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**Interlocking Directorates in the European Union:
An Argument For Their Restriction¹**
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Abstract

The EU Commission has recently undertaken a review of the EU Merger Regulation. In this process it has published a White Paper that proposes to extend the Regulation to cover situations in which firms acquire minority shareholding in their competitors. However, the White Paper is silent about the closely related phenomenon of interlocking directorates (interlocks), which occurs when the same person sits on the board of two firms. This issue has never been directly addressed by the European Union, perhaps because the theory of interlocks is underdeveloped in Europe. This paper provides comprehensive antitrust arguments for why the EU should restrict certain interlocking activity. The main argument is that the EU should prohibit horizontal interlocks (interlocks between competing firms) *per se*, as they raise serious antitrust concerns. The paper further argues that non-horizontal interlocks should be monitored, and it addresses certain important policy questions that the EU might face when designing the regulatory framework.

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I. INTRODUCTION

Let us imagine that Alpha and Beta are firms that compete in the market for mobile phones. They compete vigorously and release new versions of their products at least every two years. One of the sticks driving competition in the market is that the parties do not know about each other's plans for the future. For instance, Alpha does not know whether or how Beta is going to develop a new and improved product. This uncertainty drives innovation, as both firms want to stay ahead. Now imagine that Xavier, who has been sitting on Alpha's board for five years, joins the board of Beta. One might wonder what will happen to the competition after this appointment, as Xavier will receive sensitive business information about both firms and their future plans. Thus, the competitive force of uncertainty will not be as strong as it was.

This example describes interlocking directorates (hereinafter referred to as interlocks). In its most direct form, an interlock occurs when the same individual serves as a board member in two firms (Xavier in the above example).² From an antitrust perspective, interlocks are related to mergers, joint ventures and acquisition of shares in the sense that they establish structural links between two or more firms. Mergers differ, however, because they generally destroy the autonomy of the firms, which become the same economic entity after the merger. Interlocks, in contrast, maintain the firms' autonomy. But interlocks raise questions of an antitrust nature about what happens to competition between firms that share a director.³

² See, e.g., Mark S. Mizruchi, *What Do Interlocks Do?*, 22 ANNUAL REVIEW OF SOCIOLOGY 271, 271 (1996).

³ See JOHANNES M. PENNINGS, INTERLOCKING DIRECTORATES: ORIGINS AND CONSEQUENCES OF CONNECTIONS AMONG ORGANIZATIONS' BOARD OF DIRECTORS 21 and 193 (1980).

Even though the interlocked person usually serves as a board member in both firms, she can also hold other offices within the firm, such as a CEO or auditor. Interlocks can also take many other forms, and they do not have to involve the same person. So-called indirect interlocks exist when different people on each board represent the same person. For instance, if Gamma is a shareholder in both Alpha and Beta, it can appoint Xavier on Alpha's board and Yvonne on Beta's.⁴ Moreover, interlocks can be horizontal, vertical or conglomerate. Horizontal interlocks are interlocks between competing firms. Vertical interlocks occur between firms, such as a manufacturer and a distributor, that operate on different levels of the distribution chain. Conglomerate interlocks occur between firms that do not operate in the same markets.⁵ The following tables illustrate these different types of interlocks:

Horizontal interlock	Vertical interlock	Conglomerate interlock
A (manufacturer of lumber)	A (manufacturer of lumber)	A (manufacturer of lumber)
B (manufacturer of lumber)	B (retailer of lumber)	B (computer company)

Direct interlock	Indirect interlock
Xavier, A's board member	Xavier (repr. Gamma) A's board member
Xavier, B's board member	Yvonne (repr. Gamma) B's board member

⁴ Interlocks can even be more indirect. For example, when a director sits on the board of competing firms but is appointed by a third party that is not a shareholder in the firms (e.g. a bank). *See generally* on indirect interlocks Michael E. Jacobs, *Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies*, 37 *FORDH. INT'L L. J.* 643, 649-650 (2013-2014) and *INTERLOCKING DIRECTORATES: HANDBOOK ON SECTION 8 OF THE CLAYTON ACT* 82 (Chicago IL: Section of Antitrust Law, American Bar Association, 2011). *See also* *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974) and PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶1304 at 341-342 (3rd ed 2009).

⁵ *See* similar definitions by PENNINGS, *supra* note 2, at 10-11. However, Pennings refers to conglomerate interlocks as symbiotic. I use the term conglomerate to reflect the EU's terminology on mergers.

This paper argues that there are strong antitrust arguments for the European Union (hereinafter EU) to restrict interlocks. Interlocks are currently not addressed directly by EU Competition Law, even though the European Commission (hereinafter Commission) can intervene and prevent interlocks on certain occasions. However, as discussed in *Part III*, the EU's current mechanism is not effective in addressing the antitrust concerns raised by interlocks.

On July 9, 2014, the EU published the White Paper, "Towards More Effective EU Merger Control."⁶ The Paper advocates extending the scope of EU Regulation No 139/2004 on the control of concentrations between undertakings (usually referred to as the Merger Regulation) to situations where a person or an undertaking becomes a minority shareholder in another undertaking without acquiring control.⁷ This proposal is long overdue in the EU, as persuasive economic arguments suggest that minority shareholding can have anticompetitive effects.⁸ Significantly, however, the Paper does not address interlocks, even though they resemble minority shareholding. In both situations, firms establish structural links that may have anticompetitive effects. Because of this essential similarity, the issues are often discussed together.⁹

⁶ See EU Commission, *White Paper – Towards More Effective EU Merger Control*, COM/2014/0449, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1406814408042&uri=CELEX:52014DC0449>.

⁷ Today, the Merger Regulation only applies to concentrations where a person or an undertaking acquires *control* in another undertaking, which as a general rule requires over 50 percent of the acquisition of stocks or voting rights

⁸ See, e.g., Daniel P. O'Brien and Steven C. Shalop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST LAW JOURNAL 559 (2000) and David Gilo, *The Anticompetitive Effect of Passive Investment*, 99 MICH. L. REV. 1 (2000)

⁹ For instance, in a 2008 report, the Organization for Economic Co-Operation and Development (OECD) addressed both interlocks and minority shareholding as anticompetitive structural links that might need to be regulated. See Organization for Economic Co-operation and Development (OECD), *Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates*, DAF/COMP (2008)30, available at <http://www.oecd.org/competition/mergers/41774055.pdf>.

Interlocks are subject to restrictions in other modern economies. In the United States, horizontal interlocks that meet certain jurisdictional thresholds¹⁰ have been prohibited since the enactment of Section 8 of the Clayton Act in 1914.¹¹ Section 8 is a *per se* ban, meaning that it requires no proof of anticompetitive effects.¹² Further, in accordance with the FTC Act, Section 5, the FTC can intervene with other types of interlocks that are not directly covered by Section 8 of the Clayton Act, if they are found to be unfair methods of competition.¹³ Japan,¹⁴ South-Korea¹⁵ and Indonesia¹⁶ also restrict interlocks. Those jurisdictions, however, do not prohibit interlocks *per se*, but instead require a substantive analysis of the potential anticompetitive effects of the interlock.¹⁷

¹⁰ The Section applies if each of the firm in the interlock has capital, surplus, and undivided profits of more than \$10,000,000, adjusted for inflation, see 15 U.S.C. § 19(a)(1). Additionally, horizontal interlocks are not subject to the Section 8 restriction if: 1) the competitive sales of either corporation are less than \$1,000,000, adjusted for inflation, 2) the competitive sales of either corporation are less than 2 percent of that corporation's total sales, or 3) the competitive sales of each corporation are less than 4 percent of that corporation's total sales. "Competitive sales" in this regard means the gross revenues for all products and services sold by one corporation in competition with the other. See 15 U.S.C. § 19(a)(2).

¹¹ It has been established in court practice that Section 8 only prohibits the creation of horizontal interlocks and does, therefore, not cover vertical or conglomerate interlocks. See, e.g., Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 857 (2010-2011).

¹² See *United States v. Sears, Roebuck & Co.* (111 F. Supp. 614 (S.D.N.Y. 1953)). See also Waller, *supra* note 10, at 857 and Jacobs, *supra* note 3, at 665-666.

¹³ See, e.g., Arthur H. Travers, Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX. L. REV. 819, 833 (1967-1968). There are examples from practice where the FTC has challenged interlocks that did not violate Section 8 on the grounds of Section 5 of the FTC Act, see Remarks of J. Thomas Rosch, former Commissioner of the Federal Trade Commission, *Terra Incognita: Vertical and Conglomerate Merger and Interlocking Directorate Law Enforcement in the United States* 20 (11 September 2009) (on file with the FTC), available at <https://www.ftc.gov/public-statements/2009/09/terra-incognita-vertical-and-conglomerate-merger-and-interlocking>, referring e.g. to *Perpetual Fed. Sav. & Loan Ass'n*, 90 F.T.C. 608, 657 (1977) and *Kraftco Corp.*, 89 F.T.C. 46, 63-64 (1977).

¹⁴ The Japanese interlock restriction is in Article 13-1 of the Antimonopoly Act. An English translation of the Act is available at http://www.jftc.go.jp/en/legislation_gls/amended_ama09/

¹⁵ The South-Korean interlock restriction is in Article 12(1)-3 of the Monopoly Regulation and Fair Trade Act. An English translation of the Act is available at <http://www.moleg.go.kr/english/korLawEng?pstSeq=54772>

¹⁶ The Indonesian interlock restriction is in Article 26 of the Indonesian Competition Law. An English translation of that specific provision is available at <http://www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf>

¹⁷ The Japanese provision is not limited to horizontal interlocks but rather requires a substantive assessment of the nature and potential anticompetitive effects of the interlocks. See Jacobs, *supra* note 3, at 667 and OECD report, *supra* note 8, at 133-138 (Japan's submission to the OECD). As in Japan, the South-Korean provision is not limited to horizontal interlocks but rather the competition authority has to examine whether the interlock has "the effect of substantially limiting competition in a given area of trade." See OECD

It is difficult to explain the absence of EU regulation of interlocks, because the issue has not been appropriately addressed at the EU level. One reason might be that the EU does not yet view it as an antitrust matter. The EU might see antitrust law as a matter of external competition between firms and consider that the internal organization of firms, such as who serves as a director in a given firm, should be the subject of corporate law and corporate governance. Such a view, however, ignores the fact that interlocks raise antitrust concerns that corporate governance does not address.¹⁸

The reason for the lack is at least not that interlocks are uncommon or unknown in the EU. A recently published study on interlocks within 362 large European corporations in fifteen EU countries showed that of 6,115 director positions, there were 684 interlocks.¹⁹ Another study comparing the interlocks of the 300 largest European corporations in 2005 and 2010 revealed that over ninety-one percent “of all firms in the selection were connected through a network of shared board members.”²⁰ This study also found that while interlocks increased by only four percent at the national level, the European network of interlocks, i.e. those interlocks that cross European borders, increased by thirty-one percent from 2005 to 2010.²¹

report, at 139-140 (Korea’s submission to the OECD). In Indonesia’s submission to the OECD (OECD report at 199) the Indonesian competition authority says that their restrictions against horizontal interlocks are a rule of reason (as opposed to a *per se* rule) because proof is needed to establish that the interlock is between firms in the same relevant market. This is, however, not in line with the general view that a prohibition of horizontal interlocks is in fact *per se*, even though an enforcement action against such an interlock would require the enforcement agencies to establish that the firms are competitors.

¹⁸ See Waller, *supra* note 10, at 856, asserting that interlocks are the only “direct interplay between corporate governance and competition policy.”

¹⁹ Kees van Veen and Jan Kratzer, *National and International Interlocking Directorates within Europe: Corporate Networks Within and Among Fifteen European Countries*, 40 ECON. AND SOC. 1, 10-12 (2011). The study showed a very high number of interlocks in Germany and France but low numbers in the UK, Portugal and Greece.

²⁰ Eelke M. Heemskerk, *The Rise of the European Corporate Elite: Evidence from the Network of Interlocking Directorates in 2005 and 2010*, 42 ECON AND SOC. 74, 81 (2013).

²¹ *Id.* at 81-82. Also, notably, intra-industry interlock had almost tripled in the energy and financial services sectors between 2005 and 2010, but had decreased by 66 percent in the banking sector. *Id.* at 86.

One might wonder whether the EU simply relies on Member States to adopt their own restrictions on interlocking activity. Italy, for instance, does that in the financial sector.²² However, such decentralized patchwork legislation is likely to be chaotic. For instance, Germany could define interlocks differently from France, and Portugal might not restrict interlocks at all, while Greece might restrict only horizontal interlocks, and Belgium both horizontal and vertical interlocks. Regulating interlocks on the national level could, therefore, be cumbersome and unsuccessful in countering the growing cross-border European network of interlocks. It would be more effective to address the issue on the EU level than for each Member State to adopt its own restrictions.

This article's main thesis is that the EU should prohibit horizontal interlocks *per se*, similar to Section 8 of the Clayton Act. As will be discussed in detail in *Parts IV and V*, there are strong antitrust arguments for such restrictions. The increased information sharing enabled by an interlock creates opportunities for the firms to collude, for instance on prices or output, to the detriment of consumers. Even in the absence of collusion, horizontal interlocks can have anticompetitive effects. The interlocked director has fiduciary duties towards both firms, and to fulfil those duties, she could be tempted to dampen competition between the firms. The arguments for a *per se* restriction, i.e. a restriction without any defenses, are also strong, as a rule of reason would likely lead to underdeterrence and substantial administrative costs.

Vertical and conglomerate interlocks are not as likely as horizontal interlocks to raise antitrust concerns. Thus, it is unnecessary to prohibit them *per se*. However, as will be

²² In 2011, Italy enacted a statute (the so-called "Rescue-Italy Law Decree") which prohibits a director in a financial institution from holding the same office in another competing financial undertaking. See Valeria Falce, *Interlocking Directorates: An Italian antitrust dilemma*, 9 JOURNAL OF COMP. LAW AND ECON. 457, 461-463 (2013).

discussed in *Part VI*, vertical interlocks can increase the likelihood of anticompetitive vertical restraints and lead to preferential treatment. Moreover, conglomerate financial interlocks, i.e. interlocks between financial institutions and their customers, can impact the customer's business operations in anticompetitive ways. Therefore, it would be worthwhile for the Commission to monitor such interlocks through a notification system.

The issue of whether to restrict interlocks has not attracted scholarly interest in the EU. Only one existing article, by Tommy Staal Gabrielsen et al.,²³ discusses whether the EU should adopt some restrictions on interlocks. The authors argue that the EU's current mechanism is sufficient to counter the potential anticompetitive effects of interlocks. I disagree with that premise. The antitrust literature on interlocks in the U.S. is also surprisingly limited, and the issue seems to have been somewhat neglected by U.S. legal scholars.²⁴ In contrast, there exists a fair amount of literature in sociology, economics, and industrial organization that discusses why interlocks are formed and whether they affect the likelihood of collusion.²⁵

²³ Tommy Staahl Gabrielsen et al., *Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention*, 36 E. L. REV. 837 (2011).

