Kodex): an executive should not have more than 2 other seats, or the 2018 UK Corporate Governance Code (an executive director should not hold more than one mandate in a FTSE company).

THE PECULIAR CASE OF HORIZONTAL DIRECTORS

BY YARON NILI[1]



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I. INTRODUCTION

In March 2023, the Department of Justice announced that five board directors at three companies stepped down after the antitrust division asked them about their "interlocking" directors.[2] This enforcement action reflects a new emphasis of the DOJ — horizontal directors. Indeed, the DOJ has not stopped there: In a speech earlier that month, antitrust chief Jonathan Kanter said that the department has seventeen active investigations into possible overlapping board violations.[3]

These DOJ enforcement actions underscore a significant concern for both antitrust law and corporate governance — the service of directors on more than one company in the *same* industry. In prior work, I have termed these directors "horizontal directors."[4] Horizontal directors are significant because they stand at a unique intersection of antitrust law and corporate governance. Antitrust laws are meant to prevent competitors from colluding at the expense of consumers, while corporate governance is mostly focused on increasing shareholder welfare. Since shareholders and consumers are often at odds, horizontal directors strain this subtle distinction to its fullest. On the one hand, they may enable competing companies in the same industry to coordinate or collude at the expense of consumers. Yet, companies may benefit from the industry expertise that these directors each bring to the table. Moreover, the same coordination that is a concern from antitrust law perspective may actually benefit the shareholders of these companies, allowing them to increase profits by having consumers pay more, therefore helping company performance and improving shareholder value.

Up until recently, regulators and academics have not focused on horizontal directors. The DOJ's actions reflect a much-needed attention to the horizontal aspect of director interlocks. This attention is particularly important not only in light of the specific prohibition on directors from serving on the boards of two competitors, but also against a backdrop of increased attention to market concentration and consumer welfare in the U.S. One layer of increased attention has revolved around the traditional question of market concentration in merger decisions. A second layer involves recent research into common ownership by institutional investors. This emerging literature has sparked a vivid academic and public debate regarding the effects of shareholder concentration on antitrust policy. Prominent scholars have raised concerns regarding the incentives of companies to compete where major institutional shareholders hold large equity positions in all competitors.

Yet, the board — a middle layer between market consolidation and common ownership — has, up until recently, been left underexplored from an antitrust perspective. Horizontal directors can have a similar, yet overlooked, anticompetitive effect on the market. In fact, horizontal directors could provide a much simpler route for collusion or unlawful coordination.

Importantly, horizontal directors are not merely an isolated outlier. In prior work, I have empirically documented a troubling reality: hundreds of busy directors serve on multiple companies operating within the same industry. Horizontal directors are still prevalent among U.S. public companies. There were 1,888 directors that served on the board of more than one company within the same industry in 2019. On a more granular level, there were 412 directors (10.8 percent of directors serving on more than one board) who served on at least two companies in the same industry per four-digit SIC code. Similarly, there were 250 directors (9.2 percent of the directors serving on more than one board) that served on at least two companies' boards within the same NAICS code.

Table 1. Number & Percentage of Busy Directors Sharing SIC/NAICS Within Boards Served

# of boards	SIC/ NAICS	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
2	SIC	140 (5%)	149 (5%)	180 (6%)	183 (6%)	195 (7%)	208 (8%)	209 (8%)	170 (7%)	169 (7%)	184 (7%)
	NAICS	104 (4%)	120 (4%)	144 (5%)	155 (5%)	165 (6%)	159 (5%)	147 (5%)	143 (6%)	151 (6%)	156 (6%)
3	SIC	101 (9%)	103 (9%)	123 (11%)	139 (12%)	129 (11%)	148 (13%)	150 (13%)	146 (14%)	154 (15%)	129 (14%)
	NAICS	80 (7%)	81 (7%)	99 (9%)	118 (10%)	115 (10%)	129 (11%)	132 (12%)	121 (12%)	123 (12%)	107 (12%)

2 *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates*, Dep't of Justice (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

3 Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy, Dep't of Justice (Mar. 2, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone.

4 Yaron Nili, *Horizontal Directors*, 114 N.W. L. Rev. 1179 (2020).

4	SIC	45 (14%)	43 (15%)	53 (18%)	70 (21%)	68 (19%)	85 (25%)	102 (29%)	73 (23%)	77 (23%)	67 (21%)
	NAICS	36 (11%)	40 (14%)	41 (14%)	57 (17%)	65 (18%)	62 (17%)	56 (17%)	65 (21%)	65 (20%)	63 (20%)
5	SIC	21 (24%)	19 (21%)	28 (29%)	28 (33%)	31 (31%)	24 (32%)	26 (39%)	38 (48%)	29 (38%)	22 (35%)
	NAICS	14 (16%)	14 (16%)	28 (29%)	23 (27%)	23 (23%)	19 (26%)	24 (36%)	35 (44%)	23 (30%)	14 (23%)
6	SIC	13 (36%)	8 (35%)	9 (53%)	8 (38%)	13 (59%)	9 (56%)	10 (77%)	7 (78%)	7 (58%)	9 (90%)
	NAICS	13 (36%)	10 (43%)	7 (41%)	5 (24%)	11 (50%)	7 (44%)	8 (62%)	5 (56%)	6 (50%)	9 (90%)
7+	SIC	1 (25%)	0 (0%)	5 (62%)	7 (78%)	6 (67%)	4 (44%)	2 (40%)	2 (67%)	3 (60%)	1 (25%)
	NAICS	1 (25%)	0 (0%)	5 (62%)	6 (67%)	5 (56%)	3 (33%)	2 (40%)	2 (67%)	3 (60%)	1 (25%)
Total	SIC	321 (7.4%)	322 (7.5%)	398 (9.2%)	435 (9.5%)	442 (9.7%)	478 (10.5%)	499 (11.3%)	436 (11.1%)	449 (11.2%)	412 (10.8%)
	NAICS	248 (5.7%)	265 (6.2%)	324 (7.5%)	364 (8%)	384 (8.4%)	379 (8.3%)	369 (8.4%)	371 (9.5%)	371(9.2%)	350 (9.2%)

Table 2 below further shows that horizontal directors as a percent of busy and total directors steadily increased over the last decade with a merely a slight decline seen in the last two years. For example, in 2010, 7.4 percent of all horizontal directors that sat on at least two boards were within the same SIC classification. This number increased by 7 percent on average each year from 2010 to 2016 but decreased by 2 percent in both 2018 and 2019. A similar trend was observed under the NAICS classification with an average increase in that metric of 8 percent each year with a decline of 3 percent in the last two years of the sample.

Table 2. Time Trend of Horizontal Directors

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
% of Industry-Horizontal Directors out of All Directors	16.9	17.1	17.6	18.2	18.2	17.8	17.3	19.7	19.5	18.8
% of Industry-Horizontal Directors out of Busy Directors	46.3	47.7	48.7	49.7	49.8	49.1	49.7	50.2	50.2	49.6
% of SIC-Horizontal Directors out of All Directors	2.7	2.7	3.3	3.5	3.5	3.8	3.9	4.4	4.3	4.2
% of SIC-Horizontal Directors out of Busy Directors	7.4	7.6	9.1	9.6	9.7	10.6	10.9	11.2	11	10.8
% of NAICS-Horizontal Directors out of All Directors	2.1	2.2	2.7	2.9	3.1	3	2.9	3.7	3.6	3.6
% of NAICS-Horizontal Directors out of Busy Directors	5.7	6.2	7.4	8	8.4	8.4	8.4	9.5	9.3	9.2

More recently, a group of Stanford researchers in the legal and medical fields evaluated overlaps in board membership of 2,241 public life science companies since 2000.[5] The study revealed results consistent with my own research. The study highlighted a network of potentially illegal interlocked boards within the life science industry, finding that "at any given time, 10-20 percent of board members [of biotech companies] are interlocked," with tenures 50 percent longer than non-interlocked directors.[6]

II. THE REGULATORY FRAMEWORK

The prevalence of horizontal directors is particularly striking against a regulatory framework that restricts it. Horizontal directorships are subject to both regulatory and market restrictions. Although antitrust, corporate, and securities laws do not explicitly ban horizontal directorships, regulatory and market restrictions provide an outer limit on horizontal directors' service. Antitrust laws prohibit directors from serving on boards of *competing* companies. Fiduciary duties, shareholder advisory firms, stock exchange rules, institutional investors' voting policies, and companies' policies add an additional layer of potential restrictions to horizontal directorships. I briefly detail these restrictions next.

A. Antitrust: Section 8 of the Clayton Act and Section 5 of the FTC Act

Section 8 of the Clayton Act prohibits an individual or entity from serving on the board of two competing companies. The purpose behind Section 8 is to ensure that companies are not engaging in anticompetitive behavior through a common director or officer. Horizontal directors that serve

5 Mark A. Lemley, Manjunath Anoop, Nathan Kahrobai & Ishan Kumar, *Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards* (October 19, 2022). https://ssrn.com/abstract=4253144 or http://dx.doi.org/10.2139/ssrn.4253144.

6 *Id.*

on boards of companies within the same industry risk violating Section 8. Therefore, determining whether horizontal directorships violate antitrust law depends on whether the two companies are considered "competitors."

Section 8's "competition" requirement is broad. Companies are "competitors" in the traditional sense, that is, if they "produce the same line of products in the same region and compete for the same business."[7] Companies are also deemed "competitors" if they sell "reasonably interchangeable products within the same geographic area,"[8] or "vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each."[9] Courts, in its application of "competitor" have focused "not only on the degree of actual interchangeability of use between the products of alleged competitors, but also on evidence concerning (1) the extent to which the industry and its customers recognize the products as separate or competing; (2) the extent to which production techniques for the products are similar; and (3) the extent to which the products can be said to have distinctive customers."[10]

In addition to Section 8 of the Clayton Act, the government can prohibit horizontal directors under Section 5 of the Federal Trade Commission Act ("FTC Act") as an unfair practice or method of competition. Section 5 gives the FTC broad power to pursue per se violations and practices that violate the spirit of the Clayton Act. The FTC views its grant of power as the ability to "[p]lug the loopholes in section 8."[11]

B. Fiduciary Duty Law

Directors are agents of the corporation-principal, and therefore, owe fiduciary duties of care and loyalty to the corporation. Interlocking directors serve on two or more boards at the same time and owe concurrent fiduciary duties to each company. Since interlocking directors owe concurrent fiduciary duties, there is a heightened risk that they may violate their fiduciary duties. Said differently, if a director serves on the boards of Company A and Company B and, as a director of Company A, learns information that may impact Company B, questions arise as to whether that director can satisfy their fiduciary duties to both companies.

