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Minority Shareholding and coordinated effects – Note by BIAC

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BIAC

1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to provide its views to the OECD Competition Committee during the roundtable discussion on minority shareholding and coordinated effects which expands upon the Committee's 2008 roundtable on antitrust issues involving minority shareholding and interlocking directorates[1] and its 2017 roundtable on common ownership by institutional investors and its impact on competition.[2]

2. Minority shareholdings are crucial to finance and expand firms, establish joint ventures and strategic partnerships, enter new markets, share the cost and risk of innovation, and recapitalize businesses without transferring control.[3] Minority shareholdings are a routine feature of modern investment and in the vast majority of cases procompetitive.[4] To protect these investments, minority investors ordinarily negotiate, among other things, (i) access to information concerning the target business; (ii) board or observer representation; and (iii) veto rights over strategic business decisions.[5]

3. From a corporate and transactional perspective, these rights are not incidental to minority investment; they are the terms on which minority capital is provided. A minority investor cannot direct the business and, in an unlisted company, generally cannot exist at will. An investor, therefore, contracts for protection against the principal risks to which a non-controlling holder is ordinarily exposed.

4. While these rights and protections may, in rare instances when it is a minority investment of a competitor or a cross-shareholding in various competitors, be used to facilitate anticompetitive conduct, BIAC submits that the investigation and enforcement of minority shareholding must remain fact-based and objective.[6] In this regard, BIAC respectfully submits that there ought to be clear guidance on when the acquisition of minority shareholdings is *likely* to be considered problematic under the competition laws, including the potential adoption of safe harbours. To the extent that remedies are imposed to address any identified competition concerns, such remedies must be proportionate and

[1] OECD, Antitrust Issues Involving Minority Shareholding and Interlocking Directorates, DAF/COMP(2008)30 (June 23, 2009), https://one.oecd.org/document/DAF/COMP(2008)30/en/pdf [hereinafter 2008 OECD Minority Shareholding].

[2] OECD, Common Ownership by Institutional Investors and its Impact on Competition — Background Note by the Secretariat, DAF/COMP(2017)10 (Nov. 29, 2017), https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf [hereinafter 2017 OECD Common Ownership].

[3] 2008 OECD Minority Shareholding, *supra* note 1, at 21-22.

[4] *Id*. at 21.

[5] Competition Comm'n of S. Afr., Draft Guidelines on Minority Shareholder Protection, Gov't Notice No. 6902 (Dec. 4, 2025), at 12–14 (§ 5), 17 (¶ 6.6), 20-22 (Annexure A), 23 (Annexure B); Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings, 2008 O.J. (C 95) 1, ¶¶ 66–68 [hereinafter EC Jurisdictional Notice]; *cf*. 2008 OECD Minority Shareholding, *supra* note 1, at 11, 47.

[6] 2008 OECD Minority Shareholding, *supra* note 1, at 235–36.

must be capable of being implemented without shifting unnecessary burdens onto private firms.[7]

5. In this regard, this submission is structured as follows: first, competition authorities must consider governance rights, not shareholding value; second, the need for objective and evidence-based assessments; and third, a consideration of when remedies and safeguards are necessary, together with the objective and effective measures capable of addressing identified concerns.[8]

2. Competition Authorities Should Consider Governance Rights, Not Shareholding Value

6. BIAC notes that the evidence linking minority shareholdings to anticompetitive effects is largely unsettled, and that most minority shareholdings can have several procompetitive effects.[9] This largely remains the case. A 2024 review of the literature concluded that "a consensus has yet to emerge" and that "relatively little evidence has been found that common ownership causes lower competition," while the OECD has recently noted that minority shareholdings are "not inherently anti-competitive."[10] Nevertheless, BIAC has also acknowledged that minority shareholdings and cross-shareholdings can, in rare circumstances, give rise to concerns of coordinated effects and foreclosure.[11]

7. BIAC respectfully emphasizes that competition authorities should give particular consideration to the rights associated with the minority shareholding and not the shareholding itself.[12] This is because anticompetitive effects, including coordinated effects, arising from minority shareholdings are premised on at least three elements: (i) the investor having the ability to access the competitively sensitive information of the target; (ii) the

[7] OECD, Cross-Border Mergers — Contribution from BIAC, ¶ 47, DAF/COMP/GF/WD(2024)55 (Nov. 20, 2024), https://one.oecd.org/document/DAF/COMP/GF/WD(2024)55/en/pdf [hereinafter 2024 BIAC Note on Cross-Border Mergers].