²⁴ The reason is perhaps that the ban is generally respected, government enforcement of Section 8 of the Clayton Act is, thus, low and scholarly interest may be accordingly limited. *See generally* on antitrust enforcement AREEDA & HOVENKAMP, *supra* note 3, ¶1301c, at 331. *See also* Rosch, *supra* note 12, at 18 where he says that Section 8 has "generated surprisingly little litigation" and the penalties for violations "are fairly modest and typically are limited to elimination of the interlock." The most notable legal contributions to the antitrust literature on interlocks include articles by Arthur Travers Jr. (Travers, *supra* note 12), Benjamin M. Gerber (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 (2008)), Spencer Weber Waller (Waller, *supra* note 10), and Michael E. Jacobs (Jacobs, *supra* note 3), a handbook on interlocks published by the American Bar Association (INTERLOCKING DIRECTORATES (handbook), *supra* note 3) and discussion in ¶1300-1305 in Phillip Areeda and Herbert Hovenkamp's treatise on Antitrust Law (AREEDA & HOVENKAMP, *supra* note 3). Further, the OECD and UK's Office of Fair Trading have published reports that have addressed the antitrust concerns regarding interlocks. *See* OECD report, *supra* note 8 and DotEcon Ltd, *Minority Interest in Competitors* (research paper for UK Office of Fair Trading), available at <http://www.dotecon.com/assets/images/oftmic.pdf>.

²⁵ In that regard, my paper has benefitted from Johannes M. Pennings' book, *Interlocking Directorates* (PENNINGS, *supra* note 2), Peter John Carrington's doctoral thesis on interlocks in Canada (PETER JOHN CARRINGTON, *HORIZONTAL CO-OPTATION* (1981)), Jeffrey Pfeffer and Gerald R. Salancik's book *The*

This paper's contribution to the already existing literature is twofold. First, it argues that the EU should adopt interlock restrictions and provides advice on how to address certain policy issues. The existing antitrust literature does not discuss whether or how interlock restrictions should be adopted. Second, the paper provides a detailed and comprehensive argument for why interlocks should be restricted. The existing U.S. antitrust literature generally takes the prohibition as granted and focuses on how to interpret Section 8 of the Clayton Act. Also, when discussing why interlocks should be restricted, the literature mainly focuses on the collusive effects of interlocks. This paper demonstrates that interlocks can also have meaningful non-coordinated effects and might even increase the likelihood of anticompetitive parallel behavior.

The paper has eight parts. *Part II* introduces the main theories about why firms interlock. These will serve as a touchstone for the arguments of the paper. *Part III* explains why the EU's current mechanism cannot effectively deal with interlocks. *Parts IV* and *V* argue that the EU should prohibit horizontal interlocks *per se*. *Part VI* argues that the antitrust concerns regarding vertical and conglomerate financial interlocks are not as strong as for the horizontal types, but that there are still reasons to monitor them. *Part VII* discusses certain policy issues that the EU might face, such as how to define the concepts of interlocks and competitors, and proposes solutions. *Part VIII* reviews the main conclusions.

External Control of Organizations (JEFFREY PFEFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS (2003)) and an article by Mark S. Mizruchi from 1996 that discusses in detail the then existing empirical findings on interlocks (Mizruchi, *supra* note 1).

II. OBJECTIVES BEHIND INTERLOCKING

It is no coincidence when a person sits on the board of two firms. The person, of course, knows about this connection and the firms are obviously aware of it. This raises the question of why they would allow the person to be on their board. One view is that interlocks are not formed unless there exists an agreement on the situation.²⁶ Another more subtle explanation is that one firm (the initiating firm) might want to interlock, but the other firm might be indifferent to the interlock (the interlocked firm). This might amount to a common understanding of the situation. Alpha, the firm initiating the interlock, has at least two ways to achieve its goal to interlock with Beta. It can try either to get Xavier, its own director, appointed to Beta's board or to get Yvonne, Beta's director, on its own board. The former is more complicated, as Alpha needs to acquire shareholder power or convince shareholders to appoint Xavier to Beta's board. In the absence of any such powers, the latter method is more likely to succeed. The initiating firm is, thus, likely to create the interlock by asking the interlocked firm's board member to join its board.

But why would Alpha want to interlock with Beta? There can, of course, be many different reasons for why firms interlock, but theories in the social sciences generally provide four primary reasons. One reason, the predominant theory in industrial organization and sociology, is that firms use interlocks for cooptation. The concept of cooptation refers to a situation in which firms coopt "problematic organizations in their environment by appointing a representative of the problematic organization to an

²⁶ See Travers, *supra* note 12, at 841, where he says: "The control group of Corporation A would hardly accept on its board a director of Corporation B unless the A group had already decided not to compete with B. Similarly, the control group of B would hardly permit one of its directors so to serve unless it had reached a like decision."

advisory or decision-making board of the co-opting organization.”²⁷ In other words, firms use interlocks as strategic tools to access and exchange information and resources in order to reduce uncertainty²⁸ and strengthen bonds between themselves and a competitor.²⁹ In today’s complex business environment, information about rivals or other firms in the same industry can be very valuable to firms.³⁰

Mergers and acquisitions of shares reduce competitive uncertainty in more permanent ways than interlocks,³¹ but interlocks are more flexible and easier to implement. If Alpha wants to acquire information about Beta, it can simply offer Beta’s board member a position on its board as well. The board members could of course refuse to join the board, but as Jeffrey Pfeffer and Gerald R. Salancik point out, “they would not be likely to do so if the linkage would offer advantages to them and their organizations as well.”³² Further, in contrast to mergers and acquisitions, interlocks generally do not require large transaction costs, such as legal fees and the preparation of merger notification. Another

²⁷ CARRINGTON, *supra* note 24, at 6. Further, at 13 and 19, Carrington states that interlocks are most likely to be created with the “problematic others” in the market, i.e. it is created “between pairs of firms where at least one is problematic for the other.”

²⁸ See, e.g., PFEFFER & SALANCIK, *supra* note 24, at 161, F. David Schoorman et al., *Interlocking Directorates: A Strategy for Reducing Environmental Uncertainty*, 6 THE ACAD. OF MANAGEM. REV. 243, 244 (1981) and Michael Patrick Allen, *The Structure of Interorganizational Elite Cooptation: Interlocking Corporate Directors*, 39 AM. SOC. REV. 393, 395 (1974).

²⁹ PFEFFER & SALANCIK, *id.* at 161, make an interesting analogy between interlocks and the marriage of royal houses: “In royal houses, the practice of arranging marriages with members of other royal families to cement alliances was quite common. This practice of placing in one organization a representative from another to cement the bond between them continues to be present.”

³⁰ Sean O’Hagan and Milford B. Green have said that knowledge “is considered the most strategically important resource.” Sean O’Hagan and Milford B. Green, *Interlocking directorates: An example of Tacit Knowledge Transfer*, 23 URB. GEOGR. 154, 154-155 (2002). In a more recent article, O’Hagan and Green say: “To remain profitable in today’s competitive environment, researchers have recognized the increasing importance of knowledge and its acquisition.” Sean O’Hagan and Milford B. Green, *Corporate knowledge transfer via interlocking directorates: A network analysis approach*, 35 GEOFOR. 127, 127-128 (2004). Another commentator has said: “In a complex and uncertain environment, every possibility to minimize threats or unexpected activity is extremely valuable for companies.” Joanna Szalacha, *Interlocking directorates and possible conflicts of interests*, 174 POLISH SOCIOL. REV. 205, 206-207 (2011). See also CARRINGTON, *supra* note 24, at 6, and Allen, *supra* note 27, at 393-394.

³¹ See, e.g., O’Hagan and Green (2004), *id.* at 129.

³² PFEFFER & SALANCIK, *supra* note 24, at 161.

benefit of interlocks over mergers is that they are not subject to the same antitrust scrutiny.³³ However, the disadvantage of an interlock compared to a merger is “the less than absolute control it provides over the other organization.”³⁴

Another, related, theory about interlocks is that they are used as monitoring tools. A firm may, in other words, appoint persons to sit on other firms’ boards to monitor their behavior.³⁵ This theory most often applies to financial interlocks, i.e. financial institutions seek board representation in their debtors to monitor their performance.³⁶ This theory will be important to the discussion in *Part VI*.

A third theory is that firms use interlocks to increase their reputation. Board composition is important to shareholders and investors, and appointing a well-known, respected individual within the industry on the board can give a firm legitimacy.³⁷ The firm can use that legitimacy to attract investment.³⁸ For example, which start-up software firm would not want Mark Zuckerberg to sit on its board? His mere presence on the board might attract new investors, help retain existing investors, or raise the firm’s stocks.

A fourth theory is that interlocks are driven by a director’s own ambition. As Mizruchi puts it, “Interlocks occur between organizations, but they are created by individuals.”³⁹ A person might want to make a professional career as a director, and in order to do that she must seek opportunities for herself. An interlock might, therefore, be

³³ See PENNINGS, *supra* note 2, at 193.

³⁴ PFEFFER & SALANCIK, *supra* note 24, at 144-145.

³⁵ See Mizruchi, *supra* note 1, at 275.

³⁶ *Id.* at 275-276.

³⁷ *Id.* at 276-277 and Schoorman et. al., *supra* note 27, at 245.

³⁸ See Gerber, *supra* note 23, at 115 and Mizruchi, *supra* note 1, at 276.

³⁹ Mizruchi, *supra* note 1, at 277.

established because of a director's desire for financial remuneration and reputation as a director.⁴⁰

III. INTERLOCKS IN THE EU

EU's antitrust enforcement consists of three different substantive legal rules, two of which are found in the Treaty on the Functioning of the European Union (hereinafter TFEU). Article 101(1) of prohibits agreements and concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the internal market. *Section A* argues that Article 101(1) can only be used to attack interlocks *ex post* if their effects are anticompetitive. But addressing interlocks *ex post* is difficult and costly, and this paper will argue that regulating interlocks *ex ante* would be more efficient. Article 102 of the TFEU prohibits firms from abusing their dominant position. *Section B* argues that Article 102 is not an efficient mechanism against interlocks, as the Commission can only intervene if the initiating firm is a dominant firm. The third rule is the control of concentrations and mergers under the EU's merger regulation. *Section C* argues that even though the Commission has on certain occasions severed interlocks *ex ante* in merger cases, it is inefficient to attack them when and only when the interlocked firms merge.

⁴⁰ See Rafael Liza Santos et al., *Board Interlocking in Brazil: Directors' Participation in Multiple Companies and its Effect on Firm Value and Profitability*, 13 LAT. AM. BUS. REV. 1, 6 (2012). Santos et al. mention some empirical research that provides support for this theory. These studies show that interlocked firms generally do not reestablish interlock ties where they have broken accidentally, for instance when the director dies or retires. If the interlock was established as a way of cooptation, it is likely that the firms would try to reestablish the link if it broke accidentally. Deciding not to do that might suggest that the interlock was formed not through the firm's initiative, but rather through the director's. Another explanation might be that the need for cooptation was not as great as before. The company could have acquired enough information about the other interlocked company to be able to reduce environmental uncertainty in a satisfactory manner.

A. Article 101(1)

1. Object category

Agreements that have the object of restricting competition are (quasi) *per se* illegal under Article 101(1). The parties to the agreement are generally unable to provide procompetitive justifications for their agreement, unless they fit within the exceptions in Article 101(3). The Commission's first obstacle to proving an unlawful practice under Article 101(1) is proving the existence of an agreement. As was mentioned in *Part II*, one theory views the act of two firms interlocking as an agreement between the firms. If we assume that this is true,⁴¹ the question still remains whether the object behind interlocks is to restrict competition. In other words, is the formation of interlocks already unlawful under EU's current mechanism? The answer to this question is "no," for the following reasons.

The object category only applies to a small minority of agreements that have "obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets."⁴² These horizontal agreements are so unlikely to have any procompetitive justifications that they are presumed to have purely anticompetitive motives. Establishing an interlock is not as suspect as those agreements that generally fall under the object category. Indeed, as discussed in *Part II*, the motives behind interlocks are not

⁴¹ It is often difficult to determine when there exists an agreement or concerted practice, as described in detail in LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING 21-100 (2013). That issue is outside the scope of this paper and I will, thus, not discuss it in any detail. Instead, I will assume that interlocks amount to an agreement or concerted practice that is covered by Article 101. That is in line with AREEDA & HOVENKAMP, *supra* note 3, ¶1301a, at 328. They point out that the "arrangement between a director and the corporation reflects a contract" and if several such contracts are made between a director and firms and such agreement restraint trade "one might characterize the multiple directorships as contracts unreasonable restraining trade, which Sherman Act §1 forbids."

⁴² See Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services v. Commission*, 1998 E.C.R. II-03141 para. 136.

necessarily anticompetitive, and interlocks are, thus, not as obviously anticompetitive as, for instance, agreements on price fixing or output restrictions.

The fact that interlocks cannot be attacked *per se* under Article 101(1) can be further supported by two examples from EU case law. In the Commission's decision in *Phoenix/Global One*,⁴³ the Commission noted that U.S. antitrust laws (most likely a reference to Section 8 of the Clayton Act) were designed to prevent access to and misuse of confidential information by board representatives. The Commission did not, however, believe that the appointment of representatives on a particular board could be attacked under Article 101. On the contrary, it concluded that the notifying parties' investment in the firm fell outside the scope of Article 101.⁴⁴ Moreover, in its decision in *Philip Morris*, the European Court of Justice noted that minority shareholding, which is closely related to interlocks, did "not in itself constitute conduct restricting competition"⁴⁵

Finally, as an observational argument, the EU has not thus far addressed interlocks as a *per se* violation of Article 101, even though interlocks certainly exist in the EU. Instead, the EU has allowed interlocks "to develop in a wide range of markets,"⁴⁶ which would not happen if the Commission believed that interlocks could be attacked under the object category of Article 101(1).⁴⁷

⁴³ *Phoenix/Global One*, Case No IV/35.617, 1996 OJ L 239, para. 57-78.

⁴⁴ *Id.* para. 51.

⁴⁵ Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission*, 1987 E.C.R. 4487 para. 37.

⁴⁶ Gabrielsen et al., *supra* note 22, at 855.

⁴⁷ Also, in comparison, interlocks are explicitly restricted in the U.S. by Section 8 of the Clayton Act. They have not been attacked *per se* by Section 1 of the Sherman Act, which is the U.S. equivalent to Article 101(1).

2. *Effects category*

Because the Commission cannot attack interlocks under the object-category, an interlock needs anticompetitive *effects* for the Commission to attack it under Article 101(1). The EU can, therefore, intervene with interlocks *ex post* if they are found to be anticompetitive, such as in a situation where the Commission can prove that the firms fixed prices and used the interlocking person as a channel of communication.⁴⁸ In these circumstances, however, the Commission does not intervene because of the interlock as such, but because of the effects that the interlock caused.

The effects-category requires a careful economic analysis in order to determine anticompetitive effects. It generally requires substantial administrative costs to detect and prove anticompetitive behavior and, as such, many anticompetitive activities are never discovered.⁴⁹ An example of this is cartel enforcement. Even though significant improvement has been made over the past decades, there exists “continuing evidence [that] cartels still operate.”⁵⁰ The reason is that cartel members often go to great lengths to keep the cartel activity secret to stay off the antitrust radar.⁵¹ Empirical surveys indicate around twenty to thirty percent detection of cartels, which is in line with the

⁴⁸ See AREEDA & HOVENKAMP, *supra* note 3, ¶1301a, at 328-329.

⁴⁹ See Jacobs, *supra* note 3, at 652.

