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Legal gaps in the peruvian corporate network: Negative practices in boards of directors

Vacíos legales en la red corporativa peruana: prácticas negativas en las juntas directivas

Brechas legais na rede corporativa peruana: práticas negativas da diretoria

RESEARCH ARTICLE

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Abstract

Introduction: The networks generated among firms' boards through their shared directors can cause conflicts of interests, generating potential negative business practices. **Objective:** This paper identifies the risks of negative managerial practices driven by the absence of proper regulations to control the formation and behavior of interlocking directorates in Peru. **Methodology:** It discusses the interlocking directorates' literature, and reviews current Peruvian regulation. **Results:** In addition to the identified risks, it emphasizes in the expectations of a proper behavior of directors as a decision of their own, due to the nature of their role. **Conclusions:** This interdisciplinary study between management and law evidences gaps in Peruvian regulation for the operation of interlocking directorates and suggests the development of future empirical research in Latin America towards the prevention of these negative corporate practices.

Keywords: Collusion; Fair trade; Antitrust law; Corporate regulation; Corporate law

Resumen

Introducción: Las redes que se generan entre los directorios o juntas directivas de las empresas a través de sus directores compartidos pueden ocasionar conflictos de interés y generar potenciales prácticas empresariales negativas. **Objetivo:** Se identifican los riesgos de prácticas negativas empresariales generadas por la ausencia de normativa apropiada que regule la formación y el comportamiento de las redes de directorios en el Perú. **Metodología:** Se realiza una discusión conceptual de la literatura de redes de directorios y una revisión de la normativa peruana existente. **Resultados:** Además de los riesgos identificados, se enfatiza en la necesidad de esperar una conducta positiva por decisión propia de los directores, dada la naturaleza de su rol. **Conclusiones:** Se evidencian vacíos en la normativa peruana para el funcionamiento de las redes de directorios y se sugiere el desarrollo de estudios empíricos en América Latina para la prevención de prácticas corporativas negativas.

Palabras clave: Colusión; Comercio justo; Ley antimonopolio; Regulación corporativa; Ley corporativa.

Resumo

Introdução: As redes geradas entre os conselhos de administração das empresas ou entre os conselhos de administração por meio de seus diretores compartilhados podem causar conflitos de interesse e gerar possíveis práticas comerciais negativas. **Objetivo:** São identificados os riscos de práticas comerciais negativas geradas pela ausência de normas adequadas que regulem a formação e o comportamento das redes de diretorias no Peru. **Metodologia:** uma discussão conceitual da literatura sobre redes de diretórios e uma análise das regulamentações peruanas existentes. **Resultados:** além dos riscos identificados, enfatiza-se a necessidade de se esperar um comportamento positivo por decisão dos próprios diretores, dada a natureza de sua função. **Conclusões:** As lacunas nas regulamentações peruanas para o funcionamento das redes de diretórios são evidentes e sugere-se o desenvolvimento de estudos empíricos na América Latina para a prevenção de práticas corporativas negativas.

Palavras-chave: Conluio; Comércio justo; Lei antitruste; Regulamentação corporativa; Lei corporativa.

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Introduction

Boards of directors are corporate governance mechanisms appointed by the shareholders of an organization to fulfill control and performance objectives. These corporate governance bodies are composed of a certain number of executives with a considerable track record, reputation or knowledge that enables them to fulfill the aforementioned objectives. However, boards of directors do not remain inert, but socialize and connect with their counterparts in other organizations. Through these connections they mobilize their accumulated experience and characteristics to make decisions that directly affect the future of the organizations (Cordova and Sambrook, 2023; Hambrick, 2007), depending on the heterogeneity of the composition of the boards (Ham- brick and Mason, 1984). One of the ways in which companies relate to other companies is to share directors, forming corporate networks when a director is exercising the role in two or more companies at the same time (Mizruchi, 1996), belonging to any economic sector or industry.

While the link formed between these companies can generate strategic advantages, such as sharing important information to improve decision making (Haunschild and Beckman, 1998), enabling access to capital (Mizruchi and Brewster Stearns, 1988), conferring prestige and legitimacy (David and Westerhuis, 2014), sharing knowledge (Carrol et al..., 2018), among others (Cordova, 2018; Codina and Cordova, 2021), can also become an opportunity to formulate negative practices, such as collusion (Mizruchi, 1996), manipulation of financial statements (Fich and Shivdasani, 2007), misuse of information (Cai and Sevilir, 2012), among others that would be against the interests of shareholders, other companies or consumers in general, in an illegal and unethical way.

