COMBATTING ANTICOMPETITIVE INTERLOCKINGS: Section 8 of the Clayton Act as a Template for Chile and Similar Emerging Economies

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Michael E. Jacobs*

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*Attorney-Advisor, Fiscalía Nacional Económica

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I. INTRODUCTION

Interlocking directorates, or management interlocks, are a form of structural links between companies that occur when firms directly or indirectly share a common board director or officer.[1] Widespread in many economies around the world,[2] management interlocks appear to be relatively common occurrences in Chile as well. A recent study regarding Chile's health care market, for instance, provides examples of both direct and indirect interlocks in this important segment of the nation's economy.[3] The practice generally is not considered to be harmful to competition, and indeed from a corporate-governance perspective interlocks may produce tangible benefits.[4] Nevertheless, when an interlock involves *competitors*, serious concerns can arise because of the potential to facilitate collusion or otherwise contribute to the establishment or maintenance of tacit or oligopolistic coordination.[5]

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[1] *See* OECD, "Antitrust Issues Involving Minority Shareholding and Interlocking Directorates," DAF/COMP(2008)30 (June 23, 2009). Another common form of structural links includes minority shareholdings by one company in another.

[2] *Id*. at 48 ("Interlocking directorates are a widespread phenomenon in many OECD countries and in many industry sectors.").

Regarding the frequency of interlocks in the U.S., *see* Matt Krantz, "Web of board members ties together Corporate America," USA TODAY (Nov. 24, 2002) (finding a "startling amount of overlap" among the boards of the nation's leading companies), available at <http://usatoday30.usatoday.com/money/companies/management/2002-11-24-interlock_x.htm>. According to *USA Today*, "one-fifth of the 1,000 largest companies in the USA share at least one board member with another of the top 1,000." Moreover, "[e]leven of the 15 largest companies, including Pfizer and Citigroup, have at least two board members who sit together on another board." *Id*.

Interlocks are common elsewhere as well. *See, e.g.*, J. Thomas Rosch, "Terra Incognita: Vertical and Conglomerate Merger and Interlocking Directorate Law Enforcement in the United States" (Sept. 11, 2009), at 15-16 (noting that interlocking directorates are a common feature of Hong Kong businesses, similar in extent as in the U.S., but perhaps even more tightly linked), available at <http://www.ftc.gov/speeches/rosch/090911roschspeechunivhongkong.pdf>.

[3] *See* Pontifica Universidad Católica de Valparaíso, "Mercado de la Salud Privada en Chile" (October 2012), available at <http://www.fne.gob.cl/wp-content/uploads/2012/11/INFORME-PUCV-MERCADO-SALUD.pdf>.

[4] Spencer Weber Waller, "Corporate Governance and Competition Policy," 18 GEO. MASON L. REV. 833, 858 (2011). *See also* Benjamin M. Gerber, "Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act," 24 YALE J. ON REG. 107, 108 (2007) (describing interlocks as "a practice which may confer upon corporations benefits such as expertise, legitimacy, and cooptation of risk.").

[5] Waller, "Corporate Governance," *supra* note 4, at 858.

Despite the competitive risks involved, Chile—like the vast majority of OECD nations—does not explicitly address interlocking directorates in its competition laws, and is thus left to deal with anticompetitive interlocks *ex ante* during merger reviews[6] or *ex post* under its general competition laws.[7] In one recent example, involving the acquisition of a department store chain by one of Chile's largest retail conglomerates, the National Economic Prosecutor (*Fiscalía Nacional Económica* or "FNE") decided not to initiate a "consultation" before the Competition Tribunal (*Tribunal de Defensa de la Libre Competencia* or "TDLC") after the acquired chain agreed to eliminate ties—one of which involved common directors—with another retail competitor.[8] While this suggests that Chile's competition authorities might be able to address potentially anticompetitive interlocks in certain instances, this approach is inherently limited and, as will be discussed below, not ideally suited to the exigencies of a small, emerging economy.[9]

In contrast to Chile, the antitrust laws in the United States provide a means of tackling anticompetitive interlocks head on. Section 8 of the Clayton Act[10] prohibits a person from serving as either a director or board-elected or -appointed officer of

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[6] *Id*. at 49 ("The majority of cases dealing with interlocking directorates are merger control cases, where the commonality of board members was considered to be a factor facilitating co-ordination between the interlocked firms"); Rosch, "Terra Incognita," *supra* note 2, at 21-22; Tommy Staahl Gabrielsen *et al*, "Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention," 36 EUR. L. REV. 837, 855 (2011).

[7] *See* OECD, "Minority Shareholding," *supra* note 1, at 46; *see also* Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 859.

This latter approach, however, may be more theoretical than not. *See* OECD, "Minority Shareholding," *supra* note 1, at 49 ("In the major OECD jurisdictions, there are no reported cases [as of 2008] of application of horizontal rule on anti- competitive agreements or on unilateral conduct against interlocking directorates."); *see also* Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 838 ("There are no cases where the Commission has intervened against the exercise of minority rights or board representations within existing minority holdings.").

[8] *See* Operación de concentración Cencosud-Johnson's, Rol No 1978-11 FNE(A).

In another instance, in the recent merger of two supermarket chains, SMU with SDS, the TDLC required the merged entity to divest its ownership of another supermarket. *See* Sentencia TDLC N°43/2012, SMU-SDS.

Furthermore, while not explicitly framed as such, interlocks appear to have been a concern in a non-contentious proceeding before the TDLC involving the Port of Valparaíso. *See* Informe Nº 5/2009, *Licitación Pública del Frente de Atraque Nº 2 del Puerto del Valparaíso*, TDLC Rol: 313-08 (Sept. 29, 2009).

[9] In Chile, the problem of addressing potentially anticompetitive interlocks in the context of merger reviews is further complicated by the fact that Chile at least theoretically lacks a mandatory pre-merger notification regime.

[10] 15 U.S.C. § 19.

two or more corporations that are direct competitors with one another.[11] Importantly, section 8 has been interpreted as establishing a *per se* prohibition, so that no anticompetitive effect need be shown to establish a violation.[12] The purpose of this approach is "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[13] At the same time, the statute is quite limited in scope—some argue too limited—and provides various exceptions that assure that the prohibition does not affect the vast majority of competitively benign interlocks.[14] Like any bright-line standard, it therefore "can be both over- and under-inclusive in particular settings." Nevertheless, as Professor Spencer Waller concludes in a recent article on corporate governance and competition law, section 8 represents "an appropriate compromise"[15] that balances error costs and process costs.

While Indonesia, Japan and Korea also address interlocking directorates in their competition laws, the U.S. appears to be unique in adopting a *per se* ban that does not require any analysis of the competitive effects of an interlock.[16] Despite that fact, and that other jurisdictions have not followed the U.S. model, section 8 of the Clayton Act nevertheless provides an extremely useful template for countries like Chile (and other small, emerging economies that already have developed competition institutions) to begin addressing anticompetitive interlocks. While legal transplants from one jurisdiction to another "can be unsuccessful and even harmful if they do not deal effectively with the special characteristics of the following jurisdiction,"[17] in this case, it is precisely because the harmful effects of competitor interlocks may be especially acute in economies characterized by tight oligopolies that the adoption of a limited prophylactic measure in Chile is particularly advisable. Moreover, because competition regimes in emerging jurisdictions may benefit from adopting simple and predictable standards over complex rules that seek to replicate

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[11] 15 U.S.C. § 19(a)(1)(B) (referring to 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").

[12] *See infra* at Section II.A.

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

[14] *See* Rosch, "Terra Incognita," *supra* note 2, at 20; *see also* OECD, "Minority Shareholding," *supra* note 1, at 50.

[15] Waller, "Corporate Governance," *supra* note 4, at 858.

[16] *Id*. at 21-22. While Indonesia, Japan and Korea explicitly address management interlocks in their competition laws, those provisions generally require that the market impact of specific interlocks be considered.

[17] Michal S. Gal, "Merger Control for Small and Micro Jurisdictions," in Swedish Competition Authority, MORE PROS AND CONS OF MERGER CONTROL (2012), at 68, available at <http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rapport_pros_and_cons_more_merger_control_2012.pdf>.

all of the complexities that might be associated with a particular practice,[18] the approach of section 8 is also well suited.

In arguing for the advantages of the U.S. model, section II begins by briefly discussing the potential competitive effects of management interlocks. Section III then considers the special characteristics of small, emerging economies like Chile's and how, informed by decision theory, those particularities might be taken into account when developing rules or standards for addressing interlocks in that context. Section IV in turn discusses how the U.S. experience with section 8 of the Clayton Act has resulted in an easily administrable regime for dealing with interlocks between competitors. The flexibility of the U.S. system, particularly when compared to approaches followed in other jurisdictions, is the subject of section V, which looks at some recent enforcement matters involving section 8 and considers whether the anticompetitive concerns that had been identified could have been effectively addressed in the absence of the statute. Finally, Section VI compares the relative costs and benefits of the U.S. approach towards management interlocks, and whether more-finely-tuned alternatives might be preferable, and concludes that the U.S. model fulfills what a decision-theoretic framework would recommend as an optimal approach for an economy like Chile's. None of this is to suggest, however, that some of the recognized weaknesses of section 8 could not be improved upon, and the precise reach of any *per se* prohibition in Chile—whether implemented statutorily of by means of TDLC case law—would need to take into account the increased risks from the practice in this context. And to the extent an absolute ban on those interlocks most likely to be anticompetitive does not reach particular instances that turn out to be harmful (*i.e.*, false negatives), those might still be addressed as they are currently, during merger review or under the general provisions of the competition laws.