[8] *See* OECD, Remedies and Commitments in Abuse Cases — Background Note by the Secretariat, at 17-21, DAF/COMP/GF(2022)5 (Nov. 10, 2022), https://one.oecd.org/document/DAF/COMP/GF(2022)5/en/pdf [hereinafter 2022 OECD Remedies and Commitments].

[9] 2017 OECD Common Ownership, *supra* note 2, ¶¶ 5, 26-29, 35-37, 45, 47, 90 (evidence); *id.* ¶ 88 (efficiencies of minority equity stakes).

[10] Kristopher Gerardi, Michelle Lowry & Carola Schenone, *A Critical Review of the Common Ownership Literature*, 16 ANN. REV. FIN. ECON. 89, 89 (2024); Letter from Benoît Coeuré, Chairman, OECD Competition Comm., to Delegates, Call for Contributions — Minority Shareholding and Co-ordinated Effects, COMP/2026.084, at 1 (Aug. 7, 2026) (on file with author).

[11] 2008 OECD Minority Shareholding, *supra* note 1, at 235-236, 255.

[12] Daniel O'Brien & Steven Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L. J. 559 (2000).

investor having the ability to influence the commercial strategy of the target;[13] and (iii) minority shareholding creating sufficient financial incentive to compete less effectively.[14]

8. This approach has also been acknowledged by the European Commission (EC) by way of its draft Guidelines on the Assessment of Mergers under Council Regulation No 139/2004 (EC Draft Merger Guidelines).[15] While the EC Draft Merger Guidelines state that minority shareholding and cross-ownerships may give rise to coordinated effects and foreclosure concerns,[16] the EC will consider the in assessing the likelihood of anticompetitive effects: (i) the size and nature of the minority shareholding; and (ii) the formal rights attached to the minority shareholding; and (iii) the degree of influence that the shareholding confers.[17]

9. Minority shareholding acquisitions have rarely been the subject of substantive competition enforcement. BIAC notes that the OECD has observed that there are relatively few cases in which agencies have challenged non-controlling minority shareholdings, and fewer still in which such acquisitions actually raised competition concerns.[18]

10. This limited enforcement experience is noteworthy. While minority shareholdings are a common feature of modern investment structures, substantive interventions involving non-controlling minority interests remain uncommon.[19] The EC's decision in the food delivery sector "marked the first case in which the Commission imposed fines for the anti-competitive use of a minority shareholding."[20] For example, the OECD has observed that only relatively few agencies' merger challenges involve minority shareholding acquisitions, and that, of those few, fewer raised competition concerns.[21] The relatively

[13] Caxton & CTP Publishers & Printers Ltd. v Media24 Proprietary Ltd., Case No. 136/CAC/March 2015, [2015] ZACAC 5, ¶¶ 46, 50, 54–58 (Competition App. Ct. S. Afr. Nov. 25, 2015) (holing that "material influence" encompasses power over the 'heartland' of strategic policy, specifically veto or approval rights over appointment or dismissal of chief executive officers, consolidated annual budgets, and strategic business plans); ; *see also* 2008 OECD Minority Shareholding, *supra* note 1, at 9–10, 28.

[14] 2008 OECD Minority Shareholding, *supra* note 1, at 9, 24, 29-30.

[15] Eur. Comm'n, Draft Communication: Guidelines on the Assessment of Mergers under Council Regulation (EC) No 139/2004 (April 30, 2026), https://competition-policy.ec.europa.eu/document/download/46dde10f-85c1-4590-a3f4-2b71f85685ef_en?filename=Merger%20Guidelines%20-%20final%20for%20public%20consultation.pdf [hereinafter EC Draft Merger Guidelines].

[16] *Id*. ¶¶ 164, 266(d).

[17] *Id*. ¶ 164; *see also id.* ¶ 165 (noting that it is not *every* minority shareholding that gives rise to competition concerns, the Draft Guidelines also look to introduce a presumption that a shareholding of less than 5% does not, itself, give rise to any theory of harm).

[18] 2008 OECD Minority Shareholding, *supra* note 1, at 38.

[19] *Id*. at 21, 38, 48, 51; Gerardi et al., *supra* note 10, at 89-91, 109-111; Ronald Masulis, *Does Common Ownership Raise Antitrust Concerns?*, Harv. L. Sch. F. on Corp. Governance (Jan. 6, 2025), https://corpgov.law.harvard.edu/2025/01/06/does-common-ownership-raise-antitrust-concerns/.