In the United States, the Clayton Act of 1914 prohibits the creation of shared directories between companies in the same industry, which prevents unfair competition and collusive practices, while promoting more collaborative economies (Davis, 1996; Windolf, 2009). However, in Latin America there are few cases of regulations specifically aimed at mitigating these risks. Although many companies are now global, maintaining a productive or commercial presence in different countries, the laws and regulations for the actions of companies are different in each national territory.

The main objective of this article is to identify the existing risks in the generation of negative practices in the management of organizations linked through networks of boards of directors in Peru that would use common directors as an informal mechanism of corporate governance, taking Peruvian legislation as a frame of reference.

By identifying the risks in Peruvian legal regulations that would allow the emergence of negative practices resulting from the linkage of companies through their networks of boards of directors, appropriate mechanisms or laws could be formulated in order to avoid harm to organizations and consumers in the environment, as well as situations of unequal competition in a free market economy. This would strengthen the currently weakened action (Briolo and Cordova, 2022; Hoskisson et al., 2000; Vassolo et al., 2011) of Latin American institutions that regulate corporate action in the country, an element that would be important to support economic growth and the reduction of inequalities in Peru (Vergara Paniagua, 2018).

This article first describes the legal and operational nature of the boards of directors or the direct-

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The paper then explains the methodology and analysis. It then explains the methodology and analysis. Subsequently, he presents the concept of directory networks and the literature in this organizational field. This is followed by a discussion of the results and an analysis in the light of what free competition represents. Finally, it offers conclusions.

Directories in Peru

In Peru, the first declaration of good corporate governance practices occurred in 2002 when the Principles of Good Governance for Peruvian Companies was enacted, which was updated and replaced in 2013 by the Code of Good Corporate Governance for Peruvian Companies (Superintendencia del Mercado de Valores, 2013). According to Ysla (2017), companies in Peru still retain a reduced number of directors on their boards, as well as a low presence of independent directors (external to the organization), compared to their peers in Latin America. Boards in Peru have an average of 7.5 members, while only 35% of Peruvian boards have independent directors.

The Board of Directors as a corporate body

Nature

In order to understand the problem under analysis, it is essential to define the body known as the board of directors or board of directors, to address the functions conferred upon it and, finally, to explain the liability regime that conditions its actions. In view of these elements, we will be able to identify their relationship with the market through corporations, entities through which these bodies are manifested in the economy.

Thus, it will be useful to refer to the doctrine to clarify the notions that concern us. In this order of ideas, it can be seen that the directory has been defined as follows:

> The plural administrative body [...] which carries out its activity through the management of its members. For Vivante, the board of directors is a council, a collective body that deliberates by means of its majority in which all the members are linked by a bond of solidarity (Gagliardo, 1986, p. 11).

Although this definition seems to be sensible, the conceptualization of this body, proper to an entity such as the corporation (S. A.), has not been peaceful. This is mainly because it is a concept that has evolved over time, basically due to the great changes that have occurred since the 19th century:

> The evolution and advance of capitalism took place, among other factors, through a process characterized by the dissociation between the ownership of the means of production and the exercise of some of the inherent powers of that ownership (Elías-Laroza, 2000, p. 327).

As a result of this historical development, positions arise such as the so-called mandate theory, a

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of the original theories, on which it is emphasized that the administrators of the companies required a legal image before third parties that would guarantee their actions and decision-making (Elías-Laroza, 2000).

On the other hand, a later doctrine sought to define the board of directors not as an actor external to the company, but as an agent constituted as an integral part of it. Thus, the theory of the organ arises, which establishes the following:

> The company has a complex internal structure, in which the functions of representation, management and corporate action must be regulated by laws directed to different bodies, through which the company expresses itself. In this sense, the corporate administrators, unlike the presenters, do not express their own will, but are formers of the will of the legal entity (Elías-Laroza, 2000). (Elías-Laroza, 2000, p. 327).

