U.S. Department of Justice

Antitrust Division

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Re: *Fiscalía Nacional Económica v. Juan José Hurtado Vicuña, et al.*
Tribunal de Defensa de la Libre Competencia, Case No. 437-21

Dear Mr. Grunberg:

In 2016, Chile's Competition Act was amended to prohibit interlocking directorates. DL 211 Article 3(d). As we understand it, that prohibition is, in large part, based on the analogous U.S. prohibition, Section 8 of the Clayton Act, 15 U.S.C. § 19.[1] At your request, we discuss several aspects of Section 8 jurisprudence in the United States that may be relevant to the Supreme Court of Chile's consideration of DL 211 Article 3(d) in the appeal of the above-referenced case, in which the Tribunal de Defensa de la Libre Competencia ("TDLC") ruled that an interlocking directorate was unlawful.[2] Preventing and unwinding interlocking directorates has been and remains an enforcement priority in the United States in recent years. *See, e.g.*, Dep't of Justice, *Tencent Removes Two Directors from Epic Games and Relinquishes Its Right to Unilaterally Appoint Directors or Observers in Response to Justice Department Scrutiny* (Dec. 18, 2024), https://www.justice.gov/archives/opa/pr/tencent-removes-two-

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[1] *Fiscalía Nacional Económica v. Juan José Hurtado Vicuña, et al.*, Tribunal de Defensa de la Libre Competencia Case No. 437-21, Sentencia No. 202/2025 (Apr. 14, 2025) ("Judgement") ¶ 55; Jacobs, *COMBATTING ANTICOMPETITIVE INTERLOCKINGS: Section 8 of the Clayton Act as a Template for Chile and Similar Emerging Economies*, Fiscalía Nacional Económica (Oct. 24, 2013), https://www.fne.gob.cl/wp-content/uploads/2013/11/Clayton-Act-Section-8.pdf. Chile's prohibition on interlocking directorates does not contain Section 8's exception for interlocking directorates on corporations that are "banks, banking associations, and trust companies." 15 U.S.C. § 19(a)(1).

[2] On June 6, 2025, the TDLC in another matter fined Banco de Chile and Consorcio over $5 million for an interlocking directorate violation. *Fiscalía Nacional Económica v. Hernán Büchi Buc, et al.*, TDLC Case No. 436-21, Sentencia No. 203/2025. The interlocking director, Hernán Büchi Buc, and another company, Falabella, previously settled and agreed to pay $190,000 and $1.5 million, respectively. Fiscalía Nacional Ecónomica, *Competition Tribunal fines Banco de Chile and Consorcio over USD 5 million in new interlocking ruling* (June 9, 2025), https://www.fne.gob.cl/en/tdlc-condena-a-banco-de-chile-y-consorcio-con-multas-por-4-950-millones-en-nueva-sentencia-por-interlocking/. We understand the Supreme Court is expected to have a joint hearing on both cases.

directors-epic-games-and-relinquishes-its-right-unilaterally-appoint; Statement of Interest of the United States and Fed. Trade Comm'n, *Musk, et al. v. Altman, et al.*, Case No. 24-CV-4722-YGR (N.D. Cal. Jan. 10, 2025), Dkt. No. 87, https://www.justice.gov/atr/media/1383966/dl?inline; Khushita Vasant, *US DOJ 'very committed' to enforcing Clayton Act Section 8, Kallay says*, MLEX (June 25, 2025), https://content.mlex.com/#/content/1663853/us-doj-very-committed-to-enforcing-clayton-act-section-8-kallay-says?referrer=search_linkclick.