[20] John J. Fedele, *Why Minority Stakes Can Trigger Major Competition Compliance Concerns*, BAKER MCKENZIE (Sept. 23, 2026), https://www.bakermckenzie.com/en/insight/publications/2026/09/why-minority-stakes-can-trigger-major-competition-compliance-concerns.

[21] 2017 OECD Common Ownership, *supra* note 2, ¶ 15.

small number of cases that are regularly cited internationally indicates that competition concerns arising from minority shareholdings are highly fact specific.[22]

11. Renewed attention has been driven principally by the EC Draft Merger Guidelines, which treat non-controlling minority shareholdings as a potential stand-alone theory of harm,[23] and by the developing academic debate on common ownership, rather than any significant increase in enforcement cases involving non-controlling minority shareholdings.[24] The OECD's paper on common ownership observed that the debate as being at an early stage, with no consensus on whether common ownership poses a competition problem and substantial disagreement over its theoretical and empirical foundations.[25] For example, a critical review of literature on the topic indicates that newer studies, employing more robust methodologies, find little evidence that common ownership stifles competition, though further research is still warranted.[26]

12. It is, therefore, not a *fait accompli* that the acquisition of a minority shareholding will, in of itself, give rise to coordinated effects. Competition authorities and the EU Courts[27] have also previously acknowledged that owning a stake even in a competitor is not itself unlawful.[28]

13. In assessing decisions where a minority shareholding was found to give rise to anticompetitive effects, such findings were largely premised on the rights associated with the minority shareholding.

14. In *Toshiba/Westinghouse*, the acquisition of Westinghouse Group by Toshiba Corporation provides an example of the types of rights that have attracted regulatory scrutiny.[29] Before the transaction, Toshiba held a 22% economic interest and a 24.5% voting interest in Global Nuclear Fuel, which provided board representation, access to commercially sensitive information, and veto rights over expansion into new business areas.[30] The concern was raised that Toshiba's veto rights would allow it to prevent expansion into markets where Westinghouse competed, while its access to confidential

[22] *Id.*

[23] EC Draft Merger Guidelines, *supra* note 15, ¶¶ 163, 165.

[24] Anna Tzanaki, *Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy*, 18 J. COMPETITION L. & ECON. 168 (2022).

[25] 2017 OECD Common Ownership, *supra* note 2, ¶¶ 90, 111, 125.

[26] Gerardi et al., *supra* note 10, at 89.

[27] Joined Cases 142 & 156/84, British American Tobacco Co. Ltd v. Comm'n, 1987 E.C.R. 4487, ¶¶ 37–38 (Nov. 17, 1987).

[28] Case AT.40795—Food Delivery Services (Delivery Hero/Glovo), Comm'n Decision (June 2, 2025), https://ec.europa.eu/competition/antitrust/cases1/202530/AT_40795_1262.pdf; Press Release, Eur. Comm'n, Commission Fines Delivery Hero and Glovo €329 Million for Participation in Online Food Delivery Cartel, IP/25/1356, (June 2, 2025), https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1356.

[29] Case No COMP/M.4153—Toshiba/Westinghouse, Comm'n Decision, ¶¶ 86-87, 90, 92-93 (Sept. 19, 2006), https://ec.europa.eu/competition/mergers/cases/decisions/m4153_20060919_20212_en.pdf.

[30] *Id*. ¶¶ 71, 77, 79, 92; *id.* annex (Commitments), at 28 (definitions) (describing 22% economic interest in GNF-Holdco).

information could provide insight into competitors' pricing, capacity, and strategy.[31] The concerns, therefore, centred on governance rights and information access rather than the shareholding percentage alone. To obtain clearance, Toshiba was required to relinquish its veto rights and restrict its access to non-public business information.[32]

15. In *Beretta Holding/Sturm, Ruger & Company,* Beretta's proposed 25% shareholding in Ruger was approved by the U.S. FTC on the basis of the governance rights attached to that investment.[33] Under the Cooperation Agreement, Beretta obtained the right to source two directors for Ruger's board, and, in certain circumstances, Beretta-affiliated individuals could potentially serve in those positions.[34] As Beretta and Ruger compete directly in several firearm markets, the FTC considered these rights capable of creating an interlocking directorate and giving Beretta influence over a competitor's strategic decision-making.[35] The FTC was also concerned that board representation could provide Beretta with access to competitively sensitive information and create opportunities to influence or soften competition between the firms.[36] The matter was resolved through a consent order requiring any Beretta-nominated directors to be independent, restricting the sharing of confidential information, and imposing ongoing compliance and reporting obligations.[37] The case demonstrates that material minority shareholdings are most likely to raise competition concerns when accompanied by board representation, governance rights, or access to sensitive information, rather than where they are purely passive investments.[38]

16. BIAC submits that in any investigation involving minority shareholdings, the enforcement efforts of competition authorities should consider the extent to which a minority shareholding factually enables the investor to exert sufficient influence over the target or its other investments. The EC has previously published what rights it considers may extend sufficient powers to enable an acquirer to exercise "decisive influence" over the target,[39]which has also been similarly applied in South Africa.[40] Whether a right is ultimately sufficient to establish 'influence' will depend on the content of the right and its importance in the context of the business.

