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Related party transactions regulation in large intragroup transactions in Chile: law in books and law in action

La regulación de operaciones con partes relacionadas en grandes transacciones intragrupo en Chile: el derecho en los libros y el derecho en acción

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Abstract

What is the foreseeable effect of the Chilean regulation on related-party transactions regarding large intra-group transactions? Does it succeed in deterring transactions whose purpose is to pursue benefits for the controller without generating clear gains for the corporation? A first look at the Chilean regulation would suggest that the statutory design of the RPT regulation sets a high standard. Consequently, it should discourage or avoid large intra-group transactions that do not pursue the corporate interest. However, the practical application of the rules shows that the regulation rests in one remedy: the publication of reports by independent appraisers, the effect of which is simply to improve —not too much— for the reference corporation, the conditions of large intra-group transactions.

Keywords: *Public corporation; related-party transactions; intra-group transactions; corporate group.*

Resumen

¿Cuál es el efecto previsible de la regulación chilena sobre operaciones con partes relacionadas a propósito de grandes transacciones intragrupo? ¿Logra disuadir transacciones cuya finalidad sea perseguir beneficios para el controlador sin generar rendimientos claros para la sociedad? Una primera lectura de la regulación legal chilena permitiría considerar que el diseño legislativo de la regulación de OPR establece un estándar exigente. En consecuencia, debería disuadir o evitar grandes transacciones intragrupo que no persigan el interés social. Sin embargo, la aplicación práctica de la normativa da cuenta de que la regulación descansa en una tutela: la publicación de

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informes de evaluadores independientes, cuyo efecto es, simplemente, mejorar —no demasiado— para la sociedad de referencia, las condiciones de las grandes transacciones intragrupo.

Palabras clave: *Sociedad anónima; operaciones con partes relacionadas; transacciones intragrupo; grupo empresarial.*

I. INTRODUCTION

How to find out what is the real effect of the regulation on related-party transactions (RPT) in major transactions in Chile? Usually, the answer to this question is to analyze the legal text. However, this paper argues that the legal text suggests a much stricter effect than that applied in real cases.

The regulation on RPT for transactions of significant amount in publicly traded corporations is the regulation available in the Chilean legal system to control large transactions between corporations belonging to the same corporate group (Article 96 Securities Market Law, LMV by its acronym in Spanish), which are the most common RPT in the Chilean market; so this paper focuses on them.[1]

This study reveals that the rules governing RPT for large transactions in Chile rely on the independent appraisers' report as a fundamental safeguard. This occurs as a consequence of the way in which the regulated procedure has been applied, without the intervention —crucial in the design— of the "uninvolved" directors, in addition to the given interpretation of the regulation related to the approval of the transaction by the shareholders meeting. This way of interpreting the law is combined with high levels of concentration in the local market and institutional weaknesses in the functioning of private litigation. All this leads to the fact that, in the end, the RPT can be designed and approved, in most cases, by the controller of the group itself. Consequently, except for those cases where a specific transaction also gives rise to a right of withdrawal, the opinions of the independent appraisers disclosed to the public and the eventual write-off of the share price, stand, so far, as the only safeguard with real impact —albeit limited— in the case of large transactions covered by the RPT regulation. However, a different interpretation of the same legal rules may bring the Chilean regulation closer to an optimal functioning, allowing socially profitable transactions without harming the corporation at stake.

In terms of methodology, this paper takes the perspective of corporate governance literature that considers that to analyze corporate governance institutions, the text of the law teaches less than the observation of the law plus the available enforcement mechanisms.[2] Analyzing the law on the books is not enough; the way it interacts with the other institutional arrangements and with market structure must also be observed.

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[1] In 2018, out of a total of 172 publicly traded corporations incorporated in the list of issuers of the Santiago Stock Exchange, 90 were part of a corporate group (ISLAS, LAGOS & CERDA (2024)). According to ZINGALES (2023), p. 72, "corporate groups represent 84% of the Santiago Stock Exchange's market capitalization [as of 2019]."

[2] Thus, ENRIQUES (2002), p. 767, quotes multiple references of classic works on corporate governance in this sense, among them, ROE (2006), pp. 194-196, who points out that the relevant factor for achieving robust securities markets is not only the law on the books, but the law analyzed in accordance to the quality of the regulators, their efficiency, accuracy, the honesty of the judicial system, among other elements.

The research analyzes the Chilean law on RPT in publicly traded corporations, which the legal system considers for regulating large intra-group transactions.[3] This requires that three assumptions are met: the transaction must be considered an RPT,[4] the transaction must be of a "significant amount", and it must not be considered a regular transaction. Therefore, in this paper, a "large transaction" covered by the RPT regulation is defined as a transaction regulated by the RPT rules for publicly traded corporations, that is of a significant amount and that cannot be considered to be a regular transaction.

The article is organized as follows: first, it offers an interpretation of the Chilean legal rules on RPT, illustrating their functions and contents with the national and comparative legal literature on this matter (law in books); second, it analyzes two cases where these rules have been applied (law in action). Finally, the result of both observations is compared, concluding that the RPT regulation in Chile —as a safeguard for large intra-group transactions— is much less effective based on how it has been applied than what could be deduced from the legal regulations. However, a different interpretation of the same rules could improve this result.

II. CHILEAN REGULATION OF RPT ON THE BOOKS

In comparative law, there are three institutional trends to address the problem of large transactions between corporations belonging to the same corporate group, from the perspective of protecting the shareholders of publicly traded corporations listed on the stock exchange. First, applying general rules of corporate law, in particular, the fiduciary duties of directors, executives and controllers. The most sophisticated system in this trend is that of the law of the state of Delaware, in the United States.[5] Second, the law of corporate groups, a German legal regulation.[6] Third, the regulation of related-party transactions, an accounting regulation, originally used for corporations listed in the premium segment of the London Stock Exchange in the United Kingdom and, thereafter, extended to the rest of Europe.[7] Chilean law is part of this third regulatory model.

However sophisticated the regulatory options may seem in comparative law, the solution for the problem of large transactions where the controller faces conflicts of interest seems to be to a return to the principles of corporate law. As Subramanian argues regarding freeze-out transactions, "the objective is to replicate the elements of a transaction between independent parties —that is, approval by non-interested directors and non-interested shareholders."[8] Naturally, regulation should not be so stringent as to prevent transactions with related parties that actually create value.[9]

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[3] Law 18.046 on Corporations also contemplates rules on RPT for private corporations, in Article 44. These rules will not be analyzed in this study.

[4] On this point, see LAGOS (2024a), pp. 1-27.

[5] GEVURTZ (2020), pp. 193-222; COX & HAZEN (2020), pp. 289-299. The most relevant case to the current configuration of the rule is *Kahn v. M & F Worldwide Corp* (2014).

[6] MOCK (2020), pp. 303-398.

[7] BIANCHI & MILIC (2021), pp. 290-291; DAVIES (2022), pp. 2-3.

[8] SUBRAMANIAN (2005), p. 8.

[9] SUBRAMANIAN (2005), pp. 39-48, explaining the ways in which one can impede freeze-out transactions that create value for both parties of the transaction (controller and minority shareholders) or, in the terms coined by ENRIQUES (2015), p. 13, to decrease as much as possible the risk of tunneling (avoiding false negatives) without stifling transactions that create value (false positives).

The corporate law literature distinguishes between liability rules and property rules.[10] The former allows the majority to force a corporate agreement on the minority but provide that the transaction can be reviewed *ex post facto* by the courts under a strict standard (entire fairness). The effect is that the controller has the burden of proof to demonstrate that the transaction was favorable to the corporate interest, as if it were a transaction between unrelated third parties (arm's length). The second kind of rules (property rules) enable to stop the transaction. These are rules of governance, *i.e.*, they determine the way in which the transaction may be agreed. To satisfy the requirements of justice of the law, they must exclude the interested parties from the decision. If the corporate agreement corresponds to the board of directors, it must be adopted by a special committee of independent (or "uninvolved") directors. If the corporate agreement is taken by the shareholders meeting, the interested or involved shareholder must be excluded (majority of minority rule or MoM). If the procedure set forth by law is not followed, the corporate agreement is not valid.