II. THE POTENTIAL COMPETITIVE RISKS AND BENEFITS OF MANAGEMENT INTERLOCKS

Minority shareholdings and interlocking directorates are mechanisms through which structural links may be established between competitors. As noted above, management interlocks involve situations in which one or more persons have executive responsibilities in two or more companies, and sometimes involve companies that are in horizontal or vertical business relationships. An interlock involving competitors may be either "direct" or "indirect."[19] The former is the most straightforward situation, which occurs when the same individual has executive responsibilities in two separate competing firms. In contrast, an indirect interlock can take various forms. For instance, in an arrangement sometimes referred to as

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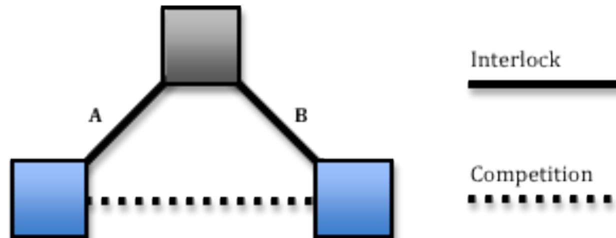
[18] *See, e.g.,* Santiago Montt Oyarzún, "Sistemas legales de menor tamaño y libre competencia" (November 4, 2010), available at <http://www.fne.gob.cl/wp-content/uploads/2011/03/2010_ddcc_0006.pdf>.

[19] *See* OECD, "Minority Shareholding," *supra* note 1, at 48.

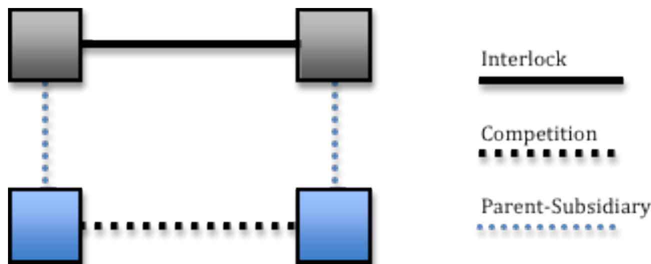
"deputization," different individuals who all represent a single person or corporation serve on the competitors' boards (as illustrated in FIGURE 1).

FIGURE 1: INDIRECT INTERLOCK ("DEPUTIZATION")



A second variation involves a person serving as an officer or director of two corporations that are do not compete themselves, but that have subsidiaries in competition with one another (as illustrated in FIGURE 2). And a third configuration can involve an interlock in which one corporation competes with the subsidiary of another (as illustrated in FIGURE 3).[20]

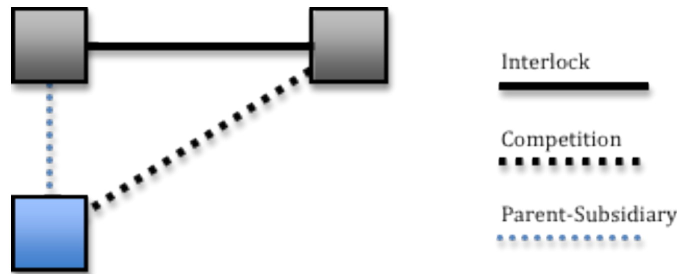
FIGURE 2: INDIRECT INTERLOCK (PARENT-SUBSIDIARY VARIATION 1)



[20] FIGURES 2 & 3 are based upon diagrams in Robert Jay Preminger, "Deputization and Parent-Subsidiary Interlocks Under Section 8 of the Clayton Act," 59 WASH. U. L. Q. 943, 958 n.72 (1981).

A third variation of parent-subsidiary interlock has also been suggested, in which two interlocks are created between competing subsidiaries and the competitor's non-competing parents. *Id*. at 958-59 n.74.

FIGURE 3: INDIRECT INTERLOCK (PARENT-SUBSIDIARY VARIATION 2)



Louis Brandeis, before his appointment to the U.S. Supreme Court, was an influential voice in the early debates surrounding interlocking directorates, and a critic of the practice. Nearly a century ago, Brandeis famously wrote:

> The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters.[21]

Contrary to Brandeis, a number of potential benefits from management interlocks have been identified in the economics literature. The most common justification relates to the ability of firms to obtain the services of knowledgeable and experienced directors.[22] Within a particular industry, the number of qualified candidates may be small, and engaging in an interlock may be necessary to allow firms to tap into the limited talent pool.[23] In addition, firms may use management interlocks to co-opt sources of supply dependency, thereby assuring themselves access to resources necessary for their business operations.[24] Finally, interlocks may lend the legitimacy and prestige necessary for a firm to obtain financial resources.[25] As one commentator has suggested:

> Interlocks in some sense provide the best of both worlds with respect to inside and outside directors: An interlocked director has the ability to perform the monitoring function of an outside director, while—like an inside director—providing a high level of expertise

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[21] Louis D. Brandeis, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT (1914) at 51.

[22] *See* Waller, "Corporate Governance," *supra* note 4, at 858. *See also* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 112-13.

[23] *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 113.

[24] *Id*. at 114.

[25] *Id*. at 115.

> (albeit not the firm-specific expertise that an internal manager can provide).[26]

Apart from potential corporate governance benefits, however, the variations of direct and indirect interlocks described above bring with them certain risks,[27] especially when the interlocks directly or indirectly involve competitors. As an initial matter, interlocks could be used to facilitate outright collusion.[28] "[W]hen an individual simultaneously serves as an officer or director of two competing companies, he or she stumbles into a prime opportunity for collusion-for example, coordination of pricing, marketing, or production plans of the two companies."[29] This is certainly not to suggest that interlocks involving "competitors" invariably will lead to collusive behavior, and indeed there is debate in the economics literature as to whether such interlocks result in meaningfully higher levels of collusion.[30] Nevertheless, collusive conduct is often difficult and costly to detect, and

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[26] *Id*.

[27] In addition to the potential competitive risks, a number of principal-agent issues have also been associated with management interlocks. *See, e.g.,* Waller, "Corporate Governance," *supra* note 4, at 857-58 (noting that interlocks "can exacerbate the agency cost problems when a director's decisions can benefit his interests in his other role with the competitor rather than serve the best interests of the shareholders at the company where he serves as a director."); Gerber, "Enabling Interlock Benefits," *supra* note 4, at 112 ("If managers are acting in their own self-interest rather than in the interest of the corporation's shareholders, interlocks can be problematic."). These risks are generally beyond the scope of this working paper.

[28] *See* Christopher R. Leslie, "Trust, Distrust, and Antitrust," 82 TEX. L. REV. 515, 583-84 (2004) (discussing the historical use of interlocking directorates); *see also* Waller, "Corporate Governance," *supra* note 4, at 858.

[29] Gale T. Miller, "Interlocking Directorates and the Antitrust Laws," 26 COLO. LAW. 53 (March 1997).

Gabrielsen *et al* suggest that even information exchanges, in the context of management interlocks, can have beneficial effects when, for instance, more information regarding demand shocks permits firms to better anticipate periods of low and high demand. Gabrielsen *et al*, *supra* note 13 at 843. Whether this should be credited as a "pro-competitive" justification, however, is questionable. In any event, these same commentators have noted that "more detailed information in some instances can enable the firms to better adapt their behaviour towards one another so that they will end up by competing less fiercely even in a setting without collusion." They conclude, based on the existing literature, that "the net effect for consumers and society depends on the nature of competition (Cournot versus Bertrand), and on the type of information that is exchanged." *Id*.

[30] *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 117; *see also* Mark S. Mizruchi, "What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates," 22 ANN. REV. SOC 271, 273 (1996); Edward J. Zajac, "Interlocking Directorates as an Interorganizational Strategy: A Test of Critical Assumptions," 31 ACAD. MGMT. J. 428, 436 (1988) ("comparing the incidence of interlocks in allegedly collusive industries with that in a control group of firms" and concluding "that the incidence of interlocking among

when it does occurs, can impose significant social costs,[31] therefore even the possibility that interlocks could result in collusion should be taken very seriously.

Apart from outright collusion, management interlocks may facilitate tacit collusion or other means of oligopolistic coordination through anticompetitive exchanges of sensitive information regarding sales and prices, product design and firm strategy.[32] These exchanges may make it easier for economic actors to reach common understandings regarding future behavior,[33] and also help firms more readily detect deviations by others, thus lessening any incentive to deviate.[34] Like outright collusion, tacit coordination can be difficult to detect, and even when it is, proscribing the conduct can be more or less difficult depending on the particular legal rules that apply. Other risks identified with horizontal interlocks include foreclosure of rivals, while perceived risks of vertical interlocks include preferential treatment of suppliers or customers through reciprocal or exclusive dealing, tying arrangements, and vertical integration.[35]

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competitively interdependent firms is no greater than that predictable by chance"); Donald Palmer, "Broken Ties: Interlocking Directorates and Intercorporate Coordination," 28 ADMIN. SCI. Q. 40, 40 (1983) (discussing "the relative likelihood that different types of interlock ties facilitate relationships of formal coordination").

[31] *See* John M. Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime Pays," 34 CARDOZO L. REV. 427, 465 (2012) (adopting a "relatively high 25% to 30% probability that cartels will be detected" in the "interest of being conservative" as to the cost-benefit analysis of cartel penalties).

[32] *See* Waller, "Corporate Governance," *supra* note 4, at 858; *see also* Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 843; OECD, "Minority Shareholding," supra note 1, at 49.

[33] Gabrielsen *et al*, *supra* note 13 at 843.

[34] *Id*. Gabrielsen *et al* conclude, however, that these information exchanges may have an ambiguous effect on the stability of any coordination:

> If you have more detailed information on the rival's most valuable customers and products (the highest price-cost margin), your deviation can be targeted towards those segments and thereby become more profitable. In that respect, it destabilises co-ordination. At the same time, such information will make it possible for the firms to directly target certain customers group, which typically leads to tougher competition after any deviation. According to this effect, information exchange may lead to a more stable co-ordinated outcome.

Id.

[35] OECD, "Minority Shareholding," *supra* note 1, at 49.

III. CHARACTERISTICS OF SMALL ECONOMIES AND IMPLICATIONS FOR DESIGNING RULES OR STANDARDS TO ADDRESS ANTICOMPETITIVE INTERLOCKS

When considering the appropriate standard or rule to adopt with respect to interlocking directorates, it is important to take into account the potential harms and benefits described above. Whatever approach is adopted ideally would proscribe those interlocks that are harmful, while permitting those that are beneficial (or at least competitively benign). In other words, the standard would minimize error costs associated with false negatives (i.e., failure to condemn anticompetitive conduct) as well as false positives (i.e., condemnations of competitive conduct). However, increased precision, which tends to require more complicated market analyses, brings with it higher process costs. A full "rule of reason" analysis of management interlocks therefore may have low error costs, in that it would tend to accurately identify and condemn only anticompetitive instances, but would bring with it high process costs. A bright-line *per se* rule, in contrast, would have low process costs but may have higher error costs.