17. Theories of coordinated effects warrant particular care. The risk of coordination depends on market conditions which allow firms to reach terms of coordination, monitor adherence and deter deviation.[41] A minority shareholding is relevant to that analysis only

[31] *Id*. ¶¶ 86-87, 90, 92-93.

[32] *Id*. ¶¶ 108, 113, 116, & annex §§ A-C.

[33] Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment at 1-2, In the Matter of Beretta Holding S.A., File No. 261-0091 (Sept. 16, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/Beretta-Ruger-AAPC.pdf.

[34] *Id*. at 1-2

[35] *Id*. at 1-3.

[36] *Id*. at 1, 3.

[37] *Id*. at 3-4.

[38] See *Id*. at 1-3.

[39] EC Jurisdictional Notice, *supra* note 5, ¶¶ 16, 66-68.

[40] Tiger Equity One (Pty) Ltd v. Competition Comm'n, Case No. 019174, [2014] ZACT 91 (Competition Trib. July 24, 2014) (S. Afr.).

[41] *See* EC Draft Merger Guidelines, *supra* note 15, ¶ 263; 2008 OECD Minority Shareholding, *supra* note 1, at 29; Case T-342/99, Airtours plc v Comm'n, EU:T:2002:146, ¶ 62 (June 6, 2002).

if it changes those conditions, e.g., by increasing transparency through access to a competitor's commercially sensitive information, by reducing the investor's incentive to deviate because it would share in the competitor's losses, or by creating a channel for communication or retaliation.[42] The assessment should, therefore, identify which of these conditions the shareholding is said to affect and show that the effect is material in the market concerned, rather than infer a risk of coordination from the existence of the structural link.[43]

18. Some practical examples of minority rights which may attract higher scrutiny include (i) the right (in consultation with the executive committee) to appoint or dismiss senior employees such as the CEO, CFO; (ii) authority or responsibility to oversee or supervise CEO, CFO; (iii) special input and consideration in preparation of budgets or business plans for submission to the board; (iv) ability/right to monitor and oversee implementation of financial or business plans and corporate governance; and (v) powers to oversee the strategic direction of group.[44]

19. By contrast, rights which protect the value of the investment are ordinary investor protections and should not attract specific scrutiny. These rights include the prevention of dilution through further share issues, the extraction of value through related party transactions or disposals of key assets, a fundamental change in the nature of the business, its business model or its long-term strategy, and amendment of the constitutional documents to its prejudice. These protections are customarily documented as reserved matters, pre-emption and anti-dilution rights, and transfer and exit rights such as tag along rights and put options, together with information and board or observer rights that allow the investor to monitor its investment and the performance of management. They should not, without more, be treated as conferring control or as a source of competitive concern.

20. Board representation is, moreover, a weaker channel of influence than is often assumed. A director nominated by a minority investor does not act as that investor's agent. Generally, company laws require that directors must exercise the powers and perform the functions of director in the best interests of the company and must not use the position of director, or any information obtained while acting in that capacity, other than for the company's purposes.[45] Accordingly, a nominee director who uses a board seat to "soften" the investee's competitive conduct or engage in coordination, or to pass its commercially sensitive information to a competing shareholder, would ordinarily be acting in breach of duty.[46] These duties do not remove the need for assessment, but authorities should take them into account before concluding that a board seat confers influence over competition or access to competitively sensitive information, and before imposing independence requirements that replicate duties already imposed by law.[47]

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[42] *See* EC Draft Merger Guidelines, *supra* note 15, ¶¶ 265, 266(d)-(e); 2008 OECD Minority Shareholding, *supra* note 1, at 9, 30.

[43] 2008 OECD Minority Shareholding, *supra* note 1, at 29; *cf.* EC Draft Merger Guidelines, *supra* note 15, ¶ 264; 2017 OECD Common Ownership, *supra* note 2, ¶¶ 41-42.

[44] *See Caxton*, *supra* note 13, ¶¶ 12-15, 54-56, 58; EC Jurisdictional Notice, *supra* note 5, ¶¶ 67, 69-70.