Among the available regulatory models, the most effective is the one developed by Delaware case law.[11] After *Kahn v. M & F Worldwide Corp.*,[12] if the corporate agreement is adopted by a committee of independent directors and, in addition, by the majority of the minority shareholders, the transaction can no longer be reviewed under the stricter standard of *entire fairness*, but only by means of the deferent *business judgment rule*.[13] This regulation is more effective, since it encourages using a committee of independent directors to approve the transaction.[14] It also promotes the approval by the majority of the minority shareholders at the shareholders' meeting, which, although having less impact on the improvement of the minority shareholders' interests, avoids the possibility of approving the agreement by an independent directors' committee lacking autonomy and enough power to fulfil its role and, thus, it strengthens the positive effect of this mechanism.[15] But, as a responsibility rule, it allows the controller to force the agreement if he considers that he can demonstrate that it is favorable

[10] GOSHEN (2003), pp. 393-438; ANDERSON (2020), pp. 1-103; in continental law, PAZ-ARES (2020), pp. 89-115.

[11] Similarly, GÖZLÜGÖL (2022), p. 656. This is a model that, based on modifying the *a posteriori* review standard, promotes adopting a procedure that is equivalent to an *a priori* RPT. Although in Chile the regulated procedure can be understood as a rule that sets the procedure, the impossibility to annul what has been done (because the law expressly restricts the remedies to compensation in the case of RPT) can lead the model to an analogous result. The convenience for Chilean corporate law of evolving from a rules-based regulation to one using the standards technique has been justified by VALENZUELA (2019), pp. 43-86. Legal literature and financial empirical research have also driven the development of this legal system, which constantly analyzes the case law criteria elaborated by the courts (See, for example, SUBRAMANIAN (2005), pp. 2-70).

[12] *Kahn v. M & F Worldwide Corp.* (2014).

[13] If the transaction is agreed only by a committee of non-involved directors, or, alternatively, only by the majority of the minority at the shareholders meeting, the transaction is still subject to review under the entire fairness standard, but the burden of proof falls on the plaintiff (*Kahn v. Lynch Communication Systems, Inc.* (1994)).

[14] From their access to information and bargaining power, utilizing a committee of independent directors is the most effective mechanism to avoid tunneling, positively impacting the price offered to shareholders in empirically observed transactions with conflicts of interest, such as acquisitions of a public corporation by its own executives, called management buy-outs or MBOs (see CAIN & DAVIDOFF (2011), p. 895), or the complete acquisition of a corporation through the purchase of minority shareholders' stocks by a controlling shareholder (freeze-out) or through its merger by absorption (freeze-out merger), more effectively than the MoM rule (see RESTREPO (2021), pp. 27-30).

[15] SUBRAMANIAN & RESTREPO (2015), p. 224.

to the corporate interest, avoiding the problem of hold-out by the minority. In addition, it reduces litigation, without diminishing the protection of minority shareholders.[16]

2.1. Summary of legal regulations on RPTs in Chile

The Chilean legal system has no legislation on corporate group law of German or continental European inspiration. Strictly speaking, although it is discussed, Chilean law does not provide for a legislative enshrinement of the group interest, but only recognizes the corporate interest.[17]

In 2009, as part of the measures adopted by Chile to join the OECD, a new Title XVI was incorporated to the Corporations Act (LSA, by its acronym in Spanish): "On related-party transactions in publicly traded corporations and their subsidiaries."[18] This is the regulation that has been used since 2009 as the main mechanism to resolve disputes arising from large intra-group transactions.

In summary, the Chilean RPT regulation in LSA can be divided into six parts, taking as a criterion for this distinction, the function of the rules within the RPT regulation. The first part of the regulation defines what RPT is in very broad terms.[19] The second part lists, exhaustively, who is a related party of the public corporation concerned (Article 146 LSA).[20] By reference to the LMV, transactions between corporations belonging to the same corporate group are to be considered RPT.[21] These first two parts determine the scope of application of the regulation.[22] The third part sets forth the standards that an RPT must meet, which are to promote the corporate interest of the corporation in question and to be subject to market conditions. The fourth sets forth the procedure —"regulated procedure"— to which a RPT

[16] RESTREPO (2021), p. 30.

[17] The case law doesn't acknowledge that Chilean law enshrines a group interest that prevails over the corporate interest. See *Mosa, Fontaine & Battaglia v. CMF* (2021) —Blanco y Negro case—, where the Supreme Court adopts the doctrine (ZEGERS & ARTEAGA (2004), pp. 245-246) that defines corporate interest "as that which is common to the current shareholders of a corporation in an objective and abstract sense; the lowest common denominator of all the shareholders from the incorporation of the corporation until its liquidation, disregarding any external element." Likewise, *Ponce Lerou v. SVS* (2020), where the Supreme Court expressly rejects the defense that the operations subject to the regulator's sanction can be justified if they benefit the entire corporate group, but are not agreed upon for the benefit of the corporate interest.

[18] On the origin and meaning of the regulation, see ISLAS (2011), pp. 9-14. Article 44 LSA was also amended, additionally enshrining it as a rule for the regulation of RPT in private corporations. Recently, the CMF —mandated by LAM's amendment on art. 147 LSA— issued General Rule No. 501 (NCG 501, by its acronym in Spanish), dated January 8th, 2024 and entered into force September 1st, 2024, on minimum mentions of RPT ordinary course of business policy and disclosure. On the problems of ordinary course of business RPT in Chile prior to this regulation, ISLAS & LAGOS (2019), pp. 95-115 can be consulted. On the rationale for this new NCG 501 on ordinary course of business operations, LAGOS (2024b) can be consulted. The new regulation is not analyzed in this paper because its impact on large transactions is not significant. This is due to the fact that large transactions are usually considered essential facts, so corporations provide information about them. Also, as can be seen in this Article, the regulator requires disclosure of information on the transaction and the law itself requires directors and external auditors to issue their opinions on the transaction. The NCG 501 requires *ex-post* disclosure of information on the RPT, so its most relevant impact will affect transactions of lower amounts that were not disclosed individually before.

[19] See LAGOS (2024a), pp. 1-27.

[20] Although most of the rules refer to conflicts of interest of the directors of corporations, this agency conflict is irrelevant in most cases, as a consequence of the combination of the rules on appointment and removal of the board of directors with the ownership concentration levels prevailing in Chile.

[21] Article 146 No. 1 LSA.

[22] See LAGOS (2024a), pp. 1-11.

transaction must be subject. The fifth part determines the effects of failing to comply with the regulated procedure, restricting them to liability remedies, therefore excluding the invalidity of the transaction when the procedure is breached. Finally, the sixth part contemplates three exceptions to the application of the regulated procedure: transactions that are of no significant amount;[23] ordinary course-of-business transactions and transactions in which the corporation of reference owns at least 95% of the shares of the counterparty.[24]

Law 21.314 of 2021 on market agents (LAM, by its acronym in Spanish) introduced a limit to declaring transactions as ordinary course-of-business ones, excluding those higher than 10% of the corporation's assets.[25] By means of this, it can be pointed out that as of 2021 large transactions subject to the regulated procedure of Article 147 LSA, are those that: are of "significant amount", or are greater than 10% of the assets of the corporation.