The potential conflicting loyalties that horizontal directors face is not uncommon. Delaware has well-developed case law interpreting allegations of duty of loyalty violations. Loyalty conflicts typically occur in the parent-subsidiary setting. Delaware courts have held that dual-seated directors, that is, directors who serve on the parent and the subsidiary's board, are not *per se*, or automatically, conflicted.[12] However, the Delaware court has found dual-seated directors to be conflicted if they violate the duty of good faith and fair dealing and there is an "absence of any attempt to structure [the] transaction on an arm's length basis."[13]

C. Interlocking Director Committee Limitations

The New York Stock Exchange ("NYSE") and the NASDAQ Stock Market create additional restrictions for horizontal directors. The NYSE and NASDAQ require that a majority of a company's board be independent. Director independence can depend on the director's or their family member's service in other companies. The NYSE standards, for instance, state that a director is not independent if the "director or an immediate family member, is, or has been with[in] the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee."[14] Because of these broad standards, a horizontal director serving on multiple boards risks losing their independence.

7 Dan A. Bailey, *Interlocking Directorates: A Sleeping Bear Awakens?*, https://baileycav.com/site/assets/files/1451/interlocking_directorates_-_a_sleeping_bear_awakens.pdf [https://perma.cc/7EJV-8ETB] (discussing *Protectoseal Co. v. Barancik*, 484 F.2d 585 (7th Cir. 1973)); see also *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686, 703–04 (N.D. Cal. 1976) ("sales in the same product and geographic market").

8 1 Earl W. Kintner et al., 5 Federal Antitrust Law § 42.11 (2019) (citing Am. *Bakeries Co. v. Gourmet Bakers, Inc.*, 515 F. Supp. 977, 980 (D. Md. 1981)).

9 *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 946 (9th Cir. 1981).

10 *Id.*

11 94 CONG. REC. A112 (1948).

12 See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

13 *Id.* at 710.

14 N.Y.S.E. Listed Company Manual (CCH) § 303A.02(b)(iv).

D. Proxy Advisory Firms, Investors and Companies

Glass Lewis and Institutional Shareholder Services, Inc. ("ISS") exert tremendous influence over corporate governance practices and board policies. Both proxy advisory firms have adopted policies that require companies to comply with certain practices to obtain the advisory firm's support. Since Glass Lewis and ISS support is crucial, the board tends to follow the firms' guidelines.

Glass Lewis and ISS have adopted polices limiting directors from serving on too many public company boards. These policies likely increase the pressure on firms to reduce the number of overlapping directors, including horizontal directors. Even though these policies only serve as an outer limit on extreme cases, they still have an impact. As the next section will demonstrate, the ratio of horizontal directors dramatically increases as they serve on more boards. Thus, even modestly limiting the number of boards a director can serve has a strong impact on horizontal directorships.

Finally, large institutional investors have adopted their own guidelines calling for limits on director service on other boards and companies themselves, at times, place limits on the service of their directors on other company boards.

III. HORIZONTAL DIRECTORS: CONTRASTING THE LAW WITH THE DATA

Antitrust law prohibits horizontal directorships in competing corporations. Yet, despite this prohibition, a significant number of directors serve on boards in the same industry, even narrowly defined. While industry measures, even as narrow as the NAICS and SIC classifications, are only a crude proxy for the potential of two companies to compete, it is nevertheless more likely that two companies operating in the same space will be considered competitors. This is especially true under the wide definition of competition that has been applied to Section 8. How can one explain this disparity?

There are several key factors that could explain the rise of horizontal directors against this regulatory backdrop. First, it could indeed be that horizontal directors do not serve on boards of competitors at all and therefore are not in violation of Section 8. Recent DOJ enforcement actions show this to not be the case, and recent studies focusing on specific industries (like the study focusing on the pharmaceuticals industry) further bring such premise into question.

Second, historically, the FTC and the DOJ have not brought Section 8 enforcement actions in court, but instead have relied on sporadic self-policing and behind-the-scenes actions to pressure violators. Indeed, by the FTC's own admission, the most frequent remedy is a board member's resignation of her own accord upon announcement of an investigation. Only recently, we have seen an uptick in DOJ attention to the topic and that may lead to more pronounced results in both the near and longer future.

The lack of clarity regarding what "counts" as competition and the discretionary power given to the FTC in applying the "competition" requirement regarding horizontal directors may also contribute to the low enforcement rates of Section 8 against horizontal directors. Current antitrust regulation focuses on direct competition, and while direct competition can be obvious, oftentimes it is not. Where the market in which a company is situated is unclear, the concept of competition could be problematic for directors serving on multiple companies' boards. As companies like Apple, Google, and Amazon increasingly expand into new markets, some argue that the current antitrust framework fails to account for the realities that currently exist with technology companies. In fact, critics argue that companies such as Facebook and Amazon limit competition even where, for instance, the target of an M&A transaction does not directly compete with the acquirer.

In sum, Section 8 lacks a bright-line-rule understanding of the "competitors" prerequisite. Additionally, the enforcement of Section 8 involves discretion, negotiations, and amicability, as well as a lack of publicity. The lack of a clear and public enforcement process adds a layer of difficulty in projecting FTC/DOJ enforcement and in deterring companies from violating Section 8 *ex ante*. Even if Section 8 were uniformly and diligently enforced, it does not regulate horizontal directorships involving two companies that operate in the same industry or SIC unless they are considered direct competitors. But, horizontal directorships that fall outside of Section 8's scope may still raise significant antitrust and corporate governance concerns.

IV. ZERO SUM PROPOSITION?

The prevalence of horizontal directors indicates that while other governance mechanisms — including state law, exchange rules, and shareholders' guidelines — may limit some instances of horizontal directorships beyond the scope of Section 8, they are far from an effective constraint on the pervasiveness of horizontal directors.

The policy implications that stem from the prominence of horizontal directors within public firms are twofold. First, legislative and regulatory reforms to Section 8 could help address the anticompetitive ramifications of horizontal directors. Second, to address horizontal directorships that do not fall within Section 8's terms but may still present corporate governance concerns, I argue that an improved disclosure regime may be warranted.

If directors serve competitor companies, even under a broader definition of competition, they may facilitate coordination to the detriment of consumers. Indeed, the intent of Section 8 was to "nip in the bud incipient violations of the antitrust laws."[15] Yet, the current regulatory framework is both over- and underinclusive. On the one hand, the Clayton Act prohibits horizontal directors among competitors. On the other, it does not provide any regulation of horizontal directors of noncompetitors. In addition, the enforcement and interpretation of Section 8's competition requirement are not uniform.

Legislative and regulatory reforms must not only address the issues raised by the current formulation of the Clayton Act but should also address the greater governance ecosystem of horizontal directors.

Indeed, some level of collaboration between companies within the same industry can be beneficial to consumers; therefore, antitrust laws only target efforts that lead to anticompetitive outcomes or collusion. Horizontal directors may provide value to the company and investors, such as contributing to the diffusion of beneficial corporate governance practices, networking and expertise. By sitting on boards of multiple companies in the same industry, horizontal directors gain intimate knowledge that can be a valuable asset to a director's ability to advise and monitor the management team. However, the presence of horizontal directors also presents concerns, such as an increased risk of antitrust collaboration, an increased risk of systemic governance risk, and decreased director independence. Furthermore, horizontal directors may facilitate anticompetitive practices that could further insulate management from market pressures which may lead to a loss of shareholder value in the long term.

Importantly, horizontal directors are not necessarily a zero-sum proposition. Companies could still tap the valuable aspects of horizontal directors while at the same time minimizing the concerns that they may present.

First, legislation that targets higher risk companies will be more effective at mitigating antitrust risks and will be easier to enforce uniformly, which will mitigate some of the current Section 8 underenforcement concerns. Some industries are more likely to have horizontal directors, and some of these horizontal-director-saturated industries also exhibit strong levels of industry concentration. Focusing the prohibition of horizontal directors on concentrated industries might strike a desired balance, allowing companies to enjoy the benefits these directors provide while prohibiting their presence in cases where the costs to competition are more likely to outweigh these benefits. For instance, Section 8 could be revised to exempt from the prohibition industries with an HHI that is below a certain threshold. Aggressively enforcing Section 8 for that subset of public companies would reduce significant antitrust risk.

Second, regulators could consider an ex ante design to Section 8 of the Clayton Act that would allow directors to apply for a waiver before accepting a horizontal directorship. By obtaining an *ex ante* "no action" wavier, companies would be more certain about nominating potential directors. Furthermore, companies would be able to justify the nomination of directors that would technically violate the Act. Giving the FTC a veto right ex ante would also reduce the need for costly ex post enforcement and may lead to more consistent enforcement.

In fact, a similar arrangement is already employed in the context of interlocking bank directorships. The Federal Reserve's (the "Fed") Regulation L is similar to the Clayton Act in that it prohibits an officer or director from serving more than one of any bank's holding companies with over $10 billion in assets from serving as an officer or director. However, Regulation L allows the Fed to grant waivers when it determines that an interlock would not substantially lessen competition.

Third, and as previously mentioned, horizontal directors toe the line between antitrust and corporate governance, and a comprehensive reform should highlight the benefits of these directors as well as address the corporate governance risks. Many companies currently keep disclosures to the bare minimum required. Thus, it is often difficult to even identify the industry of the other boards on which horizontal directors serve. Regardless of whether shareholders see horizontal directors as positively or negatively impacting the company, improved transparency via more comprehensive disclosures would enable shareholders to more effectively participate in corporate governance by making more informed director nominations and board recommendations.

Finally, state law and fiduciary law can also evolve to increase restrictions to mitigate the concerns that arise from the prominence of horizontal directors. Additionally, tightening judicial review of noncompete agreements, corporate opportunity waivers, and board fiduciary duties

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

may position common law jurisprudence to more effectively address potential governance issues that stem from the presence of horizontal directors. For example, courts may examine corporate opportunity waivers more skeptically where a horizontal director is involved and where the opportunity is given to a horizontal company. The common law route can provide the flexibility and adaptability that regulatory intervention often lacks.

V. CONCLUSION

In many ways, horizontal directors epitomize the push and pull of our corporate governance system. We depend upon directors to provide investors and companies with a myriad of functions. Directors are expected to monitor management, to provide expertise and networking, and to make the corporation's most important decisions. Yet, we lean on outsiders to serve as directors, and we allow, and even encourage, their service on other boards.

Yet, it remains unclear how we should view horizontal directorships against the backdrop of increased industry concentration and vivid discourse regarding horizontal mergers and horizontal shareholdings. These questions are especially pertinent given the overwhelming number of directors who serve on boards within the same industry.

With the rise in importance of the board as an institution, and with the emergence of contemporary antitrust discourse regarding horizontal ties between companies through common shareholders, future research into horizontal directorships is still needed. Regulators and legislators should also reevaluate the current regulatory framework governing horizontal directors in light of recent findings. Investors, too, should direct their attention to the issue of horizontal directorship. Understanding that not all companies are created equal, investors may be better situated than regulators to account for the rise in horizontal directorships and offer market-based solutions to the inherent tension that these directors present.

INTERLOCKING DIRECTORATES UNDER SECTION 8 OF THE CLAYTON ACT: DRIVING A 100-YEAR-OLD STATUTE PAST ITS LIMITS?