[45] *See, e.g.*, Companies Act 2006 §172 (UK); Corporations Act of 2001 §181(1)(a) (Aus.); Companies Act 71 of 2008 §§ 76(2)(a), 76(3)(b) (S. Afr.); Canada Business Corporations Act, R.S.C. 1985, c. C-44, § 122(1) (Can.); Companies Act 1993, §§ 131, 137 (N.Z.).

[46] *Id.* § 77(2)(a).

[47] *See id*. §§ 76(2)(a), 76(3)(a)-(b).

3. The Need for Objective and Evidence-Based Assessments

21. In assessing whether the acquisition of minority shareholding, with or without governance rights which confer control, does give rise to financial incentives sufficient to cause concern from a foreclosure or coordinated conduct perspective, BIAC submits that any investigation and enforcement must be objective and evidence-based, particularly in the context where the nexus between common ownership structures and anticompetitive effects is subject to ongoing debate.[48] Enforcement which is not sufficiently supported by robust economic analysis and evidence creates legal uncertainty and risk for business.[49]

22. For example, it was argued that Ryanair's minority shareholding in Aer Lingus would inherently have anticompetitive effects as "the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested."[50] Considering the factual evidence, however, it was found that despite the minority shareholding, Ryanair entered four new routes that were previously only served by Aer Lingus and increased its frequencies on six other routes where it competed with Aer Lingus. The General Court stated that "theoretical argument is not sufficient, in any event, to show, as such, a form of control by Ryanair of Aer Lingus able to justify the divestment of the minority shareholding at issue in the present case."[51] While Ryanair eventually had to sell-down its shareholding from 29.8% to 5%, BIAC agrees with the General Court that theoretical theories of harm must be compared against the parties' intentions with reference to any relevant facts.

23. BIAC emphasises that competition is a process by which firms continually try to improve consumer welfare through cutting prices, expanding output, and providing better quality goods and services.[52] The focus of competition authorities should be on the protection of competition with the aim of delivering consumer benefit over the longer term opposed to theoretical theories of harm. As BIAC has previously submitted, retaining this focus would prevent agencies from targeting other objectives that are very likely to lead to unintended adverse consequences for competition, consumers, and broader economic growth.[53]

24. Review and enforcement must, therefore, give proper weight to the transaction's legitimate purpose and benefits. BIAC submits that the availability and cost of capital, entry or expansion, risk sharing, innovation, rescue finance, and whether governance rights are confined to protecting the investment should be considered. Moreover, the over-regulation or over-enforcement of minority shareholdings may have the unintended consequence of making secondary effects more difficult for investors to diversify their portfolios, firms having weaker corporate governance as a result of restrictions on institutional voting, and, ultimately, harming consumer welfare.[54] This tension is acute for institutional investors,

[48] Gerardi et al., *supra* note 10, at 89.

[49] OECD, Economic Analysis and Evidence in Abuse Cases — Contribution from BIAC, ¶ 3, DAF/COMP/GF/WD(2021)40 (Nov. 26, 2021), https://one.oecd.org/document/DAF/COMP/GF/WD(2021)40/en/pdf [hereinafter 2021 BIAC Note on Economic Analysis].

[50] Case T-411/07, Aer Lingus Grp. plc v. Comm'n, 2010 E.C.R. II-3691, ¶ 74.

[51] *Id*.

[52] 2021 BIAC Note on Economic Analysis, *supra* note 49, ¶ 14.

[53] *Id*.

[54] Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, 83 ANTITRUST L.J. 201, 202-203, 224, 236-237 (2020).

which are increasingly expected to exercise, and not merely hold, their ownership rights. The Second Code for Responsible Investing in South Africa (CRISA 2), for example, lists voting, engagement and "direct intervention at Board level" among the stewardship approaches it expects investors to use and applies its stewardship policies to passive as well as active investment strategies.[55] Enforcement that treats ordinary stewardship activity as evidence of influence over competitive conduct would place these investors in a contradictory position.[56]

25. BIAC invites the Committee to consider a clear screening principle. A minority shareholding which confers no board or observer representation, no veto over strategic commercial decisions, and no access to competitively sensitive information beyond that available to ordinary shareholders should be presumed not to give rise to competition concerns, save where specific evidence shows that the financial interest alone materially alters the incentives of the investor or the target to compete. A presumption of this kind would be consistent with the direction of the EC Draft Merger Guidelines, which propose that a shareholding of less than 5% does not, of itself, give rise to a theory of harm, and would provide the legal certainty that paragraph 19 identifies as lacking.[57]

26. In this regard, BIAC respectfully submits that, to the extent that competition authorities intend on introducing safe harbours similar to that the EC Draft Merger Guidelines, it is unlikely that any material control or risks of coordination would arise if the minority shareholder does not have a meaningful shareholding (typically between 15-25%). Safe harbours should, therefore, be materially higher than the 5% proposed in the EC Draft Merger Guidelines to be effective and provide business with sufficient certainty that their acquisitions would not be scrutinised for coordination concerns.