Whenever the board of directors of a public corporation intends to agree on an intragroup transaction of a significant amount,[26] the directors elected with the votes of the controlling shareholder must refrain from voting—since they are deemed to be "involved" directors— but must express their opinion regarding the transaction ("if requested by the board of directors"). The corporate agreement must be approved with the majority of the "non-involved" directors. If the majority of directors are "involved" directors, the corporate agreement must be adopted by the unanimity of the non-involved directors.[27] This is what normally occurs in Chile, considering that ownership concentration levels are around two thirds of the shares with voting rights.[28]

2.2. Approval or rejection of the RPT by the board of directors

It is not clear whether the directors elected with minority votes can halt the operation. The law states that "the operation (…) may only be carried out if it is approved by the unanimous vote

[23] Significant amounts are those that exceed 1% of the corporation's equity, provided that the operation is greater than 2,000 U.F. (Unidades de Fomento. This is around USD 90,000) and, in any case, those greater than 20,000 U.F. (around USD 900,000).

[24] RPT exempted as part of the ordinary course of business policy will be reported and subjected to minimum rules established in NCG 501. See our working paper ISLAS & LAGOS (2024).

[25] Before this law, there were no value restrictions on the transactions declared as ordinary course-of-business (Ordinary Official Letter No. 12,473 (2011), SVS), unless they were recognized in the ordinary course of business policy, which was rarely observed (according to ISLAS & LAGOS (2020), p. 111, only one case among the 35 most traded corporations in the Stock Price Index of the Santiago Stock Exchange or IPSA).

[26] If the transaction is not of a significant amount, it is exempted from the regulated procedure (Article 147 a) LSA).

[27] The question arises here whether the independent directors elected with votes of the controller —who are independent by virtue of meeting the controller independence requirements set forth since 2009 in Article 50 bis LSA— are involved directors or not. By strictly applying the regulator's criterion —which resorts to Article 44 LSA on RPT in private corporations— the answer is yes, if he is elected with the controller's votes. This criterion is sensible in substantive terms, but it is inconsistent with the aim of recognizing independent directors ("independent directors" according to Article 50 LSA). This inconsistency shows the problem that arises when designing the figure of the independent director in Article 50 bis LSA, since he/she can be elected with the votes of the controller, rather than an inconvenience of the criterion of Article 44 LSA (according to which directors elected by the controller cannot participate in the vote of the corporate agreement). To achieve true autonomy of the controller, there are mechanisms in comparative corporate governance systems: for example, reserving at least one director quota in favor of minority shareholders in Italian corporate law, making their appointment and removal dependent thereon. Including such mechanisms in the bylaws or in the law would grant effective autonomy to the independent director of Article 50 bis LSA (see RINGE (2013), pp. 401-424).

[28] ISLAS & LAGOS (2020), p. 76.

of the non-involved members of the board of directors or, failing that, if it is approved at an extraordinary shareholders meeting with the agreement of two-thirds of the shares issued with voting rights." There are three possible constructions.

The first one consists of understanding that the RPT can only be approved by non-involved directors, unless there are no non-involved directors or, as interpreted by the regulator,[29] if it fails to have, at least, two non-involved directors.[30] Only in these cases, the RPT would be approved by a shareholders meeting.[31]

The second implies considering that the expression "failing that" is a sort of option: the transaction can be approved by the non-involved directors, or by the shareholders meeting. In any case, the question is who has the right to choose one way or the other, because the body that acts on behalf of the corporation is the board of directors. But in this case —the case of an RPT— the way to approve this corporate agreement is governed by the rule under analysis, which, precisely, prevents the directors involved from participating in the corporate agreement.[32]

The third is, strictly speaking, a variant of the previous one. This interpretation results in considering that a meeting may be called not only if there are no "non-involved" directors to adopt the decision, but also if the transaction is rejected by the "non-involved" directors."[33]

There is no case law on this point, but regulator's opinions do exist. These opinions lean towards the first interpretation, but do not affirm the rule for all cases. They only rule on cases where there has not been even one "uninvolved" director",[34] or on cases where there have not been at least two "uninvolved" directors.[35] For these cases, the regulator has decided that the RPT must be approved by the extraordinary shareholders meeting by two-thirds of the shares with voting rights.

Among the three interpretations, the first one is preferable because, as previously analyzed, the most effective and least costly safeguard for large transactions with conflicts of

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[29] In Chile, the current securities market regulator is the Comisión para el Mercado Financiero (CMF), legal successor of the Superintendencia de Valores y Seguros (SVS), by virtue of Law 21,000 of 2017.

[30] In the same sense, EYZAGUIRRE & VALENZUELA (2015), p. 279. Likewise, these authors believe that the RPT can be approved by the board when all directors are directors involved as well.

[31] In this sense, PALASKOV (2021), p. 364, states that the shareholders meeting of a public corporation has a "residual" power of approval, since it is limited to approving the operation only when it is legally impossible for the board of directors to do so. For their part, EYZAGUIRRE & VALENZUELA (2015), p. 282, only consider that the rejection of the RPT by the board of directors prevents its approval by the shareholders meeting, when no director is involved in the RPT, or when the directors involved are less than the majority and the RPT is rejected by the majority of the board of directors, since this would not be a matter within the competence of the shareholders' meeting.

[32] Although, formally, the objection may be overcome by the power of one or more shareholders representing at least 10% of the issued shares with voting rights to call a shareholders meeting (Article 58 No. 3 LSA).

[33] For example, PUGA (2023), p. 669, who states that "this meeting can be held because there was no unanimity or because all the directors were involved."

[34] Ordinary Official Letter No. 34,302 (2017), SVS. If the directors have been elected by acclamation, the regulator considers that all the directors have had votes from the controller. With this, the RPT could not be approved by the board of directors and should go directly to be approved by the shareholders meeting by 2/3 of the issued shares with voting rights (see Ordinary Official Letter No. 24,807 (2017), and Ordinary Official Letter No. 21,058 (2016), SVS).

[35] Ordinary Official Letter No. 9,914 (2012), SVS.

interest is their approval by a committee of non-involved directors.[36] Consequently, Article 147 LSA ought to be constructed as follows: if a transaction that should be approved by the special committee of non-involved directors is instead approved by the shareholders meeting, the rule must be deemed breached. This does not invalidate the RPT, but it does give rise to a claim for damages and restitution of profits by those responsible, including the controller. The breach causes the burden of proof to be reversed in favor of the plaintiffs, *i.e.*, it is for the defendants to prove that the RPT was made in the corporate interest and under market conditions of fairness.

Finally, the regulator's criterion that the directors who may participate in the special committee of "non-involved" directors should be exclusively those who have not been elected with controller's votes may be counterproductive. The purpose of incorporating independent directors,[37] who may be elected with votes of the controller, is to have a director who —in addition to those elected with votes of the minority— has no close ties with the controller, even if elected with its votes. In this way, it is possible to have one more director, who has greater autonomy *vis-à-vis* the controller. As will be seen regarding the practical application of the rules on RPT in large transactions in Chile, considering that the "independent" director of Article 50 bis LSA shall be considered "involved" for purposes of creating the *ad-hoc* committee of non-involved directors is a key interpretation to avoid creating this special committee, based on the levels of concentration of shareholding in the Chilean system.

2.3. Approval or rejection of the RPT by the extraordinary shareholders meeting

There is no case law, nor opinions, on whether or not the controller should be excluded when voting at the extraordinary shareholders meeting to approve the RPT. The text of the law does not expressly exclude him, which can be interpreted in three different ways.[38]

First, as recognizing an abstention rule. It is a general principle of law that whoever is in conflict of interest must refrain from participating in those businesses where this conflict of interest arises. If the controller takes part in the shareholders meeting, the RPT is not valid.[39]

Second, the lack of an express abstention rule should be understood as the implicit choice of an inversion rule, *i.e.*, the controller may intervene in the vote, but in the event that

[36] See the empirical evidence for the United States in the referenced works of CAIN & DAVIDOFF (2011), pp. 849-902 and RESTREPO (2021), pp. 353-394.

