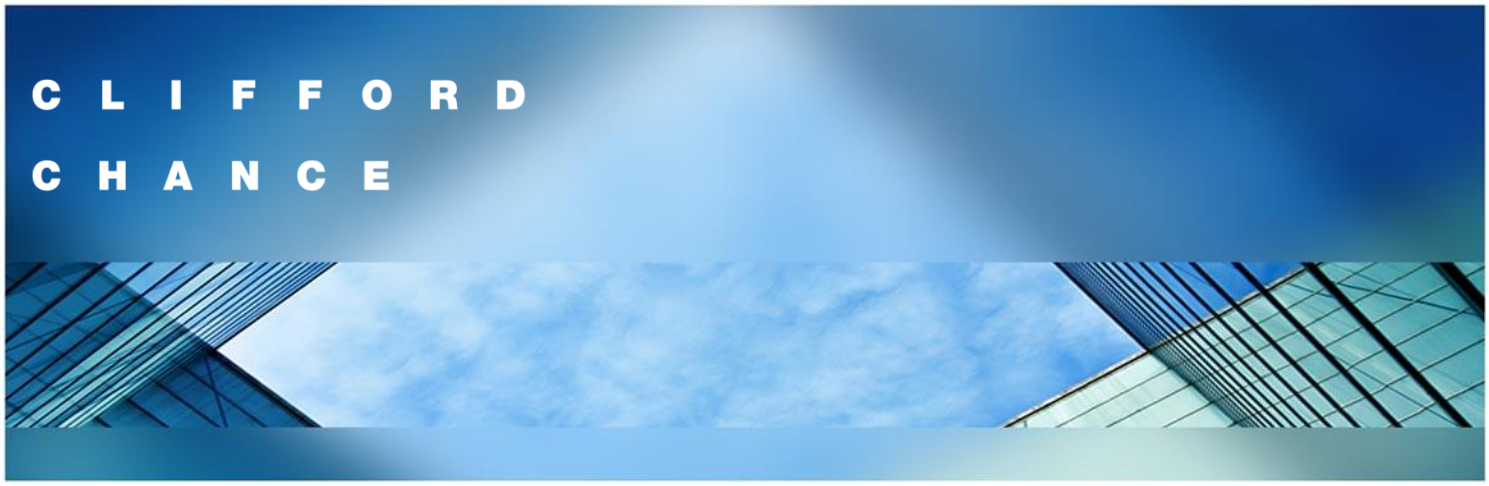

INTERLOCKING DIRECTORATES IN AMERICAS

Following the recent announcements in the US relating to enforcement against interlocking directorates under Section 8 of the Clayton Act,[1] we outline regulations and risks in other jurisdictions in Central America and South America that relate to interlocking directorates.

ARGENTINA

In Argentina, Section 3(l) of the Antitrust Law No. 27.442 states that "any individual having relevant executive positions or as directors in two or more competitor companies" could qualify as a restriction on competition. Based on that, interlocking directorates could be considered anticompetitive conduct in Argentina if the competition authority determines that such positioning potentially harms the general public's economic interests.

It should be also noted that Section 3(l) refers to participation in boards of directors and other positions that allow for the coordination of actions between competing companies. Argentina's antitrust law does not provide for any exceptions to this prohibition. Nor does Argentina's antitrust law require the individual to be elected to a board of directors; instead, the individual need only hold an executive or equivalent position.

Despite the above, we have not identified any precedent in which Argentina's competition authority has analyzed this topic in depth. In one case, the claimant argued that collusion occurred due to an alleged swapping of executive personnel in the container terminal market, but the evidence in that case ultimately demonstrated an absence of swapping and instead aggressive headhunting skills in a market with a limited executive workforce.

BRAZIL

Brazil does not have an antitrust regulation that directly applies to interlocking directorates. However, Brazilian Federal Law No. 1.521/52 ("crimes against people's economy") states that "performing direction, administration or

[1] For additional information on Section 8 of the Clayton Act and the recent announcements in the United States, please refer to our prior Client Alert, *Seven, Eight, Lay Them Straight: Seven Directors Resign from Corporate Boards Over Section 8 Interlocking Directorate Issues.* https://www.cliffordchance.com/briefings/2022/10/seven--eight--lay-them-straight--seven-directors-resign-from-cor.html

management roles, in more than one company operating in the same branch of industry or commerce, with the purpose of preventing or hindering competition" is a crime, leading to a penalty of imprisonment of 2 to 10 years and a fine. We are not aware of any criminal investigation or conviction under this law. Conviction under this law would require proof of the individual's specific intent to prevent or hinder competition.

Separately, it is worth noting the following:

- The Brazilian antitrust authority ("CADE"), requests in its standard merger filing form a list of all members of the management bodies of an entity that are also members of the management or supervisory boards of other companies operating in the same industry. This request can be based on Brazil's CNAE codes, similar to NACE codes in the EU and NAICS codes in the United States. CADE will use this list to determine whether the companies are under common control or whether they may influence each other, and CADE may also undertake analysis to determine the companies' combined market shares.
- As for anticompetitive conduct, Brazilian antitrust law bars any acts, regardless of intent, that may "limit, distort or in any way impair free competition," even if such a result is not achieved. As a result, it is theoretically possible that a transaction involving interlocking directorates could be deemed an infraction if it results or has the potential to result in harm to competition. However, we are not aware of any specific investigation along these lines; robust evidence would need to be collected by CADE to support such a claim.

Nonetheless, a primary concern of CADE continues to be the increased risk of collusion between companies and potential access to competitively sensitive information. If CADE determines during the merger review process that there are risks to competition, it may require remedies, such as the creation of a "Chinese wall" to limit coordination and information sharing between the companies.