⁵⁰ John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 433 (2012-2013).

⁵¹ One vivid example of the secrecy of cartel activity in EU is Case T-117/07, *Areva and Alstrom v. Commission*, 2011 E.C.R. II-00633. RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 513-514 (7th ed. 2012), referring to the Commission’s decision, which was upheld by the General Court, describe the cartel in such a way that “participants in the cartel used codes to conceal their companies’ names and encryption software to protect the secrecy of emails and telephone conversations; made use of free email providers and the anonymous mailboxes made available by them; sent messages as password-protected documents: the passwords were regularly changed; systematically destroyed emails; downloaded attachments on to memory sticks rather than on to their computers; and made use of mobiles telephones provided by a member of the cartel that contained encryption option.”

opinion of experienced lawyers and scholars in the field of antitrust law.⁵² Thus, in a modest estimate, around two-thirds of cartels are never discovered.

It would be administratively burdensome and costly for the EU to actively monitor interlocks and attack only the anticompetitive ones. The detection of an interlock will present the Commission's first challenge. Detecting interlocks will require a careful monitoring of board seats throughout Europe. Even though direct interlocks could perhaps be mapped out, difficulties will arise in detecting indirect interlocks because they involve different people. In order to know that Xavier and Yvonne were connected through an interlock, the Commission will need to trace their board seats to their origin (Gamma the shareholder), which will require insight into the firm's shareholder politics, shareholder agreements and more. Even when the Commission detected an interlock, it could be difficult to prove anticompetitive effects. One way of establishing anticompetitive effects is to prove the exchange of sensitive business information. Such proof is, however, unlikely to be available.⁵³ Because of the lack of hard evidence, competition authorities often rely on circumstantial evidence in order to prove anticompetitive effects.⁵⁴ But such evidence often seems fragile and open to

⁵² See Connor & Lande, *supra* note 49, at 464-465.

⁵³ This is especially the case when it comes to direct interlocks, since the information is inside the interlocked person's head and she does not necessarily have to convey the information. Indeed, she can use and manipulate the information without conveying it, see further discussion in *Part IV*. If the interlock is indirect, the Commission can monitor the behavior of the two individuals and even acquire documents, such as emails or memos that they have exchanged. Such monitoring can however be a difficult and costly procedure.

⁵⁴ See, e.g., the U.S. Supreme Court's decision in *Eastern States Retailer Lumber Dealers*, 234 U.S. 600, 612 (1914), where it said: "It is elementary ... that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done." Further, the European Court of Justice in *Case 48-69, Imperial Chemical Industries Ltd. v. Commission (Dyestuff case)*, 1972 E.C.R. 619, para. 68, noted that circumstantial evidence has to be considered "not in isolation, but as a whole, account being taken of the specific features of the market in the products in question."

interpretation, and the probability of a wrong outcome is thus substantial.⁵⁵ In order to avoid the wrong decision, competition authorities need to research the market, its characteristics, and its structure.

All of these administrative costs can also lead to an administrative hassle and social costs borne by the interlocked firms, because they will need to spend time and money to answer the Commission's inquiries and allegations. Moreover, if the firms disagree with the Commission's decision, they can file suit before the EU courts, which will lead to even further costs.

In light of the above, it seems more attractive to prohibit interlocks than to actively monitor and attack them *ex post* on the grounds of Article 101(1). Indeed, enforcement on the grounds of Article 101(1) suffers from high costs and difficulties in catching meaningful numbers of anticompetitive interlocks. A prohibition would effectively deal with the problem *ex ante* and deter firms from establishing an interlock in the first place. It will also entail less administrative and social costs than Article 101(1) enforcement, as the Commission only intervenes if firms violate the prohibition. *Part V* discusses further arguments for prohibition, and advocates for a *per se* prohibition.

B. Article 102

One could speculate whether the formation of an interlock might amount to an abuse of a dominant position and, therefore, a violation of Article 102. As an example, Alpha, a dominant firm, could appoint Xavier on the board of its rival, Beta, in order to harm Beta.

⁵⁵ To provide examples of circumstantial evidence, the competition authorities can rely on circumstances where market shares are “too stable to be a plausible product of normal competitive activity”, “price rise ... that cannot be explained plausibly by any hypothesis other than cartelization”, it can be “inferable from the presence or pattern of abnormally high rates of return” or it “can sometimes be inferred from a negative correlation between the number of firms in the market and the market price.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 375-378 (8th ed. 2011).

However, Article 102 would be a weak enforcement tool against interlocks, as it would only apply in cases where the initiating firm is in a dominant position. Moreover, the likelihood of a dominant firm using an interlock as a way of harming its rival is remote, as Alpha can choose other and more effective ways to do that (even though an interlock might be used as an ancillary strategy to achieve those goals). Interlocks might, however, facilitate collective dominance, which can be harmful to competition, an issue discussed in *Part IV*.

C. Merger review

The Commission can examine interlocks in merger cases, and on few occasions it has made the severing of interlocks a condition for clearing a merger.⁵⁶ For instance, in the Commission's decision, *Nordbanken/Postgiro*, one condition, among others, was that all current representatives of Nordbanken in Bankgiro's Board of Directors would resign.⁵⁷ This condition prevented an interlock from happening as a result of the merger. In another case, one condition for clearing a merger was "not to establish interlocking directorships with competitors in Italy. The Commission considered that this commitment was likely to remove the risk of anti-competitive information flows."⁵⁸

These decisions suggest that the Commission already believes that interlocks reduce the independence of firms and increase the likelihood of anticompetitive effects through sharing of information. Otherwise, it would not have made the severing of interlocks a

⁵⁶ See Enzo Moavero Milanesi & Alexander Winterstein, *Minority Shareholdings, Interlocking Directorships and the EC Competition Rules – Recent Commission Practice*, 1 COMPETITION POLICY NEWSLETTER 15, 16-17 (2002). See also the following decisions by the Commission: Thyssen/Krupp, Case IV/M.1080, 2 June 1998, Allianz/AGF, Case IV/M.1082, 8 May 1998 and Allianz/Dresdner, Case COMP/M.2431, 19 July 2001.

⁵⁷ See *Nordbanken/Postgiro*, Case COMP/M.2567, 8 November 2001 para. 60.

⁵⁸ Milanesi & Winterstein, *supra* note 55, at 17 and Generali/INA, Case COMP/M.1712, 12 January 2000 (only available in Italian).

condition for clearing the mergers. Merger review, however, cannot effectively prevent interlocks *ex ante*, as interlocks are usually created without a merger (and even without any shareholder relationship) between the firms. Indeed, interlocks are often used as a cooptation strategy instead of mergers.⁵⁹ Thus, if interlocks are to be regulated, it is not enough to remove them only in the case of mergers.

IV. ANTICOMPETITIVE EFFECTS OF HORIZONTAL INTERLOCKS

Among all the ways that firms can interlock, horizontal interlocks have raised the most antitrust concerns, because they enable competing firms to communicate sensitive business information.⁶⁰ For this reason, U.S. enforcement practice emphasizes the preventive nature of Section 8 of the Clayton Act. In *Square D Co. v. Schneider S.A.*, the court said that the purposes of Section 8 “are to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors.”⁶¹

If Xavier sits on the board of Alpha and Beta and the firms operate in the same market, he receives sensitive business information about both firms, such as their customers, monthly revenue and strategic plans.⁶² This puts Xavier in an optimal position to share the information he acquires. He can either share it with Alpha and Beta on each

⁵⁹ See PFEFFER & SALANCIK, *supra* note 24, at 144-145.

⁶⁰ Travers, *supra* note 12, at 839 says that “interlocking relations between competing corporations [that] have been of the most concern.”

⁶¹ *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991). Also, in its *Perpetual* decision, the FTC put it this way: “Even if competition is not reduced by formal agreement ... an interlock will surely increase the exchange of competitive information between the interlocked competitors.” *Perpetual Fed. Sav. & Loan Ass’n*, 90 F.T.C. 608, 623.

⁶² Indeed, the “board of directors plays a key role in managerial oversight and provides advice and guidance on corporate strategy.” John Bizjak et al., *Option Backdating and Financial Interlocks*, 22 THE REV. OF FINANC. STUD. 4821, 4826 (2009). Also, a board member can “affect key board-level decisions involving mergers, acquisitions, joint ventures, entry into new markets, innovation initiatives, and other key strategic determinations that can affect the competitive efforts of one, or both, of the affected firm.” Waller, *supra* note 10, at 858.

other's strategies or only share information with Alpha on Beta's strategies, or vice versa. When this type of information sharing involves sensitive strategic business information between rivals, it is of great concern to antitrust authorities. It can result in collusion or otherwise dampen the competition between the firms.⁶³

This Part argues that horizontal interlocks increase the likelihood of serious anticompetitive effects. *Section A* provides theoretical arguments that the increased flow of information between horizontally interlocked firms can increase the likelihood of collusion and anticompetitive parallel behavior. The empirical literature on whether there exists a correlation between interlocking activity and collusion is also reviewed. This literature provides mixed results and does not warrant making generalized assumptions about the issue. *Section B* argues that horizontal interlocks can also have non-coordinated effects, and that they take primarily two forms. First, the exchange and acquisition of information can lead to anticompetitive effects, even in the absence of collusion. Second, interlocks can even be anticompetitive in the absence of any collusion and information exchange. To clarify, an interlocked director should work in the best interest of both firms. This obligation becomes problematic and creates serious conflicts of interest for the interlocked person if she serves as a board member for two competing firms, because one firm's profit may mean the other firm's loss.

A. Collusive effects

Antitrust law generally assumes that competition and consumers are better off when firms make their own decisions on business strategies, such as on price and level of output.⁶⁴ If

⁶³ See Matthew Bennett & Philip Collins, *The Law and Economics of Information Sharing: The Good, the Bad and the Ugly*, 6 EUROPEAN COMPETITION JOURNAL 311, 320 (2010).

⁶⁴ See, e.g., WHISH & BAILEY, *supra* note 50, at 513.

firms decide to collude instead of competing, the result is higher prices and lower output, which leads to decreased consumer welfare and deadweight loss. Thus, by proscribing collusion antitrust laws preserve the firms' competitive autonomy.⁶⁵

Collusive effects are usually divided into two categories, explicit collusion and oligopolistic coordination. Explicit collusion is often enforced through cartel activity and refers to a situation where rivals agree to restrict competition between themselves, for example by fixing prices, reducing output or dividing markets.⁶⁶ The more intangible form of collusion, oligopolistic coordination, refers to the situation where rivals in an oligopoly charge cartel-like prices without communicating.⁶⁷ Pure oligopolistic coordination, however, is not unlawful.⁶⁸ Firms in oligopolistic markets are interdependent and take their rivals' actions into account when making decisions on prices and output.⁶⁹ Thus, firms may rationally decide to coordinate due to certain market circumstances. However, so-called facilitating practices, i.e. practices that make it easier for firms to sustain oligopolistic coordination, are generally considered unlawful "because in these cases the facilitating agreement is itself an agreement that leads to more anticompetitive results."⁷⁰ Moreover, under certain circumstances unilateral parallel behavior can have anticompetitive effects (see subsection 3).

⁶⁵ Justice Antonin Scalia of the U.S. Supreme Court put it sharply when he said that collusion is the "supreme evil of antitrust". *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

⁶⁶ See generally WHISH & BAILEY, *supra* note 50, at 513.

⁶⁷ Gilo, *supra* note 7, at 10. The theory of oligopolistic coordination is usually credited to George J. Stigler's article, *A Theory of Oligopoly*, 72 J. OF POL. ECON. 44 (1964).

⁶⁸ See, e.g., WHISH & BAILEY, *supra* note 50, at 568-569. See also on U.S. law, EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 562-563 (2d ed. 2011).

⁶⁹ See, e.g., WHISH & BAILEY, *supra* note 50, at 559-562, EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 884-886 (2d ed. 2011) and DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 160 (4th ed. 2005).

⁷⁰ ELHAUGE *supra* note 67, at 563. See also similar results by WHISH & BAILEY, *supra* note 50, at 569.

The main objective of Section 8 of the Clayton Act is to prevent collusion.⁷¹ In the beginning of the twentieth century, vigorous debate arose about interlocks in the U.S. and it became a major issue in the presidential campaign in 1912.⁷² In 1914, Louis Brandeis, one of President Woodrow Wilson's chief advisors on antitrust issues and later Justice of the U.S. Supreme Court, spoke harshly of interlocks: "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."⁷³

Justice Brandeis' view that horizontal interlocks encourage collusion reflects the current dominant argument for restricting interlocks. In a note published in the Columbia Law Review in 1954, the author said that "there is no substantial justification for the existence of interlocks" and that they are mainly established "to facilitate covert coordination of corporate action."⁷⁴ Similar views were expressed in 1997 by Gale T. Miller: "The problem is that when 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."⁷⁵ J. Thomas Rosch, former Commissioner of the FTC, also raised

⁷¹ See generally a detailed discussion of the history behind the legislation in Travers, *supra* note 12, at 824-832.

⁷² See INTERLOCKING DIRECTORATES (handbook), *supra* note 3, at 3.

⁷³ LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 51 (1914).

⁷⁴ Note, *Clayton Act Prohibition of Interlocking Directorates in Industrial or Commercial Corporations*, 54 COLUM. L. REV. 122, 131 (1954).

⁷⁵ Gale T. Miller, *Interlocking Directorates and the Antitrust Law*, 26 COLO. LAW. 53, 53 (1997).

similar concerns in a speech in 2009: “An interlocking officer or director can injure competition by facilitating coordination between competing companies”⁷⁶

In essence, scholars worry that firms utilize interlocks as a means of initiating collusion and sustaining it.⁷⁷ There are difficulties in sustaining collusion, and the economic literature generally identifies two inherent problems that colluding firms need to overcome. First, it can be difficult, time-consuming and expensive to initiate it.⁷⁸ Second, the fragile nature of collusive agreements provides incentives for firms to cheat and steal profits. In the following two subsections, I discuss how interlocks can ameliorate these two problems by making it easier for firms to facilitate and sustain collusion.

1. Common understanding

To initiate collusion, the firms need to agree on how the collusion will work – mainly, which prices to charge for each product, how to divide the profits between the colluding firms, and how to monitor performance.⁷⁹ In the case of cartels, it can be time-consuming and costly to collude. Collusion may require high transaction costs if many firms need to be involved in the cartel, if the firms offer differentiated products, or, if the firms need to agree on the price and output of many different products.⁸⁰ Directors of firms might also be nervous about getting caught or fear that the other firms in the cartel will go to the

⁷⁶ Rosch, *supra* note 12, at 16. Rosch further says that these concerns “have, if anything, only grown in recent years as the government’s burden of investigating and litigating price fixing cases has multiplied.” These increasing concerns are also obvious from recent discussions about interlocks within the OECD.

⁷⁷ See Christopher Leslie, *Trust, distrust and antitrust*, 82 TEX. L. REV. 515, 583 (2003-2004).

⁷⁸ See an extensive analysis of the optimal market characteristics for oligopolistic coordination in RICHARD M. POSNER, ANTITRUST LAW 60-68 (2d ed. 2001) and Marc Ivaldi et al., *The Economics of Tacit Collusion*, FINAL REP. FOR DG COMP., EUR. COMM. 11-57 (2003). See also a similar list of relevant factors in cartel agreements in SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENTS 171 (3d ed. 2010).