Despite the importance of these two proposals, we believe that the functional character of the corporation and its organs in human society, particularly the usefulness of its role in the economy, was not realized at the beginning of legal theorizing. Therefore, the following should have been considered:

> The effectiveness of the company as an economic and entrepreneurial instrument requires the dispersion of capital and a concentration of command, to allow efficiency and professionalism and the direction and investment of the company's operations and resources. Thus appears a form of power exercised over the property of others: corporate administration (Elías-Laroza, 2000, p. 327).

In this sense, it should be clarified that "corporate administration is the set of acts and decisions on people and on the assets of the company that are aimed at achieving the realization of the corporate objective" (Elías-Laroza, 2000, p. 327). In this way, it is possible to understand what one doctrine refers to when it points out that there is more than one way in which corporate administration manifests itself: a) the relations that the organization establishes with the different economic agents of the environment and b) the execution of the activities proper to its objectives, and thus fulfill the dual role of representation and management (Elías-Laroza, 2000).

As can be derived from the above quotation, the nature of the board of directors, as a management body, transcends the discussion of the theories presented. Thus, a foreign doctrine from a Latin American reality similar to the Peruvian one points out, citing various sources in corporate law, that the existence of administrative bodies, such as the board of directors, constitute the organizational system through which the collective will is expressed, which mediates the relations between the members of the entity and which obeys the principles of organization and action provided by the legal system (Mar- torell, 1990). Understanding the board of directors as an administrative body of the company will allow a more precise analysis of the problem at hand.

In addition to the above concept, it should be noted that, exceptionally, the decision to have a board of directors may be optional (Article 247 of Law No. 26887, General Corporations Law), although in most cases it is collegiate, since in both simple and open corporations the number of directors, by legal mandate, cannot be less than three (Article 155) (Gagliardo, 1986, p. 11). According to Gagliardo (1986), an odd number avoids inconveniences in the decision making process, being this number finally determined by the shareholders' meeting, or a fixed number previously established (art. 155).

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Functions and attributions

Given the nature of this type of legal entity and, in general, the entities in this category, it is important to consider the following:

> [A corporation] can act only through natural persons. These belong to distinct but interdependent groups, called "organs", which have specific competence [...] delimited by law, through the assignment of specific attributions, for which reason they are the holders of rights and obligations imposed by the function assumed. (Martorell, 1990, p. 283).

In view of the above, it seems pertinent to understand the justification of the powers of the board of directors from the perspective of the doctrine. Thus, one of these approaches the power inherent to the board of directors from one main cause: the manifest inefficiency of the general meeting as the body that runs the daily life of the corporation, which, added to the gradual dissociation between ownership and management and the demystification of the concepts of legal person and personality, has shifted the center of gravity of power to the board of directors. This important change has repercussions on the responsibility of directors and on the powers or attributions that they may have (Martorell, 1990).

So far, the main point of support for this article has been the doctrine; however, even it recognizes the importance of legislation:

> The director's function must be understood and systematized from a normative approach - company law - distinguishing: rules relating to the share capital, rules concerning company accounting, those relating to the management, operation, representation and liquidation of the entity, and those which, as a whole and in a generic way, describe the operating framework of a corporation (Ga- gliardo, 1986, pp. 16-17). (Ga- gliardo, 1986, pp. 16-17).

In this way, we will specify some of those mentioned, making the corresponding reference to the article that regulates them.

Full powers. One of the most outstanding characteristics of the actions of the board of directors is the scope of the powers granted by law. Thus, the doctrine states the following:

> By establishing in Article 172 of the General Corporations Law that the board of directors has the powers of management and legal representation [...] it has established that it has all the powers except those that the bylaws law attributes to the general meeting [...]. As has been pointed out [...] the powers of the board of directors shall include acts of administration and acts of disposition. (Aldana Durán, 2005, p. 171).

In this order of ideas, some of the problems arising from the General Law of Corporations occur when there are problems of interpretation of the norm, such as when it is thought that acts of administration are opposed to acts of disposition (Aldana Durán, 2005).

In view of this drawback, it is proposed that the solution to this interpretative problem can be found by going beyond the isolated interpretation of this norm, i.e., by means of a systematic reading.

