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

Rachel Brandenburger

June 29, 2014
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
  o Notification required if acquisition of “control,” defined as “decisive influence” through “contract or any other means” – New guidance

• Brazil
  o Notification required if acquisition of “control,” or five percent of target (if firms in horizontal or vertical relationship)

• India
  o Notification required if thresholds satisfied, with exemption for acquisition of less than 25 percent and no change in “control”

• COMESA
  o Notification required if acquisition of “control,” defined as “any control whatsoever” (draft guidelines require “decisive influence”)

Emerging Jurisdictions: Joint Ventures

• China
  o Notification required if acquisition of “control,” regardless of whether joint venture is “full function”

• Brazil
  o Notification required for “association contracts, consortia, and joint ventures”

• India
  o Notification may only be required for “brownfield” joint ventures not “greenfield” joint ventures

• COMESA
  o Notification required for “full function” joint ventures if acquisition of control under draft guidelines
U.S. and EU: Minority Shareholdings

• United States
  o Notification required if thresholds satisfied, with exemption for acquisition of less than 10 percent made “solely for investment”
  o Standard for “solely for investment” similar to standard for “control”

• European Union
  o 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
  o Notification required if thresholds satisfied, regardless of whether joint venture is “full function” or change in “control”

• European Union
  o Notification required for “full function” joint ventures if acquisition of control
  o 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:
  o Mandatory pre-transaction notification
  o 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:
  o Acquirer obtaining financial interest in target
  o Acquirer obtaining control over target

• Potential unilateral effects:
  o Incentivize acquirer to raise target’s price or reduce target’s output
  o Incentivize acquirer to raise its own price or reduce its own output

• Potential coordinated effects (tacit or express):
  o Sharing competitively-sensitive information
  o Ability to detect and punish deviations from agreed-upon terms
  o Increased by reciprocal shareholdings or interlocking directorates

• Vertical effects:
  o Foreclosure of competitors from access to customers or suppliers
Joint Ventures: Potential Harm

• Complex structural changes:
  o May eliminate competition like minority shareholdings and mergers
  o May result in efficiencies from integration of assets

• Effects both inside and outside the joint venture:
  o May reduce competition between the parties with respect to the assets integrated inside the JV
  o May reduce competition between the parties (and between the parties and the JV) with respect to the assets remaining outside the JV

• Vertical effects:
  o Foreclosure of competitors from access to customers or suppliers
Divergence

• Overarching policy goals:
  o Identify and remedy anticompetitive transactions
  o Accuracy (minimize the risk of over- and under-enforcement)
  o Efficiency (minimize resources, costs, and uncertainties)

• Substantial convergence with respect to mergers and cartels

• Less consistency with minority shareholdings and joint ventures:
  o Divergence increases business costs and risks?
  o Divergence impedes international cooperation in enforcement?
Framework for Global Dialogue

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