4. Designing Effective Remedies to Address Identified Competition Concerns

27. Remedies and safeguards are relevant only to the very limited number of transactions that give rise to incentive, information or influence concerns of the kind described above. Competition authorities should, therefore, turn to remedies only after completing that analysis and identifying the incremental harm attributable to the shareholding. Beginning with a preferred divestiture or generic governance restriction risks converting the inquiry into regulation of ownership rather than correction of a competition problem.[58]

28. BIAC recommends a remedy process that is effective and workable for the businesses subject to it. The authority should state the competition concern, the causal mechanism, and the competitive outcome that the remedy must restore. It should then assess options for effectiveness, proportionality, operational workability, monitorability, and consistency with remedies in other jurisdictions.[59]

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[55] CRISA Comm., Second Code for Responsible Investing in South Africa 2022 ("CRISA 2") at 10 (Sept. 2022), https://www.crisa2.co.za/wp-content/uploads/2022/09/CRISA2.pdf.

[56] *Id*.

[57] EC Draft Merger Guidelines, *supra* note 15, ¶ 165.

[58] OECD, Recommendation of the Council on Merger Review, § IV, ¶¶ 1-6, OECD/LEGAL/0333 (June 4, 2025), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333. *See also* 2022 OECD Remedies and Commitments, *supra* note 8, at 17-21.

[59] *Id*.

29. The remedy should be no broader than the proven mechanism.[60] A discrete information risk may be addressed by limits on specified data, clean teams, firewalls, or recusals; influence may be addressed by removing a board seat, veto, or voting right; and an incentive problem inherent in the economic interest may require dilution or divestiture.[61] *AFGRI/Senwes* shows that detailed confidentiality obligations can be used where the concern is information flow arising from a minority shareholding,[62] while *Bunge/Viterra* shows that governance and information restrictions are inadequate if the underlying influence remains.[63]

30. *Bunge/ Viterra* illustrates the importance of testing proposed safeguards rather than assuming that governance changes eliminate the underlying incentive. In its 2024 report and remedy assessment, the Canadian Competition Bureau found that Bunge's 25% interest in G3 carried board representation, vetoes and information access and could allow material influence after Bunge acquired Viterra.[64] The Bureau considered proposed director-independence, veto-waiver, and information restrictions inadequate and burdensome to monitor.[65] The transaction was ultimately approved subject to divestitures and legally binding controls intended to prevent Bunge from influencing G3's pricing and investment decisions.[66] These mechanisms are not novel. Where a minority investor holds a stake in a competitor, the transaction documents commonly provide for board recusal on competitively sensitive agenda items, "clean team" arrangements for due diligence and ongoing reporting, and the supply of management information on an aggregated or lagged basis. Where such arrangements are already in place and operating, authorities should give credit for them in the substantive assessment, rather than impose parallel obligations that duplicate them.

31. These matters support two propositions. The existence of a structural link does not establish competitive harm.[67] Where harm is shown, the remedy must address the identified

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[60] Competition & Mkts. Auth., Merger Remedies CMA87, ¶¶ 3.12, 3.18, 6.80 (Dec. 19, 2025), https://assets.publishing.service.gov.uk/media/6944062e501cdd438f4cf5f8/merger_remedies.pdf [hereinafter CMA Merger Remedies].

[61] 2008 OECD Minority Shareholding, *supra* note 1, at 46-49.

[62] Bus. Venture Inv. No. 1658 (Pty) Ltd v. AFGRI Operations Limited, Case No. 87/LM/2012, Reasons for Decision, Annexure A, cls 2.1–2.6 (Competition Trib. May. 7, 2013) (S.Afr.).