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and joint exercise of the powers granted by law to the general meeting, as well as to the bodies in charge of the company's administration (Aldana Durán, 2005, p. 169).

Thus, it can be understood that both acts of administration and disposition are bound by parameters that instruct the board of directors in all its functions. Thus, Elías-Laroza (2000) points out that the regulation does not impose obligations, but rather grants relevant powers of administration, where the bylaws are able to limit the powers of the director, for example, for the execution of contracts involving amounts that the shareholders' meeting considers large and that require prior approval.

The administration and disposition of the company. Particularly regarding one of the powers derived from the generality of article 172, i.e., the administration of the corporation, the doctrine states the following:

> The law has provided that the administration of the corporation is the responsibility of the board of directors and management, but, as stated above, "administration of the corporation" is not equivalent to "acts of administration", since otherwise acts of disposition would have been attributed to the general meeting. (Aldana Durán, 2005, p. 170).

This reveals that the acts of administration performed by the general shareholders' meeting are distinct from the administration of the corporation, a power granted to the board of directors and other relevant bodies, including the disposition of the corporation's assets.

Therefore, it has been unanimously recognized that the bodies to which the representation of the company is attributed form part of a sine qua non condition for the existence of the company itself. Therefore, it is accepted that the members of a company, when electing the administrators, are nominating individuals to whom the legislator recognizes an exclusive power of decision with respect to corporate management (Martorell, 1990), who, although they have the administration of the assets, must also promote both their conversation and their growth (Gagliardo, 1986).

The corporate purpose

According to Article 11 of the General Corporations Law, the board of directors has the powers to manage the corporation within the framework of its corporate purpose; therefore, it will be able to carry out acts that contribute to the realization of the corporate purpose of the legal entity, whether or not they are expressly included in the corporate purpose. However, this also implies that the corporate purpose will be a strict limit for the actions of the board of directors (Aldana Durán, 2005).

Initiative at the general meeting

The doctrine has pointed out that the Board of Directors has a series of powers, among them the so-called powers of initiative of the activity of the meeting, which include the power and the duty to convene it (Article 113), set the agenda and present the annual balance sheet, in addition to the role of legal guardian of the deliberation, and must challenge it if it is contrary to the law or the bylaws (Martorell, 1990).

Contracts with directors. Pursuant to Article 179, the Board of Directors is empowered to

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The company may enter into contracts with a director or his relatives, even if they do not relate to the operations normally carried out by the company, including the granting of credits or loans and the granting of guarantees. Likewise, these acts may be carried out, by express provision of the law, with those who are relatives of a certain class and degree of the directors (Aldana Durán, 2005).

In a commentary on this norm, part of the national doctrine has pointed out that the position adopted by the General Corporations Law on the particularly delicate situation described considers that neither the company nor the directors would be better off eliminating the possibility of carrying out an economic operation of this type, especially when the director has the required solvency. Therefore, it will be pertinent to regulate the requirements and special conditions that must be met in order to carry out this type of act under the strict responsibility of the board of directors (Elías-Laroza, 2000).

Responsibility

The liability regime is regulated in Article 177 of the General Corporations Law, which determines that directors are jointly and severally liable before the corporation, the shareholders and third parties for damages caused as a result of agreements or acts contrary to the law or the bylaws, carried out with fraud, abuse of powers or gross negligence.

Subsequently, Article 181 establishes what is known as the corporate claim for liability, whose essential characteristics are that it can only be exercised solely and exclusively by the corporation, with the purpose of obtaining compensation for the damages caused by the directors to the corporation. In Article 182, it is stated that the individual claim of liability can be configured when there are direct injuries against the interests of the shareholders and third parties, differentiating the direct damage to the individual from the damage to the social collective (Elías-Laroza, 2000).

Finally, the legislation has determined, in Article 178, a scenario in which directors may not be held liable. In this way, said article establishes the following:

> A director is not liable if, having participated in the resolution or having become aware of it, he/she expressed his/her disagreement at the time of the resolution or when he/she became aware of it. But it is not enough to disagree or even to vote against it. The Law adds an unavoidable requirement for the exception of liability: that the disagreement is recorded in the minutes, if he participated in the resolution, or that the company is informed by notarized letter, if the resolution was known later or the record in the minutes was omitted. (Elías-Laroza, 2000, p. 369).