⁷⁹ See generally BISHOP & WALKER, *supra* note 77, at 170-171 and POSNER (2001), *supra* note 77, at 65-66.

⁸⁰ See, e.g., WHISH & BAILEY, *supra* note 50, at 522.

government and whistle-blow.⁸¹ Firms might, thus, decide that it is not worthwhile to collude.

Interlocks can make cartelizing more attractive to firms, because they make it easier for them to initiate an agreement. The discussion above demonstrates that trust is an important element for firms to see cartelizing as desirable. Cartels will most likely not be formed in the first place if the directors of Alpha do not trust Beta's directors. Similarly, an already existing collusive agreement may dissolve if distrust grows between the firms.⁸² By forming an interlock, the competing firms can establish (or reinforce) trust, as the interlocked director can effectively communicate reliable information in a timely manner between the firms.⁸³ Thus, the link between the firms and the increased information flow can reduce transaction costs and also give the directors peace of mind, as they presumably do not have to worry as much about whistle-blowing.

For collusion to be possible in an oligopolistic market, the market needs to be stable, with high entry barriers and homogenous products. Oligopolistic coordination becomes difficult if there are many firms in the market, low barriers to entry or expand, the firms have different cost structures, products are differentiated and transparency is lacking.⁸⁴ Moreover, uncertainty about each other's business operations makes coordination less

⁸¹ See, e.g., BISHOP & WALKER, *supra* note 77, at 170 and 179-183.

⁸² See Szalacha, *supra* note 29, at 213. See also Davide Carbonai & Giovanni Di Bartolomeo (2006), *Interlocking directorates as a thrust substitute: The case of the Italian non-life insurance industry*, UNIV. OF TERAMO DEP. OF COMMUNIC. WORKING PAPER 1, 2 (2006).

⁸³ See further on the characteristics of information exchange through an interlocked person in Section B.

⁸⁴ See Ivaldi et al., *supra* note 77, at 12-36. It can, for instance, be difficult to maintain collusion if there are five or more firms in the market. See ELHAUGE, *supra* note 67, at 591-592.

likely. For instance, uncertainty about demand “prevents rivals from being able to monitor perfectly the quantity choices of their rivals.”⁸⁵

Interlocks can help ameliorate these problems. Indeed, Marc Ivaldi et al. suggest that oligopolistic coordination “is more likely to appear in markets where competitors are tied through structural links.”⁸⁶ The interlocked person, can, for instance, access information about the firms’ demand and remove demand uncertainty by sharing the information.⁸⁷ Moreover, interlocks make it easier for firms to agree on market conformity, as they can coordinate to reduce cost asymmetries and make their products more homogenous.

2. *Enforcement mechanism*

Collusive agreements are fragile because the firms have an incentive to cheat and steal profits from the other members.⁸⁸ Thus, the sustainability of the collusion depends on the effectiveness of the enforcement mechanism, i.e. the firms need to detect deviation from the collusive practice and punish the deviator.⁸⁹ This applies equally to explicit collusion and oligopolistic coordination.⁹⁰ As Richard Posner puts it, “To teach the cheater a sharp lesson, the large firms could respond to the cheater by dropping their price below cost,

⁸⁵ Edward J. Green et al., *Tacit Collusion in Oligopoly* (20 August 2013) (unpublished manuscript), at 11. See also Edward J. Green & Robert H. Porter, *Noncooperative Collusion under Imperfect Price Information*, 52 *ECONOMETRICA* 87 (1984).

⁸⁶ See Ivaldi et al., *supra* note 77, at 53. Also, in its *Impala* case the European Court of Justice explained that tacit collusion “is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work” Further, the court explained that for the collusion to be sustainable the firms “must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to” and to be able to have a discipline in the collusion there must “be some form of credible deterrent mechanism that can come into play if deviation is detected.” Case C-413/06 P, *Bertelsmann and Sony Corporation v. Commission*, 2008 E.C.R. I-04951 para. 123

⁸⁷ WHISH & BAILEY, *supra* note 50, at 569, identify exchange of information as a “practice that makes it easier for firms to achieve the benefits of tacit coordination.”

⁸⁸ See, e.g., CARLTON & PERLOFF, *supra* note 68, at 123.

⁸⁹ Stigler, *supra* note 66, at 45-47 and POSNER (2011), *supra* note 54, at 370.

⁹⁰ See, e.g., BISHOP & WALKER, *supra* note 77, at 171, ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW* 664-665 and 672-673 (5th ed. 2014), WHISH & BAILEY, *supra* note 50, at 522-523 and POSNER (2001) *supra* note 77, at 60-69.

thus imposing losses on the cheater as a sanction for his cheating.”⁹¹ A successful enforcement mechanism teaches the deviant how to behave. He realizes that price-cutting or increasing output is not worthwhile in the long-term.⁹²

The enforcement mechanism’s key ingredient is market transparency. Indeed, monitoring the behavior of rivals becomes difficult in a non-transparent market.⁹³ Difficulties in monitoring will consequently result in a lag in retaliation, which may reduce losses for the deviant firm.⁹⁴ Thus, increasing transparency by sharing strategic data via an interlock can create conditions for collusion in markets where coordination has been difficult.⁹⁵ Or as Christopher Leslie puts it, describing cartels, “[By] placing a director on a cartel partner’s board, each cartel member has an observer in place who can monitor activities such as plans to reduce price, expand capacity, or introduce new products that could undermine the cartel agreement.”⁹⁶ This is in line with the EU Commission’s view that “cross-directorships” (interlocks) may make monitoring of market behavior easier in an oligopolistic market.⁹⁷

Since interlocks make it easier for firms to detect deviation, their retaliation becomes quicker and more effective, which in turn deters firms from deviating.⁹⁸ Moreover, an

⁹¹ *Id.*, POSNER, at 370.

⁹² *See, e.g.*, Green et al., *supra* note 84.

⁹³ *See* Ivaldi et al., *supra* note 77, at 22-26.

⁹⁴ *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 241 (1988). *See also* GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS, OJ C 31 5.2.2004 (Horizontal Merger Guidelines), para. 49, where it says: “Markets ... need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating, and thus know when to retaliate.”

⁹⁵ Interlocks can even create transparency in markets where there was no transparency before, such as in markets where prices are generally kept secret. This is, for instance, the case in competitive bidding where firms are competing for a buyer’s demand without knowing each other’s prices. The interlocked person could eliminate the uncertainty in such cases by sharing information on the firms’ strategies. This situation will be further discussed in *Section B*.

⁹⁶ Leslie, *supra* note 76, at 583.

⁹⁷ HORIZONTAL MERGER GUIDELINES, *supra* note 93, para. 51.

⁹⁸ *See* Gabrielsen et al., *supra* note 22, at 843.

interlock can prevent useless retaliation. Firms might, for instance, err in their belief that a member has deviated and undertake costly retaliation.⁹⁹ An interlocked person can correct such misunderstandings by sharing information and thus save the firms' the trouble and cost of initiating the retaliation.¹⁰⁰

One might wonder whether a single interlock in an oligopolistic market is sufficient to facilitate coordination. This will of course depend on market circumstances, but the general answer is that it can often be sufficient. For instance, if there are three equally sized firms in a market, Alpha, Beta and Gamma, an interlock between Alpha and Beta will make it easier for them to coordinate their behavior. Let us say that before the interlock, Alpha wanted to increase the price to a supracompetitive level (from, say, \$80 to \$100), but decided not to do it because of uncertainty over whether Beta and Gamma would follow. After the interlock, it becomes easier for Alpha and Beta to arrive at a common understanding on how the coordination should work. Indeed, studies show that interlocked firms tend to copy each other's behavior because of the increased flow of information.¹⁰¹ In our example, the two firms now set their prices at \$100. Gamma is incentivized to match their prices and enjoy the supracompetitive price. Otherwise, the firms might join together to punish Gamma and drive prices down to \$70, ensuring that all of them will earn less profit.

The economic theory of price leadership in oligopolies also explains how a single interlock can facilitate oligopolistic coordination. Price leadership means that a market leader sets a price which other firms in the market follow. The price leader is generally a

⁹⁹ See, e.g., POSNER (2001), *supra* note 77, at 67.

¹⁰⁰ See in general about the cooperative strategic behavior of information exchange, CARLTON & PERLOFF, *supra* note 68, at 381.

¹⁰¹ See Pamela R. Haunschild & Christine M. Beckman, *When Do Interlocks Matter? Alternate Source of Information and Interlock Influence*, 43 ADMIN. SCIENCE QUART. 815, 817 (1998).

dominant firm or the largest firm in the market that sends signals to its rivals through pricing decisions.¹⁰² An interlock between two relatively large firms might create a price leader where there was none before. An example will illustrate this: Imagine four firms competing in a market where there is no price leader. Alpha has a forty percent market share, Beta has thirty percent, Gamma twenty percent and Delta ten percent. If Alpha and Beta establish an interlock, their total market share becomes seventy percent. If they coordinate their pricing practices, Gamma and Delta will potentially follow their behavior. Conversely, an interlock between Gamma and Delta does not make them a price leader because their total market share will only be thirty percent and hence lower than A's share.

3. *Parallel behavior/collective dominance*

In addition to increasing the likelihood of collusion, interlocks can create market circumstances for anticompetitive parallel behavior. Parallel behavior, without more, is generally lawful.¹⁰³ In the EU, however, exclusionary parallel behavior has been condemned under Article 102 as an abuse of collective dominant position.¹⁰⁴

¹⁰² See generally Jesse W. Markham, *The Nature and Significant of Price Leadership*, 41 THE AM. ECON. REV. 891, 896 (1951).

¹⁰³ See, e.g., ELHAUGE, *supra* note 67, at 562, Green et al., *supra* note 84, at 3 and WHISH & BAILEY, *supra* note 50, at 580. Whish & Bailey say: "To condemn ... parallel behaviour as abusive in itself would be a nonsense [...]." See also ELHAUGE & GERADIN, *supra* note 68, where they say that "parallel conduct can be explained by separate decisions that take into account price interdependence on oligopolistic markets." Furthermore, in *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955 (2007), the U.S. Supreme Court said: "Without more, parallel conduct does not suggest conspiracy." The EU courts' theory is similar. In the *Dyestuff* case, *supra* note 64, para. 8, the European Court of Justice said: "Although parallel behavior may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market" Further, if the Commission proves a parallel behavior the burden is on the companies to "prove circumstances which cast the facts ... in a different light and which thus allow another explanation of the facts" See *Joined Cases 29 and 30/83, Compagnie Royale v. Commission*, 1984 E.C.R. 1679 para. 16.

¹⁰⁴ In the EU the concept of collective dominance has been addressed both in merger cases, under the EU Merger Regulation, and in cases concerning the abuse of such position under Article 102 TFEU. According to its Merger Guidelines, the Commission considers that a merger "in a concentrated market may

Abuse of collective dominance is closely related to oligopolistic coordination.¹⁰⁵ However, the coordination does not concern business practices, such as price increase or output decrease, but defensive exclusionary practices. The firms act unilaterally but still effectively behave together like a single monopolist, trying either to push an existing rival out of the market or hinder competition from a new rival, with the ultimate goal of preserving their collective dominance. The firms do this, for instance, by refusing to do business with any new rivals, thereby creating high barriers to entry into that market.

The rationale behind collective dominance has been debated in the EU,¹⁰⁶ and the concept of abuse remains ambiguous and “underdeveloped in the case law.”¹⁰⁷ In order for firms to be considered collectively dominant, they must possess sufficient market power to be in a dominant position. Further, the EU Courts have emphasized that the firms must possess some element of collectiveness. In *Compagnie Maritime Belge Transports v. Commission*, the European Court of Justice held that a collective dominant position exists if firms “present themselves or act together on a particular market as a

significantly impede effective competition, through the creation or the strengthening of a *collective dominant position* ...” see HORIZONTAL MERGER GUIDELINES, *supra* note 93, para. 39. Thus, the Commission has identified collective dominance as an unattractive market structure and it can intervene with a merger if it considers it necessary to prevent such market structure from emerging or strengthening. The application of Article 102 TFEU is different in nature, as the Commission is then evaluating whether firms already hold such a position and whether it has been abused. Or as ARIEL EZRACHI, EU COMPETITION LAW – AN ANALYTICAL GUIDE TO THE LEADING CASES 287 (4th ed. 2014) puts it: “... whereas Article 102 TFEU condemns the abuse of a collective dominant position (and not the position in itself), the European Merger Regulation condemns the creation or strengthening of the collective dominant position.” Also, there are scholars in the U.S. that have argued for applying Sherman Act, Section 2, or FTC Act, Section 5, to exclusionary practices by multiple firms. See C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L. J. 1182 (2013) and ELHAUGE & GERADIN, *supra* note 68, at 843, where they suggest that “avoidable practices that facilitate oligopolistic coordination can be illegal even when purely unilateral under FTC Act § 5”

¹⁰⁵ According to BISHOP & WALKER, *supra* note 77, at 340, there is “a close correspondence between the concepts of collective dominance and tacit coordination.”

¹⁰⁶ WHISH & BAILEY, *supra* note 50, at 571 call the concept “one of the most complex and controversial issues in EU competition law” According to them the concept of collective dominance in merger cases is used to prevent market circumstances where tacit collusion could evolve. This is also in line with BISHOP & WALKER, *supra* note 77, at 340.

¹⁰⁷ See WHISH & BAILEY, *supra* note 50, at 579.

collective entity.”¹⁰⁸ Other opinions emphasize the need for firms to be united by an “economic link.”¹⁰⁹ The few cases that exist on abuse of collective dominance suggest that firms abuse their dominant position if they join forces in order to exclude smaller rivals from the market.¹¹⁰

Despite the ambiguity behind the concept of collective dominance, one can easily imagine firms using interlocks to adopt a strategy of parallel exclusion. Without communication, parallel exclusion can be difficult to implement, because firms need to know how to execute the exclusion, for instance which exclusionary practices to undertake and when. There is also an incentive for firms to cheat and decide not to partake in the exclusionary conduct, making it less effective. Similar to the arguments presented above in the case of collusion, the increased information flow resulting from the interlock may facilitate abuse of collective dominance. An interlock between firms functions as an “economic link” that makes it easier for them to act together like a “collective entity.” The firms can better align their strategies and reduce incentives to cheat, which in turn makes the exclusionary conduct more effective.

¹⁰⁸ Joined Case C-395 and 396/96 P, *Compagnie Maritime Belge v. Commission*, 2000 E.C.R. I-1365, para. 36.

¹⁰⁹ Joined Cases T-68, 77 and 78/89, *Società Italiana Vetro SpA v. Commission* (Italian Glass case), 1992 E.C.R. II-1403, para. 358 and Case C-393/92, *Almelo v. NV Energiebedrijf Ijsselmij*, 1994 E.C.R. I-1477. Still other opinions have stressed that the market in question must have the characteristics of oligopolistic coordination, i.e. transparency and enforcement mechanism. See Case T-193/02, *Laurent Piau v. Commission*, 2005 E.C.R. II-209.