[37] Through the amendment to Article 50 bis LSA by Law 20,382 of 2009, which incorporated the figure of independent directors.

[38] The text of the law is silent on whether or not the controller may participate in the vote to approve the RPT in which he is involved. Further on (Article 147 No. 7 LSA), the rule states that "the breach of this Article" entitles to compensation for damages and reimbursement of profits obtained in favor of the corporation or shareholders against "the breaching related party." The final part of the rule states that "in this case —in case of a breach of Article 147 LSA— it shall be up to the defendant to prove that the transaction complied with the provisions of this Article." Does it mean, a *contrario sensu*, that the approval of the transaction with votes of the controlling shareholder implies that the transaction complies with the substantive requirements of corporate interest and market price? No, for two reasons. First, there are good reasons to consider that the controller should refrain from voting at the shareholders meeting at which the transaction is to be approved. Second, if the controller is authorized to vote at the shareholders meeting, despite his conflict of interest, the counterpart is a reversal of the burden of proof against him.

[39] For Chilean law, ALESSANDRI (1931), p. 73, comments on specific rules prohibiting self-contracting, stating that "as all these precepts are based on the conflict of interest that normally arises from self-contracting, we believe that every time it arises, it will not be possible to celebrate it, even if there is no express text prohibiting it."

the RPT is approved with his votes, the controller who votes with conflict of interest has the burden of proving that the transaction was made in the best interest of the corporation and under market conditions.

Third, the controller with a conflict of interest may vote at the extraordinary shareholders meeting and, if the RPT is approved with his votes, the party suing the controller has the burden of proving that the transaction was not made in the best interest of the corporation or at market conditions.

Among these three interpretations, the second option is preferable for Chile.

The first option is not legally possible, since Chilean law provides that violation of the regulated procedure can only have the effect of compensation for damages, excluding the annulment of the transaction. That means that the controller can always breach the rule and force the decision by voting in the meeting, although risking compensation for damages and reversal of the burden of proof.

The third interpretation favors the position of the controller of the group. This rule makes the imposition of the controller's decision unavoidable and the regulated procedure a merely informative one.[40] It is difficult to justify such a costly procedure for such an outcome.

The second option is the one preferred by comparative doctrine. It is what Goshen identifies as a liability rule or what Paz-Ares calls an "inversion rule" and partly coincides with Delaware law.[41] It consists of allowing the controller with conflict of interest to participate in the corporate agreement for the approval of the RPT. However, it recognizes a shift of the burden of proof to the benefit of the minority that eventually sues the controller for considering that the transaction was against the corporate interest and/or was not carried out under market conditions (or, at least, reasonable and equitable conditions). This rule facilitates the management of the corporate group, but, at the same time, protects minorities by preventing them from acting opportunistically. In this way, efficient group transactions are permitted.[42]

Article 147 LSA must be interpreted as follows. Whenever the corporation is required to approve an RPT through the shareholders meeting, the controller's participation in it breaches the regulated procedure, as it contravenes a general civil law rule. This rule is that a person who is in conflict of interest cannot participate in the approval of a transaction. However, the transaction cannot be annulled and only damages can be claimed. But it is up to the defendant (controller) to prove that the transaction meets the criteria of corporate interest and market conditions.

Even so, the protection granted by this interpretation of the rule is not optimal. First, because in large transactions, it is very difficult to determine something like an objectively fair price.[43] Second, because the *a posteriori* protection granted by the rule depends heavily, for its effectiveness, on liability actions and specialized judges accustomed to analyzing this type of

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[40] ENRIQUES *et al.* (2017), p. 156.

[41] GOSHEN (2003), pp. 408-410; PAZ-ARES (2020), pp. 100-103. The similarity with the Delaware rule lies in the fact that the latter does not grant review by business judgment rule if the transaction was not approved by the special committee of non-interested directors.

[42] GILSON & SCHWARTZ (2013), pp. 160-181.

[43] PACCES (2019), pp. 196-199; GÖZLÜGÖL (2022), pp. 643-644.

transactions, as is the case in *Delaware*.[44] Third, because it is essential to have institutions such as the discovery rule or the right to inspect the corporate books (insufficiently regulated in Chile), which provide access to the internal information of the corporation in duly justified cases, in order to assess the feasibility of the claim.[45] None of which exists for now in Chile.[46]

So far, it has been observed that the text of the legal regulation on RPT allows interpretations that put the Chilean regulation not far from the optimal regulation for RPT in large transactions. But how has the RPT regulation for large transactions been applied in Chile? A look at two emblematic cases in which these rules were applied sheds light on the relevant difference between the law on the books and the law in practice for large RPT.

III. THE LAW IN ACTION: APPLYING THE RPT REGULATORY PROCEDURE IN CHILE

The scarce but significant Chilean experience in applying the procedure to approve an RPT, shows that in the case of large transactions, the controller proposes to the board of directors a complete operation, that is, expressing the details of what the controlled corporation will adopt as a corporate agreement, but not giving too much information on the foundations of the operation. Sometimes, when it is not clear that the transaction is an RPT, there is a public debate —through the press— regarding the matter, which puts pressure on the controller to submit the issue to the regulator, who responds through an opinion.

Two emblematic cases (Enersis 1 and Enersis 2) allow us to observe the practical application of the regulated procedure. Observation suggests that the role of the directors is rather secondary, since the transaction is agreed upon by the shareholders' meeting, with the participation of the controller and without there being, *a posteriori*, litigation on the transaction. Therefore, independent appraisers' reports, expressly provided by law for the case where the RPT is submitted to the extraordinary shareholder' meeting, are the main protection in favor of the minority shareholders.

3.1. The Enersis 1 Case

In 2012, the parent corporation of Enersis S.A. —Endesa Latinoamérica S.A.— proposed to its board of directors a capital increase of USD 8,020 million, equal to approximately double the corporation's capital.[47] The new shares would be paid in cash by minority shareholders and

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[44] GOSHEN (2003), pp. 435-437; GILSON & SCHWARTZ (2013), pp. 160-181. The argument consists in justifying that, beyond the rule or standard recognized by substantive law, the absence of enforcement should be equated with the absence of regulation.

[45] See GORGA & HALBERSTAM (2014), pp. 1383-1498; COX & HAZEN (2020), pp. 363-369.

[46] For a discussion of the corporate governance system in Chile in this regard, see VALENZUELA (2019), pp. 43-86; in particular, pp. 52 and 56. Regarding the problems of the derivative and individual legal actions of shareholders in Chile, see NÚÑEZ & PARDOW (2010), pp. 229-282 and LAGOS (2011), pp. 707-718, respectively. The recent addition of the new Article 134 bis to the LSA by Law 21.595 (Economic Crimes Law), of August 17, 2023, which punishes criminally those who agree or induce to agree abusive agreements, may have an impact on reinforcing the effectiveness of the regulation on RPT. But it remains to be seen which will be the real effect of this new crime on the corporate governance system.
This state of affairs leads some authors to favor property rules for large transactions. ENGERT & FLORSTEDT (2020), p. 269 prefer property rules for large transactions. HOPT & PISTOR (2001), pp. 33-36 go so far as to suggest that the higher cost of the property rule (an *a priori* decision procedure) over the liability rule (*a posteriori* judicial review) is justified in institutionally weak countries regarding the enforceability of safeguards in courts.