This means that a burden and a formality are imposed for the effective configuration of the exemption from liability, this being of a contractual nature from the perspective of a pre-established obligation, which includes liability for unlawful acts affecting the property of third parties (Martorell, 1990).

After having defined the nature of the board of directors and having pointed out the main functions of this body, it can be seen how important its presence is in the corporation. Therefore, the liability regime must have, as in fact it has, different levels of scope, allowing the protection of the rights and interests of both the legal entity and third parties. For this reason, it is possible to

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The company's Board of Directors is one of the most important bodies of the corporation: the Board of Directors.

Methodology

In order to carry out this study, secondary sources were compiled from Peruvian regulations on corporate governance issues related to the powers and expectations of boards of directors or boards of directors in the country. Likewise, a literature review of previous studies on board networks was carried out, with emphasis on articles focused on the generation of negative practices from them. Finally, gaps were identified in the regulation of corporate governance in Peru, where negative business practices could be generated.

In addition, this study considers literature and findings from two disciplines: organizational management and law. This interdisciplinary analysis allows an approach to the phenomenon of corporate networks from both an integral and functional point of view in order to provide managerial recommendations and for the formation of public policies.

Directory networks

A board network is established when there is a director who is present and participates in the board meetings of two companies, forming a link with the directors with whom he/she shares these meetings, also acting as a connecting agent between the two groups of directors and, therefore, between the two companies (Boyd, 1990; Mizruchi, 1996).

There are different studies that define directory networks as robust channels through which multiple resources can flow between organizations, such as information (Haunschild and Beckman, 1998; Shipilov et al., 2009), access to new sources of financing (Cai and Sevilir, 2012; Mizruchi and Brews- ter Stearns, 1988), corporate power or control (Mizruchi, 1996; Zajac and Westphal, 1996) and, finally, social cohe- sion as a business elite (Useem, 1984). Thus, the transmission of business practices through the board networks would be generated because these common directors in both organizations function as conduits through which certain resources flow (Shipilov et al., 2009), according to the characteristics of each director and the receptivity of each board of directors, to facilitate this process of diffusion between companies (Shropshire, 2010). Likewise, according to Salvaj (2013), regardless of the configuration or particularities of a board network, companies can take different courses of action, some of them towards corporate responsibility, while others towards controversies and bad practices towards the market.

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Negative management practices as a result of the presence of directory networks

In the same way that a network of directories can become an important source of re-courses for the organizations that are part of this corporate network, it is also possible that negative practices can flow through these conduits to take advantage of available information or positions of power in the business community. According to a literature review conducted by Cordova (2019), 16 % of the research articles reviewed described the emergence and development

of negative practices with respect to financial results, market behavior or acquisition of resources. That is to say, the companies belonging to the corporate network, as a product of their relationship through their shared directors, acquire and develop negative practices, such as manipulation of financial statements, joint fixing of prices in the market, influence on regulations favoring some economic sector, among others.

According to Mizruchi (1996), one of the reasons for the formation of board networks would be the existence of collusion between companies in the same industry. As indicated, in the United States, the Clayton Act of 1914 prohibited the possibility of having shared directors between companies in the same industry, due to the history of collusion between them, generating negative practices in the market and affecting other companies and consumers.

Chiu et al. (2013) found that there was a greater likelihood of firms manipulating their financial statements if they were connected through a common manager to any firm already engaged in this financial practice, in what they term a contagion period of at least three years.

The results of Cai and Sevilir (2012) show that, in M&A processes between organizations, when the buyer and seller present a common director on their boards, the buying companies exert an advantage over the organizations to be acquired, due to the first-hand information they receive through their shared director, which is reflected in their ability to negotiate a lower purchase price.

Likewise, Bizjak et al. (2009) explain how the corporate network of shared directors represented a very important dissemination channel for the practice referred to the manipulation of dates for the purchase of shares, favoring certain buyers by assigning dates prior to the real time, where such shares maintained a lower price.

