



HINKLE SHANOR_{LLP}

Interlocking Directorates

U.S. experience under Section 8 of the Clayton Act

U.S. and Chilean prohibitions compared

Clayton Act, Section 8

“No person shall, at the same time, serve as a director or officer in any two 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 [...].”

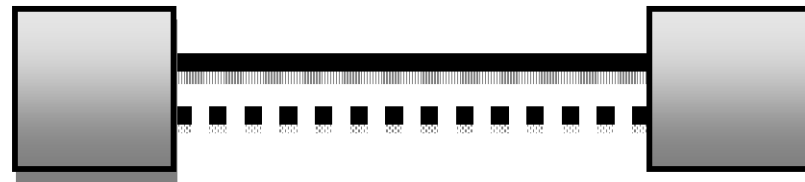
Art. 3 letra d) DL 211

“La participación simultánea de una persona en cargos ejecutivos relevantes o de director en dos o más empresas competidoras entre sí (...).”

Per se prohibition?

- *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 620-21 (S.D.N.Y. 1953)
- *Protectoseal Co. v. Barancik*, 484 F.2d 585, 589 (7th Cir. 1973) (“Congress [did not intend] the legality of an interlock to depend on the ... complex evidence” involved in assessing competitive impact)
- *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1573 (10th Cir. 1984) (“[I]f an interlocking directorate falls within section 8... the interlock is unlawful and no rule of reason analysis is necessary”), modified 793 F.2d 1171 (10th Cir. 1986) (en banc)
- *Square D Co. v. Schneider, S.A.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991) (“[t]he 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”)