[47] Although formally the board of directors of Enersis S.A. proposes the capital increase to its shareholders meeting (ENERSIS S.A. (2012a), essential fact dated July 25th, 2012), the operation is designed by the parent company Endesa España, as evidenced in a letter from Endesa España addressed to the President of the Board of Directors

with shares by the controller. The shares corresponded to electricity generation corporations in which Endesa España —controller of Endesa Latinoamérica S.A. and Enersis S.A.— was the majority shareholder in other Latin American countries. The transaction raised suspicions among minority shareholders and in the market, since at first the corporation's own board of directors had sufficient information about the purpose of the capital increase.[48] Enersis shares fell 13% after announcing the proposed capital increase, causing a great impact on the Santiago Stock Exchange.[49]

As the controller would pay for the shares to be subscribed in the capital increase with shares of other corporations, the board of directors of Enersis S.A. had commissioned an expert to appraise the shares to be contributed, as per Article 15 LSA. The appraiser estimated that the shares used by the controller to pay its share in the capital increase amounted to USD 4,862 million. The board of directors, supported by two law reports from renowned law firms and previous opinions from the regulator, considered that the transaction was not an RPT. However, upon request from institutional investors (Pension Fund Administrators, AFP by its acronym in Spanish), the regulator decided that the transaction was RPT and should therefore follow the regulated procedure. As a result, the transaction had to be approved unanimously by the non-involved directors "or, failing that," by the extraordinary shareholders' meeting, with two-thirds of the shares issued with voting rights. In addition, it implied that each director had to issue an informed opinion on the transaction, the directors' committee had to report thereon, and reports from independent appraisers could be required (Article 147 LSA).

However, although most of the directors declared themselves "involved", the transaction was not approved by the *ad-hoc* body of non-involved directors. The reason was that six of the seven directors were elected with votes from the controller, so only one director was a non-involved director.[50] In response to Enersis S.A.'s express consultation on this point, the regulator repeated its criteria expressed in a previous opinion:[51] if there is only one "non-involved" director, is not possible to comply with the requirement of Article 147 No. 4 LSA, that demands the corporate agreement to be approved by "the unanimity of the members of the board of non-involved directors" —*i.e.*, more than one. Thus, the corporate agreement

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of Enersis S.A. (ENERSIS S.A. (2012e), essential fact dated October 31st, 2012), in which it is proposed that the capital increase should be subject to a condition so as not to breach the statutory limit of 65% ownership when subscribing and paying the capital increase.

[48] In an interview around the time of the case, a former director of Endesa S.A., elected with votes of minority shareholders, resigned in reaction to an operation proposed by the controller of the Enersis group for Endesa S.A. in 2009, stating: "When I resigned as director I never wanted to give an interview or talk about what was happening in the board of directors, but today the scale of the operation is so large that I think it is necessary to do so: Endesa is one of the three largest corporations in Chile, with investments in six countries, and we had a three-hour board of directors meeting, only once a month, in where it was not possible to address all the issues. Papers were handed to us to be signed quickly. The board of directors was just a mailbox at that time." See RÍOS (2012).

[49] "The shares of the energy group Enersis sharply plummeted on Thursday and dragged down the local market, after the corporation announced a historic capital increase of around USD8,000 million by the contribution of fresh resources and assets from its Spanish controller Endesa. The shares of the electricity holding corporation, which were the most traded in the session, fell 13.06% to USD162.57 on the Santiago Stock Exchange, recording their lowest value since October 22, 2008." See LA TERCERA (2012).

[50] As stated by six out of seven directors at the board of directors meeting of August 31st, 2012 (ENERSIS S.A. (2012b), essential fact dated August 31st, 2012).

[51] Ordinary Official Letter No. 21,001 (2012), SVS, reiterating the criteria contained in Ordinary Official Letter No. 9.914 (2012), SVS.

must be approved directly by the extraordinary shareholders meeting, with a quorum of two thirds of the shares issued with voting rights.

In any case, the transaction ended up more favorable to the minority shareholders thanks to the intervention of the regulator, since, at least, declaring that the transaction was an RPT led to the independent appraisers' reports. The independent appraiser appointed by Enersis' board of directors,[52] estimated that "at the date of this Report's issuance and using the closing price of Enersis on Tuesday, October 23rd, 2012 (CLP 162.2 / share) the market value of Conosur [the corporation holding the controller's assets in Latin America] would be between USD 3,445 million and USD 3,621 million"; and that "the discounted cash flow valuations of Conosur and Enersis, based on consistent criteria and which determine the midpoint of the share swap ratio mentioned above, are USD 4,709 million and USD 14,836 million, respectively." The "market consensus" value was USD 3,827 million.[53] On the other hand, the independent appraiser appointed by the Directors' Committee[54] —a body composed mostly of independent directors[55]— considered that the value of Conosur's shares as of Tuesday, October 23 was in a range between USD 3,870 million and USD 3,912 million.[56] Finally, in an essential fact dated December 21st, 2012, Enersis informed the regulator that the price of Conosur (Endesa España) shares used to pay for the Enersis capital increase, agreed at the relevant extraordinary shareholders meeting, was USD 3,634,754,015.5 (USD 3,634 million).[57] The capital increase was finally carried out in better conditions for the minority shareholders, but doubts persisted about the purpose of the capital increase.

The Pension Fund Administrators (AFP, by its acronym in Spanish), which managed funds with investments in Enersis, reached an agreement with Endesa España: the capital increase was for USD 5,986 million (25.7% less than the originally announced capital increase of USD 8,020 million); the shares contributed by the controller were valued at USD 3,650 million (their original valuation was USD 4,862 million by an independent appraiser, as per Article 15 LSA). However, it was committed, between the AFP and Endesa España, that Enersis would be the only expansion vehicle in Latin America, and Endesa España agreed to refrain from promoting any extraordinary dividend payment. The RPT was approved by the Enersis shareholders' meeting, with the favorable votes of the AFPs and, of course, the controller, which resulted in an approval quorum of 86.04% of the shares.

3.2. The Enersis case 2

In 2015, the controller of the Enersis group (now Enel S.p.A.) decided to reorganize the group's corporations in Chile. The reorganization consisted of the division of the corporations Enersis S.A. (parent corporation of the group), Chilectra S.A. (corporation whose line of

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[52] IM Trust, in ENERSIS S.A. (2012c), essential fact dated September 5th, 2012.
[53] IM TRUST (2014). This appraiser used discounted cash flow as methodology.
[54] Claro y Asociados, in ENERSIS S.A. (2012d), essential fact dated September 7th, 2012.
[55] Article 50 bis LSA. This body may be integrated by a director independent of the controller under the terms of the aforementioned rule, even if he/she is elected with votes of the controller.
[56] CLARO Y ASOCIADOS (2012). This appraiser used two methodologies: discounted cash flow and Enterprise Value/EBITDA by the sum of the proportional EBITDA to be contributed. BEBCHUK & KAHAN (1989), pp. 27-53, have justified that the different opinions among appraisers are often evidenced in the use of different methodologies to define "fair price", in the differences in the measurement of said fair price, in addition to the influence of conflicts of interest arising from their appointment and other factors.
[57] ENERSIS S.A. (2012f), essential fact dated December 21st, 2012.

business was the electricity distribution) and Endesa S.A. (corporation whose line of business was the generation of electricity), in order to distribute the assets of these corporations in Chile and Latin America. Subsequently, the corporations created by the division, containing the Latin American assets, would be merged into Enersis Américas. The merger was subject to the condition that no right of withdrawal could be filed for more than 10% of the issued shares.

The minority shareholders of the group's corporations, particularly the institutional shareholders of Endesa S.A., expressed concerns about the operation, particularly because it was not clear the benefit to Endesa's corporate interest. The stock market regulator (SVS, by its acronym in Spanish) when consulted whether it was an RPT, stated by means of an opinion that it was not. The regulator based its answer on the fact that the regulation on mergers in the LSA was applied preferably to the regulation on RPT, as it was a special regulation regarding the latter. However, it ordered a series of informative safeguards for the benefit of minority shareholders.[58] On December 18th, 2015, Enersis S.A., in extraordinary shareholders meeting, approved the reorganization process and, particularly, the division of Enersis. Then, the "operatives" corporations of the group would be divided (Endesa S.A., which became Endesa Chile S.A. and Endesa Américas S.A.; and Chilectra S.A., which became Chilectra Chile S.A. and Chilectra Américas S.A.).