The research reviewed and mentioned above would demonstrate that in countries where the laws for companies and boards of directors are not adequately defined, there is a high risk that these companies and boards of directors may acquire negative business practices as a result of a natural contagion effect when forming part of a network of directors that facilitates this process of information transmission. The review of the literature on the functions and responsibilities of boards of directors in Peru, as well as the possible negative practices that can arise from the formation of a corporate network of directors, leads to the proposal that the laws for the formation and activity of companies, as well as for the operation of boards of directors in Peru, maintain legal loopholes that would allow the transmission of negative management practices among the companies in the corporate network.

Discussion and results

Free competition regime

Function and form of competition law

Given that an economic system such as the Peruvian one is made up of the participation of multiple

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In this context, the interests of these economic actors will shape the complex network of economic flows known as the market. For this reason, and because of the importance of an orderly market for the life of each individual, the way in which private parties develop the conduct that will satisfy their interests will be relevant; the consonance of these interests with those pursued by the legal system will also be important.

Therefore, a political and economic regime such as the Peruvian one found solidity in the concept of social market economy, a category drawn from economic theory applied to legal doctrines of social and political order. Thus, it was through Article 58 of the Constitution that the social market economy was consecrated as the basis of the Peruvian system.

In this regard, Rubio Correa (2015) points out the following in relation to the guarantee contemplated in Article 61 of the Constitution:

> The market economy is the one that is regulated according to the laws of supply and demand: goods will circulate economically and as long as there is who consumes a product and who produces it. The price will be freely fixed at the point where one is willing to buy and the other to sell. Our market economy must be social, in the sense that certain market excesses must be regulated to ensure the common good (p. 129).

Delimiting the concept of what should be understood by free competition will make it possible to establish the complexity of the problem. Thus, the doctrine has described free competition as "that situation in which different producers and consumers of products compete in the market on equal terms, so that the most efficient have the possibility of doing better business by selling more and obtaining better results" (Rubio Correa, 2015, p. 132). In line with this idea, the Organisation for Economic Co-operation and Development (OECD, 2004) indicates the following:

> Peru's free competition and market access laws form the core of antitrust legislation and policies: prohibition of anti-competitive behavior by companies and application of the fundamental principle that governments should not restrict economic activity beyond what is necessary to achieve other social objectives (p. 7).

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Free competition is a tool that allows technological development to advance, helping to improve various essential goods and reducing costs. Thus, it can be stated that there cannot coexist, together with dominant positions, situations in which certain economic agents are capable of notably influencing the market or of monopoly, scenarios in which producers or consumers control a certain market in an exclusive manner. Finally, this rule establishes that no form of agreement is allowed that, in constitutional terms, may endorse or create monopolies, a restriction that is present both for private individuals and State bodies (Rubio Correa, 2015).

Starting from the premise that a state of perfect competition is completely unattainable, it must be understood that in reality what exists are individuals who interact in the market prioritizing their interests, which in many cases generates the emergence of the so-called externalities resulting from, for example, market power. Therefore, antitrust can be defined as a kind of indirect relationship whose objective is to control the exercise of market power.

market in situations where such control depends on the existence of several competing companies" (Coloma, 2003, p. 13). In an approach to the concept, the doctrine has pointed out the following:

> The rules for the defense and protection of free competition seek to prevent companies from concentrating market power for reasons other than greater efficiency, and also to prevent them from illegally using the market power they have. They also seek to prevent market power from being concentrated through mergers or acquisitions of companies that generate a serious risk to competition and consumer welfare. (Quintana, 2013, p. 11).

This distortion, known as market power, has been defined by some experts on the subject as the ability of a company to "increase its prices above the price that would be given in competition [...], without running the risk that a considerable part of its customers will transfer their demand to other companies offering lower prices or better conditions" (Quintana, 2013, p. 15). Because of this, the evaluation of the level of market power of each company is a priority issue, to consider its potential capacity to negatively impact the natural flow of trade or some aspect of the dynamics of free competition.

Having explained some key concepts, in general, it is possible to see the need for structured mechanisms to ensure the development of a market that ensures free competition, in addition to allowing the fulfillment of the role of the social market economy. These tools have been proposed as follows:

> There are two general ways of conducting competition advocacy, known as "behavioral policy" and "structural policy". Behavioral policy is the more traditional form and consists of a series of jurisdictional procedures by which past and present actions carried out by an economic agent in violation of certain rules are sanctioned. [Structural policy, on the other hand, is a way of defending competition before the occurrence of actions considered harmful, and consists essentially in the use of measures that influence the number and type of companies operating in the markets (Coloma, 2003, p. 14). (Coloma, 2003, p. 14).