Direct interlocks



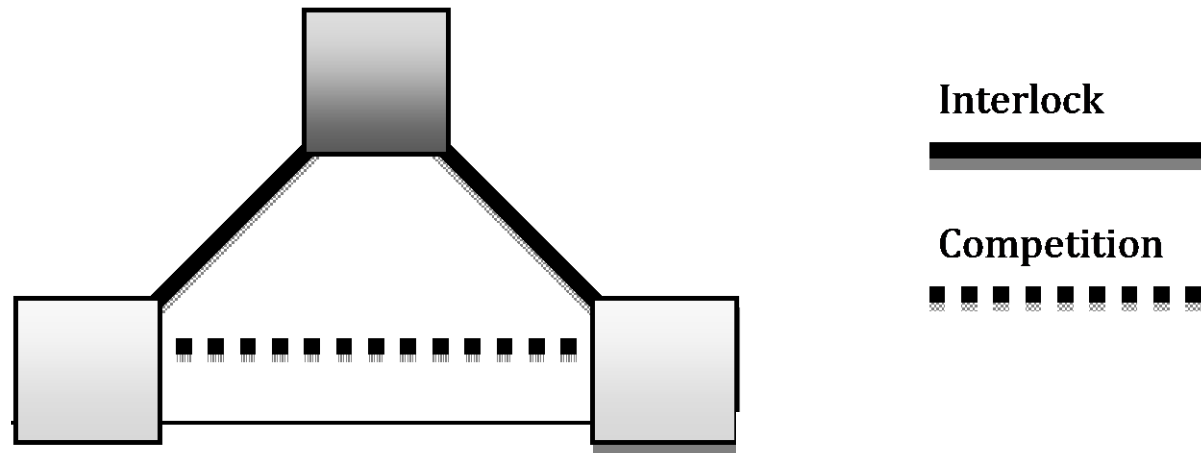
Interlock



Competition



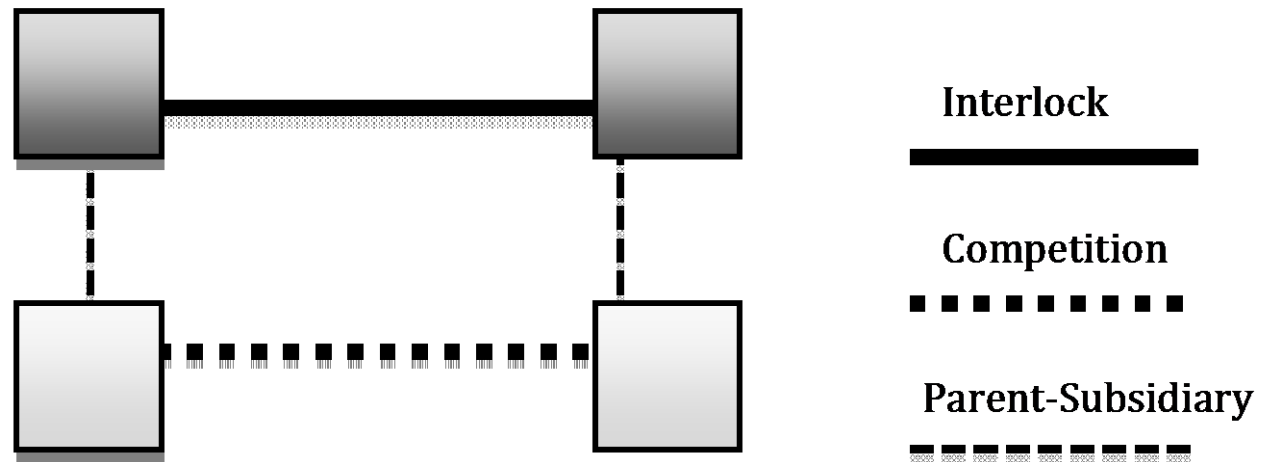
Indirect interlocks/deputization



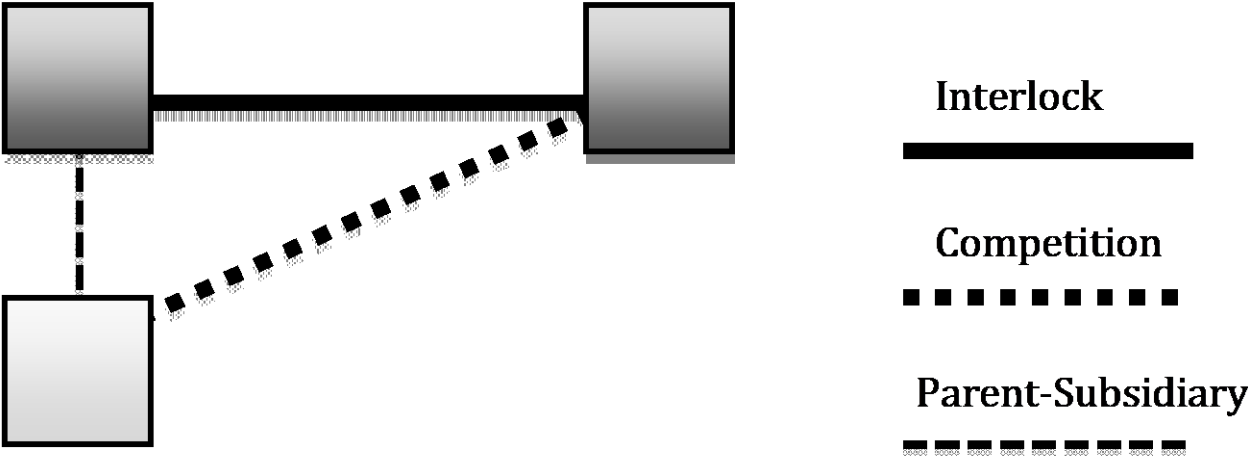
Indirect interlocks/deputization

- U.S. Department of Justice and Federal Trade Commission: corporations and associations are “persons” and may violate the Clayton Act, Section 8 if they have representative serving on the boards of two competing corporations
- *Reading Int’l, Inc., v. Oaktree Capital Management, LLC*, 317 F. Supp.2d 301 (S.D.N.Y. 2003)
 - “plaintiffs will have to show not merely that [the directors] both work for [the defendant], but that their service on the boards is not in their individual capacities, but as the deputies of [the defendant], acting as the puppets or instrumentalities of the corporation’s will...”

Indirect interlocks/parent-subsubsidiary



Indirect interlocks/parent-subsubsidiary



Indirect interlocks/parent-subsubsidiary

- *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978) (section 8 does not prohibit interlocking directorships between parent companies whose subsidiaries are competitors)
- *United States v. Crocker Nat'l Corp.*, 656 F.2d 428 (9th Cir. 1981) (legality depends on “the extent of the control exercised by the parent over the subsidiary’s business”)
- USDOJ and FTC have obtained consent decrees containing indirect interlock prohibitions

Competitors

- Market definition analyses used more broadly under antitrust laws generally applied in identifying horizontal competitors
- Some courts have allowed other factors (e.g., industry and consumer recognition) to be used
 - *United States v. Crocker Nat'l Corp.*, 656 F.2d 428, 441 (9th Cir. 1981)
 - *TRW, Inc. v. FTC*, 647 F.2d 942, 946-47 (9th Cir. 1981)
- Potential competitors?

Responsible subjects

- SCM Corp. v. Federal Trade Commission, 565 F.2d 807 (2d Cir. 1977)
 - “a corporation without fear of sanction could have the concededly prohibited ‘interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member.’ Thus, policy supports a broad reading of section 8 and [the statute’s enforcement mechanism].”
- Principal remedy is elimination of the interlock
- Damages theoretically available to private plaintiffs but unaware of any instances in which they have been awarded

Muchas gracias

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