

Minority Shareholdings and Joint Ventures in Emerging Jurisdictions: an Opportunity for Convergence?

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Minority Shareholdings and JVs

- Emerging Jurisdictions
 - China
 - Brazil
 - India
 - COMESA
- Established Jurisdictions
 - United States
 - European Union
 - EU Member States
 - European Commission Consultation
- Potential harms to competition
- Divergence across jurisdictions
- Framework for global dialogue

Minority Shareholdings and JVs

- Area of growing economic and financial activity around the world, especially in emerging jurisdictions
- Transactions may result in durable, structural changes that can significantly alter the incentive and ability of firms to compete
- Also may result in fewer offsetting efficiencies or synergies because they involve less integration than full mergers
- An under-exposed area that falls between the cracks of international antitrust convergence and cooperation?

Illustrative Example: BT / MCI

- Proposed acquisition by BT of 20 percent minority shareholding in MCI and joint venture with MCI
- DOJ found that transactions would reduce competition for international telecom services, and entered consent decree imposing various non-discrimination obligations on the companies
- European Commission found that the transactions did not constitute a “concentration” subject to the EU Merger Regulation
 - joint venture was not “full-function”
 - BT’s minority shareholding did not confer “control”

Emerging Jurisdictions: Minority Shareholdings

- China
 - Notification required if acquisition of “control,” defined as “decisive influence” through “contract or any other means” – New guidance
- Brazil
 - Notification required if acquisition of “control,” or five percent of target (if firms in horizontal or vertical relationship)
- India
 - Notification required if thresholds satisfied, with exemption for acquisition of less than 25 percent and no change in “control”
- COMESA
 - Notification required if acquisition of “control,” defined as “any control whatsoever” (draft guidelines require “decisive influence”)

Emerging Jurisdictions: Joint Ventures

- China
 - Notification required if acquisition of “control,” regardless of whether joint venture is “full function”
- Brazil
 - Notification required for “association contracts, consortia, and joint ventures”
- India
 - Notification may only be required for “brownfield” joint ventures not “greenfield” joint ventures
- COMESA
 - Notification required for “full function” joint ventures if acquisition of control under draft guidelines

U.S. and EU: Minority Shareholdings

- United States
 - Notification required if thresholds satisfied, with exemption for acquisition of less than 10 percent made “solely for investment”
 - Standard for “solely for investment” similar to standard for “control”
- European Union
 - Notification required if acquisition of “control,” defined as “decisive influence” by “purchase of securities or assets, by contract or by any other means”. Also, Article 101?

U.S. and EU: Joint Ventures

- United States
 - Notification required if thresholds satisfied, regardless of whether joint venture is “full function” or change in “control”
- European Union
 - Notification required for “full function” joint ventures if acquisition of control
 - Joint venture is “full function” if it “perform[s] on a lasting basis all of the functions of an autonomous economic entity”

EU Member States

- United Kingdom
 - Voluntary notification if acquisition of “control,” defined as ability to “materially... influence the policy” of the target
 - Presumption of control if acquisition of more than 25 percent; but also found at lower levels
- Germany
 - Notification required if acquisition of more than 25 percent or ability to “directly or indirectly exercise a competitively significant influence” on the target

EU Consultation

- European Commission consultation suggests proposals for reforming review of minority shareholdings
- Two proposals:
 - Mandatory pre-transaction notification
 - Discretionary EC review, with either no notification or simple notification for informational purposes
- Vice President Almunia: forthcoming white paper will “close this gap” in minority shareholding enforcement
- “Spillover” effect of EU proposals to emerging jurisdictions?

Minority Shareholdings: Potential Harm

- Structural changes:
 - Acquirer obtaining financial interest in target
 - Acquirer obtaining control over target
- Potential unilateral effects:
 - Incentivize acquirer to raise target's price or reduce target's output
 - Incentivize acquirer to raise its own price or reduce its own output
- Potential coordinated effects (tacit or express):
 - Sharing competitively-sensitive information
 - Ability to detect and punish deviations from agreed-upon terms
 - Increased by reciprocal shareholdings or interlocking directorates
- Vertical effects:
 - Foreclosure of competitors from access to customers or suppliers

Joint Ventures: Potential Harm

- Complex structural changes:
 - May eliminate competition like minority shareholdings and mergers
 - May result in efficiencies from integration of assets
- Effects both inside and outside the joint venture:
 - May reduce competition between the parties with respect to the assets integrated inside the JV
 - May reduce competition between the parties (and between the parties and the JV) with respect to the assets remaining outside the JV
- Vertical effects:
 - Foreclosure of competitors from access to customers or suppliers

Divergence

- Overarching policy goals:
 - Identify and remedy anticompetitive transactions
 - Accuracy (minimize the risk of over- and under-enforcement)
 - Efficiency (minimize resources, costs, and uncertainties)
- Substantial convergence with respect to mergers and cartels
- Less consistency with minority shareholdings and joint ventures:
 - Divergence increases business costs and risks?
 - Divergence impedes international cooperation in enforcement?

Framework for Global Dialogue

- Divergence raises policy and enforcement questions that should be considered on a global basis:
 - Consistency in underlying policy concerns?
 - When do policy concerns justify mandatory, pre-notification, suspensory review? Or a lighter touch?
 - Is ex ante or ex post regulation/remedies appropriate/sufficient?
 - What thresholds, “safe harbors,” or other tests are appropriate?
 - Enforcement by agencies (including complainants) and/or private plaintiffs?
 - Enforcement role for prohibitions on anticompetitive agreements and conduct?
 - Is consistency among and across emerging jurisdictions and longer established jurisdictions feasible or desirable?