In the meantime, an institutional investor, which managed pension funds that owned shares in Enersis S.A. and Endesa S.A., filed a claim of illegality against the regulator's opinion. Finally, the Santiago Court of Appeals ruled that the merger —the second part of the reorganization— was indeed an RPT. The ruling was issued only on March 22nd, 2016, once the divisions of the group corporations had already been made, although before the mergers.[59] By declaring the merger as an RPT, the transaction had to be subject to the regulated procedure of Article 147 LSA, which means, among other things, that the corporate agreement to approve the division and the merger must be submitted to the non-involved directors and, in addition, that reports of independent appraisers must be prepared and the opinions of the involved and non-involved directors must be issued. When issuing their opinions, each director had to express what was his or her relationship with the controller (the related party).

This last requirement allowed to verify that, in the board of directors of Endesa Américas S.A., composed of nine directors, there were only two directors not elected with votes from the controller. In addition, one of the directors elected with votes of the controller, had been proposed by the controller itself as an independent director, according to the definition of Article 50 bis LSA.[60] Based on the criterion, repeatedly stated by the CMF, a director elected with votes of the controller, even if independent according to Article 50 bis LSA, must be considered an "involved director" if the controller is the counterpart of the

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[58] Ordinary Official Letter No. 15,452 (2015), SVS.

[59] *AFP Habitat v. SVS* (2016).

[60] According to this Article introduced by the same Law 20,382 of 2009 that introduced the regulation on RPT, an independent director may be proposed by and be elected with votes of the controller, as long as he/she is not in any of the cases established in that same Article. These negative requirements —absence of kinship, labor or commercial ties— constitute formal requirements that justify —from the legislator's perspective— the independence of the director. Beyond the question of whether the requirements of the law effectively guarantee his autonomy, it should be noted that the independent director can be reelected indefinitely with the votes of the controller itself, with which his substantive independence is inevitably weakened over time.

corporation in which he serves.[61] Therefore, he cannot intervene in the adoption of the corporate agreement to approve said transaction.

However, in Endesa S.A. there were two non-involved directors —*i.e.*, not elected with votes of the controller— who could meet the requirements of Article 147 No. 4 LSA (to approve the transaction by unanimity of the non-involved directors). However, the board of directors, by unanimous decision, decided to "formally initiate the merger process", despite declaring that only seven of its nine directors were "involved."[62] The unanimous decision of the board of directors expressly repeats the terms of the merger approved at the extraordinary shareholders' meeting of Endesa S.A. on December 18th, 2015 (prior to the ruling of the Court of Appeals declaring illegal the regulator's opinion that the transaction was not an RPT).

The text of the essential fact of May 6th, 2016 implies that the crucial content of the merger agreement (the share swap ratio) was proposed by the controller of the group, Enel S.p.A., and was not a decision prepared, analyzed and deliberated by the board of directors of Enersis S.A., much less by that of Endesa S.A. and, even less, by the unanimity of the non-involved directors, as required by law. As can be seen in the opinion related to the second part of the operation (merger), issued by a director of Endesa Américas S.A.,[63] the corporate agreement was prepared and proposed by the controller.

The "non-involved" directors play, rather, a negotiation role based on previously agreed terms. In fact, one of them stated —when providing his opinion on the RPT that the law requires him to prepare and publish— that "in the same Division Meeting (as well as in essential facts informed in the days prior to said meeting), Enel and Enersis S.A. disclosed the terms and conditions related to the Merger that they would propose to be known in the shareholders' meetings of Endesa Américas, Enersis Américas and Chilectra Américas, in the event they were summoned to pronounce regarding the merger."[64] The same "non-involved" director indicated that "in my capacity as a member of the Directors' Committee, I held working meetings with the management of Endesa Américas and with Tyndall [independent appraiser appointed by the directors' committee] where aspects of the Merger and the Terms and Conditions of the Merger were discussed, questions were asked and doubts were clarified"[65], all of which occurred after the controller made the proposal.

This shows the role of the non-involved directors in the negotiation of the transaction and their access to information being limited and strongly dependent —as the basis of their opinion shows— on the conclusions of the independent appraisers' reports on the RPT and those of the expert witness who was to analyze the merger. In particular, his view seems heavily influenced by the expert opinions regarding the share swap ratio. It should also be noted that both the expert and one of the independent appraisers were appointed by the board of

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[61] See the Ordinary Official Letters No. 22.062 (2011), No. 9.914 (2012) and No. 24.122 (2015), SVS.

[62] The board of directors decides, among other things, "to declare that the directors [naming the seven directors involved, including the independent director according to Article 50 bis LSA] have been decisively elected with votes of the controlling shareholder of the corporation, have declared to have an interest in the Merger under the terms of Article 147 of the Corporations Act, and in accordance with the provisions of the Ruling of the Court of Appeals of Santiago of March 22nd, 2016" (ENDESA AMÉRICAS S.A. (2016), essential fact dated August 5th, 2016).

[63] CHEYRE (2016).

[64] CHEYRE (2016), p. 5.

[65] CHEYRE (2016), p. 13.

directors, the majority of whom were "involved" directors (in this case, elected with the votes of the controller).

The reorganization as a whole was analyzed in the reports of the independent appraisers appointed by the board of directors (Banco Santander) and by the committee of directors (Tyndall), issued on August 5th, 2016. In particular, the report of the independent appraiser appointed by the committee of directors, composed mostly of minority shareholders, held that the transaction pursued preferentially the interest of the parent corporation of the controlling group. In particular, through the better use of tax credits.[66]

According to Tyndall, the reasons given by Enel S.A., the controller of Enersis, in favor of the corporate reorganization, were not sufficient in themselves to justify the reorganization from Endesa's perspective. The reasons given for reorganizing the Enersis group were threefold: i) administrative inefficiencies; ii) tax inefficiencies; and iii) undervaluation of assets. The Tyndall report indicates that: i) the proposed reorganization is simply aimed at an organizational option different from the existing one, which did not necessarily improve all the administrative problems of the group's organization; ii) the solution to the "tax inefficiency" due to the non-use of credits for taxes paid in Chile at the level of the group's "operating corporations" —such as Endesa— would benefit the shareholders of Enersis, that is, not those of Endesa, the corporation whose corporate interest should prevail, as required by Article 147 first paragraph LSA. As the report states, the transaction is beneficial "regarding those shareholders with final tax rates (Complementary Global Tax and Additional Tax) higher than the first category income tax rate in force in Chile and, in the case of non-residents in Chile, regarding those who reside in countries with a double taxation agreement with Chile."[67] That is, the reorganization especially favored the controller, thanks to the double taxation agreement in force since December 2016, signed on October 23rd, 2015, between Chile and Italy; iii) that the discount applied to the shares of the corporations of the group by virtue of its organization, strictly speaking, was greater in the case of Enersis than in the case of Endesa, therefore, the reorganization mainly benefited Enersis, not Endesa.