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The Biden Administration's whole-of-government approach to competition has led to increased emphasis on several types of antitrust cases that the Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") had emphasized in recent decades. Those include cases under the Clayton Act Section 8's absolute prohibition of interlocking directors or officers among competitors in certain circumstances. In a speech in April 2022, Assistant Attorney General for the Antitrust Division ("AAG") Jonathan Kanter stated: "[W]e are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. . . . We are ramping up efforts to identify violations across the broader economy and we will not hesitate to bring Section 8 cases to break up interlocking directorates."[2]

The DOJ subsequently announced that seven individuals had resigned from the boards of five companies "in response to concerns by the Antitrust Division that their roles violated [Section 8]'s prohibition on interlocking directorates."[3] The DOJ affirmed that this "is the first in a broader review of potentially unlawful interlocking directorates."[4] Shortly thereafter, the FTC claimed authority to challenge interlocks "not covered by the literal language of [Section 8 of] the Clayton Act" under Section 5 of the Federal Trade Commission Act."[5] Before this, the Commission had passed a resolution allowing the FTC's use of compulsory process (i.e. ability to request companies to produce information) to investigate common officers and directors of competing corporations.[6] Congressional leadership has opined on this issue with Senate Judiciary Committee Chair Richard Durbin (D-IL) stating that the DOJ's and the FTC's "increased emphasis on combatting interlocking directorates is long overdue after decades of lax enforcement in this area."[7] And most recently in March 2023, the DOJ announced that "five more directors resigned from four corporate boards and one company declined to exercise board appointment rights in response to the Antitrust Division's enforcement efforts around Section 8 . . . bring[ing] the number of interlocks unwound or prevented as a result of the division's recent efforts to at least thirteen directors from ten boards."[8]

We describe Section 8's statutory text and explain the competitive harms that Section 8 seeks to prevent; the antitrust agencies' recent expanded approach to Section 8 enforcement; how the antitrust agencies' Section 8 enforcement program may test the statute's boundaries; and contribute a few thoughts regarding the future of Section 8 enforcement.

I. THE TEXT OF SECTION 8

Section 8, which was part of the original Clayton Act, has been in effect for over a century,[9] and prohibits a "person" from serving as a director or board-appointed officer of two or more "corporations" if (i) the corporations are "by virtue of their business and location of operation, competitors . . .;" and (ii) certain dollar thresholds are met, (iii) subject to certain de minimis exemptions.[10]

Section 8 is a prophylactic statute that is intended to prevent collusion or information exchanges that can lessen competitive robustness before they occur.[11] Unlike other antitrust statutes, Section 8 does not require *actual* anticompetitive behavior or effects. Instead, it is designed to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through

2 Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice, Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

3 Press Release, U.S. Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

4 See *id*.

5 15 U.S.C. § 45(a)(1). Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

6 Fed. Trade Comm'n, File No. 211 0161, Resolution Directing Use of Compulsory Process Regarding Common Directors and Officers and Common Ownership (Sept. 2, 2021), https://www.ftc.gov/system/files/attachments/press-releases/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable/omnibus_resolutions_p859900.pdf.

7 Letter from U.S. Senator D. Durbin to Jonathan Kanter, AAG, DOJ, and Lina Khan, Chair, FTC, re Interlocking Directorates in the Life Sciences Industry (Feb. 13,2023), https://www.durbin.senate.gov/imo/media/doc/letter_from_chair_durbin_to_doj_and_ftc.pdf.

8 Press Release, U.S. Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

9 *Antitrust Act*, 1914, ch. 323, § 8, 38 Stat. 730, 732-33 (codified as amended at 15 U.S.C. § 19).

10 15 U.S.C. §§ 19(a)(1) and (2).

11 Jonathan Kanter, *supra* note 2.

interlocking directorates."[12] Louis Brandeis, then advisor to President Woodrow Wilson in 1914, defined interlocking directorates as "the root of many evils."[13]

The DOJ, the FTC, and private parties[14] can enforce Section 8. The principal remedy is eliminating the interlock. Though damages are in theory available to private plaintiffs (although not the antitrust agencies), no court has ever awarded damages. Section 8 allows a one-year grace period for a person to resign from one interlocking position where the interlock was lawful when established but became a Section 8 violation because of changes over time (e.g. exceeding a *de minimis* exemption or new competition between subject corporations).[15]

Director or officer interlocks are exempted from Section 8 under limited circumstances: (1) the "competitive sales" of *either* corporation are less than $4,525,700;[16] (2) the competitive sales of *either* corporation are less than 2 percent of that corporation's total sales; or (3) the competitive sales of each corporation are less than 4 percent of that corporation's total sales. Section 8 defines "competitive sales" as the "gross revenues for all products and services sold 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."[17] Whether these exceptions apply will sometimes turn on how the antitrust agency assesses competition, as discussed below.

II. THE AGENCIES' ENHANCED ENFORCEMENT APPROACH

Consistent with their aggressive posture towards many types of conduct, the antitrust agencies are seeking greatly to expand Section 8 enforcement. In recent decades, most of the agencies' Section 8 cases had arisen from information discovered during unrelated investigations, especially merger reviews. AAG Kanter has said that "[f]or too long, our Section 8 enforcement has essentially been limited to our merger review process."[18] But this has changed. The DOJ's recent Section 8 enforcement actions appear to have resulted not from a merger review or another investigation of a separate potential antitrust violation, but rather from dedicated efforts to scour publicly-available information, such as securities filings and other corporate public statements, in search of possible Section 8 violations.

As the antitrust agencies become more aggressive in enforcing Section 8, they may increasingly rely on expansive and untested interpretations of the statute, stretching the bounds of Congress's intent and making it more difficult for companies to predict the course of enforcement and avoid agency challenges.

The FTC's suggestion that it may use its Section 5 authority to challenge interlocks that are outside Section 8's scope brings even more uncertainty.[19] The FTC has given some examples of where it might use Section 5 — including interlocks involving banks, which Section 8 exempts,[20] or the *TRW* case, where the Ninth Circuit endorsed the FTC's broad notion of when companies with an interlocking director or officer compete with one another, based on industry and consumer recognition, similar production techniques or distinct costumers, going beyond a determination based on typical standards like cross-elasticity of demand or reasonable interchangeability between products that the companies offer,[21] and where the FTC Administrative Law Judge observed that Section 5 "may reach interlocking . . . between potential competitors."[22]

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12 See *SCM Corp. v. Fed. Trade Comm'n*, 565 F.2d 807, 811 (2d Cir. 1977) (quoting *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)).

13 Louis D. Brandeis, Chapter III, Other People's Money (1914), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-iii.

14 See, e.g. *Cia. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 412-13 (1st Cir. 1985) (competitor of interlocked corporations).

15 15 U.S.C. § 19(b).

16 This Section 8 threshold is adjusted annually. The 2023 threshold is available at https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-announces-2023-update-size-transaction-thresholds-premerger-notification-filings-interlocking.

17 15 U.S.C. § 19(a)(2).

18 Jonathan Kanter, *supra* note 2.

19 Fed. Trade Comm'n, Policy Statement, *supra* note 5.

20 *Id.* at 15, citing *In re Perpetual Fed. Savings & Loan Ass'n*, 90 F.T.C. 608, 657 (1977).

21 *Id.* at 15, citing *TRW, Inc. v. FTC.*, 647 F.2d 942, 947 (9th Cir. 1981).

22 *TRW Inc.*, 93 F.T.C. 325, 379, n.12 (1979).

III. TESTING SECTION 8'S STATUTORY BOUNDS

Notwithstanding its superficial relative simplicity, Section 8 presents many important and unresolved questions of interpretation. The current antitrust agencies may well press the bounds of Section 8 to try to bring more enforcement actions. Opportunities to do so are particularly ripe because the courts have relatively few opportunities to adjudicate even recurring issues of Section 8 interpretation. Perhaps because Section 8 enforcement has historically not been terribly active and where interlocks have been challenged parties have typically agreed to unwind rather than litigate, Section 8, has in practice, "primarily been enforced by counsel to corporations" and "there has been very little litigation."[23] This jurisprudential lacuna is likely to give the agencies substantial latitude to challenge interlocks that Section 8, properly construed, may not in fact prohibit.

We outline below some of the recurring issues of Section 8 construction that remain unresolved and that may well be implicated by the agencies' aggressive approach.

A. Who Exactly Does Section 8 Cover?

1. A Single Person or Designees of a Single Firm?

Even the most basic building block of Section 8 — the prohibition on a "person" serving on the board of competing corporations — is fraught with uncertainty. Does "person" mean "individual," such that two separate designees of the same corporation could serve on competing boards without violating the statute? Or does "person" refer to the *firm* that has designated the two *individuals*, so that Section 8 captures the interlock? The antitrust agencies have long taken the latter position based on a "deputization" theory, whereby each individual director or officer is understood to be acting as a "deputy" of the firm with which he or she is associated.[24] For instance, in fall 2022, the DOJ challenged under Section 8 memberships on competing boards of five individuals who had been designated by the same investment firm.[25] Additionally, in March 2023, the DOJ announced it had raised concerns about *potential* interlocks, i.e., when a firm designates directors for one company and has (unused) board designation rights for a competitor of that company. DOJ is clearly pursuing a "deputization" theory, condemning interlocks involving different individuals that have been designated by a single *firm* and not requiring that the interlock involves a single *individual*. For instance, the DOJ announced that, in response to its investigation, two individuals appointed by an investment firm had resigned from the board of a domestic air freight service provider following the investment firm's proposed acquisition of an alleged competitor.[26] And in January 2023, a subsidiary of an investment firm announced it would no longer exercise its director appointment right for an insurance company given DOJ's concerns regarding the subsidiary appointment of directors and officers for another insurance company that was allegedly competing with the first insurance company.[27] But no court has ever addressed whether Section 8 actually prohibits purported interlocks involving different individuals based on a deputization theory.[28] And there are serious questions whether Congress intended for Section 8 to apply in this situation. In fact, the House Report regarding the Interlocking Directorate Act of 1990 distinguished between "direct" (same individual) and "indirect" (different individuals) interlocks, stating: "Generally interlocks fit into one of two categories: direct or indirect. Section 8 only regulates direct interlocks."[29]

Considering DOJ's recent challenges, investment firms seem to be a particular target of expansive agency applications of the deputization theory, since they frequently designate or employ board members for companies in which they hold interests that may com-

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23 American Bar Association, INTERLOCKING DIRECTORATES HANDBOOK (2011), Chapter I., I.B.

24 See, e.g. U.S. v. CommScope, Inc., 72 Fed. Reg. 72,376 (DOJ Dec. 6, 2007); FTC Advisory Opinion, *United Auto Workers*, 97 F.T.C. 933 (1981); *Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp.*, 828 F.2d 211, 215 (4th Cir.1987); *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366–67 (S.D.N.Y. 1991).