¹¹⁰ See, e.g., *Compagnie Maritime Belge* case, *supra* note 118. These practices have generally been condemned both on the grounds of Article 101 and 102, which suggests that there is a thin line between collusion and the abuse of collective dominance. However, the EU Courts have at the same time emphasized that the application of Articles 101 and 102 TFEU are different in nature and that the Commission cannot “recycle” the facts from an Article 101 violation to establish an abuse of collective dominance under Article 102. *Italian Glass*, *supra* note 108, para. 360. See also Case T-41/96, *Bayer AG v. Commission*, 2000 E.C.R. II-3383, para. 174-180 and WHISH & BAILEY, *supra* note 50, at 575. However, confusingly, the General Court in *Irish Sugar* held that a single firm could abuse a collective dominant position, which suggests that not even a minimum level of conspiracy between collectively dominant firms is a requirement for a violation of Article 102. See Case T-228/97, *Irish Sugar v. Commission*, 1999 E.C.R. II-2969.

4. *Empirical research on collusion and interlocks*

It has long been debated in the sociology and economics literature whether there exists a meaningful correlation between interlocks and collusion.¹¹¹ Interlocks are difficult to examine empirically, as they depend largely on the extent and nature of the information exchange between the firms. In order to come to ample conclusions on the competitive effects of interlocks, researchers need access to the information that firms exchange. However, researchers do not have such access. Indeed, “most researchers satisfy themselves with detecting networks or clusters of organizations and making speculative assumptions about their socioeconomic power.”¹¹² We, therefore, know very little about the extent of information exchange that goes on between interlocked firms.¹¹³ But there exists a fair amount of research that makes assumptions about the correlation based on observations about the market structure following interlocking activities. This section briefly describes the main empirical findings of this research.

A new study by Hubert Buch-Hansen on cartels in the EU concludes that horizontal interlocks “do not appear to facilitate cartels.”¹¹⁴ The research covered all EU-cartel cases from 1969 to 2012 where companies were found guilty of collusion. It showed that of the 1,030 firms involved in cartel activities in that time period, 3,318 interlocking ties existed between them. However, only twelve interlocks (three direct and nine indirect) existed when the firms engaged in the collusive activities.¹¹⁵

¹¹¹ See Gerber, *supra* note 23, at 112 and Mizuchi, *supra* note 1, at 273. Posner has, for instance, suggested that “interlocking directorates never have been an effective method of collusion or monopolization.” POSNER (2001), *supra* note 77, at 42.

¹¹² PENNINGS, *supra* note 2, at 5.

¹¹³ See, e.g., Mizuchi, *supra* note 1, at 288.

¹¹⁴ Hubert Buch-Hansen, *Interlocking Directorates and Collusion: An Empirical Analysis*, INTERNAT. SOCIOLOG. 1, 16 (2014), published online at <http://iss.sagepub.com/content/early/2014/03/31/0268580914527021>.

¹¹⁵ *Id.* at 10.

Despite this interesting outcome, the conclusion that interlocks “do not appear to facilitate cartels” is almost certainly overstated. There were many interlocking ties that existed between these firms, but only a very small number of them at the time of the anticompetitive activities. This trend might suggest that interlocks are utilized to build mutual trust between the parties and then broken when the cartel activity begins, perhaps in order to be more secretive. Buch-Hansen mentions this possibility, but he believes that interlocks are in most cases “considered insufficient for establishing and maintaining a cartel, especially if the cartel is to be composed of a larger group of companies.”¹¹⁶ Although this statement might be true, it does not answer the question whether interlocks are used to clear the way for cartels, even though the firms remove the interlock when the cartel is at its “best.”

Further, Buch-Hansen’s findings contradict what other commentators have suggested. Leslie mentions, for example, that Rio Tinto Zinc “controlled many of the world’s mining concerns through an extensive network of interlocking directorates,” and that the diamond cartel “receives much of its stability from a complex web of interlocking directorates.”¹¹⁷ Finally, Buch-Hansen’s research only involved cartels that got caught. As Carlton and Perloff have pointed out, “we know a great deal about cartels that get caught, but very little about those that escape detection.”¹¹⁸

There are also difficulties in trying to examine whether horizontal interlocks facilitate oligopolistic coordination. One way of examining the correlation is to look at the interlock’s *ex post* effects on firms’ performance in the market. There exists a substantial

¹¹⁶ *Id.* at 13.

¹¹⁷ Leslie, *supra* note 76, at 584.

¹¹⁸ CARLTON & PERLOFF, *supra* note 68, at 127. They also mention that studies have shown that cartels that get caught tend to be “unprofitable, and hence, perhaps, atypical.”

body of empirical literature on that issue, but it provides mixed results, and there is no consensus on the impact of interlocks on firm performance.¹¹⁹ For instance, a positive correlation between interlocks and firm performance was found in Carrington's research on Canadian firms,¹²⁰ Pennings' research on U.S. firms,¹²¹ and Chin-Huat Ong's et al. research on Singaporean firms.¹²² However, research by Edward J. Zajac¹²³ and Neil Fligstein and Peter Brantley¹²⁴ on U.S. firms casts doubt on the existence of a correlation.

The reason for this ambiguity presumably relates to the difficulties of isolating the effects of interlocks on firm performance. That is, it is difficult to predict what the competition would have looked like but for the interlock. There could be number of different reasons for increased or decreased profits, for example a shift in demand or prices or increased or decreased concentration. Also, it might take time to build mutual trust, and interlocks might thus only meaningfully affect performance in the long run.

Carrington's research is especially noteworthy, because he found that "almost one-third of the effect of concentration on profits is due to directly horizontal interlocking."¹²⁵ Further, even though he found a positive correlation between interlock density and profit margins, i.e. profits were higher when numerous interlocks existed, it accounted only for thirty-nine percent of the variance in profit margins.¹²⁶ Thus, there is no need for all of the firms to be interlocked for profits to rise. Indeed, an interlock between two firms can

¹¹⁹ See a general review of the existing empirical literature in Haunschild & Beckman, *supra* note 100, at 815, Santos et al., *supra* note 39, at 5-6 and Mizruchi, *supra* note 1, at 273-273.

¹²⁰ See CARRINGTON, *supra* note 24.

¹²¹ See PENNINGS, *supra* note 2.

¹²² See Chin-Huat Ong et al., *An Explanatory Study on Interlocking Directorates in Listed Firms in Singapore*, 11 CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 322 (2003).

¹²³ See Edward J. Zajac, *Interlocking Directorates as an Interorganizational Strategy: A Test of Critical Assumptions*, 31 THE ACADEMY OF MANAGEMENT JOURNAL 428 (1988).

¹²⁴ See Neil Fligstein & Peter Brantley, *Bank Control, Owner Control, or Organizational Dynamics: Who Controls the Large Modern Corporation?*, 98 AMERICAN JOURNAL OF SOCIOLOGY 280 (1992).

¹²⁵ CARRINGTON, *supra* note 24, at 192.

¹²⁶ *Id.* at 210.

increase profits in the industry as a whole, which supports the theory that a single (or few) interlocks can facilitate oligopolistic coordination (see discussion above on price leadership).

For the purposes of this paper, the empirical findings at least do not invalidate the theoretical arguments set forth in subsections 1-3. On the contrary, the mixed findings do not warrant making general assumptions about the correlation between collusion and interlocks. In order to fully understand the effects of interlocks on collusion, we still need answers to important empirical questions. For instance, firms in a duopoly might use an interlock to facilitate collusion, while the chances of using an interlock for this purpose are remote in a market with many firms.¹²⁷ Again, research needs to be conducted on whether interlocks are initially used to build mutual trust, and then dissolved when the collusion begins.

B. Non-coordinated effects

The last section discussed the potential collusive effects of interlocks. Those are the effects most often mentioned in the antitrust literature and the ones that researchers have tried to identify empirically. However, the literature generally pays little attention to the non-coordinated effects of interlocks.¹²⁸ *Subsection 1* argues that acquisition of sensitive business information through an interlock can “soften” competition between rivals, even though they do not collude. Moreover, information conveyed through the interlocked person is more reliable than information conveyed by the firm itself. *Subsection 2* argues

¹²⁷ This is for instance the conclusion of PENNINGS, *supra* note 2.

¹²⁸ Non-coordinated effects arise in the absence of collusion. We try to evaluate the anticompetitive effects by assuming that the firms do not collude, they set their price unilaterally and their pricing decisions are not intended to be a signal to other players in the market. See, e.g., O’Brien & Shalop, *supra* note 7, at 568.

that horizontal interlocks can have anticompetitive effects even in the absence of any information exchange.

1. Acquisition of information in the absence of collusion

Let us assume that Xavier, who serves as a director in both Alpha and Beta, exchanges information between the firms, but the firms do not agree on prices or output – they simply exchange the information. Such information sharing can have anticompetitive effects even in the absence of explicit collusion. The mere exchange of such information may reduce environmental uncertainty and lessen the competitive forces in the market. Acquiring sensitive information about a rival plausibly affects the future behavior of the firm receiving the information, and thereby distorts its competitive autonomy.¹²⁹ In other words, when firms acquire sensitive information about their rivals, it can “soften the degree of competition” between them.¹³⁰

One could argue that an interlock represents only one of many ways to convey information, and that firms will find other ways to exchange it if interlocks are prohibited. This argument, however, overlooks the fact that information acquired and shared by the interlocked person is more reliable than information from the firm itself.¹³¹ In fact, a firm has an incentive to mislead and delude its rivals by giving wrong information, hoping that the rival will make wrong decisions. The interlocked individual, who works in the interest of both firms, gains nothing from providing wrong information to the firms. Her incentive is in fact to do the opposite, because otherwise she might

¹²⁹ See GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS, 2011/C 11/01 para. 62: “When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour.”

¹³⁰ Bennett & Collins, *supra* note 62, at 324-325.

¹³¹ See Haunschild & Beckman, *supra* note 100, at 817.

breach her fiduciary obligations. Also, an interlocked person can convey reliable information that she personally and directly obtained. Firms can certainly obtain information on their rivals through other sources, such as through communication between employees of the two firms. However, the interlocked person possesses firsthand knowledge of discussions that went on inside the board room. Employees rarely possess such accurate information.

Moreover, the information exchange is more efficient and immediate if conducted through the interlocked person.¹³² Even if firms exchange information voluntarily there can be a time lag in the exchange which might make the information outdated and useless. However, an interlocked person always gets information as soon as it is available and can communicate it immediately.

Finally, the presence of interlocks severely restricts the possibility that a firm's acquisition of information will lead to unilateral price reduction. In the absence of an interlock, a firm that acquires information about its rival's strategies may use it to lower its prices.¹³³ This is best explained by an example¹³⁴: Alpha and Beta are rivals in a tendering procedure, where prices are confidential. The buyer, Gamma, has announced that it will award the agreement to the firm offering the lowest price. Alpha calculates that its costs are 6, and projects, without having any affirmative information, that Beta's price will be 11. In the absence of affirmative information, Alpha will make an offer of 10, just below Beta's price of 11. However, if Alpha acquires information that Beta's

¹³² Or as Gabrielsen et al., *supra* note 22, at 838, put it: "[Interlocks] create a platform for information exchange, since having a position in a competitor makes it possible to acquire more, and fresher, information."

¹³³ See generally how information acquisition can benefit consumers in Bennett & Collins, *supra* note 62, at 325-326.

¹³⁴ The example is similar to an example provided by Bennett & Collins, *supra* note 62, at 326.

offer will be 8, Alpha will make an offer of 7. Gamma will be better off, because it will only pay 7 instead of the 8 that it would have paid Beta if Alpha had not received the information.¹³⁵ This result will not, however, be reached with an interlock between Alpha and Beta, because the interlocked individual can affect the prices of both firms. Knowing that Beta plans to offer 8 and that Alpha will make an offer of 10 (because it lacks the necessary information) Xavier, the interlocked director, knows that Beta will win the tender procedure. Instead of recommending that Alpha lowers its price below Beta's offer (i.e. down to 7), Xavier recommends that Beta raises its price to 9, to increase its profits to the detriment of the buyer.

2. Effects in the absence of collusion and information exchange

An important point of this article is that horizontal interlocks can have anticompetitive effects even in the absence of any collusion or information exchange. To show this, let us assume three things: 1) Xavier sits on the board of Alpha and Beta, 2) he does not communicate any information between the firms, and 3) the firms do not collude on price, output or other market strategies. Is such an interlock benign, as it has no effects on express competition between the firms? The answer to that question is “no”, for the following two reasons (both of which could be called internal aspects of interlocks, i.e. reasons relating to the interlocked person's state of mind and internal struggle).

The more obvious reason is that Xavier does not necessarily have to communicate information between Alpha and Beta in order to affect their decisions. He possesses information about both firms and can manipulate it without ever expressly

¹³⁵ It should be noted that this can have opposite effects if Alpha acquired information that Beta will offer 11. In that case Alpha will offer 10 and Gamma will be worse off than in the absence of information because he would have paid 9 instead of 10.

communicating it. Recall the example of Gamma's tendering procedure. In that example, Xavier manipulated the competitive bidding process to favor Beta, without sharing information about Alpha's plans. This manipulation, however, comes quite close to oligopolistic coordination. Indeed, Xavier's fellow board members at Beta might look at Xavier's voting as a signal of the other firm's strategy. For instance, if Xavier recommends to Beta that the firm raise its price from 8 to 9, the other board members might assume that this is because Xavier knows that Alpha's offer will be above 9.

In addition to the potential for manipulation through inference from signaling, there exists a more subtle reason for anticompetitive effects in the absence of direct information exchange. We may call this a fiduciary tension. This tension is captured in the maxim that "no man can serve two masters."¹³⁶ A person serving as a director in Alpha and Beta has personal ties and legal responsibilities towards both firms. The personal ties are of a social and psychological nature, as the director needs to show commitment to both firms and will "come to support the [firm], will concern himself with its problems, will favorably present it to others, and will try to aid it."¹³⁷ The director also has fiduciary obligations towards the firms. These obligations include the duty of care and duty of loyalty, both of which are supposed to ensure that directors act in the interest of the firm rather than in their own self-interest.¹³⁸

¹³⁶ This saying is originally from the Bible, and was used by Justice Brandeis in the case of interlocks. See *BRANDEIS*, *supra* note 72, at 56, where he says that a prohibition against interlocks will "give full legal sanction to the fundamental law of morals and of human nature: that 'No man can serve two masters.'"

¹³⁷ *PFEFFER & SALANCIK*, *supra* note 24, at 163.

¹³⁸ See, e.g., ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 200 (3rd ed 2004). See also Waller, *supra* note 10, at 836, where he says: "The duty of loyalty requires that directors consider the interest of the corporation over any personal interests so that they do not profit improperly at the corporation's expense and avoid self-dealing. ... The duty of care generally requires directors to act in good faith and with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances."

As a general rule, firms try to maximize their profits.¹³⁹ A director who prevents her firm from enjoying profits is likely to be violating her fiduciary obligations. Xavier, our interlocked director, is obviously facing a dilemma because a decision that benefits Alpha might result in a loss for Beta, or vice versa. “Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result.”¹⁴⁰ An example of this is provided by Arthur Travers: “Suppose X is a director of both Corporation A and Corporation B. X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B; at the same time he could hardly abstain from voting without depriving A of his best judgment.”¹⁴¹

This fiduciary tension presents a conflict of interest for the interlocked person.¹⁴² Knowing that one firm’s profits can mean another’s loss, a tempting way for a director to fulfil her fiduciary obligations towards both firms is to attempt to reduce competition between them, for example by raising prices, which could in turn yield increased profits for both of them.¹⁴³ Whether she is successful in reducing competition will, of course, depend on her power within the board. The point, however, is that the director has a strong incentive to advocate for the reduction of competition. This incentive is even stronger if the director stands to benefit financially from reducing competition.¹⁴⁴

Interestingly, the fiduciary tension may presents a tension between corporate governance

¹³⁹ This assumption is also in line with the basic economic assumption that “each firm sets its prices in order to maximize its profits”. See O’Brien & Shalop, *supra* note 7, at 572. The theory of maximizing profits is also a general assumption in industrial organization about the object of any firm. CARLTON & PERLOFF, *supra* note 68, at 58.