Since the reorganization process, as the report revealed, favored the controller and there was no mechanism to stop the transaction, Tyndall suggested compensation for Endesa's minority shareholders. This could be achieved by improving the share swap rate for Endesa in Enersis Américas, which would result in a share participation for Endesa's minority shareholders of 16% in Enersis Américas (the corporation resulting from the merger after the division of the electric-generation assets in Chile and Latin America).[68]

After negotiations between the controller and members of the directors' committee —advised by the independent appraiser appointed by that body— the controller decided to make a tender offer (OPA, by its acronym in Spanish) for Endesa's shares. The objective was to prevent the merger from failing due to the condition that the right of withdrawal would not be

[66] TYNDALL (2015).
[67] TYNDALL (2015), pp. 7 y 115.
[68] TYNDALL (2015), p. 13, indicates that "a reasonable approach to determine the Share Swap Ratio, therefore, should consider: • The relative contribution made by each group of shareholders to the merger of Enersis Américas at amounts that consider the relative discounts with which Enersis and Endesa currently trade, that is, at values as close as possible to the market • Compensation for the certain tax cost that Endesa will incur on occasion of the division • The relative risks incurred by the different groups of shareholders [as a consequence of the reorganization]."

exercised for more than 10% of the shares issued. The controller offered a way out to the minority shareholders of Endesa S.A., beyond the right of withdrawal, by means of an OPA for the shares of Endesa Américas S.A.; paid with cash (the amount was gradually increased in the negotiations from 236 to 285 and then to 300 CLP per share). Endesa's directors gave their opinions on the convenience or inconvenience of the OPA. Therein, it is stated that the price of 300 CLP per share is lower than the stock market price at the date of their reports (CLP 304.7), and also lower than the price involved in the merger (CLP 314.2).[69] However, the shareholders would have received a price of CLP 299.64 when exercising their right of withdrawal. Thus, the price of the OPA was low (a 4.5% reduction regarding the share valuation as a consequence of the merger[70]), but higher than that of the right of withdrawal. With this, the failure of the merger was avoided due to the fulfillment of the aforementioned condition, with no excessive increase of the operation's cost from Endesa's point of view. Particularly, of its controller, the principal interested party in the operation.

Finally, in the OPA, Enersis Américas S.A. received sales offers for shares equivalent to 3.1% of the capital of Endesa Américas, suggesting that the exit price offered was not particularly attractive. This is supported by the director's opinions that considered the transaction "inconvenient" or "unattractive."[71]

3.3. Key aspects of implementing the regulated procedure for approving RPT in Chile

In both procedures to agree that Enersis would enter into the RPT, the shareholders meeting was chosen directly, not submitting the matter to the *ad-hoc* committee of non-involved directors established by law.

In the first case, this occurred because there was no more than one "non-involved" director. The issue is relevant, as the median of concentration of publicly traded corporations listed on the Chilean stock exchange increased from 61% in 1990 to 67% in 2019.[72] Considering that the controller of Enersis S.A. held 60.62% of the shares at the time of the proposed capital increase,[73] one can foresee that in most publicly traded corporations in Chile, the *ad-hoc* committee of uninvolved directors will not be constituted to negotiate the terms of the RPT with the controller, nor agree on it on behalf of the public corporation involved in the transaction. This deprives the Chilean regulated procedure of the most effective and least costly control mechanism for the RPTs in most cases.[74]

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[69] Value obtained from the share swap ratio between the shares of Enersis Américas and Endesa Américas (2.8), considering the listed price of Enersis Américas at the time of issuance of the report.

[70] On the factors that may result in the difference between the market price of the share and the price of the share under right of withdrawal rules, see CABALLERO & LAVÍN (2018), pp. 205-242.

[71] This is consistent with the opinions issued by each of the nine directors of Endesa Américas S.A., who unanimously concluded that the offer was inconvenient, economically unattractive or inferior to other liquidity alternatives. See for all CHEYRE (2016), director that justified his opinion considering that the CLP 300 per share price offered in the OPA was lower than the market price (CLP 304.7, discount of 1.5%); was lower "than the price implied in the merger transaction" (discount of 4.5%); and only marginally higher than the price if the right of withdrawal was exercised (CLP 299.64) recognized by law if the merger was approved. The reports of each director are available at https://www.enelamericas.com/es/inversionistas/a201609-junta-extraordinaria-de-accionistas-2016.html (last time retrieved on November 14th, 2024).

[72] ISLAS & LAGOS (2020), p. 76.

[73] ENERSIS S.A. (ca. 2013), p. 30.

[74] The corporate governance literature generally considered more effective an RPT regulation involving a decision-making procedure where both independent directors and, subsequently, uninvolved shareholders participate

In the second case, the approval by the board was resorted to directly, despite having sufficient quorum to form the *ad-hoc* committee of non-involved directors, and with no apparent opposition from the minority shareholders or the regulator. There is no information on why the board of directors decided to do so and did not constitute a committee of independent directors, as expressly required by law. This may be due to two reasons. First, a *fait accompli* policy: the operation was declared by the court to be an RPT only after the first part of the reorganization operation (the split-up) was already completed.[75] The failure of the reorganization was probably more costly for the corporations than before the division. Secondly, the direct recourse to the extraordinary shareholders meeting, with no objections from minority shareholders or the controller, may be due to the belief that the expression "failing" the approval of the "non-involved" directors, grants a right to opt for the RPT to be approved directly by the meeting, without the intervention of this *ad-hoc* body. But these are only speculations.[76]

To whom would correspond the potential choice of the RPT to be approved by the shareholders meeting? Certainly not the controller, who plays no formal role in the approval of corporate agreements. In the Enersis 2 case, the option was exercised by the unanimous vote of the board of directors. Probably, it was done in this way so that no objection would be raised to the decision not having the agreement of the non-involved directors. However, the law mandates forming a committee of "non-involved" directors, where the other directors are not allowed to participate, since deliberation in one or the other body is naturally not

(ENRIQUES (2015), pp. 20-21), following the Delaware example (GEVURTZ (2020), pp. 196-205). However, part of the specialized doctrine leans towards preferring the intervention of independent directors over the approval of the shareholders meeting in this type of transactions, for at least three reasons: first, because the —independent— directors are more able to obtain information on the RPT than the uninvolved shareholders (PACCES (2019), pp. 209-212); second, and based on behavioral economics criteria, because it increases the possibilities of collaboration (GÖZLÜGÖL (2022), pp. 644-656); third, because of the possibility of extortive use of the mechanism of approval by the majority of the minority, to the detriment of the corporation itself (PAZ-ARES (2020), pp. 100-107), although the possibility of extortive use is limited if, as in Delaware and as it could be interpreted in Chile, the rule permits the corporation to breach the procedure, without challenging or annulling the corporate resolution, but subject to a review under criteria of entire fairness (Delaware) or altering the burden of proof (Chile). Likewise, the approval by a special committee of non-involved directors trusted by the minority shareholders may constitute a relevant signal to them, increasing the chances that the RPT will be approved at the meeting and avoiding that the RPT regulation hinders value-creating transactions (ENRIQUES (2015), p. 201). Regarding manager buy-out and freeze-out transactions with conflict of interest, functionally equivalent to RPT of significant amount, the financial literature shows that the special committee of directors is the most effective and least costly mechanism (respectively, CAIN & DAVIDOFF (2011), pp. 849-902 and RESTREPO (2021), pp. 353-394). The latter author states that the approval by a majority of the minority does not necessarily increase the price achieved by the directors' committee negotiation, but it fulfills the important role of avoiding a transaction where the special committee has not acted with due independence, by a second review of the operation.

[75] It should be borne in mind that Article 147 LSA expressly states that "a breach of this Article shall not affect the validity of the transaction", so that only legal actions for civil liability and reimbursement of profits can be pursued. However, as the national literature has shown, tort actions present technical difficulties in matters of corporate wrongdoing (see NÚÑEZ & PARDOW (2010), pp. 229-282 and LAGOS (2011), pp. 707-718), as does the reimbursement action regarding causation (PINO (2019), p. 393).

[76] The Chilean experience in this matter seems to be in line with the conclusion of GÖZLÜGÖL (2021), p. 855, after observing the behavior of institutional investors regarding the approval of intra-group RPT in large transactions in Europe: "the evidence on RPT voting and on executives' remuneration supports the idea that institutional investors will become active only when they need to appear to be so."

comparable. Failure to do so implies a breach of the rule, with the consequent effect of reversal of the burden of proof provided for in Article 147 No. 7 LSA.