25 Press Release, U.S. Dep't of Justice, *supra* note 3 (two directors appointed by investment firm Thoma Bravo resigned from the board of Solarwind Corp. where a third director appointed by the same firm was a member of the boards of Solarwind Corp. and alleged rival Dynatrace, Inc.); Press Release, U.S. Dep't of Justice, *supra* note 8 (two separate directors appointed by Thoma Bravo resigned from the board of N-able Inc., a competitor to SolarWinds Corp. and Dynatrace, Inc.).

26 Press Release, U.S. Dep't of Justice, *supra* note 8 (two directors appointed by Apollo Global Management, Inc. ("Apollo") resigned from the board of Sun Country Airlines Holdings, Inc. ("Sun Country") after Apollo announced its proposed acquisition of Sun Country's alleged rival Atlas Air Worldwide Holdings, Inc.).

27 *Id.* (Brookfield Asset Management Inc. ("BAM") wholly owned subsidiary Brookfield Asset Management Reinsurance Partners Ltd. ("BAMRP") announced it would no longer exercise its right to appoint a director in American Equity Investment Life Holding Company, an insurance company, following DOJ's Section 8 concerns over BAMRP fully owning and appointing directors at alleged rival American National).

28 See, e.g. *U.S. v. Cleveland Trust Co.*, 392 F. Supp. 699, 710-12 (N.D. Ohio 1974) (observing that whether a corporation may be deemed to sit on board of directors of another corporation through a "deputy" is "entirely unsettled"), aff'd mem., 513 F.2d 633 (6th Cir. 1975).

29 H.R. REP. NO. 101-483, at 4 n.8 (1990).

pete with one another. In practice, these designees may represent very different entities within the investment firm complex (often as a fiduciary to diverging investors with varied investment objectives). Such situations seemingly will typically not present the same grounds for concerns about potential anticompetitive effects that underly Section 8's absolute prohibition: "The purposes of § 8 are to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors."[30]

2. Corporations v. Other Business Structures

Section 8 prohibits interlocks between "two corporations." Under a plain reading of that term, the same person could lawfully serve on the board of competing entities, if at least one of them is an unincorporated entity such as an LLC or a partnership. The Supreme Court in *BankAmerica Corp. v. United States* said that Congress deliberately chose statutory language that "selectively regulates interlocks with respect to . . . different classes of business organizations,"[31] suggesting that only corporations are captured. Other antitrust laws also distinguish corporations from unincorporated entities. For instance, the implementing regulations of the Hart-Scott-Rodino ("HSR") Act[32] differentiate between corporations and other entities, and provide different types of HSR treatment for the different types of entities.[33] But no court has squarely addressed the corporation versus other business entity question in the Section 8 context.

An aggressive DOJ or FTC may attempt to challenge under Section 8 interlocks involving non-corporate entities, such as LLCs. Former AAG Makam Delrahim has suggested that possibility, stating that "[i]t is not clear from our review of the legislative history that Congress intended to limit the application of Section 8 solely to corporations . . . whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too. We are thinking about how to bring this thinking to Section 8 as well."[34] All the entities that were relevant to the DOJ challenges announced in October 2022 were corporations, however.

B. What is "Competition" and What Does it Mean to "Compete"?

1. What Does it Mean to Compete?

Section 8 captures interlocks between corporations that are in competition with each other, but precisely what constitutes "competition" remains a gray area.[35] Some courts have determined that companies compete for purposes of Section 8 if they would be deemed in the same antitrust market for purposes of the Sherman and Clayton Acts more generally, which determination accounts for cross-elasticity of demand and reasonable product interchangeability.[36] Other courts consider factors that might result in a broader notion of competition in certain circumstances such as (1) the extent to which the industry and its customers recognize the products as separate or competing; (2) the extent to which production techniques for the products are similar; and (3) the extent to which the products can be said to have distinctive customers.[37] That antitrust agencies may be relying in the first instance on publicly-available information, such as securities filings, to identify candidate illegal interlocks between competing companies, may sometimes result in false positives (although subjects of Section 8 investigations are free to try to convince the agency that the subject companies are not in fact competitors). Given their aggressive posture — and the likelihood that they will not have to defend their Section 8 challenges in court — we expect the agencies may take an expansive view of when subject companies compete with

30 *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991).

31 *BankAmerica Corp. v. United States*, 462 U.S. 122, 127-28 (1983).

32 *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U.S.C. § 18a.

33 E.g. 16 CFR § 801.1(b)(2) contains different definitions of "control" depending on whether the entity at issue is a corporation or an unincorporated entity; 16 CFR §§ 801.40 and 801.50 provide different reportability tests for the formation of "joint ventures and other corporations" and "unincorporated entities," respectively; and 16 C.F.R. 801.1(f)(1)(ii) defines "non-corporate interests" as interests in unincorporated entities that "include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, *limited liability companies*, cooperatives and business trusts" (emphasis added).

34 Makan Delrahim, Former Assistant Attorney General, U.S. Dep't of Justice, Remarks at Fordham University School of Law (May 1, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law.

35 ". . . that the elimination of competition by agreement between [the corporations] would constitute a violation of any of the antitrust laws." 15 U.S.C. § 19(a)(1)(B). Section 8 does not cover vertical interlocks. See *Paramount Pictures*, 1966 U.S. Dist. LEXIS 10596, at *12-13; *TRW, Inc.*, 93 F.T.C. 325, 379 (1979), aff'd in part & rev'd in part, 647 F.2d 942 (9th Cir. 1981).

36 See, e.g. *American Bakeries Co. v. Gourmet Bakers*, 515 F. Supp. 977, 980-81 (D. Md. 1981); *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686, 703-04 (N.D. Cal. 1976).

37 *TRW, Inc. v. FTC.*, 647 F.2d 942, 948 (9th Cir. 1981).

one another. One question is whether the agencies might try to apply Section 8 to circumstances beyond current product or service competition, such as future or innovation competition.

2. Parents and Subsidiaries

Section 8 does not apply to an interlock between a parent and its wholly-owned subsidiary because a parent and its subsidiary cannot conspire under *Copperweld's* "single-entity" doctrine.[38] Whether non-fully owned subsidiaries also benefit from the *Copperweld* doctrine is not completely settled. The predominate view is that "single entity" doctrine applies to parents and their 51 percent-owned affiliates.[39] According to the Supreme Court, the "key" to the analysis is whether the concerted action involves "separate decisionmakers . . . pursuing separate economic interests."[40] On this basis, the position that, at least in most circumstances, majority ownership is sufficient to make a parent and its majority owned subsidiary — or sister corporations under common majority ownership — incapable of conspiring with one another seems correct.

Nonetheless, it is conceivable that an aggressive antitrust agency may contend that only interlocks involving wholly-owned subsidiaries benefit from *Copperweld* and seek to apply Section 8 to interlocks involving parents and non-wholly-owned subsidiaries or sister corporations that are under common majority — but not complete — ownership. Private equity firms should be particularly sensitive to this possibility insofar as they may appoint personnel to boards of majority — but not wholly-owned — firm portfolio companies that may compete with each other.

3. Competing Through Subsidiaries

It is unsettled whether Section 8 applies to interlocks between corporations that are not themselves competitors but have subsidiaries that compete (or where one corporation competes with the subsidiary of the other). Courts have taken divergent views. The Ninth Circuit has suggested that Section 8 may apply in some such circumstances based on its determination that the legality of such an interlock depends on "the extent of control exercised by the parent over the subsidiary's business."[41] The Second Circuit, however, has held that Section 8 does not prohibit interlocking directorships between parent companies whose subsidiaries are competitors.[42] The DOJ and the FTC have, in the past, obtained consent decrees based on alleged interlocks between corporations that compete only through a subsidiary,[43] and likely will continue to take the position that Section 8 reaches that circumstance.

IV. A FEW THOUGHTS ON THE FUTURE OF SECTION 8 ENFORCEMENT

There may be legitimate grounds for concern that the agencies have historically taken an overly passive approach to Section 8 enforcement and belief that a more aggressive approach can further Congress's intention that Section 8 serve a prophylactic purpose to prevent collusion or information exchanges among competitors that can harm competition.[44] There is an appreciable danger, however, that the antitrust agencies will seek to apply Section 8 beyond its bounds, and that businesses may face undue uncertainty and difficulty complying with the statute in the real world, particularly given the many important unsettled questions of Section 8 construction. And the antitrust agencies will often not face the same level of discipline for their enforcement decisions from operating in the shadow of likely judicial review that they face in the typical merger or conduct investigation setting, since enforcement targets will often choose simply to unwind the challenged interlock rather than go to the expense and burden of litigating.

There are important reasons why the agencies should not overreach, however. Given that Section 8 is an absolute liability statute, many interlocks do not raise even a remote danger of real harm to competition (e.g. when the relevant market is unconcentrated). Scarce agency resources may be better spent on enforcing against mergers or other collusive or unilateral conduct that is more likely actually to harm competition

38 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-74 (1984) (holding that a parent and its wholly owned subsidiary are not separate entities capable of conspiring in violation of § 1 of the Sherman Act).

39 See, e.g. *Direct Media Corp. v. Camden Telephone and Telegraph Co., Inc. and TDS*, 989 F. Supp. 1211, 1217 (S.D. Ga 1997).

40 *American Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010).

41 *United States v. Crocker Nat'l Corp.*, 656 F.2d 428, 450 (9th Cir. 1981) (finding Section 8 violation where one of the interlocked corporations competed with the other's subsidiary).

42 K*ennecott Copper Corp. v. Curtiss-Wright Corp*, 584 F.2d 1195, 1205 (2d Cir. 1978)

43 See, e.g. *United States v. Bam*, 1976 U.S. Dist. LEXIS 16805, at *6-7 (D. Conn. 1976); *United States v. Cooper*, 1976 U.S. Dist. LEXIS 14453 (S.D. Tex. 1976).

44 *SCM Corp. v. Fed. Trade Comm'n, supra* note 12.

and consumers. Moreover, individual directors and officers often bring crucial and unique perspective and expertise to their companies, enabling the firms to innovate, enter or expand their presence in a market, lower their costs, more ably address customer needs, or bring other benefits to markets that badly need more or better suppliers. An overly expansive Section 8 enforcement approach threatens to keep a director with special skills or expertise from benefiting more than one company in an industry or chill companies from realizing these advantages even when Section 8 does not actually prohibit a proposed interlock. We worry that it may ultimately be competition and consumers that bear the harm from an overly expansive Section 8 enforcement approach.