¹⁴⁰ Travers, *supra* note 12, at 840.

¹⁴¹ *Id.* at 840.

¹⁴² In some instances this conflict of interest “can be a direct violation of the duty of loyalty for either or both of the corporations where the director serves.” Waller, *supra* note 10, at 858.

¹⁴³ See AREEDA & HOVENKAMP, *supra* note 3, ¶1300, at 327.

¹⁴⁴ DotEcon report, *supra* note 23, at 60-61 says that if the “director’s remuneration is closely tied to company performance, then it may pay for the director to adopt decisions that imply that the companies compete less aggressively with each other.”

and antitrust law. When a director is faced with a fiduciary tension, the rules of corporate governance might encourage her to restrict competition between the firms. Otherwise she might be breaching her fiduciary obligations. Her actions might, however, subject the firms and herself to antitrust liability.

Fiduciary tension is present irrespective of the objective behind the interlock. Recall from *Part II* that a director can move to establish an interlock from personal ambition. Although this objective is not anticompetitive, the director still experiences a fiduciary tension and will have trouble managing it without attempting to soften competition between the firms. However, the fiduciary tension is not as apparent when the interlock is indirect, as the fiduciary obligation then rests on two different individuals. Xavier only has a fiduciary obligation towards Alpha, and Yvonne towards Beta. Xavier could, however, violate his fiduciary obligations, for instance, by communicating information to Yvonne that she then uses to harm Alpha. But in that situation, Xavier is involved in information exchange, which is more in line with the anticompetitive theory of information sharing in the absence of collusion (subsection 1).

V. ARGUING FOR A PER SE RULE AGAINST HORIZONTAL INTERLOCKS

Part IV was dedicated to the potential anticompetitive effects of horizontal interlocks. This Part discusses why and how horizontal interlocks should be prohibited. *Section A* reviews the most compelling arguments used against adopting such restrictions. Those arguments are that: 1) information exchange is not necessarily anticompetitive, 2) firms should be able to choose their directors freely, and 3) interlocks that are not driven by anticompetitive motives should not be restricted. *Section B* weighs the arguments for and

against restrictions on horizontal interlocks, and concludes that the possible gains of interlocking activity pale in comparison to the damage it can cause to consumers. Finally, *Section C* argues that the prohibition against horizontal interlocks should be *per se*, and not a rule of reason.

A. Arguments against restrictions

1. Information exchange is not anticompetitive

A person skeptical of restricting horizontal interlocks might argue that information exchange between rivals is not necessarily anticompetitive. This is true, but in the case of interlocks the objection is superficial. To be clear, information exchange between rivals can be procompetitive. In its *Guidelines on the applicability of Article 101 to horizontal co-operation agreements*, the Commission notes that information exchange “may help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand,” which can result in benefits to consumers “by reducing their search costs and improving choice.”¹⁴⁵ Information exchange is, for instance, unlikely to be anticompetitive if firms are only exchanging historic or aggregated (i.e. not individualized) data.¹⁴⁶

If we could confidently think that firms use interlocks only to communicate procompetitive information, interlocks would not be problematic. But a director’s position enables her to get access to a great deal of sensitive and strategic business information that she can share with the firms.¹⁴⁷ This data is individualized and relates to

¹⁴⁵ GUIDELINES ON THE APPLICABILITY OF ARTICLE 101, *supra* note 128, para. 57.

¹⁴⁶ *Id.* para. 89-90.

¹⁴⁷ In *Id.* para. 86, strategic information is defined in the following way: “Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments,

future prices and practices. The data's nature is, thus, anticompetitive. Also, using an interlock to exchange information looks suspect. If the firms only exchanged procompetitive information, they could use more formal or public ways of communicating. The use of an interlock indicates that the firms realize that the information exchange may be anticompetitive.

2. *Firms should be able to freely choose their directors*

A widespread argument for not intervening with interlocks is that firms are consumers in the market for executive talent, and they should be able to purchase their "product" without government interference. As Travers put it, "The most prevalent defense of interlocks is that they make available to the employing companies the best men available. Any restriction on interlocking directorates, or other interlocks, however slight, restricts the freedom of choice of the buying corporations."¹⁴⁸

Being a director is a difficult task. Directors need to dedicate time and effort in order to do a good job. Even though being a director does not require specific education or expertise, a good director needs to understand the market to be able to make informed decisions on market strategies. Additionally, a director must monitor the firm's performance.¹⁴⁹ Being a director, therefore, requires certain qualities and talents, and some people are simply better qualified than others to perform the tasks of a director, whether it is because of talent, experience, education, reputation or connections.¹⁵⁰ A

technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand."

¹⁴⁸ Travers, *supra* note 12, at 834.

¹⁴⁹ See Eliezer M. Fich & Lawrence J. White, *Why Do CEO's Reciprocally Sit on Each Other's Boards?*, 11 J. OF CORP. FIN. 175, 183 (2005).

¹⁵⁰ A Canadian study suggests that directors are often hired because of their political, social or business connections. The study showed "positive and very significant relationship between director's economic, political and social connections and the firm's main financial resources, i.e. debt level and level of

director who has some or many of these qualities can have positive effects on a firm's value and profits. A well-connected director might, for example, acquire new customers or get better deals from suppliers than his predecessors.

Empirical data show that certain individuals serve as directors on many different boards. For instance, in 2002, more than 1,000 board members from the top 1,000 U.S. companies sat on four or more corporate boards, and 235 of them sat on more than six.¹⁵¹ A recent study showed that in 2010, one individual sat on the board of seventeen of the three hundred largest firms in the EU.¹⁵² These findings suggest that these individuals are in very high demand, or that there is a lower supply of people with executive talent than one would expect.

According to theory, appointing outside directors can be valuable, because they are unbiased and will not work in the interest of particular shareholders. Moreover, outside directors often possess important expertise.¹⁵³ Alpha could, thus, argue that appointing Yvonne is the firm's best choice, as (1) she is an outside director and (2) already possesses experience and knowledge in the particular field. By prohibiting Alpha from appointing Yvonne as a board member, because she also serves as a board member for Beta, Alpha could argue that the firm is forced "to take less than it deems best."¹⁵⁴

shareholder equity." Saidatou Dicko & Hassan El Ibrami, *Directors' Connections, Financial Resources and Performance: An In-Depth Analysis of Canadian Companies*, 8 *INTERN. J. OF BUSIN. AND MANAG.* 1, 10 (2013).

¹⁵¹ Rosch, *supra* note 12, at 15. See also the original source Matt Krantz, *Web of Board Members Ties Together Corporate America*, USA TODAY, (Nov. 24, 2002), available online at http://usatoday30.usatoday.com/money/companies/management/2002-11-24-interlock_x.htm.

¹⁵² Heemskerk, *supra* note 19, at 93. Interestingly, however, a director in high demand generally has a negative impact on the firm's value, see Santos et al., *supra* note 39, at 3. This is attributed to the director being so busy that she does not have the time to be engaged in the operations of every firm, the so-called "busyness theory" of interlocking, see Szymon Kaczmarek et al., *Interlocking Directorships and Firm Performance in Highly Regulated Sectors: The Moderating Impact of Board Diversity*, 18 *J. MANAG. GOV.* 347, 367 (2012). This suggests that interlocks are not beneficial for firms if they are used in excess.

¹⁵³ See Waller, *supra* note 10, at 858.

¹⁵⁴ Travers, *supra* note 12, at 834.

These arguments, however, ignore certain important points. Although firms should be able to choose their directors, “a slight restriction in freedom might not meaningfully constrain the corporation’s choice of executive talent.”¹⁵⁵ For instance, it seems unlikely that a firm’s only option in appointing an experienced outside director is to pick someone from a competing firm. Indeed, hiring such a director suggests ulterior motives besides the expertise of the director. In sum, the “market-of-executive-talent” argument ignores the cooptation theory, i.e. that firms see independent value in creating interlocks and thereby reducing environmental uncertainty.

However, there may be difficulties in finding experienced and knowledgeable directors in certain small and specialized industries. Certainly increased education, communication, and globalization in today’s business environment reduces the persuasiveness of this argument, but it is still relevant. In the extreme case, the people with the necessary expertise are so few that no one can enter the market without establishing an interlock with an already existing firm. Prohibiting interlocks in such cases would create excessive barriers to entry. This barrier might ironically increase the chances of collusion, because the existing firms do not have to worry about new entries. However, this point about small and specialized industries does not eliminate the strong arguments for restricting interlocks. It only supports the conclusion that the prohibition should not be absolute, an issue discussed in *Part VII*.

3. *Interlocks do not necessarily have anticompetitive motives*

Part II suggested that the objectives behind interlocks are not necessarily anticompetitive. Reputational motives are, for instance, not anticompetitive in themselves, as the firm’s

¹⁵⁵ Gerber, *supra* note 23, at 113.

intention when appointing the director is not to restrict competition. One could, thus, argue that interlocks driven by these non-competitive motives should not be restricted, because their anticompetitive effects are remote.

Even though these neutral reasons can be present in the case of non-horizontal interlocks, it seems implausible that the objective behind interlocking with a rival is unrelated to competition. Indeed, the dominant theory about cooptation assumes that firms use interlocks to acquire information about firms that they view as “problematic” in their business environment. When the problematic firm is a rival, this motive raises serious antitrust concerns.

Further, although the initial motive behind interlocking is not necessarily anticompetitive, the firms involved might later, as their relationship strengthens, adopt a cooptation strategy. It would be practically impossible for antitrust authorities to monitor such a shift in use of the interlock. Exceptions based on motive would also be difficult to implement in practice. For instance, if firms with reputational motives are exempted from horizontal interlocks restriction, every firm would be incentivized to conceal its true motive for creating an interlock and pretend that reputational motives were the controlling factor. Finally, to reiterate an earlier point, horizontal interlocks can have anticompetitive non-coordinated effects, even though the objective behind the interlock is not anticompetitive (recall the discussion in *Part IV* on fiduciary tension).

B. Weighing the arguments

When weighing the arguments for and against interlock restrictions, we must keep in mind that antitrust law protects effective competition to the benefit of consumers, i.e. it

protects consumer welfare.¹⁵⁶ Even though this objective has perhaps not been as obvious in the EU as in the U.S., the Commission recently made it clear that their primary concern is consumer welfare.¹⁵⁷ As a result, the EU does not use a total welfare standard.¹⁵⁸ This means that if a certain behavior increases total welfare, but decreases consumer welfare, for instance if an interlock increases the firms' profits by 100 but decreases consumer welfare by 10, it is still deemed anticompetitive, even though it has net positive welfare effects.

Anticompetitive activity, especially collusion, is socially harmful and harms consumer welfare. For instance, according to John M. Connor and Robert H. Lande, the median overcharge of cartel activity is estimated at around twenty-five percent, which results in "many billion dollars every year" in consumer overcharge.¹⁵⁹ But obviously we cannot prohibit every possible scenario that conceivably fertilizes collusion. Many directors of large competing firms go to the same country club and have mutual friends. It would of course be absurd to ban directors of competing firms from having mutual friends. But that does not mean that we should not try to counteract the activities that are most likely to facilitate collusion and other anticompetitive activities.

¹⁵⁶ See, e.g., ELHAUGE & GERADIN, *supra* note 68, at 409. It should be noted that there are different theories about what the goal of antitrust law is or should be. Two theories dominate scholarly discussion. The first one is the aforementioned consumer welfare theory. Advocating for this theory, Robert Bork said that the "only legitimate goal of American antitrust law is the maximization of consumer welfare." ROBERT BORK, ANTITRUST PARADOX 51 (1978). The other theory is the theory of efficiency. Proponents of that theory view rivalry "as a pre-requisite for efficiency and consumer well-being but antitrust's goal should be to seek to maintain efficiency in the market rather than rivalry for its own sake." EUGÈNE BUTTIGIEG, COMPETITION LAW: SAFEGUARDING THE CONSUMER INTEREST – A COMPARATIVE ANALYSIS OF US ANTITRUST LAW AND EC COMPETITION LAW 14 (2009). See also POSNER (2001), *supra* note 77, at 2 where he says that "the only goal of antitrust law should be to promote efficiency in the economic sense"

¹⁵⁷ See WHISH & BAILEY, *supra* note 50, at 19.

¹⁵⁸ See ELHAUGE & GERADIN, *supra* note 68, at 409. Some scholars have, however, argued that antitrust law should adopt a total welfare standard. For an overview of this literature, see ELHAUGE, *supra* note 67, at 264 (footnote 63).

¹⁵⁹ Connor & Lande, *supra* note 49, at 456-457 and 428.

Interlocks differ significantly from scenarios such as being in the same country club or having mutual friends. They are organized and structural and are often utilized to acquire information about problematic firms (cooptation). Even though the anticompetitive effects of horizontal interlocks are probabilistic (i.e. an interlock is not always anticompetitive), *Part IV* demonstrated that they meaningfully increase the likelihood of harmful conduct. In the extreme case, interlocks facilitate cartel activity and eliminate competition between the firms, which leads to higher prices to the detriment of consumers.

The arguments against restricting interlocks *ex ante* are not convincing antitrust arguments. They primarily relate to firms' private interests, namely that allowing firms to freely choose their directors increases their value and reputation. Antitrust policy, however, is not enforced to protect or benefit the corporate interests of individual firms, but to promote consumer interests.

Also, a subtle point mostly overlooked in the literature is that for every new board seat, many interlocking ties are formed. For instance, if a person holds directorships in Alpha, Beta and Delta, there are three interlocking ties between the firms (AB, AD and BD). By adding a fourth directorship with Gamma the interlocking ties double and go up to six (AB, AD, AG, BD, BG and DG). This means that even though the potential harm from one interlock may seem small, the total harm could be large because of the aggregate of interlocks. Thus, every extra interlock may significantly impact the relationship among firms in a particular market.

In addition to the anticompetitive arguments, the discussion on EU enforcement in *Part III* demonstrated that detecting and proving anticompetitive activity is

administratively difficult. Instead of requiring proof of outright collusion, interlock restrictions aim to identify and prevent potential channels of anticompetitive behavior. For instance, U.S. enforcement practice has emphasized the preventive nature of Section 8 of the Clayton Act.¹⁶⁰ In the *Sears* case, the Court noted that by enacting Section 8, Congress was trying to prevent “incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.”¹⁶¹

In sum, when balancing the arguments for and against restricting horizontal interlocks, the scale leans substantially in favor of such restrictions. Indeed, the possible gains from interlocking activity pale in comparison to the damage it can cause to customers and competition, even though its anticompetitive effects are probabilistic. As one commentator puts it, “Even the possibility that interlocks could result in collusion ... should be taken very seriously.”¹⁶² In essence, the reason why horizontal interlocks should be restricted is because such restrictions aim at “preventing *potential* anticompetitive harm, since *actual* anticompetitive harm ... is extremely hard to prove ...”¹⁶³

¹⁶⁰ Indeed, “rather than confronting antitrust violations as they arise under the Sherman Act, Section 8 is intended to be preventative.” INTERLOCKING DIRECTORATES (handbook), *supra* note 3, at 41. *See also* Bork, *supra* note 155, at 47. He refers to the wording of the preamble of the original Clayton bill to show that the main objective was “to prohibit certain trade practices which ... singly and in themselves are not covered by the [Sherman Act] ... and thus to arrest the creation of trusts, conspiracies and monopolies in their incipency and before consummation.” It should, however, be noted that Bork criticizes the probabilistic nature of the Clayton Act and its interpretation by the courts.