Decision theory provides a useful framework for determining optimal legal rules or standards in a particular context.[36] As "a process for making factual determinations and decisions when information is costly and therefore imperfect,"[37] decision theory helps to determine, among other things, how much information, and what kinds, should be gathered and considered in arriving at a decision in a manner that accounts for both error costs and process costs.[38] Following this approach, the pertinent questions to be considered when designing a rule or standard to address a particular category of conduct are: (1) how *frequently* pro-competitive (versus anti-competitive) uses of that conduct are encountered; (2) what is the *magnitude* of any benefit (versus harms) from that conduct; and (3) whether, given unavoidable error

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[36] *See* Michal Gal, "When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce," 41 Loy. U. L. Rev. 417, 433 (2010). *See also, e.g.*, Isaac Ehrlich & Richard A. Posner, "An Economic Analysis of Legal Rulemaking," 3 J. OF LEGAL STUD. 257 (1974); Mark S. Popofsky, "Defining Exclusionary Conduct," 73 ANTITRUST L.J. 435 (2006); Mark S. Popofsky, "Section 2, Safe Harbors, and the Rule of Reason," 15 GEO. MASON L. REV. 1265 (2008); Wolfgang Kerber, "Competition Policy with Optimally Differentiated Rules Instead of 'Per Se Rules vs. Rule Of Reason," J. OF COMP. L. ECON. 2(2), 215 (2006); David S. Evans & A. Jorge Padilla, "Excessive Prices: Using Economics to Define Administrable Legal Rules," 1 J. OF COMPETITION L. ECON. 97 (2005).

[37] *See* C. Frederick Beckner III & Steven C. Salop, "Decision Theory and Antitrust Rules," 67 ANTITRUST L.J. 41 (1999).

[38] *See id*. at 44 ("Every decision maker faced with imperfect information must resolve three related questions. First, assuming that a decision must be made with imperfect information, what is the optimal decision? Second, how much information should the decision maker gather and consider in making a decision? Third, if information is to be gathered, exactly which information should be considered and in what order?").

costs,[39] an alternative rule would, on balance, "generally improve consumer welfare and administration of the [competition] laws."[40] In short, the designer must balance error and process costs.

The insights from decision theory also lead to the important conclusion that it is not enough simply to assume that an approach that works in one country necessarily will function in another. As Professor Gal, a leading scholar on competition law in small economies, has cautioned: "the special characteristics of some economies may change the optimal rules because they affect the relative size of process and/or error costs."[41] For instance, Chile's economy is characterized by tight oligopolies and by high barriers to entry in important sectors.[42] Moreover, in smaller economies, the "invisible hand" is less likely to lead to market self-correction than in larger ones,[43] and the business elite more tightly knit and less willing to enter each other's domains.[44] In this context, the error costs associated with not preventing anti-competitive interlocks (false negatives) is likely to be

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[39] As Justice Breyer noted, economic theory suggests that even horizontal price-fixing could be more beneficial than "unfettered competition" under some very limited circumstances. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 915 (2007) (citing F.M. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3d ed. 1990) at 335-39). However, a *per se* rule against horizontal price fixing agreements is justifiable given the potential costs and the difficulties involved in identifying those few scenarios.

[40] *See* Brief of the American Antitrust Institute as *Amicus Curiae* in Support of Respondent, *Leegin Create Leather Prods., Inc. v. PSKS, Inc.*, No. 06-480 (Feb. 26, 2007) at 11. *See also* Brunell, "Overruling *Dr. Miles*," *supra* note 20, at 495; Lao, "*Leegin* and RPM – A Model for Emulation or for Caution," *supra* note 18, at 254 (Modern decision theory "requires focus… on the frequency of [any procompetitive] benefits and [anticompetitive] harms, error costs, and whether an alternative rule would better serve consumer welfare and the administration of the antitrust law."); Arndt Christiansen & Wolfgang Kerber, "Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason," 2 J. COMP. L & ECON. 215, 238 (2006) (applying an "error cost approach," it is "not sufficient to show that there are cases in which resale price maintenance can lead to positive welfare effects.").

[41] Gal, "Merger Control," *supra* note 17, at 68.

[42] Patrick Rey, "Vertical restraints – an economic perspective" (October 13, 2012), at 47 (noting that the Chilean economy, like many other small economies, is characterized by a relatively high degree of concentration, with some of the most important industries having just a few participants), available at <http://www.fne.gob.cl/wp-content/uploads/2012/10/Vertical-restraints.pdf>.

[43] Michal S. Gal, "Size Does Matter: The Effects of Market Size on Optimal Competition Policy," 74 S. Cal. L. Rev. 1437, 1472 (2001) ("[T]he market's self-correcting tendencies are more pronounced in large economies than in smaller ones. In large economies, such tendencies are believed to deal effectively with most nonnatural monopolies. This, however, cannot as easily be said of small economies. In small economies, market conditions are such that the self-correcting forces of the market have a far more limited effect[.]").

[44] *Id*. at 1448.

appreciably higher than in larger economies.[45] At the same time, given the smaller pool of available business talent, the error costs of not allowing benign or beneficial interlocks may also be somewhat higher. Those facts, if true, would need to be taken into account in formulating a standard.

Additionally, particularities with respect to process costs also need to be taken into consideration. In small jurisdictions like Chile, scarcity of enforcement resources is a significant issue, and will likely to continue to be an issue even as Chile's wealth continues on its upward trajectory.[46] While application of complex rules that seek to map the intricacies of economic theories in larger, developed jurisdictions—where, because of the expertise and sheer resources of the enforcement institutions, error costs are often low—may make sense, in a more resource constrained environment, enforcement agencies will suffer from a more limited ability to perform the necessary analysis.[47] It is not a given in these circumstances that the increased process costs of pursuing a more complex rule will reduce the error costs associated with a simpler rule. Moreover, those resources expended in enforcing the more complex rule (which may or may not reduce error costs) also translate into lower levels of overall enforcement. Those trade-offs should also be taken into account in formulating an approach.[48]

Based on this discussion, a few observations are in order regarding an appropriate standard for management interlocks in the Chilean context:

- First, management interlocks are not intrinsically problematic, only certain interlocks. Therefore, the standard cannot be too restrictive such that it unduly restricts those instances in which interlocks would be beneficial or otherwise competitively benign.
- Second, the standard must nevertheless recognize that a certain subset of interlocks—*those that either directly or indirectly involve competitors*—have a significant potential for causing serious harm, and therefore are worthy of some kind of enforcement activity.
- Third, given the nature of Chile's economy, it would be preferable to err on the side of caution with respect to competitively suspect interlocks. The error costs of false negatives, which could result in cartelization or the softening of competition in oligopolistic markets, are potentially enormous. On the other

[45] Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 837 ("Minority share ownership, interlocking directorships and other links between competitors have been something of a headache in competition law for decades. This is particularly so in oligopolistic markets, where the anti-competitive effect of various forms of structural links may be particularly visible.").

[46] Gal, "When the Going Gets Tight," *supra* note 36 at 421.

[47] *Id*. at 435.

[48] *See id*. at 437.

hand, the costs of false positives (foregone benefits described in the prior section) would seem quite small in comparison. Indeed, the asymmetry seems so large that even if only some fraction of competitor interlocks results in actual harm, the balance would still favor a bias towards preventing false negatives.

- Fourth, given relatively low error costs of false positives on the margins, the process costs of engaging in additional inquiry, through a rule of reason, to eliminate those instances would have to be very low to be worthwhile.
- Fifth, whatever net benefits might be obtainable by engaging in a refined analysis of suspect interlocks must be weighed against the impact on overall enforcement efforts by an agency with limited resources.[49]

As will be described in the following sections, section 8 of the Clayton Act—which adopts a relatively bright-line rule that is also quite limited in reach—provides a reasonable model for satisfying these considerations.

IV. CLAYTON ACT SECTION 8: AN "APPROPRIATE COMPROMISE" BETWEEN OVER- AND UNDER-INCLUSIVENESS

The U.S. approach to dealing with potentially problematic management interlocks dates back to 1914 with the enactment of section 8 of the Clayton Act.[50] The statute provides in relevant part:

> No person[51] shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies[52]) that are…

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[49] The most recent annual budget for the FNE was around US$8.6 million, for a country with a population of around 16.6 million. By contrast, the budget for Canada's Competition Bureau, for a country just over twice the size, with 35.2 million inhabitants, was around US41.9 million. *See* Global Competition Review, RATING ENFORCEMENT 2013, available at <http://globalcompetitionreview.com/surveys/828/rating-enforcement-2013/>.

[50] *See* Rosch, "Terra Incognita," *supra* note 2, at 17 (noting that concerns about interlocking directorates "became such a hot-button political issue in the 1912 [presidential] election that all three political party platforms called for legislation to address the subject.").

[51] The Clayton Act defines "person" to include "corporations":

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 12(a).

> 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…[53]
>
> if each of the corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection[54] [currently US$23,883,000[55]].

Section 8 is limited in both ambition and reach. It proscribes interlocks—*but not every interlock*. It applies only to interlocks involving corporations that are horizontal competitors. While not necessarily encompassing the universe of potentially anticompetitive interlocks, the statute nevertheless draws a line that is likely captures the most competitively suspect ones. Even with respect to direct competitor interlocks, however, section 8 exempts those that are most likely to present only a *de minimus* risk of anticompetitive harm given the size of the corporations involved. These exemptions were refined even further in 1990, when the U.S. Congress enacted additional restrictions on the reach of section 8.[56] Thus, currently, interlocks involving competitors are not prohibited when:

Interlocks involving other types of business entities, such as partnerships, are not reached. *See North Am. Soccer League v. NFL*, 670 F.2d 1249, 1262 (2d Cir. 1982) (holding that Section 8 does not apply to sports leagues).

[52] In addition, Section 8 also does not reach interlocking directorates between bank and nonbank corporations. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 128 (1983).