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

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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]

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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.*

SECTION 8 INTERLOCKS: MANAGING INCREASING ENFORCEMENT CHALLENGES

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I. INTRODUCTION

The U.S. antitrust enforcement agencies (the "Agencies") continue to pursue aggressive and novel tactics across many areas of antitrust enforcement, including merger review, criminal enforcement, and administrative proceedings and rulemaking. Among these efforts, the Antitrust Division of the United States Department of Justice ("DOJ") has stated that it will reinvigorate enforcement of Section 8 of the Clayton Act ("Section 8"), which prohibits a practice commonly known as "interlocking directorates" – i.e. the simultaneous service by a "person" as a board member or officer of two or more competing "corporations."[2] In an April 2022 speech addressed to antitrust regulators, Assistant Attorney General Jonathan Kanter declared that the DOJ would be expanding its use of Section 8 as an enforcement tool: "For too long, our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates."[3]

By October 2022, Mr. Kanter fulfilled his promise. On October 19, 2022, the DOJ announced that seven board directors across five U.S. companies had resigned from their board seats.[4] Each of the resignations was the result of the DOJ's investigation of whether the directors' service on the corporate boards violated the prohibition on interlocking directorates under Section 8. And at the end of the same month, it was reported that three major private equity firms had received civil investigative demands from the DOJ directed at possible board overlaps.[5]

The text of Section 8 is relatively straightforward. A "person" may not hold a board or officer position at two or more corporations (subject to certain exemptions pertaining to the size of the corporations' competitive sales) if: (1) each corporation is engaged in U.S. commerce; (2) the corporations are, "by virtue of their business and location of operation, competitors"; and (3) the combined capital, surplus, and undivided profits of each of the corporations exceeds $45,257,000.[6] The purpose of Section 8 is to prevent an overlap in directors or officers at two competitors from becoming a conduit through which the competitors may restrict competition.[7] Whether an interlock presents a Section 8 concern, however, may be ambiguous as "competition" has become increasingly uncertain in a fluid and complex economy and other Section 8 terms have not been fully clarified.[8]

We will outline several ambiguities in the application of Section 8 as well as the possibility that the Agencies also may assess whether the Section 8 interlock raises issues under Section 1 of the Sherman Act ("Section 1"), which prohibits agreements in restraint of trade,[9] or Section 5 of the FTC Act ("Section 5"), which prohibits unfair methods of competition.[10] The remedies and penalties associated with Section 1 and Section 5 can be more serious than those under Section 8 alone, so that even if interlocked companies have good faith arguments that they

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2 15 U.S.C. § 19 (2018).

3 Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022).

4 Press Release, U.S. Dep't of Justice, Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

5 Liz Kiesche, [Private Equity Firms] *face Justice Department probe on influence over boards*, Seeking Alpha (Oct. 28, 2022, 2:48 PM), https://seekingalpha.com/news/3897438-kkr-apollo-blackstone-face-justice-department-probe-on-influence-over-boards-report; *see also* James Arkin, *Durbin Wants Life Science Cos.' Interlocking Boards Reviewed*, Law360 (Feb. 13, 2023), https://www.law360.com/articles/1575832?e_id=f4ec58b6-ef0d-4e13-ae08-0de044c79e13&utm_source=engagement-alerts&utm_medium=email&utm_campaign=similar_articles ("Sen. Dick Durbin, D-Ill… called on top antitrust officials in the Biden administration to investigate the life sciences industry for anti-competitive 'interlocking directorates' after recent research showed a substantial increase in the number of overlapping board members at competing companies.").

6 This number generally adjusts on an annual basis. 15 U.S.C. § 19(a)(1)(A)-(B) (2018); 15 U.S.C. § 19(a)(5) (2018); Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, 88 Fed. Reg. 3742 (Jan. 20, 2023).

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

8 Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022) ("I believe our horizontal and vertical framework has been limiting in this respect. Focusing on that distinction has sometimes screened out important information about mergers that entrench market power or tend to create a monopoly. Mergers that relate to adjacent markets can have those effects, without being strictly horizontal or vertical. Our tools, however, have not equipped us to analyze them flexibly and comprehensively.").

9 15 U.S.C. § 1 (2018).

10 15 U.S.C. § 45 (2018).

have complied with Section 8, they may wish to implement measures to protect against potential allegations of an agreement in restraint of trade arising from the interlock.

The Agencies have "called out" private equity firms as targets of more intensive antitrust scrutiny in mergers and acquisitions, and they are likely to focus on private equity firms in connection with Section 8 enforcement as well.[11] We will explore such preventative measures as firewalls and recusal procedures that companies may employ to reduce the likelihood that Section 8 ambiguities may invite Section 1 or Section 5 collusion concerns.

II. ALTHOUGH THE TEXT OF SECTION 8 IS STRAIGHTFORWARD, TODAY'S COMPLEX NOTIONS OF COMPETITION AND OTHER AMBIGUITIES COMPLICATE ITS APPLICATION

While the statutory language of Section 8 may appear easy to parse, ambiguities surrounding interpretation of key terms and evolving Agency approaches to enforcement complicate its application.

A. Considering Interlocks Between Unincorporated Entities

To whom Section 8 applies is a more complicated question than its text would suggest. The Section 8 prohibition, by its terms, applies only to "corporations." We are not aware of any court decisions addressing whether the same person could serve on the board of competing *limited liability companies* ("LLCs"). At least one commentary implies that the Agencies or a court may conclude that an LLC interlock could be within the scope of the Section 8 prohibition: "Section 8 pre-dates the use of LLCs … To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities."[12]

In any event, even if Section 8 is read literally to apply solely to "corporations" of the type that existed when Section 8 was enacted, interlocks involving other entities (whether a limited liability partnership, an LLC, or other business entity) may be covered by Section 5 of the FTC Act and subject to FTC investigation and enforcement. Such an interlock may also raise Section 1 issues.

B. What Constitutes a "Person" Under Section 8?

Several cases have interpreted "person," under a so-called "deputization" theory, to include a business entity that designates the natural, "deputized" representatives sitting on competing boards.[13] That theory has been extended to include not only employees, but also agents, of the single, appointing business entity. Under *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362 (S.D.N.Y. 1991), natural person representatives need have only an agency relationship to the parent business entity and need not be directors, officers, or even employees of that person to fall within the scope of Section 8. *Id*. at 366-67. "[A] cause of action under § 8 is stated where a company attempts to place on the Board of a competitor individuals who are agents of, and have an employment or business relationship with, such company." *Id*. at 367.

The DOJ's October 2022 Section 8 enforcement announcement, though relatively summary, also provided sufficient information to infer that one interlock likely arose from a single private equity firm's having representatives on the boards of allegedly competing firms through different private equity employees. In the interlocking directorate involving the competing companies, Solarwinds and Dynatrace, two director representatives of the same private equity firm served on the board of Solarwinds and resigned from that board. Another director and representative of the same private equity firm served on the boards of both Solarwinds and Dynatrace. That representative apparently

11 Deputy Assistant Attorney General Andrew Forman stated in an ABA keynote address that "[private equity firms] can extract value or try to thwart rivals—adding cost, delay, and burden, while reducing quality and impeding innovation which competition brings." Andrew Forman, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Deputy Assistant Attorney General Andrew Forman Delivers Keynote at the ABA's Antitrust in Healthcare Conference (June 3, 2022). Similarly, FTC Chair Lina Khan asserted in a June 2022 statement that "[a]ntitrust enforcers must be attentive to how private equity firms' business models may in some instances distort incentives in ways that strip productive capacity, degrade the quality of goods and services, and hinder competition." Lina Khan, Chairwoman, Fed. Trade Comm., Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya In the Matter of JAB Consumer Fund/SAGE Veterinary Partners Commission File No. 2110140 (June 13, 2022).

12 Julian O. Von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 35.03[2][a] (2d. 2022) (quoting Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Don't "Take the Money and Run": Antitrust in the Financial Sector at 4 (May 1, 2019), https://www.justice.gov/opa/speech/file/1159346/download).

13 *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 217 (4th Cir.1987) ("when a parent company designates different persons to sit on the boards of competing subsidiaries, these persons are treated as 'deputies' of the same principal so that they are the same person for § 8 interlock purposes.").

produced the prohibited interlock under the deputization theory that caused the resignation of the first two private equity representatives from the board of Solarwinds.

Finally, under the "attribution" theory, also applied by the court in *Square D*, an interlock for the purposes of Section 8 may be found when a director sits on the board of both a subsidiary of one company and the *parent* of a competing subsidiary. *Square D Co.*, 760 F. Supp. at 367. For the attribution theory to apply, however, the parent must sufficiently control the subsidiary for the competitive activities of the subsidiary to be "attributed" to the parent. "[C]ompetition with a subsidiary may be properly deemed to a parent corporation where the parent closely controls or dictates the policies of its subsidiary." *Id.*

C. Agencies Have Expanded Their Interpretation of "Competition"

Similarly complicating the application of Section 8 is the broad interpretation of "competitor" in the statute and the recently expanded interpretation of "competition" by the Agencies. In *TRW, Inc. v. Federal Trade Commission*, 647 F.2d 942, 947 (9th Cir. 1981), for example, the court rejected the standard for determining competition under the Sherman Act and Section 7 of the Clayton Act as "too restrictive" under Section 8. Rather, the court found that:

> To further the purpose of Section 8 there should be reliance not only on the degree of actual interchangeability of use between the products of alleged competitors, but also on evidence concerning (1) the extent to which the industry and its customers recognize the products as separate or competing; (2) the extent to which production techniques for the products are similar; and (3) the extent to which the products can be said to have distinctive customers. *Id.*

The Agencies have also indicated that "competition" should be construed broadly to serve the prophylactic purposes of Section 8. "Under Section 8 . . . the critical inquiry is to identify a competitive nexus between corporations sufficient to warrant concern over potential antitrust violations involving coordination of competition between the firms—in other words, to determine whether the products are sufficiently substitutable to raise a concern of price-fixing or other collusion."[14]

The task of determining whether competition exists between interlocked companies becomes more complex when one considers the Agencies' recent suggestion that relevant competition may be broader than traditional horizontal relationships.[15] In seeking comments in connection with the Agencies' revision of the Merger Guidelines, the Request for Information asked "whether distinctions between horizontal and vertical transactions reflected in the guidelines should be revisited in light of trends in the modern economy."[16] In that regard, Jonathan Kanter recently remarked, "We obsess in all cases about market definition, when in many situations direct evidence can help us assess the potential for harm. Competition varies, and our framework must adapt accordingly."[17] In addition, virtually every Agency merger challenge involves a dispute as to market definition. One cannot avoid the fact that which firms are, and are not, "competitors" of one another is frequently a contested question.

Interpreting "competitor" is further complicated when one considers competition for such inputs as labor. The Agencies have emphasized their enforcement intentions and actions with respect to agreements that reduce employee wages and benefits.[18] Determining which companies are "competitors" for labor – and other inputs – may not be resolved by traditional means of comparing output products and services.

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14 Borg-Warner Corp., 101 F.T.C. 863, 928-29 (1983); see also Debbie Feinstein, *Have a plan to comply with the bar on horizontal interlocks,* Fed. trade Comm'n (Jan. 23, 2017), available at www.ftc.gov/news-events/blogs/competition-matters/2017/01/have-plan-comply-ban-horizontalinterlocks ("Section 8 applies to 'competitors' in the sense that 'the elimination of competition by agreement between them' would violate the antitrust laws. But courts have rejected the argument that this is the same as the market definition analysis found in other antitrust cases. In *TRW, Inc. v. Federal Trade Commission*, the Ninth Circuit found that especially in emerging industries, competition in the Section 8 sense can encompass more than an assessment of the cross-elasticity of demand for existing products.").