¹⁶¹ *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953). The legislative intent behind Section 8 is also discussed in the case, where the Court says that interlocks “had been the instrumentality of defeating the purpose of the antitrust laws” and that they “had tended to suppress competition or to foster joint action against third party competitors.”

¹⁶² Jacobs, *supra* note 3, at 652.

¹⁶³ I’m borrowing here the wording of Gilo, *supra* note 7, at 46, on why minority shareholding should be restricted. It should also be noted that there is nothing new in proposing that antitrust law should cover probabilistic practices, rather than only those that have already caused anticompetitive effects. Mergers, for instance, only “create a danger rather than a certainty of monopoly.” POSNER (2001), *supra* note 77, at 1

C. Per se or rule of reason?

There are mainly two options for how to restrict horizontal interlocks: 1) a *per se* rule, such as Section 8 of the Clayton Act, or 2) a rule of reason notification system, as in Japan and South-Korea. A *per se* rule would restrict interlocks without inquiring into their possible procompetitive effects, while a rule of reason would require firms to notify interlocks to the Commission, which would only sever an interlock if its potential anticompetitive effects outweighed the possible procompetitive efficiencies.

If horizontal interlocks are restricted, the arguments for a *per se* rule are strong. The rule is simple and would not create significant administrative costs for the Commission. The Commission would only intervene if firms violated the ban. The main argument in favor of the rule of reason is that only anticompetitive interlocks would be terminated, but not the neutral or potentially procompetitive ones. However, under a rule of reason the Commission would need to conduct a thorough analysis of the market circumstances and examine the potential pro- and anticompetitive effects of each interlock. Thus, a rule of reason would result in an expensive administrative leap for the Commission. The Commission would have to go from no formal monitoring system of interlocks to a complete monitoring system.

The problem with a *per se* rule is potential overdeterrence. By prohibiting all horizontal interlocks we would run the risk of restricting interlocks that are not anticompetitive (false negatives). Conversely, the problem with a rule of reason is potential underdeterrence, i.e. the Commission could incorrectly determine an interlock to be procompetitive, and thus not intervene, when it was in fact anticompetitive (false positives). In the case of horizontal interlocks, the potential harm of overdeterrence is

insignificant compared to the potential harm of underdeterrence. By overdetering we only deprive firms of the complete freedom to choose their directors. This restriction is not burdensome, since the firms can choose directors from non-competing firms. That pool of executive talent is still substantial. Also, a *per se* restriction would not chill procompetitive behavior, because firms could still achieve potential procompetitive effects through information exchange by other less restrictive means. By underdetering, however, we run the risk of substantial harm to consumer welfare.

In sum, proscribing interlocks *per se* would prevent potential harm to consumer welfare without meaningfully restricting firms' freedom to choose their directors or harm them in other ways. When this conclusion is taken together with the substantial administrative costs attached to a rule of reason on top of that, a *per se* rule becomes compelling.

In fact, the danger of possible overdeterrence from instituting a *per se* rule can be limited by adopting a jurisdictional threshold. This could either be a revenue threshold, as in Section 8 of the Clayton Act, or a minimal share of the market (market share *de minimis*). Such a threshold would avoid overregulating the market, as an interlock between minor players would be unlikely to dampen competition. A revenue threshold could, however, be problematic, because some anticompetitive interlocks might not reach the threshold. For instance, an industry could be small with correspondingly low revenue, but give rise to no good reason for allowing interlocks. Indeed, the interlocked firms might enjoy substantial market power without meeting the revenue threshold. A market share *de minimis* of, say ten percent, would be a better policy decision. It would address the overdeterrence concerns directly, as it would only exempt interlocks between minor

players. A market share *de minimis* would also be in line with Article 8(a) of the Commission's De Minimis Notice, which stipulates that agreements between rivals are not covered by Article 101(1) if the aggregate market share held by the parties to the agreement does not exceed ten percent on any of the relevant markets affected by the agreement.¹⁶⁴

VI. ANTICOMPETITIVE EFFECTS OF NON-HORIZONTAL INTERLOCKS

As a general rule, vertical agreements do not raise the same antitrust concerns as horizontal agreements.¹⁶⁵ Vertical relationships are important and efficient, since they enable companies to divide tasks in the distribution chain. This means that a producer does not have to put together his own distribution system and retail store. Instead, he can rely on other firms to take care of it for him and the producer can focus on what he does best – produce goods.¹⁶⁶ Therefore, vertical agreements do not raise antitrust concerns unless they create certain anticompetitive restraints (so-called vertical restraints) that can either affect downstream or upstream competition.

The general antitrust concern regarding vertical interlocks is the increased likelihood of interbrand vertical restraints, such as exclusive dealing and tying.¹⁶⁷ These types of restraints can negatively affect competitors and consumers, either by impeding rivals'

¹⁶⁴ See Commission's Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01). Moreover, as a side note, this would also be in line with the White Paper on minority shareholding, which proposes that minority shareholding should only be notified if the acquired share is 20 percent (or between 5 and 20 percent under certain circumstances). See White Paper, *supra* note 5, para. 48.

¹⁶⁵ See EU COMMISSION'S GUIDELINES ON VERTICAL RESTRAINTS (2010/C 130/01), para. 100.

¹⁶⁶ Indeed, the main objective behind such transactions is "to reduce transaction costs involved in coordinating production by means of contracts with other firms." POSNER (2001), *supra* note 77, at 224.

¹⁶⁷ See AREEDA & HOVENKAMP, *supra* note 3, ¶1303, at 339-340.

efficiencies or extracting consumer surplus.¹⁶⁸ However, *Section A* argues that the concerns arising from vertical interlocks are not as strong as for horizontal interlocks.

Conglomerate interlocks are even less likely to raise antitrust concerns than vertical interlocks. The reasons for them can be various, ranging from family ties to a high demand for a board member on account of her executive talents. Proscribing conglomerate interlocks would prevent a person from simultaneously serving as a director in two or more firms in different markets. This would obviously be over-inclusive, since it is difficult to imagine, for instance, any anticompetitive effects if Xavier sits on the board of a computer company and a lumber manufacturer. There are, however, two possible scenarios where conglomerate interlocks may raise antitrust concerns. First, as discussed in *Section B*, financial interlocks can be anticompetitive if they lead to preferential treatment or, in the case of insolvent customers, if they restrict competition to a greater extent than is necessary to guarantee solvency. Second, conglomerate interlocks between potential competitors may raise antitrust concerns. That issue will be deferred to *Part VII*, which discusses whether the EU should include potential competitors in the concept of “competitors.”

Section C argues that the EU should monitor non-horizontal interlocks (that reach certain jurisdictional thresholds) through a notification system. For vertical interlocks, a clearing notification system seems optimal, whereas an intervention notification system seems optimal in the case of conglomerate financial interlocks.

¹⁶⁸ See generally ELHAUGE, *supra* note 67, at 325 and 360-362.

A. Potential anticompetitive effects of vertical interlocks

When looking at the possible effects of vertical interlocks, we must distinguish between vertical integration and vertical restraints. Vertical integration occurs when a firm operates on two or more levels in a distribution chain, for example a producer that has a subsidiary that takes care of distribution.¹⁶⁹ Article 101(1) TFEU does not cover agreements between vertically integrated firms. Vertically integrated firms form what is called a single economic entity, and their agreements are, therefore, not “between undertakings” within the meaning of Article 101(1).¹⁷⁰ Establishing an interlock between vertically integrated firms (a parent and a subsidiary, for instance) does not create any additional antitrust concerns, because their relationship already allows them to make exclusionary agreements without being subject to antitrust scrutiny.¹⁷¹

An interlock between two independent vertically related firms can be seen as a partial vertical integration.¹⁷² That is, instead of buying a distributor (complete vertical integration) the manufacturer can establish an interlock. A vertical interlock might be established because the firms want to do more business with each other.¹⁷³ It could also be used as a strategic tool to acquire information about the other firm. The effects of such cooptation are, however, not as serious as in the case of horizontal interlocks. Indeed, if

¹⁶⁹ See WHISH & BAILEY, *supra* note 50, at 619-620.

¹⁷⁰ *Id.* at 620 and Case C-73/95 P, *Viho v. Commission*, 1996 E.C.R. I-5457.

¹⁷¹ See AREEDA & HOVENKAMP, *supra* note 3, ¶1302, at 335-336. It should, however, be noted that in theory predatory vertical integration could be deemed unlawful, for instance if a producer buys the only line of distribution and makes it difficult for new producers to enter the market. This is though generally unlikely to happen. See a general discussion and a criticism of this theory in POSNER (2001), *supra* note 77, at 224-227.

¹⁷² See Travers, *supra* note 12, at 853.

¹⁷³ Its establishment might suggest that “the firms intend to deal with one another to a greater extent than they would absent the interlock.” *Id.* at 851.

vertically related firms acquire more information about each other's business they can work together to increase their efficiencies, which could benefit consumers.¹⁷⁴

However, the interlock might also increase incentives to impose vertical restraints. The main antitrust concern regarding vertical interlocks is that they “can lead to preferential treatment at the expense of other suppliers or customers by facilitating reciprocal or exclusive dealing, tying arrangement, and vertical integration.”¹⁷⁵ An example of this would be the following: Gamma, a distributor, does equal business with its two producers of homogenous products, Alpha and Beta, for \$10 apiece. Alpha appoints Xavier on Gamma's board and after acquiring information about Beta's price, Alpha offers Gamma to buy the product for \$9 apiece, in return for all of Gamma's purchasing (an exclusive purchasing agreement). Exclusive purchasing agreements generally exclude rivals from competing for the buyer's demand, as the buyer cannot purchase his products from another seller.¹⁷⁶ If the exclusive purchasing agreement leads to substantial foreclosure it can limit rivals' ability to expand and create barriers to entry.¹⁷⁷

Also, the incentives to foreclose rivals may be stronger in the case of partial as opposed to complete vertical integration.¹⁷⁸ If Alpha purchases its distributor Gamma (complete vertical integration), the merged firm will only reject business from Beta if the firm is better off, i.e. it weighs the possible benefits of refusing to deal with Beta against

¹⁷⁴ See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762 (1984), where it says: “A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.”

¹⁷⁵ AREEDA & HOVENKAMP, *supra* note 3, ¶1302, at 335.

¹⁷⁶ See, e.g., POSNER (2011), *supra* note 54, at 405-406.

¹⁷⁷ See, e.g., ELHAUGE, *supra* note 67, at 325.

¹⁷⁸ See White Paper, *supra* note 5, Annex I (Economic Literature on Non-Controlling Minority Shareholdings), para. 13 where it says: “Vertical structural links may even have more pronounced anti-competitive effects than full vertical mergers.”

the costs of losing Beta's business (which could result in lower profits for Alpha). However, a firm initiating an interlock (partial vertical integration) does not have to take potential losses into consideration. If Xavier sits on the boards of both Alpha and Gamma, he can advocate to cut business with Beta without that having any negative effects on Alpha's profits.

However, economists do not consider vertical restraints to be necessarily anticompetitive.¹⁷⁹ In fact, they can be procompetitive. They can, for instance, open up new markets and lead to lower retail prices because of economies of scale.¹⁸⁰ Thus, vertical restraints are generally only considered anticompetitive when either the seller or the buyer enjoys market power or if the agreement forecloses competition from rivals.¹⁸¹ In its *Guidelines on Vertical Restraints*, the Commission decided to limit its inquiry into vertical restraints to "undertakings holding a certain degree of market power where inter-brand competition may be insufficient."¹⁸² This market power requirement makes enforcement against vertical restraints much more limited than in the case of horizontal agreements. Moreover, in the case of vertical restraints, the EU adopted certain *de*

¹⁷⁹ See generally CARLTON & PERLOFF, *supra* note 68, at 426.

¹⁸⁰ See GUIDELINES ON VERTICAL RESTRAINTS, *supra* note 164, para. 116, for more details on procompetitive effects. See also point (6) in the Preamble of EU Regulation No 330/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices (Regulation on Block Exemptions), where it says: "Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels."

¹⁸¹ See Gabrielsen et al., *supra* note 22, at 844 and WHISH & BAILEY, *supra* note 50, at 624.

¹⁸² GUIDELINES ON VERTICAL RESTRAINTS, *supra* note 164, para. 102. Further, according to para. 103, EU competition law aims at preventing the following negative effects that may result from vertical restraints: "(i) foreclosure of other suppliers or other buyers by raising barriers to entry, (ii) reduction of inter-brand competition between the companies operating on a market, including facilitation of collusion amongst suppliers or buyers; by collusion is meant both explicit collusion and tacit collusion (conscious parallel behavior); (iii) reduction of intra-brand competition between distributors of the same brand; (iv) the creation of obstacles to market integration, including, above all, limitations on the freedom of consumers to purchase goods or services in any Member State they may choose."

minimis jurisdictional thresholds and block exemptions. According to the *de minimis* rules, Article 101(1) TFEU does not apply to vertical agreements if the market share of each of the parties to the agreement does not exceed fifteen percent.¹⁸³ Even though a vertical agreement falls outside the *de minimis* rules, and thus inside Article 101(1), it can still be block exempted, according to EU Regulation No 330/2010 on Block Exemptions, if the buyer's and supplier's market shares are below thirty percent in the relevant markets and if the agreement does not contain hard-core vertical restrictions, such as exclusive purchasing or restrictions on sale prices.¹⁸⁴

To summarize the above discussion, interlocks can increase the likelihood of vertical restraints, but vertical restraints are unlikely to produce anticompetitive behavior unless there is a degree of market power or foreclosure. This raises the question of whether vertical interlocks raise any meaningful antitrust concerns. Phillip E. Areeda and Herbert Hovenkamp argue that the effects of vertical interlocks on competition “if any” are “indirect at best.”¹⁸⁵ Indeed, although vertical interlocks can increase the likelihood of “preferential treatment”, the increased cooperation can also be procompetitive and lead to more efficiency and lower prices. Therefore, vertical interlocks do not raise antitrust concerns that are independent from the general notion that vertical restraints can be anticompetitive. Moreover, the issue of vertical interlocks raises a question of causal order: Did the firms agree to a vertical restraint because of the interlock or did they establish an interlock to better implement a vertical agreement?¹⁸⁶

¹⁸³ See Article 8(b) of the De Minimis Notice, *supra* note 163.

¹⁸⁴ See Articles 3 and 4 of Regulation on Block Exemption No 330/2010.

¹⁸⁵ AREEDA & HOVENKAMP, *supra* note 3, ¶1303, at 339.