These concepts are equally applicable to the Peruvian context (Quintana, 2013). We consider it necessary to begin by mentioning the content of the second of these control policies, since it will not be important to go too deeply into it. Thus, the control of structures implies the evaluative action of the authority, which will verify whether the new business configuration will have an impact on the structure that at that time characterizes a given market. Subsequently, considering the impact on competition and consumers, it determines the approval of the con- centration (Quintana, 2013).

Market abuse and collusion

The first of the aforementioned control policies, i.e., the rules of conduct control, is manifested through two useful mechanisms for the protection of the rights of economic agents in the market, namely: the restriction of the abuse of dominant position and collusive practices. By restricting the abuse of dominance, the following scenario is identified:

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> A company that has substantial market power or a dominant position, [which] takes undue advantage of that power or position in the market to take advantage of it and prevent the entry of new competitors or hinder the permanence of those already operating in the market. (Quintana, 2013, p. 18).

In this way, the abuse of a particular situation is controlled and sanctioned and not the condition itself called dominance position.

For the international organization, the abuse of a dominant position is linked, as we have argued, to certain conducts mainly attributable to individual companies. Thus, this company will not face actual or potential competitors, charging higher prices and producing smaller quantities or lowering quality; likewise, it is less likely to invest in more efficient or innovative mechanisms or products, or to charge exaggerated prices for products that by their nature are necessary for people's subsistence (OECD, 2004).

In view of this worrying scenario, as part of the behavior control policy, national regulations have provided for the regulation of this type of phenomena through Legislative Decree No. 1034, Law for the Repression of Anticompetitive Conduct, which makes an important distinction between the position of dominance and the abuse of it, prohibiting and sanctioning the latter as illegal while expressly qualifying the former as legal.

Accordingly, the Law for the Repression of Anticompetitive Conduct regulates the abuse of a dominant position, according to which abuse is considered to exist when an economic agent, holding a dominant position in the market, uses such position to unduly restrict competition, obtaining benefits and harming actual or potential, direct or indirect competitors, which would not have been possible if it had not held such position (art. 10.1).

The second conduct that should be regulated is that which controls the relationship between market agents, particularly when it degenerates into collusive practices. Thus, the technique must determine, through the different administrative instances, whether the agreements between different companies may in any way violate the normal functioning of the market. Thus, collusive practices have been defined:

> Coordinated behavior between competing agents or agents acting at different stages of the production or marketing process who, through coordination, cease to act independently of each other and behave in collusion according to agreed terms, thus creating an undue restriction of competition. (Quintana, 2013, p. 33).

This, like the previous conduct, presents useful internal classifications to frame the collusion phenomenon. Thus, we can find horizontal collusive practices, also called between competitors, which occur when agreements are made between competitors belonging to the same industry, for the exercise of market power (Coloma, 2003).

On the other hand, there are also vertical collusive practices, known as vertical restrictions of competition, which occur between economic agents that carry out activities at different levels of the production or marketing chain. These have two requirements: a) the participation in the

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(b) that at least one of them agrees to limit its entrepreneurial will based on the commitment assumed with the other agent (Quintana, 2013).

One of the main problems when talking about these agreements, and being able to state that they degenerate into collusion detrimental to free competition, whether horizontal or vertical, is to determine how much they are really unlawful; for this reason, legislations play an important role in this field, given that taxation is a principle that must be present in these cases to guarantee freedom of association and cooperation between private parties. This cooperation, especially horizontal cooperation, although it could affect competition, could lead to the standardization of products, research and quality, generating a positive effect for consumers (OECD, 2004).

Conclusions

Having exposed the most important elements of the two global issues relevant to this problem, such as the board of directors and the protection of free competition, we can approach the conflict itself, namely: the qualification that deserves the conduct according to which two or more companies act under the command of their respective boards of directors, but where the boards share one or more of their executives.

In order to resolve this conflict, it should be remembered that the boards of directors perform a series of functions that seek to ensure and protect the interests of the corporation, hence the transcendental importance of these bodies for this type of legal entity.

