The Evolving Landscape of Public Interest in BRICS Competition Law: A New Paradigm for Development

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Abstract

The traditional foundations of competition law and policy, primarily centred on market efficiency and consumer welfare, are increasingly being challenged by the evolving socioeconomic realities prevalent in developing and emerging economies. The scholarly discourse on the integration of public interest considerations remains notably sparse, particularly concerning the cross-learning potential between BRICS members. This lack of comparative, normative, and empirical analysis limits a comprehensive understanding of how competition law and policy can be systematically harnessed for inclusive and sustainable development. By spotlighting regulatory innovations within BRICS, this paper challenges orthodox competition paradigms. It critically examines the integration of public interest objectives into competition enforcement across original BRICS members and explores the implications for new entrants with emerging regulatory frameworks. Furthermore, it proposes a conceptual framework for the contextual implementation and ex-post evaluation of public interest remedies, thereby advancing both theoretical insights and practical policy applications.

Introduction

Public interest considerations have long been an integral part of competition law and policy application and implementation (Leslie, 2012). In the context of BRICS countries, defining the concept of public interest and its contextual application is critical to the effective enforcement of competition law as a transformational tool, beyond merely promoting market fairness and efficiency. While public interest is fundamentally a socio-political concept and, in some cases, a constitutional imperative concerned with the general welfare of society, it also carries an economic dimension, often reflected in a government's industrial and trade policy objectives (Gouri, 2020). In many developing and emerging economies, competition policy is viewed as one of the key micro-economic policies available to support a coherent set of national development goals (Capobianco & Nagy, 2016).

Within this framework, public interest considerations in competition law broadly, and specifically within mergers and acquisitions and cartel enforcement, extend beyond the traditional focus on economic efficiency and consumer welfare (Boshoff, Dingley & Dingley, 2012) towards expanding overall economic opportunity and ensuring greater access to essential goods for marginalised populations (Amato, 1997). These extended considerations, commonly termed "competition plus" factors, encompass a wide range of socio-economic goals: promoting employment, advancing industrial development, opening new market entry opportunities, ensuring equitable access to essential services, supporting small and medium enterprises (SMEs) and Historically Disadvantaged Persons (HDPs), encouraging innovation, driving economic transformation, and reducing inequality (Gitonga, 2015).

Public interest thus serves as a mechanism to align competition law enforcement with national developmental and social priorities, particularly in emerging economies where market dynamics alone may not adequately support inclusive growth or structural reform. This is especially relevant in countries which continue to grapple with socio-economic challenges such as inequality, high unemployment, limited job creation, poverty, market concentration, and the difficulties faced by domestic firms in competing globally (Klaaren, Padayachie and Shedi, 2023). The very role of competition in development has sometimes been questioned, which further underscores the necessity for competition policy to respond to developmental challenges, lest it becomes irrelevant.

Overview of Public Interest in the BRICS

The BRICS economies share significant commonalities from a human development perspective, suggesting that their economic concerns should extend beyond mere efficiency to embrace equity. Given the unifying factors among BRICS nations, their competition law enforcement regimes cannot operate in isolation. Instead, competition policy must be shaped and transformed by existing socio-economic policies as they collectively address shared challenges.

The crucial question, then, is how competition law can practically contribute to a broader developmental agenda through the application of public interest. Can it be a vehicle for pursuing more progressive goals? For BRICS nations, this is particularly significant: competition law is not just a technical tool for correcting market failures, but a strategic instrument to advance societal objectives and address human development challenges. This perspective must be reflected in both policy formulation and the decision-making processes of competition law adjudicators. (Bonakele, 2016)

South Africa

The underlying rationale behind including public interest in South African Competition policy is to address pressing economic redistributive justice needs (Njisane, 2011). South Africa's competition policy is distinctively crafted to pursue both economic and developmental objectives.

South Africa's history of racial segregation has profoundly shaped the development of the Competition Act and continues to influence its implementation, even more than 30 years after the advent of democracy. The apartheid regime entrenched deep economic inequalities and severely diminished the quality of life for Black South Africans, creating a historical context that is essential to understanding the evolution of competition policy in South Africa. One of the most damaging legacies of apartheid was the systematic economic exclusion of the Black majority, which led to a highly distorted and uncompetitive market structure.