15 Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, U.S. Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium (Sept. 13, 2022) ("[M]erger enforcement has become disconnected from the competitive realities of our economy. It has become a sometimes-artificial exercise. We focus too much on a small handful of models for predicting price effects, and lose sight of the competition actually at stake. We obsess in all cases about market definition, when in many situations direct evidence can help us assess the potential for harm. Competition varies, and our framework must adapt accordingly.").

16 Press Release, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

17 *Supra* note 15.

18 See e.g. Plea Agreement, *United States v. VDA OC, LLC*, No. 2:21-CR-00098, (D. Nev. Oct. 27, 2022) (guilty plea by health care company conspiring to suppress wages of school nurses); Indictment, *United States v. Neeraj Jindal*, No. 4:20-cr-00358, (E.D. Tex. Dec. 9, 2020) (indictment under Section 1 alleging defendant conspired with other therapist staffing businesses to fix lower wages paid to physical therapists and their assistants) (defendant Jindal was acquitted of the price-fixing charge in the indictment, Verdict, *United States v. Neeraj Jindal,* No. 4:20-cr-00358, (E.D. Tex. Apr. 14, 2022)).

D. Section 8 Exemptions May Be Available But Can Involve Risk as to Interpretation and a Fluid Business Landscape

Section 8 provides for exemptions from its scope. Most notable is the *de minimis* exemption for corporations for which the competitive sales (a) of either corporation are less than $4,525,700 (indexed annually), (b) of either corporation are less than 2 percent of that corporation's total sales, or (c) of each corporation are less than 4% of that corporation's total sales.[19]

Ambiguities persist regarding the application of the *de minimis* exemption. We are aware of no judicial guidance on whether foreign sales must be included in any aspect of the de *minimis* calculation. Competitive businesses may grow rapidly and competitive landscapes may change, so that competitive sales calculations must be monitored. In addition, as discussed below, the Agencies may investigate an exempt interlock under Section 1 or Section 5, neither of which has a *de minimis* exemption.

E. Interlocks May Provide an Occasion for Potential Section 1 or Section 5 Concerns

Conscious parallelism alone is not illegal.[20] But parallel conduct plus some additional factor, often some form of communication between the competitors that are engaged in the parallel conduct,[21] can support an inference of collusion.[22] An enforcer could assert that the interlock, including an exempt interlock, provided a conduit for communications between the competitors. The question is then one of evidence and the reasonable inferences that may be drawn from that evidence.

Companies may consider whether the implementation of such preventative measures as firewalls and recusal protocols (discussed below) would be prudent even in the context of exempt interlocks or interlocks that are not covered by the terms of Section 8.

F. Resignation, Consent Orders, or Injunctions Typically Resolve Section 8 Issues

Section 8 cases that are brought by the DOJ or FTC are sometimes resolved through injunctive relief, and other cases are settled with consent judgments or informally. Most recently, as noted above, several board directors resigned from their board seats, without admitting liability, in response to DOJ's concerns that the directors' service on those corporate boards violated the Section 8 prohibition.[23]

At least one private plaintiff has sought damages for a Section 8 claim, but the case was a derivative action and does not appear to have continued to judgment.[24] To our knowledge, no case has been litigated to judgment in which the court has awarded damages for a violation of Section 8. As such, it is unclear whether a damages claim under Section 8 would require an antitrust inju-

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19 15 U.S.C. § 19(a)(1), (2).

20 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007) ("Even 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions[,]' is 'not in itself unlawful.'" (citation omitted)); *Theatre Enterprises v. Paramount Distributing*, 346 U.S. 537, 541 (1953) ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.").

21 See e.g. *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981) ("The parallel pricing conduct clearly demonstrated in the record *plus the numerous items of direct evidence of communication between high-level personnel on pricing policy* adequately support the jury's verdict.") (emphasis added); see also *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000) ("Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy."); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987) (plus factors might include "a high level of interfirm communications").

22 *Capitol Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co.*, 163 F. Supp. 3d 1229, 1234 (M.D. Fla. 2016), aff'd sub nom. *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707 (11th Cir. 2020), and aff'd sub nom. *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.,* 953 F.3d 707 (11th Cir. 2020) ("Evidence of conscious parallelism alone does not permit an inference of conspiracy unless the Plaintiff either (1) establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest or (2) *offers other 'plus factors' tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade"*) (emphasis added); *In re Musical Instruments and Equipment Antitrust Litigations*, 798 F.3d 1186, 1194 n.7 (9th Cir. 2015) ("Plus factors coupled with parallel conduct can take a complaint from merely possible to plausible.")

23 Press Release, U.S. Dep't of Justice, Directors Resign From the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

24 See *Treves v. Servel, Inc.,* 244 F.Supp. 773, 775, 777 (1965).

ry,[25] even though courts have construed the statute to impose *per se* liability without regard to competitive effects.[26] A company may conclude, however, that the cost of litigating a Section 8 case exceeds the value of any principle to be vindicated or directorship to be preserved.

III. MANAGING SECTION 8 AMBIGUITIES

As Agencies focus their attention on Section 8 enforcement, companies may wish to be proactive in addressing the potential concerns that may arise. Such an affirmative approach would involve (1) identifying where potential interlocks exist (which would require officers and directors to disclose other board seats and officerships that they hold), (2) assessing the directness of any competition between the interlocked companies and the application of potential exemptions, and (3) considering the implementation of firewalls and recusal procedures to "break the conduit" that may serve as the basis of allegations of concerted unlawful coordination under Section 1 or Section 5.

Companies can monitor Section 8 issues by including in their compliance program periodic board-membership reviews to monitor known interlocks and identify newly developed ones. Compliance protocols can emphasize the importance of confidentiality and a director's not serving as a conduit for, or common locus of, competitively sensitive information. Private equity firms might be especially careful to track their holdings, especially if they are investing in multiple companies in the same sector, to assess for interlocks.

Companies may consider whether firewalls and recusal protocols may be prudent measures that would help to forestall allegations of collusion. Those allegations might assert that the common director or officer served as a conduit for the transmission of competitively sensitive information between the interlocked companies. The common director or officer might also serve as a common locus of such information, which a plaintiff might assert enabled the common director or officer to coordinate the behavior of the interlocked companies. If that behavior is later deemed to have been parallel, the plaintiff might further seek to allege a tacit agreement by way of the common director or officer.

Firewalls are designed to prevent the transfer of confidential information between "deputized" representatives of a common owner serving on competing boards Recusals require a representative to not participate in confidential board discussions on at least one of the competing boards and to decline receipt of any information regarding the relevant competing business.[27] Firewalls and recusals together should prevent a common director or officer, whether the same natural person or "deputized" individuals, from becoming a conduit for, or repository of, the competitively sensitive information of the interlocked companies.

Firewalls and recusal procedures alone will not absolve a company of a Section 8 violation, as courts have held that an anticompetitive effect is not an element of a Section 8 liability claim.[28] They may, however, reduce the likelihood that viable allegations can be made of collusion

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25 *Atlantic Richfield v. USA Petroleum*, 495 U.S. 328, 335 (1990) suggests that an antitrust injury might be required to support a damages claim under Section 8. The Supreme Court in *Atlantic Richfield* rejected the contention that "any loss flowing from a *per se* violation of Section 1 automatically [satisfied] the antitrust injury requirement."

26 *U.S. v. Crocker Nat. Corp.*, 656 F.2d 428, 438 (9th Cir. 1981) ("Interlocking arrangements between competing corporations threaten the basic purpose of the Sherman Act and are therefore treated as illegal per se."); *U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. at 617 ("To accept [the government's] workable per se test, instead of the defendants' alternative, permits the prohibitory features of §8 to be administered with the full scope which the legislators must have contemplated."); see also Herbert Hovenkamp & Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1302 (5th ed. 2020) ("The [*Sears*] court adopted a per se rule requiring only a showing that two firms are or have been competitors and that the dollar amount is sufficient to invoke the Act.").

27 The FTC's 1996 settlement with Lockheed Martin Corporation in relation to its merger with Loral provides an example of firewall and recusal protections for board members. The agreement provided, for example, that Lockheed Martin "shall require any Common LM/Loral Space Director to refrain from discussing, providing, disclosing or otherwise making available, directly or indirectly, any NonPublic Space Information of Loral Space to any member of the Board of Directors of Lockheed Martin, any officer of Lockheed Martin or any employee of Lockheed Martin." Lockheed Martin also agreed to "conduct all matters relating to Space & Strategic Missiles without the vote, concurrence or other participation of any kind whatsoever of any Common LM/Loral Space Director." See Decision and Order at Section XIII (B) and (C), Lockheed Martin Corporation, FTC Docket No. C-3685 (Sept. 19, 1996).

28 *See supra* note 29.

between the interlocked companies.[29] Firewalls and recusal procedures also reflect a corporate commitment to competitive independence[30] and may serve as an acceptable mitigant or remedy to an uncertain or temporary interlock.[31]

A temporary interlock may arise in circumstances where Section 8 allows a one-year grace period to a director or officer to eliminate certain after-occurring interlocks. When a director or officer lawfully assumes his or her position with a given corporation and, by reason of a change in the affairs of that corporation, the officer or director becomes no longer able to maintain that position under Section 8, he or she may serve in the relevant position for one year following the occurrence of the prohibited interlock.[32] Firewall and recusal protections can avoid inadvertent communications or confidential information access during the period before which the interlock is eliminated.[33]

IV. CONCLUSION

In light of Agencies' more aggressive enforcement intentions regarding Section 8 interlocks, companies may wish to monitor with heightened sensitivity director and officer interlocks. They may also wish to implement such preventative measures as firewalls and recusal procedures to maintain competitive independence where the application of Section 8 is uncertain, or the interlock is not covered by the terms of Section 8.

29 While many examples of firewall and recusal procedures from consent orders occur in the Section 7 context, a 1981 FTC advisory opinion sought by the United Automobile Workers of America discussed as a key fact that it was clear that one of the directors at issue would "function independently and [would] refrain from sharing confidential commercial information with other union officials, including the UAW director on the other board" in finding that a representative relationship for the purposes of Section 8 was not present. See Advisory Opinion, United Auto Workers, 97 F.T.C. 933, 935-36 (May 8, 1981).

30 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (2019), https://www.justice.gov/atr/page/file/1182001/download ("Moreover, effective antitrust compliance programs not only prevent, detect, and address antitrust violations, they also further remedial efforts and help foster corporate and individual accountability by facilitating a corporation's prompt self-reporting and timely and thorough cooperation in the Antitrust Division's investigations.").