[63] Competition Bureau Canada, Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act: Proposed Acquisition by Bunge Limited of Viterra Limited (Apr. 22, 2024), https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/report-minister-transport-and-parties-transaction-pursuant-subsection-5322-canada-transportation-act; Competition Bureau Canada, Competition Bureau's Remedy Assessment Letter to the Minister of Transport for Bunge's Proposed Acquisition of Viterra (Nov. 27, 2024), https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/competition-bureaus-remedy-letter-minister-transport-bunges-proposed-acquisition-viterra-0;Press Release, Transport Canada, Government of Canada Announces Approval of Bunge Global SA's Acquisition of Viterra Limited, (Jan. 14, 2025), https://www.canada.ca/en/transport-canada/news/2025/01/government-of-canada-announces-approval-of-bunge-global-sas-acquisition-of-viterra-limited.html.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] 2008 OECD Minority Shareholding, *supra* note 1, at 29.

mechanism: information safeguards do not necessarily remove a financial incentive, while a sell-down may be unnecessary where the concern is confined to a discrete information channel that can be separated effectively.[68]

32. Agencies should preserve legitimate investment and governance arrangements where a targeted measure will solve the problem. Given the benefits associated with information, a remedy should not prevent access to information needed for financial reporting, regulatory compliance, valuation or protection against value-destroying changes where those purposes can be served through aggregation, delay, restricted recipients or trustee oversight.[69] Parties should be able to propose suitable transaction design at the early stages of the review stage. In *RWE/E.ON*, the Commission assessed limits built into the notified investor relationship rather than treating them as an imposed remedy.[70]

33. Structural relief should be reserved for concerns arising from the financial interest itself or for risks that cannot be addressed reliably through narrower measures.[71] Even then, the authority should determine the minimum reduction required, allow a realistic period for an orderly sale and avoid unnecessary fire-sale pressure.[72] *Ryanair/Aer Lingus* and *Naspers/Just Eat Takeaway* show targeted sell-downs combined with governance restrictions rather than an automatic requirement of complete exit.[73]

34. Calibrated structural relief can be appropriate where influence and incentives are established. In *Ryanair/Aer Lingus*, Ryanair's 29.8% holding was found to lessen competition and was ordered to reduce its shareholding down to 5%, with restrictions on

[68] *Id*. at 46-49; *see also* Competition Bureau Canada, Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act: Proposed Acquisition by Bunge Limited of Viterra Limited §§ 8.2.3, 8.3 (Apr. 22, 2024), https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/report-minister-transport-and-parties-transaction-pursuant-subsection-5322-canada-transportation-act.

[69] OECD, Information Sharing in Competition Policy — Background Note by the Secretariat, ¶¶ 8-15, DAF/COMP(2026)2 (May 26, 2026), https://one.oecd.org/document/DAF/COMP(2026)2/en/pdf [hereinafter 2026 OECD Secretariat Note on Information Sharing].

[70] Case M.8871—RWE/E.ON Assets, Comm'n Decision C(2019) 1711 final, ¶¶ 76-77, 93-94 (Feb. 26, 2019), https://ec.europa.eu/competition/mergers/cases/decisions/m8871_2573_3.pdf; Tobias Pukropski, *Focus on Minority Shareholdings: RWE/E.ON, E.ON/Innogy and Naspers/JET in the Area of Tension Between Merger Control and Antitrust Law*, 3 ZWER, 305 (2026), § II.

[71] CMA Merger Remedies, *supra* note 60, ¶¶ 3.12, 3.18, 5.4, 7.2, 7.38.

[72] *Id*. ¶¶ 6.48-6.49, 6.80.

[73] UK Competition Comm'n, Ryanair Holdings plc / Aer Lingus Group plc, Final Report (Aug. 28, 2013), https://assets.publishing.service.gov.uk/media/5329ddc8ed915d0e60000189/130828_ryanair_final_report.pdf; UK Competition & Mkts. Auth., Ryanair/Aer Lingus Merger Inquiry, Final Decision on possible material change of circumstances (June 11, 2015), https://assets.publishing.service.gov.uk/media/55785f55ed915d15be00002e/MCC_decision.pdf; Press Release, Eur. Comm'n, Commission approves Naspers' acquisition of Just Eat Takeaway.com, subject to conditions, IP/25/1951(Aug. 11, 2025), https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1951.

board representation and reacquisition.[74] In *BskyB/ITV*, a 17.9% holding was ordered reduced below 7.5%, together with undertakings not to seek board representation or reacquire shares.[75] Neither case establishes a universal percentage threshold; each remedy responded to the authority's case-specific findings.