The resulting economic landscape was characterised by several entrenched weaknesses, including exceptionally high levels of concentration and monopolisation; limited consumer choice and inflated prices for basic goods; an underdeveloped small and medium enterprise (SME) sector; ownership patterns that overwhelmingly favoured a small, privileged minority; and low productivity, driven in part by excessive rent-seeking within dominant firms. These structural deficiencies continue to shape the priorities and interventions of South Africa's competition authorities, who are tasked not only with promoting efficiency but also with advancing inclusive economic transformation.

While South Africa's Competition Act draws on international models, most notably those of the United States, Canada, and the European Union, the drafters were deliberate in ensuring that the legislation reflected the country's unique socio-economic context and priorities, rather than simply replicating foreign frameworks. The Act was specifically designed to support localised objectives, such as fostering a dynamic small and medium enterprise (SME) sector to drive job creation and economic growth, and promoting broader ownership of the economy.

The most significant departures from conventional competition regimes are found in the provisions relating to exemptions and public interest considerations. These sections of the Act clearly reflect its underlying socio-economic rationale, embedding developmental goals directly into the legal framework of competition policy. In this regard, Section 10 of the Competition Act permits firms to apply for exemptions from the standard application of competition law where the proposed restriction on competition is necessary to achieve specific public interest objectives. These include, among others, the promotion and development of small and medium-sized enterprises (SMEs) and the economic empowerment of historically disadvantaged communities. Additionally, the Act's merger control provisions require the competition authorities to evaluate not only the impact of a merger on market competition, but also its broader socio-economic effects, particularly on employment, SMEs, and historically disadvantaged persons (HDPs).

Just over two decades after the promulgation of the 1998 Competition Act, the legislature significantly expanded the scope of public interest considerations within the Act. Prior to the 2019 amendments, South Africa's public interest regime was relatively limited, applying primarily to the assessment of public interest factors in merger evaluations and to the criteria used for considering exemption applications.

Section 12A(1)(b) of the Competition Act stated that when evaluating a merger, the Competition Commission or Competition Tribunal must first determine whether the merger is likely to substantially prevent or lessen competition, based on the factors listed in subsection (2). If the merger does not significantly harm competition, they must then assess whether it can be justified on substantial public interest grounds, in accordance with the factors set out in subsection (3). These public interest considerations include the impact of the merger on a particular industrial sector or region, employment, the ability of small businesses or firms owned or controlled by historically disadvantaged persons to become competitive, and the capacity of national industries to compete in international markets.

Amendments to the Act introduced in February 2019 enhanced the public interest factors to be taken into account in merger assessments. The competition authorities' mandate thus included an additional public interest factor, namely the "promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market".

In addition, Section 12A(3)(c) was amended slightly to enable the competition authorities to take into account the "ability of small and medium businesses or firms controlled by historically disadvantaged persons to effectively enter into, participate in or expand" within the market.

The 2019 amendments added a requirement that, when determining whether a proposed transaction was to be approved or prohibited, the competition authorities were to consider: the extent of ownership by a party to a merger of other firms in a related market (s12A (2)(i)); the extent to which a party to the merger is related to other firms in related markets, including through common members or directors (s12A (2)(j)); and any other mergers engaged in by a party to a merger for a period to be stipulated by the Competition Commission (s12A (2)(k)).

The 2019 amendments also made two changes that brought public interest factors firmly into competition enforcement, namely: price discrimination provisions in favour of small and medium sized enterprises (SMEs) and historically disadvantaged persons (HDPs); and the addition of provisions against the abuse of buyer power in relation to SMEs and HDPs.