I. Background

Chile's National Economic Prosecutor's Office (Fiscalía Nacional Ecónomica, "FNE") sued Juan José Hurtado Vicuña, Consorcio Financiero S.A. ("Consorcio"), and Larraín Vial SpA ("Larraín Vial"), alleging that Mr. Hurtado simultaneously served as a board member of Consorcio and Larraín Vial in violation of Chile's Competition Act's prohibition of interlocking directorates. *FNE v. Juan José Hurtado Vicuña, et al.*, TDLC Case No. 437-21, Requerimiento (Dec. 27, 2021) ("Complaint") ¶¶ 3-5.[3] The FNE alleged that Consorcio and Larraín Vial were competitors because they both controlled subsidiaries who competed in the market for securities brokerage services and other services provided by broker dealers. Complaint ¶¶ 6-12. Consorcio is the parent company of a corporate group engaged in various financial and insurance activities. Complaint ¶ 6. One of its subsidiaries, Consorcio Corredores de Bolsa S.A. ("Consorcio Corredores"), which is wholly owned by Consorcio through other related entities, provides securities brokerage services and other services supplied by broker dealers. Complaint ¶ 7. Larraín Vial is the parent company of a corporate group engaged in financial services. Complaint ¶ 8. It wholly owns, directly and through another subsidiary, Larraín Vial S.A. Corredora de Bolsa ("Larraín Vial Corredora"), which provides securities brokerage services and other services supplied by broker dealers. *Id.*

In the country's first-ever ruling on interlocking directorates, the TDLC ruled that Defendants violated Chile's Competition Act's prohibition of interlocking directorates. FNE, *Antitrust Court Fines CLP $2.5 Billion in Landmark Interlocking Directorates Case Involving Competing Securities Brokerage Firms* (Apr. 16, 2025), https://www.fne.gob.cl/en/tdlc-aplica-multas-por-2-500-millones-a-juan-hurtado-vicuna-consorcio-y-larrain-vial-en-primera-sentencia-por-interlocking/. The TDLC imposed fines of approximately $1 million on Consorcio, $1.6 million on Larraín Vial, and $65,000 on Mr. Hurtado. *Id.*

The TDLC ruled that interlocking directorates are a per se violation of the Competition Act, meaning they are unlawful without the need to demonstrate anticompetitive effects. Judgment ¶ 37. The TDLC also ruled that interlocking can occur through parent companies of subsidiary firms who compete against each other, with the relevant inquiry depending on whether each parent company and its subsidiaries form a single economic unit such that the competition between the subsidiaries can be imputed to the parent companies. Judgment ¶¶ 50, 59, 192. That inquiry, in turn, looks to whether each parent company sufficiently controlled the relevant business of its subsidiaries. Judgment ¶¶ 61-111. Applying this standard, the TDLC

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[3] Our recitation of the facts is based on our review of the FNE's Complaint and the TDLC's Judgment, which are publicly available at https://www.fne.gob.cl/wp-content/uploads/2021/12/Requerimiento-al-TDLC-JHV.pdf and https://www.fne.gob.cl/wp-content/uploads/2025/04/Sentencia-202-Interlocking.pdf, respectively.

found that Consorcio should be treated as a single firm with its subsidiary and that Larraín Vial should be treated as a single firm with its subsidiary. *Id.* The court therefore found that Consorcio and Larraín Vial effectively competed in the provision of securities brokerage services and other services provided by broker dealers. Judgment ¶¶ 192-98.

II. Discussion

We discuss three aspects of U.S. Section 8 jurisprudence that may be relevant to the Supreme Court's analysis in this case. *First*, U.S. courts interpret Section 8 broadly in light of its purpose of prohibiting interlocking directorates. *Second*, U.S. courts have found that interlocking directorates would be per se unlawful when (i) a director serves on the board of multiple companies that compete through subsidiaries and (ii) the parent sufficiently controls its subsidiary. *Third*, where the competition of a subsidiary is imputed to its parent, this would be a "direct" interlock subject to Section 8's per se rule.

A. Courts in the United States interpret Section 8 broadly in light of its purpose.

Section 8 of the Clayton Act provides that "[n]o person shall, at the same time, serve as a director or officer in any two corporations . . . that are . . . competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." 15 U.S.C. § 19. Section 8 makes interlocking directorates per se unlawful. *TRW, Inc. v. FTC*, 647 F.2d 942, 948 (9th Cir. 1981).