The approval of the RPT by the shareholders meeting requires two thirds of the issued shares with voting rights. If the median concentration in the Chilean market is 67% and the controller is not excluded from the vote (nor is this seen as a contravention of Article 147 LSA), it is likely that in most cases the approval by the shareholders meeting is a mere formality.

In addition, both transactions have been reported on by independent appraisers. The relevant differences in the appraisal of assets in the Enersis 1 case confirm the skepticism of the literature on this matter.[77] For this reason, it is essential that the rule allows the appointment of an independent appraiser by the directors' committee (Article 147 No. 5 LSA), at least, so that the "battle" of experts' reports is evened out.[78] In the same sense, it is also important that the *ad hoc* committee of uninvolved independent directors may commission the report of independent appraisers, although —as stated above— this power also arises from other more general rules concerning the board of directors (Articles 39 clauses 2 and 4 and 41 LSA).

It should also be pointed out that, in both large transactions analyzed, according to the independent appraisers' reports appointed by the board of directors, the risk of minority hold-out with a potentially harmful effect on the corporation was zero. This is because the expected benefit of the operation impacted directly on the controller,[79] with no clear positive effect on the controlled corporation.

Both cases show that, at the end of the day, the most relevant safeguard, despite its limitations, was the independent appraisers' report. The reports supported poorly informed directors and provided a basis for a negotiation between majority and minority shareholders, as evidenced by the fact that the terms of the RPT were improved to the benefit of the corporation and that several of them voted for the RPT favorably.

However, in a highly concentrated market with a low free float, where corporations are financed primarily through debt (bonds) rather than through equity participation (issuance of cash shares), the influence of information on the share price, as a mechanism to get better conditions for minority shareholders, is less than in markets where corporations are mainly financed through capital increases. Therefore, the bargaining power of minority shareholders, as a result of the RPT regulation in Chile, is quite weak. In addition, the threat of litigation has not been relevant so far.

A negligible effect for such a long and costly procedure.

[77] LICHT (2020), pp. 32-35 refers to how Delaware judges express that it is very difficult to match the inside knowledge of the business that directors and insider executives (and the controller) have and, consequently, despite needing them, they are skeptical about the possibility of verifying independent appraisers' report results. GOSHEN (2003), pp. 403-404 and GÖZLÜGÖL (2022), p. 643 question their accuracy and reliability. The former explains that part of the reports necessarily rely on the assumption that certain events will take place and what their foreseeable effect will be. These assumptions are likely to be made in a biased manner and, of course, may be biased in favor of the party commissioning the report.

[78] The rule contained in Article 147 No. 5 LSA provides that, if an extraordinary shareholders meeting is called for the approval of the transaction, the board of directors must appoint an independent appraiser, who has to report on "the terms of the transaction, its effects and potential impact on the corporation." In addition, a second independent appraiser may be appointed, in principle, without interference from the controller.

[79] In the first case, an improvement in its capital/debt *ratio* without financial cost. In the second case, the possibility of benefiting from tax credits.

However, by a different interpretation of these same legal norms, it is possible to bring their application closer to an optimal regulatory design. *Ex ante*, it should be noted that, whenever the *ad-hoc* committee of "non-involved" directors can be formed, an RPT of significant amount should be negotiated and approved by this body. Only if it is not possible to form it, the transaction may be approved by the shareholders meeting, in which shareholders in conflict of interest should not participate.[80] If they do so, the regulation is breached, resulting in a reversal of the burden of proof in favor of the plaintiff.

This interpretation would mean that, in more cases, non-involved directors would be the ones negotiating and approving a "large transaction." However, in those situations where the RPT must be approved by the shareholders meeting, the participation of the controller in the vote gives rise to a reversal of the burden of proof against him. As a result, the MoM rule is recognized as a liability rule rather than a property rule, allowing a controller or controlling group, holding two-thirds of the shares or more, to "force" the transaction if deemed profitable. This, in turn, should have two effects. First, the controller imposing the RPT should have the burden of proving that the transaction is in the corporate interest of the controlled publicly traded corporation. Second, if he cannot do so —and if he considers anyway that the transaction is more profitable for the group or for the parent corporation than detrimental to the subsidiary— he should compensate or be bound to adequately compensate the controlled corporation, in order to avoid a breach of his duty of loyalty.[81]

As shown, this manner of interpreting the rule prevents RPT where the benefit for the reference corporation is not evident, but, at the same time, allows to carry out large intra-group transactions that are favorable to this form of organization.[82]

IV. CONCLUSION

When the RPT regulation was introduced in 2009, it was received as an important step forward in developing the Chilean corporate governance system. Requiring the corporate agreement for concluding the RPT to be approved by independent directors and, failing that, by the shareholders meeting, seems, at least in the text of the law, a sufficiently demanding system for

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[80] Also bearing in mind that, because of the above-mentioned reasons, it would be advisable to consider the independent director of Article 50 bis LSA able to participate in the *ad-hoc* directors' committee for the approval of an RPT of a significant amount.

[81] Currently in Chile, both the directors and the controller are more concerned about not breaching their duties of loyalty, due to the new criminal offense of Article 134 bis of Law 21.595 of 2023 on economic crimes, which punishes abusive agreements.

[82] ENRIQUES & GILOTTA (2023) show how in Minority Co-Owned Groups the general rules of corporate law allow efficient Kaldor-Hicks transactions to be carried out, with no need to recognize a special corporate group law. This is because "Ordinary fiduciary duties require directors to obtain compensation for the damage otherwise suffered as a consequence of the relevant decision, as a condition for legitimately taking that decision"(ENRIQUES & GILOTTA (2023), pp. 488-489).

In any case, as these same authors point out, the regulation of German group law leads to an analogous result (see ENRIQUES & GILOTTA (2023), note 152). However, the German regulation has a major shortcoming, which makes general corporative law preferable for regulating these cases. As MOCK (2020), pp. 353-354 explains, the parent corporation has one fiscal year to compensate the disadvantage caused, and if it does not comply within this period, the controlling and controlled corporations must ascertain the amount of compensation within one year. "However, the major shortcoming of this concept is that section 311 *Aktiengesetz* grants no enforceable right to the controlled entity. In fact, section 311 *Aktiengesetz* relies on the idea that both corporations reach an agreement on good terms. So far, legal practice shows that this is not usually the case and that the controlling corporations do not grant any compensation."

a developing market of concentrated ownership. However, as Roscoe Pound stated more than a hundred years ago, the law on the books is one thing, but the law in action is another. The levels of ownership concentration in publicly traded corporations, combined with how the rules structuring the regulated procedure for agreeing an RPT are interpreted, produce that the most effective tool for controlling tunneling —approval by independent or "uninvolved" directors— is easily circumvented. If this is combined with the weakness of the shareholder protection mechanisms, the result is that the Chilean system *de facto* depends on the effect of the independent appraisers' reports on the share price of the corporation approving an RPT. This effect is not sufficient protection, as it only results in minority shareholders being able to negotiate slightly more favorable conditions for the corporation , even when the transaction appears to benefit exclusively the controller. Even less so, if one considers that expert investors can anticipate that in Chile, in most cases, the transaction will —inevitably— be approved unilaterally by the controller. However, the legislation allows an interpretation that leads to an optimal application of the RPT regulation in large transactions, promoting the —until now non-existent— participation of the *ad-hoc* committee of non-involved directors. Likewise, by allowing that in corporations with high levels of ownership concentration, the controller may impose the RPT if he demonstrates that the operation is beneficial to the controlled corporation or, at least, that it is adequately compensated.

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