Previously, price discrimination was prohibited if it "substantially prevented or lessened competition" in the market as a whole. The amendment added a crucial element: it is now also prohibited if it is likely to have the effect of "impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively" in a market (Section 9(1)(a)(ii)). This is a major change. For SMEs and HDPs, the previous requirement to demonstrate a substantial lessening of competition across an entire market was incredibly difficult to meet. A single SME or HDP firm, by its nature, would rarely have the market power to significantly impact overall market competition. The amendment shifts the focus from market-wide competitive harm to the firm-specific harm experienced by SMEs and HDPs. This makes it much easier for these smaller entities to successfully bring complaints. The provision directly tackles a pervasive issue in the South African economy where larger, dominant firms often leverage their power to offer better prices or conditions to other large players, disadvantaging smaller, and often HDP-owned, businesses. This perpetuated existing inequalities and hindered transformation. By making it easier for SMEs and HDPs to compete on a more level playing field, the amendment aims to foster greater inclusivity and participation in the economy, aligning with the broader transformation agenda of the country.

Crucially, the Act also prohibits dominant firms from avoiding selling, or refusing to sell, goods or services to an SME or HDP purchaser solely to circumvent this price discrimination prohibition. This prevents dominant firms from simply cutting off supply to avoid compliance (s9(1A)). The Competition Commission has since issued Price Discrimination Enforcement Guidelines that provide benchmarks and factors for assessing whether price discrimination impedes effective participation, including considerations of the significance of the input to the SME/HDP's cost structure and the likelihood of decreased demand for their products.

The 2019 amendments also introduced Section 8(4) of the Competition Act, which prohibits a dominant buyer in designated sectors from imposing "unfair prices or trading conditions" on SMEs or firms owned by HDPs. This includes an "anti-avoidance" provision that prevents dominant buyers from avoiding transacting with SMEs or HDPs to circumvent this prohibition. This provision directly addresses situations where powerful buyers (often large retailers, distributors, or manufacturers) exploit the weaker bargaining position of their SME and HDP suppliers. This can manifest as excessively low prices, delayed payments, unilateral changes to contracts, or the imposition of onerous trading conditions that unfairly transfer costs or risks onto the smaller suppliers. The application of the buyer power provisions is initially limited to sectors designated by the Minister of Trade, Industry and Competition. Currently, these include the agro-processing, grocery wholesale and retail, and e-commerce and online services sectors. This targeted approach allows the authorities to focus on sectors where buyer power concerns are particularly prevalent and impactful for SMEs and HDPs.

The Competition Commission's Buyer Power Enforcement Guidelines (Competition Commission, 2020) elaborate on what constitutes "unfair prices or trading conditions." This often involves comparing prices/conditions offered to SME/HDP suppliers versus larger, non-SME/HDP suppliers for like goods/services, or assessing whether trading conditions are one-sided, onerous, or disproportionate. Similar to price discrimination, the Act prohibits dominant buyers from avoiding purchasing, or refusing to purchase, goods or services from an SME or HDP supplier to circumvent the buyer power provisions. This prevents dominant buyers from simply delisting or refusing to deal with vulnerable suppliers. By reining in the abuse of buyer power, the amendments aim to create a more equitable and sustainable supply chain for SMEs and HDPs, allowing them to operate more profitably and expand their participation in the economy. This contributes to the broader objective of de-concentrating economic power. Like the price discrimination provisions, the buyer power provisions do not require proof of a broad lessening of competition in the downstream market. Instead, the focus is on the direct harm inflicted upon the SME/HDP supplier due to the dominant buyer's conduct.

The focus on SMEs and HDPs in price discrimination and buyer power provisions, alongside strengthened public interest factors in merger control, demonstrates a clear legislative intent to use competition law as a tool for economic transformation, inclusivity, and addressing historical disparities. This approach acknowledges that a competitive market is not just about low prices for consumers, but also about creating opportunities for all participants, particularly those who have been historically excluded. It provides the competition authorities with stronger tools to intervene in markets where powerful firms might otherwise stifle the growth and participation of smaller, transformative businesses. However, it also presents complexities in enforcement, requiring careful balancing of traditional competition principles with these broader socio-economic objectives.