[53] Because liability arises for interlocks only when an agreement between the corporations involved "would constitute a violation of any of the antitrust laws," section 8 does not apply to interlocks between parent corporations and their wholly owned subsidiaries. *See, e.g., Burnup & Sims, Inc. v. Posner*, 688 F. Supp. 1532, 1534 (S.D. Fla. 1988). Under *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 771-74 (1984), a parent company and its wholly owned subsidiary are not considered separate entities, and thus are legally incapable of conspiring for purposes of Section 1 of the Sherman Act. What is less clear is the applicability of section 8 to partially-owned subsidiaries. *See* ANTITRUST LAW DEVELOPMENTS (Sixth) at 427.

[54] 15 U.S.C. § 19(a). The complete text of Section 8 is included in Appendix A.

[55] 78 FED. REG. 9 (Jan. 14, 2013), at 2675.

[56] S. REP. NO. 101-286, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4100, 4103-04 ("The intent of the committee is to preclude from the prohibition against interlocking directors competitive overlaps which are too small to have competitive significance in the vast majority of situations"); *see also* H.R. REP. NO. 101-483, at 7 (1990).

Prior to the 1990 amendments, the FTC majority, in *In re Borg-Warner Corp.*, 101 F.T.C. 863, 932, *modified*, 102 F.T.C. 1164 (1983), *rev'd on other grounds*, 742 F.2d 108 (2d Cir. 1984), held that there was no *de minimus* defense to a section 8 violation. In a footnote, however,

- Competitive sales of either corporation are less than an inflation adjusted figure of US$1 million[57] (currently US$2,888,300 for 2013);[58]
- Competitive sales of either corporation are less than two percent of that corporation's total sales;[59] or
- Competitive sales of each corporation are less than four percent of the corporation's total sales.[60]

Section 8 has generated remarkably little jurisprudence during its nearly one hundred-year history.[61] That is likely the result of the federal courts having adopted a *per se* construction of section 8, which allows a violation to be established with no proof of actual anticompetitive effects from the management interlock. Moreover, "pragmatic" court decisions involving other issues arising under the statute—including the definition of "competitors" and whether the statute reaches "indirect" interlocks—have further contributed to the ability of the section 8 to reach various manifestations of anticompetitive interlocks. Combined with the 1990 amendments, these appear to have struck a reasonable balance that generally tends to allow beneficial or benign interlocks, but does so in a manner that avoids making enforcement unreasonably costly (and thereby increasing the frequency of anticompetitive interlocks).

A. The *Per Se* Approach to Finding Violations of Section 8

The *per se* approach dates back to a 1953 district court ruling in *United States v. Sears, Roebuck & Co*.,[62] the "first judicial construction" of section 8 since its enactment in 1914. In *Sears*, the defendant argued that "the 'so that' clause of § 8 required a showing that a hypothetical merger between the two firms would violate Clayton Act § 7,"[63] which prohibits mergers between firms only when "the *effect* of such acquisition may be substantially to lessen competition, or to tend to create a

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the majority suggested that the level of commerce affected might play a role in the agency's exercise of prosecutorial discretion with respect to a particular interlock, or in determining the scope of any subsequent order.

Courts were divided on the *de minimus* question prior to the 1990 amendments. *See* William C. MacLeod, "Interlocks at the Federal Trade Commission: Room for Reason in a 'Per Se' Statute?," 53 ANTITRUST L.J. 1077, 1080-81 (1984).

[57] 15 U.S.C. § 19(a)(2)(A).

[58] 78 FED. REG. 9 (Jan. 14, 2013), at 2675.

[59] 15 U.S.C. § 19(a)(2)(B).

[60] 15 U.S.C. § 19(a)(2)(C).

[61] Rosch, "Terra Incognita," *supra* note 2, at 17.

[62] 111 F. Supp. 614 (S.D.N.Y. 1953).

[63] *Id* at 616.

monopoly."[64] The court, however, rejected the defendant's argument and instead held that the statute applied when a possible agreement (for instance, on prices) between the interlocked parties would contravene "*any* of the provisions of *any* of the antitrust laws."[65] In short, it concluded that a straightforward *per se* test—under which liability turned on whether or not the two firms were or had been competitors—was the proper one.

Administrability considerations were important factors in the court's decision to adopt a *per se* rule in *Sears*. Examining the legislative history of section 8, it concluded that "[t]he legislation was essentially preventative," and that the defendant's position "would defeat the Congressional purpose 'to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation.'"[66] According to the court:

> This conclusion is compelled because of the futility of trying to decide whether a given hypothetical merger would violate the pertinent sections of the antitrust laws. Such a decision would involve a consideration of many factors… [which] can be applied only in an actual case and not in a hypothetical situation… This difficulty suggests that the merger test would result in complete nullification of the law prohibiting interlocking directorates in all but the rawest situation….[67]

The *per se* rule, in contrast, "permits the prohibitory features of § 8 to be administered with the full scope which the legislators must have contemplated."[68]

The U.S. Court of Appeals for the Seventh Circuit, in *Protectoseal Co. v. Barancik*,[69] similarly concluded that it did "not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be

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[64] 15 U.S.C. § 18 (emphasis added).

[65] *Sears*, 111 F. Supp. at 616-17, 620-21 (emphasis added). *See also* Preminger, "Deputization and Parent-Subsidiary Interlocks," *supra* note 20, at 951 ("In so deciding, the district court established a rule, thereafter the standard in section 8 cases, that a *per se* violation of the statute occurs" under these circumstances so that "it is manifestly difficult for a defendant to successfully rebut an alleged section 8 violation when the… remaining conditions are proven.").

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

[67] *Id*. (citations omitted).

[68] *Id*.

As noted below, however, such a standard would have sacrificed the simplicity of the existing analysis, while delivering questionable benefits.

[69] 484 F.2d 585, 589 (7th Cir. 1973).

required in a protracted case arising under § 7."[70] As in *Sears,* the defendant in *Protectoseal* argued that a violation of section 8 could not occur unless a merger of the two companies would be unlawful under section 7. In rejecting that position, the Seventh Circuit concluded that the relevant language of Section 8 "establishes *rather simple objective criteria* for judging the legality of the interlock," and that "a market-wide analysis of competition [was] unnecessary" under the statute.[71]

In 1990, the U.S. Congress debated whether the section 7 standard, which had been rejected by the courts, should be applied to interlocks under section 8.[72] Concerns were raised that echoed those expressed by the courts in *Sears* and *Protectoseal*, including that

> [s]uch a standard would require a complete competitive analysis, covering relevant market definition, entry barreirs [sic], etc., before one could tell whether an interlock is permissible. This would introduce substantial uncertainty and require a great deal of effort on the part of the agencies to enforce a law….[73]

Congress further recognized that these higher enforcement costs would mean that "the interlock prohibition would effectively be nullified in all but the most egregious situations."[74] Thus, the bright-line standard was retained as the most appropriate approach given the prophylactic nature of section 8, even as *per se* approaches were being jettisoned in other areas of U.S. antitrust jurisprudence around this time.[75]

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[70] *Id*. In this instance, however, the Seventh Circuit may not have been discussing the kind of evidence needed to establish whether or not the corporations were competitors, but instead may have been referring to whether or not a Section 8 violation required a showing that a merger between the parties would have violated Section 7.

[71] *Id*. at 589 (emphasis added).

A recent 2012 ruling from the U.S. Court of Appeals for the Seventh Circuit, in *Robert F. Booth Trust v. Crowley*, stated that, under section 8, "a district judge must define a market and decide whether a merger between [the defendant] and one of the firms interlocked by the directorships would be unlawful." No. 10-3285 (7th Cir. June 13, 2012), Slip. Op. at 4. The latter part of that statement misstates the relevant standard. *See supra* at 15 n.76.

[72] A version of H.R. 29 was proposed "which would [have] permitted an interlock if the two competing corporations would be allowed to merge under the standard set forth in section 7 of the Clayton Act." *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 134.

[73] H.R. REP. No. 101-483, at 6.

[74] *Id*. at 7 (observing that the "Merger Guidelines... often work to permit mergers of direct market rivals with up to a 35-40 percent marketshare").

[75] *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (adopting rule of reason standard for analyzing non-price vertical restraints); *State Oil v. Khan, Inc.*, 522 U.S. 3 (1997) (adopting rule of reason standard for analyzing maximum resale price agreements).

In contrast to the U.S., Japan has adopted the very standard that was rejected for section 8 by precluding interlocks only when "the effect of such an interlocking directorate may be substantially to restrain competition in any particular field of trade."[76] Unlike with the Clayton Act, the focus of the Japanese Antimonopoly Act is not on whether there is simply an interlock between competitors.[77] Rather, the focus is entirely on the effects of the restraint. Korea and Indonesia also follow similar approaches, and in all three cases, the requirement that there be a showing that the interlock would have an actual effect on competition results in an enforcement burden not present with section 8.

B. Identification of "Competitors" and Other Issues

With the adoption of a *per se* approach in the U.S., one of the core remaining questions under section 8 has been whether two corporations are "competitors" with one another within the meaning of the statute. In answering that question, some courts have applied the market definition analyses used under the Sherman and Clayton Acts more generally.[78] Other courts, however, have not restricted

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[76] Art. 13(1), Japanese Antimonopoly Act, available at <http://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama09_04.html>.

[77] Article 13(1) reads in full:

> Neither an officer nor an employee (meaning in this article a person other than officers engaged in the business of a company on a regular basis) of a company shall hold at the same time a position as an officer of another company where the effect of such an interlocking directorate may be substantially to restrain competition in any particular field of trade.

[78] ANTITRUST LAW DEVELOPMENTS (Sixth) at 427-28; *see also* Preminger, "Deputization and Parent-Subsidiary Interlocks," *supra* note 20, at 948-49 ("[A] policy has developed whereby the courts and the Federal Trade Commission (FTC) apply, by analogy, the "line of commerce" and geographic market standard recognized by the Supreme Court in the section 7 merger [context]…. Although applied in a less than mechanical fashion, these standards provide structured criteria by which to test the degree of competition between interlocked entities.").

In *American Bakeries Co. v. Gourmet Bakers, Inc.*, for instance, a federal district court stated that

> there are clear antitrust guidelines for determining whether corporations compete. For example, the 'relevant market test' may be applied…. The presence of actual competitiveness ... is determined by two tests:
>
> (1) Can the two products (the defendant's and the substitute) be said to compete because they are reasonably interchangeable with respect to the uses to which they can be put?

themselves to using "quantitative market definition analysis typically applied in Clayton Act Section 7 merger cases," but rather have employed a more flexible "qualitative analysis" as well.[79] As with the rejection of an effects analysis, concerns with respect to administrability and the policy objectives of section 8 underlie these decisions as well.

