TRANSATLANTIC PERSPECTIVES ON INTERLOCKING DIRECTORATES

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

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

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

I. ANTI-COMPETITIVE EFFECTS OF INTERLOCKING DIRECTORATES

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

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

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

4 Apart from Italy in the financial sector since 2011.

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

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

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

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

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

10 n 3.

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

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

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

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

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

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

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

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

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

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

15 Buch-Hansen (n9).

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

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

18 UK OFT (n11) 60-63.

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

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

21 EU Merger Control Regulation, Recital 20.

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

A. EU Merger Control

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

B. Article 101 TFEU

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

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

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22 *Ibid.* art 2.

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

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

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

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

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

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

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

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

C. Article 102 TFEU

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

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

III. INTERLOCKING DIRECTORATES IN OTHER JURISDICTIONS

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

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

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

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

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

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

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

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

36 15 USC §19 (a)(1) (A) and (B).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Interlocking Directorates in EU Member States

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

IV. CONCLUDING REMARKS

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

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

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

50 Nili (n 8).

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

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

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

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