The statute's "prophylactic purpose was 'to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.'" *SCM Corp. v. FTC*, 565 F.2d 807, 811 (2d Cir. 1977) (quoting *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)). Put another way, Section 8 "prevent[s] restraints on competition before they materialize[] by outlawing a particular practice thought to facilitate such restraints." *TRW*, 647 F.2d at 948. For example, preventing interlocking directorates helps "avoid the opportunity for the coordination of business decisions by competitors and . . . the exchange of commercially sensitive information by competitors." *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991). Such conduct can facilitate unreasonable restraints of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) or help a monopolist maintain and entrench its power in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). In this way, Section 8 reinforces the federal antitrust laws more generally. *Sears*, 111 F. Supp. at 616 ("Section 8 was but one of a series of measures which finally emerged as the Clayton Act, all intended to strengthen the Sherman Act . . . ."). U.S. courts have therefore consistently supported a "broad" and not "undu[ly] literal[]" reading of Section 8 in view of the prophylactic aim of the statute. *SCM*, 565 F.2d at 811.

B. Interlocking directorates involving parent-subsidiary relationships violate Section 8 when the parent sufficiently controls the relevant business of the subsidiary.

U.S. courts commonly hold that interlocking directors who serve on the boards of multiple companies that compete through subsidiaries violate Section 8 "where the parent closely controls or dictates the policies of its subsidiary." *Square D*, 760 F. Supp. at 367-68. In *United States v.*

Crocker National Corp., the court held that "[w]hether for the purposes of Section 8 the business of a subsidiary is to be attributed to a parent in determining if the parent competes with another corporation with which it is interlocked, turns upon the extent of the control exercised by the parent over the subsidiary's business." 656 F.2d 428, 450 (9th Cir. 1981), *rev'd on other grounds, Bankamerica Corp. v. United States*, 462 U.S. 122 (1983); *see also Crouse-Hinds Co. v. InterNorth, Inc.*, 518 F. Supp. 416, 448 n.112 (N.D.N.Y. 1980) ("[A] central question is to what extent the parent company controls its subsidiary."); *cf. Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978) (finding no violation of Section 8 where interlocked parent corporations had competing subsidiaries, but reserving whether the statute would cover a "parent corporation that closely controls and dictates the policies of its subsidiary"). As a leading treatise on U.S. antitrust law explained, the inquiry boils down to whether "one of the interlocked companies, although not itself a competitor, is nevertheless so closely connected in actual operations with that competitor as to be, in effect, the direct competitor of the other interlocked corporation." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1302b (5th ed. 2022).

U.S. courts have further recognized that any interpretation of Section 8 to the contrary—*i.e.* as if the competition of a subsidiary cannot be imputed to its parent company—would run afoul of the statute's prophylactic purpose and potentially permit companies to avoid liability by manipulating the corporate form. For instance, *Crocker* explained that "to interpret Section 8 as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a 'competitor' within the meaning of Section 8 would assume that Congress intended to permit such a simple and obvious means of avoidance as to render the statute meaningless, and would ignore the Supreme Court's admonition that the antitrust laws are 'aimed at substance rather than form.'" 656 F.2d at 450 (citing *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947)). Areeda and Hovenkamp similarly contend that "a blanket rule allowing all interlocks involving parents or subsidiaries could do violence to §8's policies against information exchanges, interest conflicts, and opportunities for joint action." ¶ 1302b.

There is limited precedent on when a parent company exercises sufficient control over its subsidiary for Section 8 purposes. However, general U.S. antitrust and corporate governance principles support looking to factors such as "whether the subsidiary's business could ordinarily be expected to be the subject of the parent's boardroom deliberations." Areeda & Hovenkamp, ¶ 1302b. For example, in *In re Borg-Warner Corp.*, two directors of Bosch GmbH were also directors of Borg-Warner, which competed with Bosch GmbH's subsidiary, Bosch U.S. 1983 WL 486332, *43-47 (F.T.C. 1983), *rev'd on other grounds*, *Borg-Warner Corp. v. FTC*, 746 F. 2d 108 (2d Cir. 1984).[4] In concluding that Bosch GmbH sufficiently controlled Bosch U.S., the Federal Trade Commission ("FTC") relied on the following factual findings, among others: Bosch GmbH wholly owned Bosch U.S., both directly and through holding companies; the president and CEO of Bosch U.S. reported directly to the Bosch U.S. board, which represented shareholder interests, and Bosch GmbH was the majority shareholder of Bosch U.S.; Bosch GmbH and its subsidiaries nominated and elected directors to Bosch U.S.; and Bosch U.S. submitted reports concerning its forecasts, operating results, balance sheets, and business plans