The Ninth Circuit's decision in *TRW, Inc., v. Fed. Trade Comm'n*.[80] provides an example of this truncated approach to identifying "competitors" for purposes of section 8. In *TRW*, the defendants argued that whether they were "competitors" should be judged by the standards of cross-elasticity of demand and reasonable interchangeability of use of their products.[81] The Court of Appeals, however, rejected the defendants' position and concluded that the prophylactic purposes underlying section 8 "would not be well served" by such a requirement.

The Ninth Circuit gave two principal reasons for its conclusion. First, such an inquiry is not conceptually necessary given that section 8 only requires that "two alleged 'competitors' [be] involved and proof that the interlock has an actual anticompetitive effect is not required."[82] Second, the Ninth Circuit considered the defendants' proposed standard to be "too restrictive."[83] For instance, "while the tests of cross-elasticity of demand and interchangeability of use may yield realistic results in well-established industries," the court noted that they are much less useful in evolving markets still in their "infancy."[84] Thus, it concluded that in order to further the purpose of the statute, it was also appropriate to consider 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.[85]

> (2) Are the two products actually competitive because there is a high cross-elasticity of demand on the part of customers?

515 F. Supp. 977, 980 (D. Md. 1981).

[79] Gerber, "Enabling Interlock Benefits," *supra* note 4, at 108; *see also* ANTITRUST LAW DEVELOPMENTS (Sixth) at 428.

[80] 647 F.2d 942 (9th Cir. 1981).

[81] *Id*. at 946.

[82] *Id*. at 947 (internal citations omitted).

[83] *Id*.

[84] *Id*.

[85] *Id*.

The Ninth Circuit's "qualitative" approach has the potential to increase uncertainty, and perhaps in some instances to raise enforcement costs. The Court of Appeals itself recognized that its approach "may render more difficult the process of screening potential directors for compliance with section 8"[86] On the other hand, even market definition analyses that do not engage in a full competitive analysis can be extremely costly,[87] and by not requiring such an assessment, enforcement costs are reduced. This goes hand-in-hand with the approach described above eschewing an effects analysis. Moreover, this flexible approach may better facilitate section 8's prophylactic purpose in important sectors of the new economy.

An additional complication with the U.S. approach is whether section 8 reaches not only "direct" interlocks involving competitors, but the various "indirect" interlocks described above.[88] The DOJ and FTC both have taken the position that a violation of section 8 may occur when different individuals, representing a single

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[86] *Id.*

[87] *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 131 (noting that "even absent a requirement of anticompetitive effect, the cost of quantitative market definition remains a valid concern.").

[88] Preminger argues that "[w]hat scant legislative history exists supports the contention that Congress did not intend section 8 to extend to interlocks other than the more blatant, *direct* forms that come within the literal meaning of the statute." Preminger, "Deputization and Parent-Subsidiary Interlocks," *supra* note 20, at 951.

To the extent that is the case, that may have been a function of the fact that "[w]hen the Clayton Act was written the Congress had no experience with legislation about interlocking directorates. The provisions of the statute were apparently designed to cope with the problems that had become most conspicuous during the two previous decades." Fed. Trade Comm'n, REPORT ON INTERLOCKING DIRECTORATES, H.R. Doc. No. 652, 81st Cong., 2d Sess. (1951) at 13.

The staff of the House Judiciary Committee's Antitrust Subcommittee later came to a similar conclusion, noting that:

> [d]ivergences in coverage and in treatment [of the Clayton Act anti-interlock provisions] manifest the exploratory and experimental nature of the legislation. Congress apparently was reluctant to go beyond the specific management abuses that had been define at the time and promulgate a consistent policy that would define and deal with the root of the problem.

Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, 89th Cong., 1st Sess., REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT (1965), at 28.

But see Reading Int'l. v. Oaktree Capital Management LLC, 317 F. Supp.2d 301, 330 (S.D.N.Y. 2003) ("Indeed, the paucity of explicit discussion of this question in the debates surrounding the bill's passage indicates that it was not the particular form that interlocks might take, but rather their result, that was the primary concern of Congress in 1914.").

person or corporation, serve on boards of competitors (see Figure 1 *supra*).[89] This makes sense since the same concerns regarding information exchange between competitors can arise regardless of whether the same individual serves in an executive capacity with two firms, or whether the interlock is accomplished with two or more people.[90]

A federal district court reached a similar conclusion in *Reading Int'l. v. Oaktree Capital Management LLC*,[91] a case involving a private equity firm that had significant ownership interests in two competing movie theater chains.[92] In *Reading*, the equity firm's president served on the board of one of the theater chains, while a principal of the firm was a board member of the other chain.[93] On the defendant's motion to dismiss, the district court rejected the argument that section 8 could only apply to an *individual* serving simultaneously on two competitors' boards. Rather, the court concluded that the plaintiffs could prevail by establishing that the directors' service on the competitors' boards was not in their individual capacities, but rather "as the deputies of [the private equity firm], acting as the puppets or instrumentalities of the corporation's will, such that it can legitimately be said that it is the [firm] as an entity… which 'serve[s] as a director' of both [movie theater chains]."[94] To hold otherwise, according to the court,

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[89] *See* Antitrust Law Developments (Sixth) at 428-29.

See Br. for the United States as Amicus Curiae*, Reading Int'l, Inc. v. Oaktree Capital Mgm't LLC*, Case No. 03-CV-1895 (GEL)(THK) (Oct. 1, 2003), at 3 ("The United States has long taken the position that a corporation or other business entity may violate Section 8 of the Clayton Act if its deputies serve as directors or officers of competing corporations barred from sharing directors or officers under the statute."), available at <http://www.justice.gov/atr/cases/f201300/201321.pdf>.

In *United States v. International Ass'n of Machinists*, 1994-2 Trade Cas. (CCH) ¶ 70,813 (D.D.C. 1994) (consent decree), the DOJ challenged a situation in which the union simultaneously had different individual representatives serving on the boards of two competing airlines.

See also Advisory Opinion Letter to United Auto Workers, 97 F.T.C. 933 (1981) (stating that the FTC believes that "a corporation of association may violate Section 8 of the Clayton Act if it has representatives or deputies serving simultaneously on the boards of two competing corporations").

[90] It also makes sense given that the definition of "person" under the Clayton Act includes "corporations and associations." 15 U.S.C. § 12(a). Corporations and associations, of course, can only act through their human agents. *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001).

[91] 317 F. Supp.2d 301 (S.D.N.Y. 2003).

[92] *Id*. at 308 (ownership interests of 40 percent in Loews and 17 percent of Regal).

[93] *Id*. at 309.

[94] *Id*. at 331.

> would be to allow corporations (and individuals) to evade antitrust liability simply by designating agents to serve their bidding on the boards of competing businesses. The purposes of the statute, "to avoid the opportunity for the coordination of commercially sensitive information by competitors," would be ill-served by such a cramped reading.[95]

With respect to other configurations of indirect interlocks, including situations in which a person serves as an officer or director of two corporations that are not themselves competitors, but that involve subsidiaries (*see* FIGURES 2 & 3 *supra*), both the DOJ and the FTC have taken enforcement actions premised on such indirect interlocks.[96] In *Borg-Warner Corp.*, for instance, the FTC concluded that the relevant inquiry under section 8 in these circumstances

> is whether the parent company should be regarded as a "competitor" of the subsidiary's competitors, and whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decisionmaking at the director level so as to dampen competitive relationships between divided corporate interests.[97]

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[95] *Id*. (emphasis added) (quoting *Square D Co. v. Schneider*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991)).

Other courts have also referred to the possibility that Section 8 liability might arise in the case of a indirect lock consisting of different representatives from the same entity. In *United States v. Cleveland Trust Co.*, the DOJ alleged that the defendant, through two different "agents," had been a "member" of the boards of two direct competitors. 392 F. Supp. 699, 702 (N.D. Ohio 1974), *aff'd.* 513 F.2d 633 (6th Cir. 1975). The district court, on a motion for summary judgment, did not reject the government's theory as a matter of law (though it noted that the question was "entirely unsettled"), but declined to grant the motion because of significant factual questions that remained. *Id*. at 712.

In *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, the U.S. Court of Appeals for the Fourth Circuit dismissed the plaintiff's Section 8 claim based on a representative theory, but did so because the record before the court included only "conclusory allegations" that deputization had occurred. 828 F.2d 211, 217 (4th Cir. 1987). The appellate court did not reject the theory as a matter of law.

For a discussion of how "deputization" and parent-subsidiary interlocks were "often used successfully to sidestep the express restrictions of [Section 8]," and thereby threatening the purpose of the statute, *see* Preminger, "Deputization and Parent-Subsidiary Interlocks," *supra* note 20.

[96] *See* ANTITRUST LAW DEVELOPMENTS (Sixth) at 429-30.

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

Federal courts, however, have split on this question. In *United States v. Crocker Nat'l Corp.*,[98] the Ninth Circuit concluded that when a parent "substantially controls the policies of its subsidiary," the "business and location" of the parent includes that of the subsidiary as well.[99] In contrast, the Second Circuit, in *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,[100] overturned the "general rule" adopted by the district court that section 8 prohibits interlocking directorates between parent companies with subsidiaries that are competitors,[101] though that ruling may be limited by its facts and is not necessarily inconsistent with the pragmatic approach adopted by the Ninth Circuit.

In contrast to section 8, the Japanese Antimonopoly Act does not appear to concern itself whatsoever with whether "competitors" are involved in the interlock. The result is that Japan's approach may be more expansive than the Clayton Act, which has been held to apply only to interlocking directorates between *horizontal* competitors,[102] whereas the Japanese act conceivably could reach even vertical interlocks that affect competition.[103] The Japanese approach, in theory, also relieves enforcers of the burden of establishing that the parties involved are competitors. However, it seems unlikely that the overall enforcement burden under the Japanese approach, with a requirement of showing possible effects, would be less than in the U.S., where "competitors" can be (at least in some courts) established using a "qualitative" approach.

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

[98] 656 F.2d 428, 450-51 (9th Cir. 1981), *rev'd on other grounds sub nom BankAmerica Corp. v. United States*, 462 U.S. 122 (1983).