31 The Agencies have found under Section 7 of the Clayton Act that firewall policies adequately addressed similar concerns regarding the sharing of competitively sensitive information. See e.g. Final Judgment at VII.A, *United States v. Evangelical Cmty. Hosp.*, No. 4:20-cv-01383-MWB (Sept. 16, 2021)("Defendants must implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed, by or through implementation and execution of the obligations in this Final Judgment or the Amended and Restated Collaboration Agreement or through Geisinger's provision of information technology systems and support to Evangelical . . . between or among employees of Geisinger and Evangelical."); Decision and Order at II.A, The Coca-Cola Company, FTC Docket No. C-4305 (Nov. 3, 2010) ("TCCC shall use DPSG Commercially Sensitive Information only under the following conditions"), *id.* at II.C ("TCCC shall disclose DPSG Commercially Sensitive Information to Additional Firewalled TCCC Personnel only under the following conditions…"); Decision & Order at II.C.2, PepsiCo, Inc., FTC Docket No. C-4301 (Sept. 27, 2010) ("PepsiCo shall comply with the following procedure in connection with Additional Firewalled PepsiCo Personnel), id. at Appendix A pp. 16-17 ("There will be a firewall between [Executive Vice President and Chief Commercial Officer] and the CEO of PBA."); see also Pretrial Brief of Defendants at 39-40, *United States, et al. v. UnitedHealth Group Incorporated*, et al., No. 1:22-cv-0481-CJN (D.D.C. filed Jul. 22 2022).

32 15 U.S.C. § 19(b).

33 Banks, banking associations, and trust companies are explicitly excluded from Section 8 liability. 15 U.S.C. § 19(a). However, Section 1 and Section 5 (and other statutes and regulations) apply to a bank's behavior, and such firewall and recusal procedures may provide protection to these entities. An assessment of interlocks between or among banks, banking associations, and trust companies is outside of the scope of this article.

WHO IS A COMPETITOR UNDER SECTION 8?

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I. INTRODUCTION

The Department of Justice Antitrust Division ("DOJ") has recently been investigating public companies for possible violations of Section 8 of the Clayton Act, 15 U.S.C. § 19, based on information listed in the Risk Factors section of their annual and quarterly SEC filings. Section 8 prohibits "interlocking directorates," situations in which an individual or entity serves as a director or officer of two corporations that are "competitors." As Deputy Assistant Attorney General Andrew Forman recently stated, "the Division is committed to taking aggressive action" against board interlocks.[2]

So far, DOJ's efforts appear to focus on interlocks in which one company named the other as a competitor in a public filing. Academic commentators have also latched onto companies listed as competitors in public filings as strong evidence of illegal interlocks where the company making the disclosure and the purported competitor have a board member in common. In a recent economic study into the prevalence of interlocking directorates, the authors posited that the "most stringent method of identifying competitors is when companies self-report their competitors in their regulatory filings."[3]

Whether courts would agree remains to be seen. So far, there is only one litigated case in which an interlock was alleged on the basis of a 10-K filing. In *in re eBay Inc. Derivative Litigation*, 2011 WL 3880924 (D. Del. 2011), eBay shareholders brought a derivative suit based on an alleged interlock between eBay and the New York Times. eBay had disclosed in its 2009 10-K filing that it competed with "online and offline classifieds platforms." Because the New York Times' newspaper features classified ads, the shareholders alleged that the interlock with the New York Times violated Section 8. The court did not reach the question of whether the two corporations compete, so the weight of 10-K filings in Section 8 litigation is still an open question.

In this article, we explain that the "competitors" listed in a public company's SEC filings are not necessarily competitors within the meaning of Section 8.

I. ABOUT SECTION 8

Competitors with interlocking boards are strictly liable for violating Section 8, without regard to whether the interlock caused harm to competition. An antitrust agency that proves an illegal interlock may be entitled to an injunction mandating the interlocking director to step down and/or requiring the corporations to submit to compliance monitoring. However, companies that share a director have several possible defenses to a Section 8 claim. Section 8 applies only to public or private corporations – LLCs and other non-corporate entities are exempt. Both corporations must have U.S. operations or sales. Banks, banking associations, and trust companies are exempt. Section 8 does not apply if either corporation's net worth is less than an annually adjusted threshold amount, currently set at $45 million.[4]

Perhaps the most common defense to a Section 8 claim is that competitive sales are *de minimis*. Congress amended Section 8 in 1990 to carve out insignificant interlocks, reasoning that a "ban on interlocking directorates serves no functional purpose where the corporations are not in competition with one another to a significant degree or where they compete in a line of business that is not economically significant in relation to their overall operations."[5] Corporations with interlocking directors do not violate Section 8 if either corporation's annual "competitive sales" are less than 2 percent of its total revenue; each corporation's annual "competitive sales" are less than 4 percent of its total revenue; or either corporation's annual "competitive sales" are less than an annually-adjust threshold amount (currently $4.5 million).[6]

2 Andrew Forman, Deputy Assistant Attorney General, *The Importance of Vigorous Antitrust Enforcement in Health Care* (June 3, 2022).

3 Mark A. Lemley et al., Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards (Stanford Law Working Paper No. 578, 2022), http://ssrn.com/abstract=4253144.

4 Federal Trade Commission, *FTC Announces 2023 Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates* (Jan. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-announces-2023-update-size-transaction-thresholds-premerger-notification-filings-interlocking. The statutory phrase "capital, surplus, and undivided profits" means net worth. *See Protectoseal Co. v. Barancik*, 1993 U.S. Dist. LEXIS 12299 (N.D. Ill 1993), *aff'd* l 23 F.3d 1184 (7th Cir. 1994).

5 H.R. Comm. on the Judiciary, Report on Antitrust Amendments Act of 1990, P.L. 101-588, 104 Stat. 2879, at 7 (May 14, 1990) [hereinafter *House Judiciary Report*].

6 Federal Trade Commission, *FTC Announces 2023 Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates* (Jan. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-announces-2023-update-size-transaction-thresholds-premerger-notification-filings-interlocking.

Any violation of Section 8 must involve two corporations that are "competitors." It is important to note that the word "competitors" means different things in different contexts. Antitrust lawyers are of course familiar with this concept. A firm's competitors in its primary product market may not be its competitors for other product lines and it may have a wholly different set of competitors in labor markets. Two firms which would be considered as parts of separate markets in a Section 7 case might still have sufficient overlap to warrant precautions about sharing competitively sensitive information. And this is just within antitrust law.

II. COMPETITORS IN RISK FACTORS

The use of the term competitor in a company's risk factors on SEC filings is yet another variation on the definition, applicable to a different body of law than antitrust. Risk factors in SEC disclosures are drafted by the business in conjunction with public company lawyers. Antitrust lawyers are typically not involved in this process. The purpose of disclosing potential competitors in risk factors is to head off potential securities lawsuits. If a public company's stock drops due to some unforeseen event, this often leads to a wave of class action lawsuits from investors alleging the company made misleading statements in its public disclosures. Risk factors serve as a barrier against these suits: if the company disclosed that the unforeseen event was possible, it stands a better chance of winning on motion to dismiss, and therefore the settlement value of these types of investor suits will be lower.

The securities laws do not lay out criteria that a public company must use in determining which companies to list as competitors. In fact, a company is not required to list any specific competitors by name. As such, companies take varied approaches to disclosing risks from competition based on their own risk tolerance. For example, the short-term rental app provider Airbnb, Inc. names a host of companies offering travel-related services as its competitors in its Form 10-K filing:

"We compete to attract and retain guests to and on our platform, as guests have a range of options to find and book accommodations and experiences. … Our competitors include:

> · Online travel agencies ("OTAs"), such as Booking Holdings (including the brands Booking.com, KAYAK, Priceline.com, and Agoda.com); Expedia Group (including the brands Expedia, Vrbo, HomeAway, Hotels.com, Orbitz, and Travelocity); Trip.com Group (including the brands Ctrip.com, Trip.com, Qunar, Tongcheng-eLong, and SkyScanner); Meituan Dianping; Fliggy (a subsidiary of Alibaba); Despegar; MakeMyTrip; and other regional OTAs;
> · Internet search engines, such as Google, including its travel search products; Baidu; and other regional search engines;
> · Listing and meta search websites, such as TripAdvisor, Trivago, Mafengwo, AllTheRooms.com, and Craigslist;
> · Hotel chains, such as Marriott, Hilton, Accor, Wyndham, InterContinental, OYO, and Huazhu, as well as boutique hotel chains and independent hotels;
> · Chinese short-term rental competitors, such as Tujia, Meituan B&B, and Xiaozhu; and
> · Online platforms offering experiences, such as Viator, GetYourGuide, Klook, Traveloka, and KKDay."[7]

By contrast, the dating app provider Bumble Inc. describes its competitive set in general terms without naming any specific competitors:

> "The online dating industry is fast growing and highly competitive. We compete with a number of companies that provide dating products and services for the same markets in which we operate. … In addition, while we compete with other online dating platforms, offline forms of dating are sources of competition as well. We compete with offline dating services, such as in-person matchmakers, as well as more traditional forms of dating that involve people meeting offline without the use of dating products or services altogether. Because of the extensibility of the Bumble app platform beyond dating, we also compete with social media and networking platforms."[8]

7 Airbnb, Inc., 2021 Annual Report on Form 10-K, https://s26.q4cdn.com/656283129/files/doc_financials/2021/q4/2a413af0-3429-4317-9d3c-a71f2d6d2683.pdf.

8 Bumble Inc., 2021 Annual Report on Form 10-K, https://s202.q4cdn.com/372973788/files/doc_financials/2022/ar/Bumble-Inc.-Annual-Report-2021.pdf.

III. COMPETITORS UNDER SECTION 8

The term "competitors" has a specific meaning under Section 8 that differs from meanings the same word may have in public company filings or even other types of antitrust cases.

Section 8 prohibits interlocks between corporations that are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." This definition, as a start, tells us that there must be overlap in both the product market and the geographic market for the companies to be considered competitors under Section 8.[9]

The required product market and geographic overlap must be current (rather than future), and it must be for the sale of goods or services. This is stands in contrast to competition under the Sherman Act and Section 7 of the Clayton Act, both of which govern a wider set of competitive circumstances, including competition to purchase labor or other inputs, competition to innovate, and competition that might take place in the future.[10]

Any doubt on this point was laid to rest in 1990, when Congress amended Section 8 to provide safe harbors for interlocks between corporations with *de minimis* "competitive sales." Congress defined "competitive sales" as "the gross revenues for all products and services sold by one corporation in competition with the other … in that corporation's last completed fiscal year," which made clear that Section 8 affects only corporations with current overlapping sales.