¹⁸⁶ AREEDA & HOVENKAMP, *supra* note 3, ¶1303, at 340 suggest that “most vertical interlocks are a result, rather than a cause, of vertical dealings.”

In essence, the concerns of vertical interlocks are not as strong as for horizontal interlocks. Indeed, in the case of horizontal interlocks the danger of anticompetitive effects is only one step away, i.e. the interlock increases the general likelihood of anticompetitive effects. The anticompetitive effects of vertical interlocks, however, are two steps away, i.e. the interlock increases the general likelihood of vertical agreements (first step), but vertical agreements are not anticompetitive unless they have foreclosing effects and/or the firms involved enjoy market power (second step).

B. Potential anticompetitive effects of conglomerate financial interlocks

Financial interlocks are established between a bank (or another financial institution) and its customer. Such interlocks can be viewed both as conglomerate and vertical. They are conglomerate in the sense that they are usually established between a financial institution and a firm in a completely unrelated business operation. They can also be viewed as vertical. Financial institutions provide customers with capital, a necessary resource for them to purchase input and produce output.¹⁸⁷ In many cases, firms are dependent on capital from financial institutions. By virtue of this resource dependence, a financial institution is sometimes in a position to demand a board seat in its customer.¹⁸⁸

One antitrust concern regarding financial interlocks is similar to the concern for vertical interlocks, i.e. the interlock can lead to preferential treatment. In his study, Johannes Pennings found that financial institutions had a tendency to interlock with

¹⁸⁷ It should also be noted that financial interlocks can take the form of horizontal interlocks, for instance if Gamma, a financial institution, has a representative on the boards of both Alpha and Beta. In such cases, the financial interlock is effectively an indirect horizontal interlock and should thus be addressed accordingly. This section does not focus on such interlocks, but only on the situation where the interlock is between a financial institution and a single customer.

¹⁸⁸ See, e.g., Mark S. Mizruchi & Linda Brewster Stearns, *A Longitudinal Study of the Formation of Interlocking Directorates*, 33 ADMINISTRATIVE SCIENCE QUARTERLY, 194 (1988).

“well-performing organizations to secure their deposits and to provide other lucrative financial services.”¹⁸⁹ By establishing such an interlock the financial institution has access to financial information and strategic data that it does not normally possess about other customers. This is valuable for the financial institution, as it reduces the level of uncertainty about its customer’s performance. Thus, firms willing to have a representative from a financial institution on its board might be rewarded in exchange, for instance, with lower interest rates or other favorable terms.¹⁹⁰ This type of price discrimination might create a competitive disadvantage for the customer’s rivals.

Another concern arises when financial institutions establish interlocks with firms that have defaulted, or are likely to default on a loan. The bank can then better monitor the performance of the firm, hence the monitor theory of interlocks mentioned in *Part II*.¹⁹¹ This type of financial interlock can often be beneficial for competition. For instance, if the firm in question is efficient but has been badly managed, it could be good for competition if the bank stepped in temporarily and restore the firm’s viability. However, the bank’s interests do not necessarily align with the interest of competition. For instance, the firm might be solvent and have only experienced a temporary backlash that led it to default. However, the bank only wants to ensure that the loan is paid. The bank might try to achieve this goal by raising prices or restricting output. This could be detrimental to competition, especially if the firm in question enjoys market power. Moreover, if the bank were not to step in, the firm’s directors might choose other and less anticompetitive (but still effective) means to pay the loan.

¹⁸⁹ PENNINGS, *supra* note 2, at 180.

¹⁹⁰ *Id.* at 181.

¹⁹¹ See Mizruchi, *supra* note 1, at 275-276. He refers to research that shows that “bankers often join a board when a firm is in financial difficulty.”

In sum, there are certain antitrust concerns regarding financial interlocks. But these concerns should not be confused with the fact that bankers often take seats on boards because of their knowledge and expertise. Therefore, regulating financial interlocks can be problematic, as we do not want to discourage bankers excessively from taking a board seat in another firm. These problems of policy choice will be discussed in the next section.

C. Policy choices

In light of the above, there is no reason to have a *per se* ban on vertical or on conglomerate financial interlocks. Such a ban would be over-inclusive and deter a lot of procompetitive activity. One could even argue that the current mechanism in the EU is sufficient. The EU can attack anticompetitive non-horizontal interlocks on the basis of Articles 101 and 102 and remove them in merger cases. However, as already discussed, there are excessive costs involved if the Commission tries both to detect and monitor every non-horizontal interlock in the EU. Moreover, in the case of vertical interlocks, the EU's White Paper on Minority Shareholding proposes a required notification of both horizontal and vertical shareholding over a certain market share threshold.¹⁹² That might indicate that the EU thinks that vertical structural links are worth monitoring.

The benefits of requiring notifications of vertical and conglomerate financial interlocks would be mainly twofold. First, the Commission would have a better overview of interlocking activity in the EU. Instead of having to detect interlocks by itself, firms would have to notify the Commission. Thus, the Commission could more easily map out interlocks and monitor their effects on the market. Second, knowing that their behavior

¹⁹² See White Paper, *supra* note 5, para. 47.

would be monitored by the Commission, firms would have less incentive to establish anticompetitive interlocks. Presumably, they would be more careful when choosing their directors and might decide to establish interlocks only when this would be clearly beneficial.

There would be at least two ways of setting up a monitoring system. One would be a rule of reason notification system where the firms would notify the Commission about the interlock and the Commission, within a certain period of time, would need to clear the interlock, i.e. decide whether to approve it or take action and sever it (a clearing notification system). Because this would be a rule of reason inquiry, the Commission would only sever an interlock if the anticompetitive effects outweighed the potential procompetitive ones. A clearing notification system would seem suitable for vertical interlocks, as those are established between firms in the same industry. Thus, the Commission could, as in the case of vertical mergers, predict how the industry would develop following the interlock. In other words, the Commission might be able to weigh the potential anti- and procompetitive effects *ex ante*.

Another approach would be to structure a rule of reason notification system so that the Commission would have to affirmatively intervene and terminate the interlock after its establishment, instead of having firms wait for clearance from the Commission (intervention notification system). The EU would benefit mainly from the monitoring aspect of such a system. The Commission would know about the interlock and could intervene later if its market effects proved to be negative. Because of the difficulties associated with predicting *ex ante* how conglomerate interlocks may affect different markets, this approach seems better suited for financial interlocks than a clearing

notification system. Also, financial interlocks are often established because of the customer's insolvency. A clearing from the Commission in those circumstances could prove burdensome, since an insolvency usually needs to be resolved quickly.

A drawback of the abovementioned monitoring systems, both in the case of vertical and conglomerate interlocks, is that they would increase costs for the Commission and the firms. The firms would need to spend money on preparing the notification, even if the risk of anticompetitive effects were remote. This would become especially problematic for firms with small market shares. These problems could be remedied substantially by only requiring notification if the firms' market shares were to go above certain market share thresholds in one or both markets (twenty or thirty percent for example). Such thresholds would be in line with the aforementioned *de minimis* rules on vertical restraints and the block exemptions.

VII. ADDRESSING IMPORTANT POLICY ISSUES

The principal argument of this paper is that the EU should prohibit horizontal interlocks *per se*. Such a prohibition raises two important policy considerations, which this chapter addresses: 1) how to define "interlocks", and 2) how to define "competitors". *Section A* argues for the importance of developing a functional definition of interlocks to avoid circumvention of the prohibition. *Section B* argues that the EU could recycle the general definition of competitors for the interlock prohibition. Moreover, it argues that the concept should not incorporate potential competitors. Finally, the small-and-specialized-industry argument is valid and should, therefore, be addressed. *Section C* discusses how the EU could tailor such an exception.

A. How to define “interlocks”

When it comes to regulating interlocks, the definition of the term needs to be broad. For instance, a restriction against interlocks becomes meaningless if it only covers direct interlocks, i.e. when the same individual serves as a director in both firms. The definition also needs to cover indirect interlocks, which are more complicated than the direct version. They can take many forms and can be difficult to identify. Thus, if a restriction only covered direct interlocks, firms could simply avoid it by establishing an indirect interlock and figure out a way to communicate the information between the interlocked directors.

Firms could also easily circumvent a prohibition against interlocks if it only covered directors and not employees. The provisions on interlock restrictions in Japan, South-Korea and Indonesia specifically cover the situation when a person serves as a director in one firm and an employee in the other.¹⁹³ Section 8 of the Clayton Act has also been interpreted as to cover employees, even though the plain wording of the statute does not support that interpretation.¹⁹⁴ The rationale for extending Section 8 to cover employees is based on an agency theory according to which an employee “may be regarded as the agent of the corporation for which he or she works.”¹⁹⁵ This makes sense, as a firm could simply make a director resign and employ him instead to escape the restriction.

¹⁹³ The Japanese interlock restriction in Article 13-(1) of the Antimonopoly Act is not limited to the situation where an individual is a director in both firms, it also covers the situation where a firm’s employee holds directorships in another firm. Article 12(1)-3 of the Korean Monopoly Regulation and Fair Trade Act also covers both executives and employees. Finally, Article 26 of the Indonesian Competition Law covers both firms’ directors and other commissioners.

¹⁹⁴ According to the statute, an officer has to be “elected or chosen by the Board of Directors.” 15 U.S.C. § 19(a)(4).

¹⁹⁵ INTERLOCKING DIRECTORATES (handbook), *supra* note 3, at 59-61. See, for instance, at 60: “The rationale behind the holding is that trusted employees, no less than officers or directors, may be expected to advance the interests of the corporation they serve.” In *Square D Co. v. Schneider S.A.* the court held that if a literal reading of Section 8 were adopted “it would be easy for a company to interlock with a competitor

In sum, the definition of the word interlock needs to be broad and functional to incorporate relationships that have potentially the same effects as if the same person sat on the board of both firms. The Commission must be able to look through the person serving as a director and see whom the person represents.¹⁹⁶

B. How to define “competitors”

The concept of competitors will become central if horizontal interlocks are prohibited.¹⁹⁷ However, the EU can quite easily solve that problem, as the Commission and the EU Courts frequently engage in market definitions to determine which firms are competitors. Indeed, market definitions are relevant for all three substantive aspects of EU Competition Law (merger review, Article 101 and Article 102).¹⁹⁸ Thus, there exists a large body of precedent and literature on how to define the term “competitors,” which policymakers could recycle for the purpose of restricting interlocks.¹⁹⁹ That would also make the prohibition foreseeable for firms.

However, matters become trickier with regard to whether the concept should also cover potential competitors. A conglomerate interlock between Alpha and Beta might look innocent on its face, but Alpha might use the interlock to discourage Beta from entering Alpha’s market. Antitrust policy takes this into consideration in the case of

and yet evade § 8 liability simply by calling its agents on the competitors’ board something other than either officers or directors.” See *Square D Co. v. Schneider S.A.* 760 F. Supp. 362, 368 (S.D.N.Y. 1991).

¹⁹⁶ The requirement that the board member must be representing another person is important, because otherwise a restriction on interlocks could go as far as prohibiting good friends from sitting on the board of two rivals. Such a restriction would be too extreme and not serve the purpose of limiting anticompetitive effects. There has to be evidence that the friend is only a proxy or an agent of the other person and that the friend’s appointment is a way to circumvent the restriction. See AREEDA & HOVENKAMP, *supra* note 3, ¶1304, at 342.

¹⁹⁷ Gerber, *supra* note 23, argues that the definition of competitors, within the meaning of Section 8, has been problematic in court practice. In his article he provides an approach towards an optimal definition of competitors.

¹⁹⁸ See WHISH & BAILEY, *supra* note 50, at 28-29.

¹⁹⁹ See Gerber, *supra* note 23, where he argues for a quick-look quantitative analysis when determining whether firms are competitors within the meaning of Section 8 of the Clayton Act.

mergers. The fear that firms use conglomerate mergers to prevent potential competition is one of the main reasons why they are monitored.²⁰⁰ Although firms could conceivably use a conglomerate interlock to prevent potential competition, the chances seem remote. Areeda and Hovenkamp provide convincing arguments for why *per se* interlock restrictions should not cover potential competitors:

[The] holding that interlocks between future competitors are not *per se* illegal seems correct. A contrary approach to such interlocks would involve the court in the kind of lengthy, complicated, and speculative analysis of markets, competitive behavior, and likelihood of entry that may be required in appropriate conglomerate merger case. But such inquiries do not seem to be worth the cost in the case of an interlocking directorate between two future competitors, particularly where the interlock can be stopped easily when and if actual entry becomes imminent.²⁰¹

C. Exception for small and specialized industry exception

There are at least two ways to adopt an exception for small and specialized industries. First, the firms themselves could evaluate whether the exception applied and be punished if their evaluation proved unreasonable. This approach could be highly problematic if there was underdeterrence in the punishment (due either to low detection or low fines), because firms might risk being punished if the benefits of interlocking outweighed the possible costs. It could also prove difficult to determine whether a firm's evaluation was unreasonable.

Second, the Commission could determine whether the exception applied, i.e. the firms would have to apply for an exception. The benefit of such a system is that it would

²⁰⁰ See generally ELHAUGE, *supra* note 67, at 679.

²⁰¹ AREEDA & HOVENKAMP, *supra* note 3, ¶1302c, at 336-337. The rest of the quote is as follows: "To be sure, the presence of the interlocked director might conceivably contribute in some way to discouraging future entry or give the other company advance information that it ought not to have. Nevertheless, such determinations would seem to involve too high a level of speculation to warrant invoking the application of this *per se* statute."

prevent firms from manipulating the exception. On the other hand, it could increase administrative costs, which might in turn weaken the policy argument that restricting interlocks would save administrative costs. Those costs could, however, be largely avoided by setting strong precedents and criteria, imposing an application fee or charging extra fees for firms that obviously submitted meritless applications. If these measures could reduce administrative costs effectively, the second option would seem to be the optimal policy choice.

VIII. CONCLUSIONS

The paper's core argument is that the EU should prohibit horizontal interlocks *per se*. Interlocks are not directly addressed by the EU, and its current mechanism is insufficient to attack anticompetitive interlocks effectively. As discussed in *Part IV*, horizontal interlocks can have serious anticompetitive effects. Interlocks can make it easier for firms to collude, as they establish trust between the firms involved and increase transparency through information exchange. The risk of non-coordinated effects is also very high, as an interlocked director will have a hard time fulfilling his fiduciary obligations towards both firms without at least trying to dampen or soften the competition between them.

As discussed in *Part V*, the arguments against restricting horizontal interlocks are weak. The arguments mainly concern the private interest of the firms, but antitrust law aims at protecting consumer welfare. *Part V* further argued that a *per se* rule against horizontal interlocks would be optimal. Even though a *per se* rule might cause overdeterrence, a rule of reason would cause underdeterrence and also result in significant administrative costs. In the case of horizontal interlocks, underdeterrence is

harmful to consumers, whereas the harm from overdeterrence is remote, as firms can still choose other, less restrictive, ways to exchange procompetitive information.

The arguments for restricting vertical and conglomerate financial interlocks are not as persuasive. Even though such interlocks can, for instance, lead to preferential treatment, a prohibition would be over-inclusive. *Part VI* argued that it would, however, be worthwhile for the EU to monitor vertical and conglomerate financial interlocks above certain jurisdictional thresholds through a notification system. That would make it easier for the Commission to map out interlocks and monitor how the market develops following their formation.