[99] 656 F.2d at 450.

[100] 584 F.2d 1195 (2d Cir. 1978).

[101] *Id*. at 1205.

[102] *In re TRW, Inc.*, 93 F.T.C. 325, 379 (1979), *aff'd in part, rev'd in part sub nom. TRW, Inc. v. Fed. Trade Comm'n*, 647 F.2d 942 (9th Cir. 1981).

[103] While interlocks between suppliers and customers are not reached by section 8, in theory, these could raise competitive concerns. As the OECD has noted, these arrangements "traditionally have been criticized on the ground that they can lead to preferential treatment at the expense of other suppliers or customers by facilitating reciprocal or exclusive dealing, tying arrangements, and vertical integration." *See* OECD, "Minority Shareholding," *supra* note 1, at 49.

C. Section 8 Does Not Reach All Potentially Anticompetitive Interlocks

By its own terms, section 8 has some important limitations that prevent it from reaching certain competitor interlocks that nevertheless could raise concerns.[104] For instance, the statute applies only to officers or directors, not employees or agents, even though interlocks involving the latter could also result in information exchanges or other anticompetitive harms. Furthermore, section 8 only applies to officers or directors of *corporations*, but not of other types of business entities, such as partnerships.[105] Moreover, the statute probably does not reach interlocks in which individuals from competing corporations sit on a board of a non-competing company, or interlocks involving family members or close friends, even though, again, these forms could also lead to anticompetitive results.[106] While any

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[104] Even when Section 8 does not apply, other legal prohibitions may exist regarding management interlocks. For instance, Section 305 the Federal Power Act, 16 U.S.C. § 825d(b), prohibits individuals—absent prior authorization from the Federal Energy Regulatory Commission—from being an officer or director of more than one public utility or from holding such a position with a public utility and a company that may underwrite or market public utility securities. Similar sector-specific restrictions have been enacted in other industries as well. *See, e.g.,* Section 17(c) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79q(c) (regulating interlocks involving public utility holding companies); Sections 10(b)(2) & 10(c) of the Investment Company Act of 1940, 15 U.S.C. § 80a-10(b)(2) & 80a-10(c) (regulating interlocks between registered investment companies and, respectively, underwriters and bank officers, directors or employees); Section 212 of the Communications Act of 1934, 47 U.S.C. § 212 (regulating interlocks between *communications* carriers).

Some states have enacted similar prohibitions that apply eve when firms do not meet the minimum monetary thresholds for Section 8. *See, e.g.*, Alaska Stat. § 45.50.570; Wis. Stat. § 133.06.

Further, the FTC has challenged interlocks that did not violate Section 8 by means of Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair methods of competition," and can be used to reach conduct that is not necessarily proscribed by other antitrust statutes. *See* Rosch, "Terra Incognita," *supra* note 2, at 19-20 (citing *Kraftco Corp*., 89 F.T.C. 46, *remanded on other grounds sub nom. SCM Corp. v. FTC*, 565 F.2d 807 (2d Cir. 1977), *appeal after remand*, 612 F.2d 707 (2d Cir.), *cert. denied*, 449 U.S. 821 (1980)).

[105] *See North Am. Soccer League v. NFL*, 670 F.2d 1249, 1262 (2d Cir. 1982) (holding that Section 8 does not apply to sports leagues).

[106] *See* Rosch, "Terra Incognita," *supra* note 2, at 18.

Rosch also notes that interlocks between potential (as opposed to actual) competitors are not covered. *Id*. However, that is not entirely certain. In *TRW*, the FTC noted that Section 5 of the FTC Act might apply to interlocks between potential competitors. *TRW, Inc.*, 93 F.T.C. at 379 n.12. The U.S. Court of Appeals for the Ninth Circuit, in largely affirming the FTC's decision in *TRW*, expressed "no opinion about whether section 8 encompasses interlocking directorates between corporations that are merely potential competitors." *TRW, Inc.*, 647 F.2d at 946 n.4.

of these limitations could be addressed by means of a statutory modification, the benefits would need to be balanced against increased administrative complexities that might be introduced, or the possibility that too many competitively benign interlocks would be ensnared by a *per se* rule.

V. ENFORCEMENT OF SECTION 8: ADVANTAGES OF THE BRIGHT-LINE APPROACH

The relatively low-cost and on-balance predictable nature of the bright-line rule for interlocks in the U.S. translates into some real benefits with respect to enforcement, which are particularly important when considering emerging economies where agency resources are (in relative terms) scarce. Section 8 can be enforced by the DOJ, the FTC, or by private parties, and in theory, remedies in private actions theoretically could include treble damages, although there do not appear to be any instances in which monetary awards have been given.[107] Rather, when disputes arise, the typical remedy involves the resignation of a director from one of the two corporations,[108] or sometimes the divestiture of a business line so the firms are no longer competitors, and thus no longer subject to the statute's prohibitions.[109]

The federal government rarely sues under section 8.[110] In fact, the most recent contested case brought by the government, *Borg-Warner*, was filed 35 years ago.[111] While this may be due in part to section 8 enforcement having experienced "periods of benign neglect" over its history,[112] in recent years both the DOJ and FTC have addressed management interlocks—with the FTC having pursued a particularly high-profile matter involving Google and Apple.[113] Rather, the dearth of

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[107] *See* ANTITRUST LAW DEVELOPMENTS (Sixth) at 430.

[108] Under the statute, a person who becomes ineligible to serve as an officer or director of a competitor due to some intervening event has a one-year grace period from the time of that event in which they can continue in that position. *See* 15 U.S.C. § 19(b).

[109] *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 131.

[110] *See Crowley*, No. 10-3285, Slip. Op. at 8 (estimating the odds of a lawsuit by the DOJ or FTC for the challenged interlock at less than 1 percent).

See also Preminger, "Deputization and Parent-Subsidiary Interlocks," *supra* note 20, at 952 n.41 (noting that from 1914 to 1965 the DOJ had filed only 10 cases alleging violations of Section 8, while the FTC filed 13 lawsuits in that time, with all but one resulting in dismissal upon voluntary dissolution of the interlock).

[111] *See Crowley*, No. 10-3285, Slip. Op. at 8.

[112] *See* J. Randolph Wilson, "Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act," 45 ANTITRUST L.J. 317 (1976) (describing DOJ and FTC enforcement of Section 8 as having "been punctuated by a few bursts of mild activity and then followed by long periods of benign neglect").

[113] In this way, Section 8 enforcement is entirely unlike the not-so-benign neglect of the Robinson-Patman Act, 15 U.S.C. § 13, which prohibits unfair price discrimination on the sale

section 8 litigation is more likely attributable to government enforcement having become largely "administrative" in nature. As Judge Easterbrook recently described that process, "[w]hen the [DOJ] or the FTC concludes that directorships improperly overlap, it notifies the firm and gives it a chance to avoid litigation (or to convince the enforcers that the interlock is lawful)."[114] While there may be disputes about the parties' status as "competitors" or whether the statute applies to a particular "indirect" interlock, the legal analysis under section 8 (as described above) is otherwise generally quite straightforward—something that could not necessarily be said under an effects standard.[115] Because of the *per se* standard followed by the courts, the likely outcome is more certain and predictable. Moreover, if a violation of section 8 has occurred, the investigated corporations usually can resolve the matter

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of goods to equally-situated distributors when the effect is to reduce competition. Government enforcement of the Robinson-Patman Act has been curtailed significantly since the 1960's, and the Antitrust Modernization Commission recommended in its April 2007 report that the statute be repealed. *See* Antitrust Modern. Comm'n, REPORT AND RECOMMENDATIONS (April 2007), at 38 ("Congress should repeal the Robinson-Patman Act in its entirety.").

[114] *Crowley*, No. 10-3285, Slip. Op. at 8.

Indeed, this "administrative" approach appears to have been the norm for far longer, as one commentator describes the process in an article from 1950:

> The Department of Justice's extra-judicial procedure for wholesale enforcement of Section 8 is a novel antitrust enforcement technique. It has been customary to correct alleged violations by instituting lawsuits. But if enforcement by administrative persuasion accomplishes the objectives of the statute, that method would seem to be not only in the public interest but also in the interests of the persons whose directorships are questioned since it gives them an opportunity to resign without publicity and its attendant unpleasantness .... In Section 8 matters, the relief is simple and specific: resignation from all but one of the boards of the competing corporations.

Victor H. Kramer, "Interlocking Directorships and the Clayton Act After 35 Years," 59 YALE L.J. 1266, 1271 (1950).

See also Ephraim Jacobs, "Interlocks," 29 ANTITRUST L.J. 204, 209 (1965) (describing "voluntary compliance" with Section 8).

For a less sanguine view, *see* Preminger, "Deputization and Parent-Subsidiary Interlocks," *supra* note 20, at 952-53 (arguing that "[d]espite the efficiency of these summary enforcement techniques, their use detracts from the deterrence value of the statute" and that "[t]he paucity of reasoned decisions on the merits in section 8 cases gives the statute less coherence and predictability of interpretation than a sixty-seven year old law would normally warrant.").

[115] *See supra* at Section IV. *See also* Waller, "Corporate Governance," *supra* note 4, at 857 (describing the typical disputes as "boundary" issues).

at relatively low cost, with the resignation of a board member or divestiture of a line of business.[116] As a result, "[f]or more than 30 years, this process has enabled antitrust enforcers to resolve § 8 issues amicably—either avoiding litigation or entering consent decrees contemporaneous with a suit's initiation."[117] This dynamic is illustrated by some examples of recent enforcement activity in the U.S.