A company could also bring a claim to CADE if it has concerns that a minority investor could use its position on the board of directors to interfere with competition.

Ultimately, companies operating in Brazil should remain alert and proactive with regard to interlocking directorate issues. In the context of joint ventures, minority shareholding, or other transactions that could lead to interlocking directorates, it may be necessary to create internal agreements that mitigate concerns (e.g., agreements placing limits on the role of those individuals involved in both companies).

CHILE

The Chilean Competition Act ("DL211") identifies the simultaneous participation of an individual in executive or director positions in two or more companies as an act that prevents, restricts, or hinders competition, or tends to produce such effects. This infraction is a *per se* infraction of Chile's antitrust laws. Note, however, that this regulation only applies where the annual revenue from sales, services, and other activities earned by each business group to which the referred companies

belong exceeds 100,000 Unidades de Fomento (approx. US$ 4 million). Also, an infringement only occurs where the simultaneous participation continues 90 days from the end of the calendar year when the relevant threshold was surpassed (DL 211, Article 3d).

In addition, Article 3 of the DL 211's broad definition of anti-competitive conduct may prohibit other interlocking scenarios. This article prohibits “any event, act or agreement that prevents, restricts or hinders competition, or tends to produce such effects”.

Enforcement against interlocking directorates has occurred on November 2022, the Chilean competition tribunal ("TDLC") approved a settlement agreement between department store chain Falabella and the national competition authority - *Fiscalía Nacional Económica* ("FNE"). Falabella had been under investigation for "horizontal interlocking" — when competing companies have the same person simultaneously occupying the position of director or relevant executive. Banco de Chile Director Hernán Büchi Buc was the individual simultaneously working as a director at Falabella, Banco de Chile and financial services firm Consorcio Financiero. The settlement approved by the TDLC requires that Hernán Büchi resign from his position as director in Falabella and that the company not hire him in the future as an advisor or in another equivalent position.

In this investigation, FNE used a broad concept of “competing companies”, encompassing indirect interlocking scenarios under Article 3d of the DL 211. Also, the FNE has included the relevant companies as potential punishable subjects, rather than merely including those individuals that held simultaneous, interlocking positions.

COLOMBIA

In Colombia, the Law 155 expressly prohibits competing companies from sharing directors. A violation can lead to the voiding of the appointment and penalties of up to 20% of net worth or up to US$23 million, whichever is higher. The Law 155 aims to prevent conflicts of interest or unjust advantage due to access to the sharing of competitively sensitive information. It also aims to prevent managers from involvement in the distribution of products as this may affect competition.

In particular, Articles 5 and 6 of the Law 155 state the following:

- Article 5: "The incompatibility established in Article 7 of Law 5 of 1947, for members of the Boards of Directors and Managers of credit institutions and Stock Exchanges, is extended to Presidents, Managers, Directors, legal representatives, and members of Boards of Directors of companies whose purpose is the production, supply, distribution or consumption of the same goods and/or the same services."
- Article 6: "Presidents, Managers, Directors, legal representatives, or members of Boards of Directors of industrial companies incorporated as corporations may not distribute by themselves or through an intermediary products, merchandise, articles or services produced by the respective company or its subsidiaries, nor be partners of commercial companies, which distribute or sell such products, merchandise, articles or services."

- Article 6: "This incompatibility extends to the officers of limited liability companies that have as partners other companies, in a way that the total number of individuals exceeds twenty (20)".
    - Article 6 Paragraph 1: "The prohibition contained in this article extends to the parents, spouses, siblings, and children of those officers."
    - Article 6 Paragraph 2: "The companies shall have a term of eighteen (18) months to comply with the provisions of this article."

The Colombian competition authority has yet to impose any sanctions under this portion of the law.

MEXICO

Mexican competition law does not include any regulations that refer directly to interlocking directorates.

However, both the Mexican competition authority and the Federal Institute of Telecommunications[2] have imposed remedies on transactions in order to prevent competition issues that may have arisen due to the possibility that one of the parties could name certain directorates in their competitor's companies as a result of the transaction. Such concerns were addressed, for instance, in Delta/ Grupo Aeroméxico (GAM)[3] where the parties adopted a protocol to regulate and limit the exchange of commercially sensitive information during board meetings. The protocol establishes that, before every meeting, one of the Directors must review the different items in the meeting's agenda to ensure that no item includes competitively sensitive information. If the agenda does contain competitively sensitive information, the affected directors (i.e. the directors appointed by a competitor) must leave the meeting and refrain from participating in the discussions or resolutions related to that sensitive information. However, the protocol also indicates that the director may participate in all discussions and resolutions that are not related to that sensitive information or competition. In addition, the protocol includes a non-exhaustive list of matters that the directors appointed by a competitors cannot discuss during the board meetings. Among others, the protocol indicates that:

- Those involved should not discuss how GAM or a competitor compete in any of the overlapping businesses, including product discussions, customers, or suppliers.
- Those involved must also avoid discussion of any matters containing confidential information from GAM or that relate to sensitive issues from the point of view of competition, such as price, pricing strategies, market allocation or clients in relation to any of the overlapping or interlocking businesses.

2 The Federal Institute of Telecommunications in Mexico also adopted some measures to prevent interlocking directorate issues in the AT&T/ Time Warner transaction.

3 Delta Air Lines Inc. y Grupo Aeroméxico, S.A.B, Expediente No. CNT-004-2012

OTHER JURISDICTIONS IN THE REGION

Uruguay, Peru, Paraguay and Ecuador do not appear to have any specific regulations that limit interlocking directorates. However, this does not mean that interlocking directorates may not be caught by wider regulations that intend to prevent the distortion of competition.

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