Case law provides additional insight into how competition should be considered under Section 8. Although the antitrust agencies have enforced Section 8 only sporadically, the statute passed in 1914 and there have been several litigated cases over the last 100+ years. As the Senate Judiciary Committee noted at the time of the 1990 amendments: "The courts have looked to a wide variety of factors to determine whether competition exists."[11] Courts have not performed a surface-level analysis, simply declaring companies as competitors if they participate in the same industry or offer similar-sounding products. While they have sought to avoid the complex economic analysis they would undertake in a merger challenge,[12] courts have given a close look at competitive dynamics and the products or services at issue to determine whether the defendants truly do compete.[13]

For instance, functional differences between the corporations' respective offerings can show they are not competitors within the meaning of Section 8. For instance, in *American Bakeries Co. v. Gourmet Bakers, Inc.*,[14] each party sold bakery supplies to grocery stores and fast food chains, but the court held it would be "facile" to view it at this level of generality and find the parties competed. Rather, the court looked to "traditional tests of competitiveness": (1) whether the products are reasonably interchangeable in their uses and (2) whether customers are likely to switch between them in response to a price increase. For grocery store customers, the parties were not competitors because the products sold were not functionally interchangeable: American produced and sold fresh baked goods, while Gourmet purchased and resold frozen doughs. Similarly, in *Borg-Warner*, the FTC's administrative law judge looked closely to determine whether two manufacturers of similar hydraulic pumps and valves actually competed.[15] Both manufacturers, Bosch U.S. and Borg-Warner, offered hydraulic pumps and valves that were used in aero-

9 *United States v. Crocker National Corp.*, 422 F. Supp. 686, 703-04 (N.D. Cal. 1976), *rev'd on other grounds*, 656 F.2d 428 (9th Cir. 1981), *rev'd sub nom. Bankamerica Corp. v. United States*, 462 U.S. 122 (1983).

10 *See, e.g., Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (labor competition); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (purchasing competition); *In the Matter of Illumina, Inc. and GRAIL, Inc.*, Fed. Trade Comm'n, https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter (innovation competition); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1972) (potential competition).

11 S. Comm. on the Judiciary, Report on Antitrust Amendments Act of 1990, P.L. 101-588, 104 Stat. 2879 (May 14, 1990) [hereinafter *Senate Judiciary Report*].

12 See *Protectoseal Co. v. Barancik*, 484 F.2d 585, 589 (7th Cir. 1973) ("We do not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be required in a protracted case arising under § 7.).

13 See H.R. Comm. on the Judiciary, Report on Antitrust Amendments Act of 1990, P.L. 101-588, 104 Stat. 2879 (May 14, 1990) [hereinafter *House Judiciary Report*] ("While the case law interpreting section 8 has not been abundant, it does seem clear that for the prohibition to apply, there must be an interlock between corporations that actually compete.").

14 515 F. Supp. 977 (D. Md. 1981).

15 *In re Borg-Warner*, 101 F.T.C. 863, 1983 FTC LEXIS 69, at *64-68 (FTC 1983); *rev'd on other grounds, Borg-Warner v. FTC*, 746 F.2d 108 (2d Cir. 1984).

space, industrial, and mobile equipment applications.[16] The pumps and valves were "functionally similar."[17] However, Bosch's pumps and valves were designed to work at high pressure, while Borg-Warner's pumps and valves were designed to work at low pressure, so the two were not interchangeable and therefore did not compete.[18]

A different business model might also render two corporations non-competitors for Section 8 purposes. In *American Bakeries*, the court ruled out competition to serve fast food chain customers on this ground. Burger King purchased steak rolls from American while McDonalds used Gourmet to source steak rolls. However, the court found the parties did not compete in this regard because American acted as a manufacturer/supplier while Gourmet acted as a purchasing agent. Similarly, in *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.*,[19] the court held that an agent that helped television production companies sell programs to networks did not compete with Paramount, which produced its own programs and sold them to networks itself. The agent did not compete in the market for television programs because it did not control "to whom and at what price the program shall be sold." Conversely, Paramount did not compete in the agency business because it never sought to acquire principals other than itself.

There have been no cases interpreting the definition of competitors under Section 8 since the time of the 1990 amendments, so the principles described above represent the current state of the law.[20]

IV. THE TROUBLE WITH USING RISK FACTORS TO IDENTIFY SECTION 8 VIOLATIONS

As Congress has recognized, "directoral interlocks are commonplace and generally do not threaten competition."[21] The problem with interlocks among competitors is that the common director could use her influence at each corporation to get the corporations to compete less vigorously (to their joint benefit, but at the expense of their customers), or she could share key competitive secrets across the two entities, leading to the same result. Interlocks among non-competitors in the same general industry do not pose this same danger. To the contrary, such interlocks can be procompetitive, as a director that is knowledgeable about a given industry and experienced in serving on corporate boards can go a long way towards improving a corporation's performance.

Using risk factors to identify Section 8 violations is likely to be over-inclusive, causing the Department and businesses to waste time, effort, and money on investigations that are ultimately fruitless.

Consider Airbnb. Airbnb discloses competition with hotel chains such as Marriott and Hilton, but it serves a different role in the travel industry than these companies do and given the current state of law, a court would likely not consider these companies competitors under Section 8. Marriott and Hilton generate revenue by managing hotels on behalf of property owners, by licensing their brands to franchisees, and by owning and operating hotels. In contrast, Airbnb offers a platform that connects property owners offering short-term vacation rentals with prospective guests – it makes money by charging service fees to property owners and guests. Under the analysis of *Paramount and American Bakeries*, these companies likely do not compete.

Or consider Bumble. Bumble offers an online dating platform that allows users to create a profile, "swipe" through potential dates, and communicate with "matches." The app is free to use and generates revenue by offering premium features to a subset of users. In its 10-K filing, Bumble discloses competition with off-line matchmaking services. While these services serve the same basic function – helping users find dates – there are significant differences such that most users would not consider such services interchangeable.

Even where corporations do compete in the same product and geographic market, the statute might not apply due to the statutory safe harbors. Section 8 does not apply if the annual competitive sales of either corporation account for less than 2 percent of the company's sales or

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16 *Id.* at *64-66.

17 *Id.* at *64-66.

18 *Id.* at *68 ("although performing the same function, [the pumps and valves] were not interchangeable because of significant physical and performance characteristics"). The administrative law judge did not give any weight to the possibility that customers could substitute the products by redesigning their hydraulic systems to work with one or the other type of pump. *Id.*

19 1966 U.S. Dist. LEXIS 10596 (S.D.N.Y. 1966).

20 *Senate Judiciary Report* at 6 ("It is not the intention of the committee to alter the way in which courts have determined whether products or services sold by one corporation are in competition with products or services sold by another corporation.").

21 *House Judiciary Report* at 4.

are below a certain threshold (currently $4.5m). Corporations sometimes list competitors with which they overlap only in minor product lines. For example, Bumble discloses that "[b]ecause of the extensibility of the Bumble app platform beyond dating, we also compete with social media and networking platforms." This presumably refers to "Bumble BFF" and "Bumble Bizz," features of the Bumble app that allow users to "swipe" for platonic friendships or professional connections. It is possible that these features account for less than 2 percent of Bumble's revenue.

Companies might overlap in their main product lines and still meet the *de minimis* criteria if the products have not yet started to generate significant competitive sales. In Lemley et al.'s study of interlocks among public companies in the life sciences industry, more than 80 percent of the interlocks identified involved at least one company with less than $5 million in all-time historical revenue. Most such interlocks are not illegal. Antitrust enforcers should be cautious about discouraging legal interlocks in the life sciences industry. As Lemley and his coauthors note, life sciences start-ups often "require officers and board members with the rare domain expertise required to usher cutting-edge, disease-specific products through clinical trials and into the market."

V. CONCLUSION

The competitors listed in a public company's risk factors disclosure may or may not be the same as its competitors for the purposes of Section 8 of the Clayton Act. Therefore, we encourage antitrust enforcers to search public sources for additional evidence of competition before issuing subpoenas based on public companies' risk factor disclosures.

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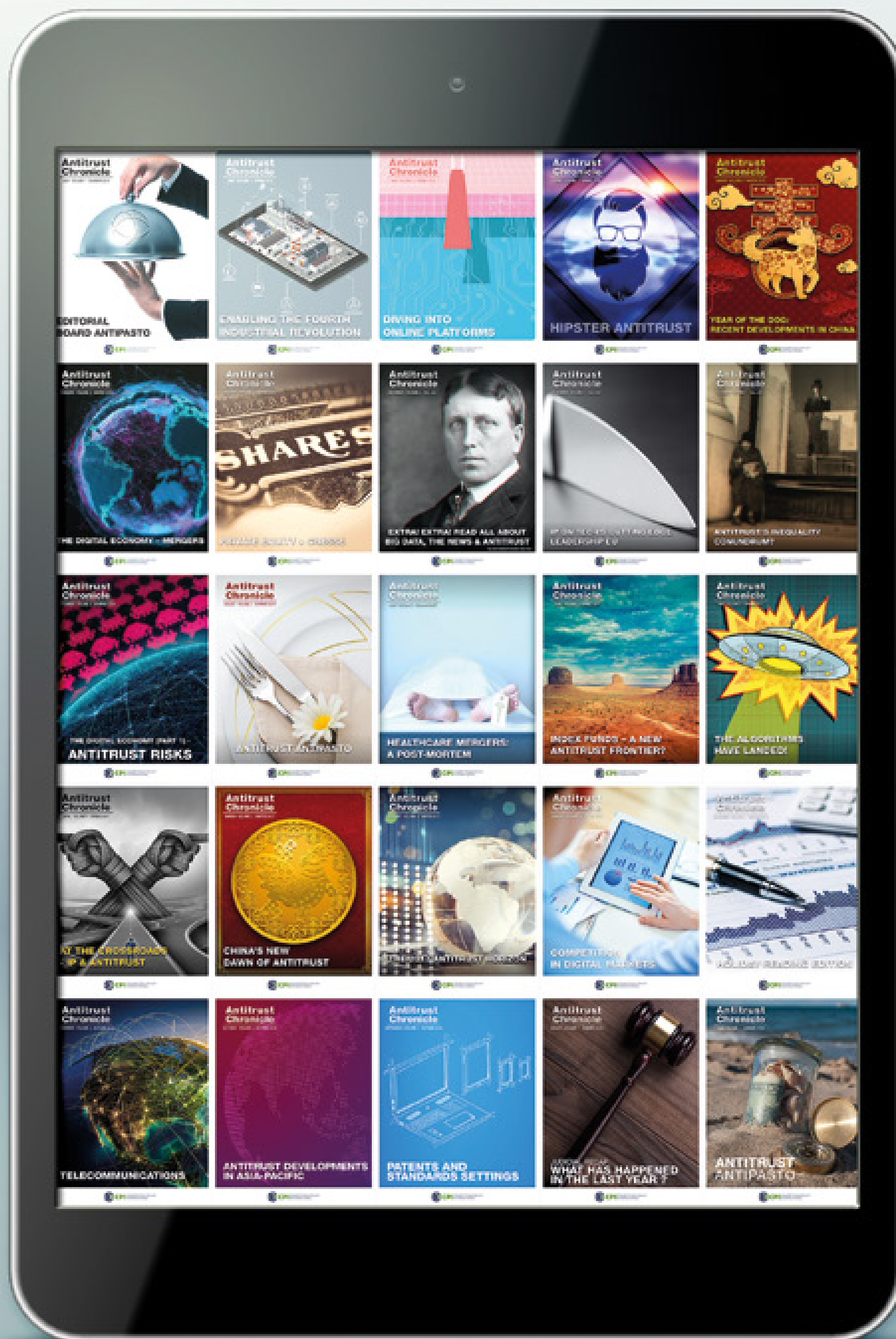

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