A. *Ex Ante* Interlock Enforcement in Merger Review Context

As noted above in the case of Chile and elsewhere, interlock issues sometimes arise in the merger context. Section 8 has been used in the U.S. to address those concerns when they arise in that situation. One recent example involves the December 2007 consent decree in *U.S. v. CommScope*. In that matter, CommScope, a manufacturer of wire and cable products, including drop cable and related hardware, acquired another company, Andrew, that had recently sold its own drop cable manufacturing business to a third company, Andes. Andrews, in turn, held a 30 percent equity stake in Andes at the time of the acquisition, and enjoyed other governance rights, including the right to designate various board members.[118] Those rights became a source of concern for the DOJ because, the agency concluded, CommScope and Andes were each other's closest competitors for many customers. The rights would thus give CommScope "both the incentive and the ability to coordinate its activities with those of Andes, and/or to undermine Andes' ability to compete on price and innovation."[119] To ameliorate those concerns, the DOJ required the parties—as a condition to its approval of the transaction—to renounce their governance rights, including CommScope's right to appoint members of Andes' board.[120]

Even in jurisdictions that do not follow the U.S. model, it may be possible to analyze the potential competitive effect of management interlocks during merger reviews. Chile's competition authorities, for instance, have been able to address the practice in certain instances, even though the Competition Act does not specifically

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116 *See* Waller, "Corporate Governance," *supra* note 4, at 857.

117 *Crowley*, No. 10-3285, Slip. Op. at 8.

118 Competitive Impact Statement, *United States v. CommScope, Inc.*, at 7, available at <http://www.usdoj.gov/atr/cases/f228300/228364.htm>.

119 *Id*.

120 *Id*.

In the context of E.U. merger reviews, divestiture or reduction of minority ownership interests outside of the transaction under review have been offered and accepted by the Commission in various cases. *See* Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 846. This demonstrates some flexibility in terms of the merger review process being able to address management interlocks that may not have arisen from the merger itself. However, as discussed below, there are other instances of management interlocks that could not be reached under this mechanism.

address interlocking directorates.[121] In the European context, however, it has been noted that that law does not address the issue "in a coherent way," and consequently "minority shareholdings, cross-shareholdings and interlocking directorships have been allowed to develop in a wide range of markets."[122] In Chile, which does not have a comprehensive merger regulation like the E.U., the regulatory gap for dealing with questionable interlocks during the merger review process can be expected to be even greater. From an enforcement perspective, then, relying on merger reviews for addressing potentially anticompetitive interlocks does not appear to be an optimal solution, producing too many false negatives.

B. Non-Merger Interlock Enforcement Under Section 8

Apart from interlocks that arise in connection with mergers, however, competitive concerns can also arise in situations that do not involve reviewable transactions, such as when corporations expand into new markets and lines of business. The FTC's investigation regarding a management interlock between Apple and Google provides a good example of this. When the FTC began its inquiry in 2009, Apple and Google shared two directors: Eric Schmidt, who was CEO of Google, and Arthur Levinson, former CEO of Genentech. Dr. Schmidt became an Apple director in August 2006,[123] at a time when Apple and Google were working to integrate various Google technologies, such as search and Google Maps, into Apple's iPhone, then under development. Following Apple's announcement of the iPhone in January 2007, however, Google unveiled its Android mobile device platform in November of that year and the two companies became major competitors in the smart phone market.[124] Indeed, Apple's fortunes were increasingly seen as tied to mobile devices, and Google viewed the mobile arena as a strategic opportunity for expanding its advertising services. It was this competitive overlap that presumably became the source of the FTC's concerns,[125] and ultimately led to Dr. Schmidt

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[121] *See supra* at n.18-19 and accompanying text.

[122] Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 855. For a discussion of merger reviews in the E.U. that also involved minority ownership links and management interlocks, *see id*., at 845-46.

[123] *See* "Google CEO Dr. Eric Schmidt Joins Apple's Board of Directors," PR Newswire (August 29, 2006), available at < http://www.prnewswire.com/news-releases/google-ceo-dr-eric-schmidt-joins-apples-board-of-directors-56271542.html>.

[124] In addition, Apple's Safari web browser competed with Google's Chrome, and Google Internet properties, such as YouTube, and Apple's iTunes became rival distribution vehicles for music and videos. *See* "Board Ties at Apple and Google Are Scrutinized," NEW YORK TIMES (May 4, 2009), available at http://www.nytimes.com/2009/05/05/technology/companies/05apple.html>.

[125] *Id*.

resignation from Apple's board in August 2009,[126] and Mr. Levinson's from Google's in October 2009.[127]

Again, in jurisdictions like Chile that do not follow the U.S. model, it might be possible to reach interlocks arising outside of the merger context under the substantive competition laws.[128] However, without section 8 as an available option, it does not seem likely that resolution of the competitive concerns arising from the Google-Apple would have been possible, at least not at such an early stage or in an equally efficient manner. The FTC was able to intervene at an early stage, *before* the interlock presumably could have resulted in any actual violation of the substantive laws or caused any anticompetitive harm. That is precisely what section 8 is intended to prevent. Moreover, the FTC was able to address the interlock without the need to satisfy the more rigorous requirements of a substantive violation—a far more costly proposition for the agency.[129] Under an alternative model that relies on

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[126] Fed. Trade Comm'n, "Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board" (Aug. 3, 2009), available at <http://www.ftc.gov/opa/2009/08/googlestmt.shtm>.

Given the increased rivalry between Apple and Google in mobile smart phones, it is reasonable to ask whether Dr. Schmidt would have been able to continue in his role on Apple's board even without an FTC investigation. *See* "Why Google's Schmidt Resigned from Apple's Board," TIME (August 3, 2009) ("In a shockingly unsurprising move, Google CEO Eric Schmidt resigned from Apple Inc.'s board of directors today. This was inevitable, since both companies are staking their future growth on the explosion in mobile computing."), available at <http://www.time.com/time/business/article/0,8599,1914350,00.html>.

[127] Fed. Trade Comm'n, "Statement of Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board" (Oct. 12, 2009), available at <http://www.ftc.gov/opa/2009/10/google.shtml>.

[128] Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 855-58 (discussing the availability of Art. 101 TFEU as a potential mechanism for intervening *ex post* to deal with information exchanges arising from management interlocks and other minority ownership links).

[129] Another similar FTC investigation may have been responsible for the announcement in March 2010 that famed venture capitalist John Doerr would be resigning from Amazon's board of directors later that year. At the time of the announcement, Mr. Doerr had been a director of both Amazon and Google. According to the New York Times, "Mr. Doerr's decision was prompted by a Federal Trade Commission inquiry" into ties between the two companies.

As in the case involving Apple, it was Google's evolving competitive relationship with Amazon that reportedly drew the attention of the FTC:

> While Amazon remains primarily an e-commerce company and Google an online advertising giant, competition between the two companies has intensified in recent years. Both companies offer so-called cloud computing services to start-up companies and others. What's more, the two are quickly

higher-stakes litigation, the benefits of section 8's "administrative" enforcement might not materialize.

VI. THE LOW COST, ADMINISTRABLE APPROACH OF SECTION 8 PROVIDES A SUITABLE TEMPLATE FOR ECONOMIES LIKE CHILE'S

As described above, section 8 is a "limited" provision, and one that is largely prophylactic in nature. The statute identifies an area of potential competitive and concern—management interlocks—and establishes a ban on the practice, *but only* as to those interlocks involving competing corporations, which carry the greatest anticompetitive risks. Rather than inquire about the competitive effects of an interlock by considering whether a combination of the companies involved would violate section 7 (as some defendants had argued), the courts in *Sears* and *Protectoseal* opted for a far more administrable *per se* approach. But the statute itself then only applies to interlocks between competitors that exceed a certain threshold in terms of "capital, surplus, and undivided profits," thereby eliminating from coverage interlocks that are unlikely to have market wide anticompetitive effects. Moreover, the additional exemptions enacted in 1990, which exclude from Section 8 interlocks that are likely to have *de minimus* competitive effects, further refine the statute's scope.

The sanctions for a violation of section 8 are also, as a practical matter, "limited." As mentioned earlier, the typical remedy involves the resignation of a director from one of the two corporations, or sometimes the divestiture of a business line so the firms are no longer competitors, and thus no longer subject to section 8's prohibitions.[130] And while private plaintiffs theoretically could recover damages, there do not appear to be any instances in which that has occurred.[131] Thus, given the relatively low stakes involved, combined with the general clarity of

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> becoming rivals in the competitive electronic books market[.] …

See "F.T.C. Is Said to Have Looked Into Amazon-Google Ties," NEW YORK TIMES (April 1, 2010), available at <http://bits.blogs.nytimes.com/2010/04/01/f-t-c-is-said-to-have-looked-into-amazon-google-ties/>.

To the extent Mr. Doerr's departure was the result of an FTC investigation, it—like the resolution of the Apple and Google interlocks—was accomplished without the need for litigation. Similarly, any investigation was not initiated in connection with a reviewable merger or similar transaction, but in response to concerns that arose as Google and Amazon's business came into competition with one another. Given the further intensification of competition between Google and Amazon since 2010—in electronic books and other digital content, including music and movies—this presumptive example further illustrates the importance of Section 8's prophylactic nature and the flexibility it provides for regulators to respond to developing concerns in emerging markets.

[130] *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 131.

[131] *See* ANTITRUST LAW DEVELOPMENTS (Sixth) at 430.

the *per se* rule, enforcement of section 8 has tended to follow the "amicable" path described by Judge Easterbrook—"either avoiding litigation or entering consent decrees contemporaneous with a suit's initiation."[132] Indeed, more than 30 years have elapsed since the last *contested* Section 8 case brought by the government, notwithstanding continued enforcement efforts described in the prior section.

The U.S. model appears to be capable of satisfying the criteria described above in section III, and thus would be reasonable approach for an economy like Chile's. An absolute ban on those interlocks involving horizontal competitors—whether imposed by an amendment to the Competition Act or adopted through case law by the TDLC[133]—takes seriously the notion that these carry with them serious risks to competition, particularly in a small economy. It perhaps sweeps more broadly than a more flexible, case-by-case analysis would, and is likely to prohibit some instances of interlocks that might be socially beneficial or otherwise benign. However, the experience with section 8 shows that the number of false positives can be limited by including bright line *de minimus* exceptions that are properly tailored to their environment. Finally, the U.S. model allows for enforcement to be carried out at relatively low costs.

Certainly, implementing a bright line in an imprecise manner—either too broadly or narrowly—can create problems from corporate governance and competition perspectives.[134] For instance, an overly-broad application could interfere "unduly with selection of executive talent and deprive[] non-competing

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[132] *Crowley*, No. 10-3285, Slip. Op. at 8.