The "generic duty" is linked to the imperative that the director, respecting the principles of diligence and loyalty, orient his conduct to serve the social interest. Therefore, it is stated that, in an obligatory relationship, in addition to the duties of performance, there are duties of conduct, it admits the explication based on the loyalty and diligence that a "good businessman" would maintain to resolve a specific situation, especially if it is not expressly contemplated in the law or in the bylaws, seeking an action ordered to the fulfillment of the corporate purpose (Martorell, 1990) and in favor of the administration of the company (Gagliardo, 1986).

This is how respect for the rules, especially those dedicated to the protection of free competition, is an intrinsic duty of directors, so that the principles governing freedom of competition must be observed, even in unregulated cases, such as the one discussed in this paper. By this, we mean that, although it is not an illegal act in itself, because there is no local regulation that affirms it, if a company has a board of directors formed by one or more persons who are also on the board of directors of another company, these directors will be obliged to act with the necessary diligence so that their conduct does not negatively affect respect for free competition.

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At this point, taking up what was said when defining dominant positions and collusive practices, we can see that, since the existence of an intentional component is necessary for the configu- ration of these cases, it will not be possible to classify this conduct as an unlawful act per se. Because if this were the case, the justification of the conflict of interest by corporations that are different from each other, but also competitors or part of the production chain, would reach other corporate grouping phenomena,

such as business groups or so-called holding companies. Thus, Martorell (1990) and Useem (1984) have pointed out how these business dynamics, in the face of the advance of management techniques, formed groups of business elites, united by common interests.

These economic associations are defined as the "concentration of different exploitations by an individual or collective entrepreneur [...]. In this regard, it was noted that, although the private system had not regulated 'business associations'" (Martorell, 1990, p. 460), this does not mean that they are a phenomenon removed from reality. Thus, the different tools that facilitate business groupings, as well as the subjection of business groups to certain provisions that do not come from the legal system, must respect the legal system in all its aspects. In this way, the boards of directors fulfill the role of the administration of both legal entities, having the duty to respect the independence and private autonomy of each one.

However, if the case arises in which a shared board of directors ends up violating the rules that protect free competition, generating damage, it will be necessary to determine whether this damage is considered to be the result of only the abuse of a dominant position, or of collusive practices, or a combination of both. To identify the former, the concept of relevant market will be relevant, i.e., that it is able to impose the conditions of purchase or sale, regardless of the reaction of its customers, suppliers or competitors, being the case that the latter have no real alternative (Quintana, 2013).

In order for the situation described to arise, it is understood that, first, there must have been a collusion agreement, given that, however shared the board of directors may be, they are still two legal entities, and given that they will not necessarily record the terms of the collusion in the minutes, it can be said that we are not dealing with an "explicit" type of agreement, but with a form of "tacit" collusion, in the sense that it can arise only through continuous interaction between the agents and be expressed in the strategies that the companies apply in the market (García Carpio and Pérez-Reyes, 2012); Mizruchi, 1996).

We can conclude, then, that it is possible to speak of the effect on free competition in the case of what we have called shared boards of directors, an effect that can be manifested only from a collusive practice, whether express, tacit, horizontal or vertical, or, in addition to this, a practice of abuse of dominance resulting from the conduct of two different corporations. However, despite the aforementioned risk, board networks would at the same time be able to allow organizations to share strategic and important resources for their business management and decision making, so that any change or incorporation in local regulations should prevent negative practices, without this representing the loss of perceived benefits.

We can reach this conclusion based on the general duties inherent to the managerial function, which involves respect for the legal system, and also because to justify otherwise would leave business groups and other forms of associations of companies, which must also comply with the legal system, outside the regulatory framework for the defense of competition.

Finally, it is worth noting that, since there is a risk of collusion (or other negative practices) through the establishment of shared directories among Peruvian companies that the law does not currently protect, and given that this is not an assumption specifically expressed by the legislator as unlawful per se, it must be a subsequent evaluation that assesses the damages that may be caused by the establishment of such directories.

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The purpose of the Company is to exercise the natural role that the Constitution, through the social market economy regime, has granted to the public administration to control and sanction these conducts that restrict free competition.

Conflicts of interest

The authors declare that there are no conflicts of interest in the development of this study.

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