35. Importantly, the potential secondary effects of structural remedies are often overlooked. BIAC submits that significant reductions in ownership impact the market value of the issuer and its financing position. In concentrated sectors, forced sell-downs may also influence broader patterns of consolidation.[76] *Naspers/Just Eat Takeaway* (including the reduction of Prosus' shareholding in Delivery Hero) highlights the extent to which remedies may affect market outcomes beyond the immediate concern they were designed to address.[77] More broadly, the consequences of significant share disposals, and their effect on future ownership and industry structures, impact the ease of doing business and have concomitant consequences.[78]

36. Operational workability should be tested with the business before terms are finalized. Obligations should identify the covered entities, personnel, decisions, and information; provide practical exceptions for legal and regulatory reporting; allocate responsibilities; set implementation dates; specify trustee powers and reporting; and provide a prompt process for resolving interpretive issues. An obligation dependent on continuous commercial judgement or extensive day-to-day supervision is unlikely to be durable.[79]

37. In multi-jurisdictional cases, BIAC submits that agencies should coordinate early on the remedial objective, scope, and implementation, subject to applicable confidentiality rules. Businesses should not face overlapping measures that use inconsistent definitions, impose contradictory governance duties, or appoint multiple trustees to perform the same function without justification. BIAC has separately urged authorities to avoid contradictory remedies and align remedy requirements where possible.[80]

38. BIAC notes that no single remedy is appropriate in every circumstance. Rather, the remedial measures depend upon the mechanism through which the concern is said to arise, whether that concern relates to information access, practical influence, or the ownership interest itself.[81] BIAC also notes that there is often a divergence in approach between the various merger review agencies on the transactions being evaluated, which highlights the

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[74] *Id*. Ryanair's 29.8% shareholding in Aer Lingus was found to confer material influence and to lessen competition; the remedy required Ryanair to reduce its stake to 5% and restricted board representation and reacquisition.

[75] Sec'y of State for Bus., Enter. & Regulatory Reform (U.K.), Final Decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's Acquisition of a 17.9% Shareholding in ITV plc, ¶¶ 21-25 (Jan. 29, 2008), https://data.parliament.uk/DepositedPapers/Files/DEP2008-0239/DEP2008-0239.pdf.

[76] Pukropski, *supra* note 70, § VI.2.

[77] Press Release, IP/25/1951, *supra* note 73.

[78] *Id*.; *see also* Pukropski, *supra* note 70, § VI.2.

[79] CMA Merger Remedies, *supra* note 60, ¶¶ 4.9, 7.9, 7.38.

[80] 2024 BIAC Note on Cross-Border Mergers, *supra* note 7, ¶¶ 45, 47.

[81] 2008 OECD Minority Shareholding, *supra* note 1, at 46-48.

need for clarity as to which transactions will fall within the merger review net and be subject to remedial measures.[82]

39. Remedies imposed in relation to minority shareholdings should also be time limited or subject to periodic review. The conditions that justify a behavioural or governance remedy may change: the investor may sell down, the overlap between the businesses of the investor and the target may end, or the market may evolve. Remedies should therefore include a sunset clause or a review mechanism and should fall away automatically where the holding falls below a specified level or the relevant overlap ceases, without requiring a fresh application to the authority.

5. Conclusion

40. Minority shareholdings finance growth, spread risk, and enable collaboration without transferring control. The governance and information rights attached to them often protect capital and support accountable investment. Over-enforcement can affect financing decisions and ordinary corporate governance well beyond the limited cases in which a shareholding creates a genuine competition concern.

41. Proportionate intervention remains justified where an authority has reliable evidence to demonstrate that minority shareholding gives the acquirer a significant financial interest in its competitors' profits, enables it to influence materially the commercial policy of the target, or grants it access to commercially sensitive information,[83] and that, as a result, firms are significantly more likely to coordinate or coordination becomes easier, more stable, or more effective.[84] These concerns, however, are most likely to arise where a material shareholding is acquired and, in this regard, the introduction of meaningful safe harbours would provide welcomed certainty and transparency from a business perspective.

42. Where that harm is established, BIAC stresses that any remedy mechanism should be targeted at the specific source of harm identified and should preserve the investment where a narrower measure will work. BIAC suggests that its terms should be operationally clear, proportionate, monitorable, coordinated across jurisdictions where relevant, and capable of review and termination.

43. BIAC accordingly supports an enforcement environment which preserves legitimate investment and workable governance, requires a transaction- and market-specific effects analysis, and ensures that agencies design the least intrusive effective remedy in consultation with the businesses that must implement it.

[82] 2026 OECD Secretariat Note on Information Sharing, *supra* note 69,at 21-22.

[83] *White Paper: Towards More Effective EU Merger Control,* ¶¶ 29, 46, COM(2014) 449 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0449.

[84] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2004 O.J. (C 31) 5, ¶ 22(b).