[4] The Federal Trade Commission's modified final order was reversed on appeal because the Commission failed to show "a cognizable danger of recurrent violation" necessary for injunctive relief. *Borg-Warner Corp. v. FTC*, 746 F. 2d 108, 111 (2d Cir. 1984).

to Bosch GmbH. *Id.* at *50-52; *see also United States v. Cleveland Tr. Co.*, 392 F. Supp. 699, 712 (N.D. Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975) (indicating that there may be "a strong case for holding the directorships unlawful" where "the major policies of the subsidiaries are dictated by the parents" (quoting Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L.J. 1266, 1268 n.11 (1950))).

C. Interlocking directorates for which the competition of a subsidiary is imputed to its parent company are direct interlocks that are per se unlawful.

Defendants previously argued that this case involved an indirect interlock, which either is not unlawful under Chile's Competition Act, or is subject to the rule of reason instead of the per se rule. Judgment ¶¶ 24-26, 182. There is little U.S. caselaw directly on point, but that which exists suggests that interlocking directorates relying on parent-subsidiary relationships are direct, not indirect, interlocks. For instance, in *In re Borg-Warner*, the defendants argued—similar to Defendants here—that Section 8 deals only with direct interlocks and that the case involved an indirect interlock. 1983 WL 486332, at *51. The FTC disagreed, concluding that parent-subsidiary interlocks "are more accurately designated as direct interlocks between competing corporations" and noted that it was unaware of any authority that "include parent-subsidiary relationships among the lists of 'indirect' interlocks." *Id.* Likewise, in *Reading International, Inc. v. Oaktree Capital Management LLC*, the defendants argued that a corporation cannot be liable under Section 8 when its agents serve as directors of competing corporations because, they claimed, the statute does not cover indirect interlocks. 317 F. Supp. 2d 301, 326 (S.D.N.Y. 2003). While noting that the argument "divert[ed] attention from the language of the statute," which does not use the terms "direct" and "indirect," the court ultimately concluded that the plaintiffs did not allege an "indirect" interlock because they contended that the same entity served as a director of competing corporations through its agents. *Id.* at 326-31; *cf. id.* at 328 (noting that "the few courts that have approached this question have either reserved judgment on factual grounds or adopted a more expansive reading of section 8").[5] And the Areeda and Hovenkamp treatise indicates that interlocks where the competition of a subsidiary is imputed onto a parent are direct, discussing parent-subsidiary interlocks in section titled "Horizontal Interlocks," ¶ 1302b, which is separate and different from its discussion of indirect interlocks, ¶ 1304 (examples include a company with different employees on the boards of two companies that compete with each other or two competitors each with a director on the board of a third, non-competitor company).[6]

Thus, once a court determines that the parent company controls the relevant business and policies of its subsidiary, an interlocking director effectively serves on the boards of two competing companies and violates Section 8, subject to the other statutory requirements. *See TRW*, 647 F.2d at 948 (interlocking directorates that violate Section 8 are per se unlawful).

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[5] In attempting to distinguish another case, the defendants in *Reading* conceded that cases "involv[ing] the same individuals serving on the boards of two competitors" are "'direct' interlock case[s]." *Reading Int'l*, 317 F. Supp. 2d at 329.

[6] Because this case does not appear to raise an indirect interlock, we do not discuss here whether indirect interlocks are covered by Section 8.

III. Conclusion

We hope this discussion of Section 8 of the Clayton Act is useful to the Chile Supreme Court's consideration of the appeal in this case.

Sincerely,

Abigail Slater

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