[133] Chilean competition policy generally emphasizes market power, and Article 3(a) of DL Nº 211 speaks in terms of horizontal agreements or concerted practices that confer market power on the parties. Although *de minimis* or *per se* rules have not yet been explicitly recognized in Chile, the Supreme Court seems to have made a move towards allowing something approximating a *per se* approach in a recent joint price fixing decision involving tourism operators. *See FNE v. Explora*, Ruling CS N°113/2012 (Sept. 7, 2012). The Supreme Court held in that case that even when a collusive agreement is not capable of influencing prices or quantities, it could still violate the Competition Act. Future cases should elaborate on this point.

[134] *See* Gerber, "Enabling Interlock Benefits," *supra* note 4, at 125-27; *see also id.* at 108-09 (Section 8's proscription of interlocking directorates "may in some instances be too broad, restricting corporations that do not meaningfully compete, and in other instances be too narrow, permitting interlocks between corporations that do meaningfully compete.").

Gerber points to *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997), and *U.S. v. Oracle Corp.*, 331 F. Supp.2d 1098 (N.D. Cal. 2004)—cases decided under Section 7 of the Clayton Act—as examples that illustrate how a non-quantitative approach to identify "competitors" under Section 8 can be, respectively, too broad or too narrow. In *Staples*, for instance, the court found, based on quantitative econometric evidence, that office supplies sold by office supply superstores constituted a separate product market from identical products sold in other types of stores. A "qualitative" analysis, in contrast, might have identified a broader market.

corporations of the numerous innocuous (not anti-competitive) benefits that interlocks confer."[135] Conversely, an under-inclusive application of the statue might not reach all management interlocks between corporations that actually are meaningful competitors, "such that the statute's intent to prevent collusion is not fully realized."[136] In devising administrable rules, however, it is inevitable that business practices that "*sometimes* produce benefits" sometimes will be prohibited.[137] As noted above, however, the proper focus is whether on balance the rule is cost effective. The search for greater precision generally leads to higher enforcement costs,[138] which may or may not be offset by the social benefits of allowing competitively beneficial conduct that otherwise would have been proscribed under the less precise, but more administrable rule.[139]

When the U.S. Congress considered—and rejected—a proposal that would have prohibited interlocks only when a merger between the interlocked firms otherwise would violate section 7 of the Clayton Act, similar to the Japanese model, it recognized that such a rule would increase enforcement costs substantially, rendering enforcement uneconomical: "We would be most reluctant to expend such resources to determine whether a interlock should be challenged. An interlock does not pose the same degree of anticompetitive potential as a merger…. We favor bright line tests for prophylactic rules."[140] There are undoubtedly some questions that arise around the edges under the U.S. approach, such as whether or not certain configurations of interlocks are implicated by the *per se* ban—an issue that might be even more problematic in Chile with its economic groups that have interests in wide swaths of the economy. Nevertheless, as argued above, the analysis is substantially less complex than under an "effects" standard and remains consistent with the desired bright line approach.

It might be possible to further refine the section 8 analysis while remaining faithful to the *per se* approach courts have followed. Professor Waller, however,

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[135] Gerber, "Enabling Interlock Benefits," *supra* note 4, at 109.

[136] *Id*.

[137] *Leegin Creative Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 915 (2007) (Breyer, J., dissenting) (emphasis added).

[138] In the U.S., for instance, the practical difference between litigating a bright-line *per se* case compared to a matter decided under the "rule of reason" is significant. As former FTC Chairman Robert Pitofsky has commented, "rule of reason cases often take years to litigate[,] are extremely expensive" and are "very difficult for a plaintiff (either the government or a private party) to win." Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, "71 GEO. L.J. 1487, 1489 (1983).

[139] For an illuminating discussion about how the assignment of burdens of proof and the standards for satisfying those burdens can play an important role in enforcement of the competition laws (in the context of exclusionary discounts), *see* Robert H. Lande, "Should Predatory Pricing Rules Immunize Exclusionary Discounts?," 2006 UTAH L. REV. 879 (2006).

[140] H.R. REP. No. 101-483, at 6.

convincingly notes that, in the context of interlocks, a "clear 'no'" might be better than a "maybe," especially when viewed *ex ante*.[141] He further remarks that "further precision would probably come at such a high cost that *the incremental gains would not be worthwhile for either competition policy or corporate governance*."[142] Those costs include not only increased expenses for the government in enforcing the prohibition in specific cases, but also social costs generally if the prophylactic nature of the statute is undermined and an increase in anticompetitive management interlocks results in increased instances of unilateral or coordinated conduct that harms consumers. Moreover, to the extent that specific interlocks that do not fall under the bright-line ban nevertheless raise serious enough competitive concerns so as to infringe the general prohibitions of the competition laws, there appears to be no reason those could not be independently prosecuted in specific cases. Based on the discussion above, Professor Waller's conclusion appears to be a reasonable one. Given the limited nature of a *per se* ban, with appropriately designed *de minimus* exceptions, further refinements to such an easily administrable approach probably are not justifiable on a cost-benefit basis.

Moreover, it should be recognized that the costs associated with *not* adopting some kind of reasonable measure to deal with interlocks involving competitors—but instead waiting for a violation of the substantive competition laws—can be high. Former FTC Commissioner Thomas J. Rosch, in a 2009 speech about section 8 enforcement delivered to an audience in Hong Kong, commented on the risk of competitor interlocks, and then went on to caution that "[t]hese concerns have, if anything, *only grown in recent years as the government's burden of investigating and litigating price fixing cases has multiplied*."[143] Those burdens are the result, at least in part, of massive quantities of electronic communications and other documents that oftentimes must be reviewed and analyzed in connection with a complex antitrust case. They also include the social costs of *undetected* anticompetitive conduct that is not avoided by means of a reasonable *ex ante* prohibition. Thus, while the trend in U.S. antitrust law has moved away from *per se* rules, Commissioner Rosch suggested that Hong Kong—where firms were linked together even more tightly than their U.S. counterparts and the number of overlapping directors tended to be higher—"may wish to consider emulating the United States."[144]

In jurisdictions like Chile, which do not explicitly address management interlocks in their respective laws, it may still be possible to challenge particular interlocks under the general competition laws, or to analyze their effects during the course of a merger review.[145] As discussed above, however, interlocks that raise

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[141] Waller, "Corporate Governance," *supra* note 4, at 884.

[142] *Id*. (emphasis added).

[143] Rosch, "Terra Incognita," *supra* note 2, at 16.

[144] *Id*. at 3.

[145] *See* Gabrielsen *et al*, "Rethinking Minority Share Ownership," *supra* note 6, at 855-58.

competitive concerns can arise independently of a merger or other reviewable transaction, and the general competition laws might not arise until actual anticompetitive harm has occurred. Moreover, without a bright line prohibition, the costs of dealing with problematic interlocks is likely to be higher than in the U.S., where the certainty of the rule generally leads to "amicable" resolutions of those concerns. In short, the section 8 approach is far preferable to the current framework for addressing competitor interlocks in Chile—and indeed, appears to be an optimum solution overall.

VII. CONCLUSION

Section 8 was intended "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[146] The *per se* test applied by the courts allows for the statute to serve its prophylactic purpose, at the same time the *de minimus* exemptions exclude interlocks unlikely to have an adverse effect on competition. Although section 8 may be over- or under-inclusive in certain circumstances, and does not always clearly delineate whether firms are competitors, the U.S. experience with management interlocks shows that "real utility" can be gained when the legislature, the courts and commentators "thoughtfully address" two legal spheres—corporate law and competition law—"in a unified manner."[147]

The recent study conducted for the FNE on the Chilean health care market provides examples of management interlocks, both direct (with common directors between different private health insurers and private hospitals) and indirect (for example, directors of the insurers participate in two or more private hospitals, and vice versa), in an important segment of the economy.[148] While simply transplanting existing competition law approaches across jurisdictions to deal with these issues is not always a recommended exercise, in the case of management interlocks, the relevant considerations discussed above argue point in favor of adopting a U.S.-style approach. That model, if implemented in Chile, would certainly require some adjustments to deal with certain peculiarities in the market—such as when an interlock should be considered to involve "competitors" in the context of the country's sprawling economic groups. And it should not be expected that such a measure would resolve the myriad enforcement issues associated with other types of structural ties between actual and potential competitors. Nevertheless, a limited ban on competitor interlocks—whether by legislation or adopted through case law by the TDLC—would be a good start, and a relatively low cost one at that.

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[146] *Sears*, 111 F. Supp. at 616.

[147] Waller, "Corporate Governance," *supra* note 4, at 858.

[148] *See, generally*, "Mercado de la Salud Privada en Chile," *supra* note 3.

APPENDIX A

15 USC § 19 - Interlocking Directorates and Officers

(a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are—

(A) engaged in whole or in part in commerce; and

(B) 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;

if each of the corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection.

(2) Notwithstanding the provisions of paragraph (1), simultaneous service as a director or officer in any two corporations shall not be prohibited by this section if—

(A) the competitive sales of either corporation are less than $1,000,000, as adjusted pursuant to paragraph (5) of this subsection;

(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.

For purposes of this paragraph, "competitive sales" means 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. For the purposes of this paragraph, "total sales" means the gross revenues for all products and services sold by one corporation over that corporation's last completed fiscal year.

(3) The eligibility of a director or officer under the provisions of paragraph (1) shall be determined by the capital, surplus and undivided profits, exclusive of dividends declared but not paid to stockholders, of each corporation at the end of that corporation's last completed fiscal year.

(4) For purposes of this section, the term "officer" means an officer elected or chosen by the Board of Directors.

(5) For each fiscal year commencing after September 30, 1990, the $10,000,000 and $1,000,000 thresholds in this subsection shall be increased (or decreased) as of

October 1 each year by an amount equal to the percentage increase (or decrease) in the gross national product, as determined by the Department of Commerce or its successor, for the year then ended over the level so established for the year ending September 30, 1989. As soon as practicable, but not later than January 31 of each year, the Federal Trade Commission shall publish the adjusted amounts required by this paragraph.

(b) When any person elected or chosen as a director or officer of any corporation subject to the provisions hereof is eligible at the time of his election or selection to act for such corporation in such capacity, his eligibility to act in such capacity shall not be affected by any of the provisions hereof by reason of any change in the capital, surplus and undivided profits, or affairs of such corporation from whatever cause, until the expiration of one year from the date on which the event causing ineligibility occurred.