One of the major reasons for expanding the public interest regime in 2019 was the persistent challenge of market concentration. Despite two decades of enforcement under the 1998 Competition Act, South Africa had made limited progress in addressing structural concentration in its economy. A 2021 study by the Competition Commission of South Africa revealed that 70% of the 144 industries assessed were highly concentrated, while only 10% of sectors were found to have unconcentrated markets (Competition Commission of South Africa, 2021). These findings cast a critical light on the legacy of competition enforcement since 1998, highlighting the limitations of the existing framework in achieving meaningful economic transformation. They also underscore the need for more direct and robust legislative and judicial interventions aimed at restructuring the economy, interventions that, while grounded in competition policy, extend beyond its traditional boundaries.

Mediclinic Merger Case

The economic and developmental dual mandate of competition policy was practically applied by the Constitutional Court in the

Mediclinic merger case (*Competition Commission of South Africa v Mediclinic Southern Africa (Pty) and Another*, 2022). This case affirmed the role of competition authorities in advancing the broader goals outlined in the Competition Act's preamble and purpose provisions. The case sparked a crucial debate: should competition authorities, when faced with a merger impacting essential services like healthcare, be solely guided by traditional competition and efficiency metrics, or should they also give significant weight to public interest considerations and constitutional rights, particularly the fundamental right to access healthcare? The Constitutional Court ruled that while traditional merger evaluation principles remain relevant, public interest and the Bill of Rights (especially the right to access healthcare) carry significant weight and can justify prohibiting a merger.

The case involved Mediclinic's proposed acquisition of Matlosana Medical Health Services. The Competition Tribunal initially prohibited the merger due to concerns about increased tariffs, particularly for uninsured patients, which would negatively impact healthcare access. The Competition Appeal Court overturned this decision, but the Constitutional Court reinstated the Tribunal's decision. The

Mediclinic landmark ruling emphasizes that competition authorities have an obligation to help realize the right to access health services. This means that even if a merger might appear to meet traditional competition standards, if it severely undermines a fundamental human right like access to healthcare, it can and should be prohibited based on public interest considerations. The

Mediclinic decision affirmed the Constitution's transformative goals, emphasizing that apartheid, colonialism, and neo-colonialism entrenched systemic racial disparities in economic power and ownership.

The public interest goals encapsulated in the preamble and purpose provision in Section 2 of the Competition Act include promoting employment, enhancing the social and economic welfare of South Africans, ensuring the participation of small and medium-sized enterprises (SMEs), and fostering a broader distribution of ownership, particularly by increasing the ownership stakes of historically disadvantaged persons (HDPs). While the preamble and purpose provisions are not considered operative clauses of the Act, the Constitutional Court in

Mediclinic has made it clear that they are far from inconsequential and must inform the interpretation and application of the law.

Tensions between Competition Law and Foreign Direct Investment (FDI)

Tensions between competition law and foreign direct investment (FDI) have long been recognized. Critics argue that public interest considerations in merger control may deter FDI and be vulnerable to political manipulation. While FDI is undeniably vital for driving and sustaining economic growth, especially in developing countries, it is equally important to strike a balance between safeguarding FDI as a key source of capital and advancing national interests. Achieving this balance is essential to ensure more effective and inclusive economic outcomes.(Njisane and Ratshisusu, 2017)

Furthermore, there is an inherent tension between the independence of competition authorities and broader industrial policy goals. As such, competition authorities have increasingly sought independence from political processes to avoid being "overly vulnerable to special interests, the emotional appeal of 'saving jobs', or the short-term imperatives of the electoral cycle" (Baker, 2013). This pursuit of independence is largely predicated on the belief that a singular focus on competition outcomes, primarily consumer welfare and market efficiency, yields the most consistent and economically beneficial results. Indeed, a clear, predictable, and non-politicized application of competition law is crucial for fostering investment, innovation, and long-term economic growth.

However, a counter-argument suggests that a complete divorce between competition policy and broader public interest objectives, including social and industrial policy goals, might lead to an overly narrow interpretation of public interest and potentially limit the overall effectiveness of competition authorities. While acknowledging the risks of political interference and the "emotional appeal of 'saving jobs'," proponents of a more integrated approach argue that competition policy does not operate in a vacuum. Broader societal objectives, such as sustainable development, inclusive growth, and even employment stability and poverty alleviation, can be legitimate considerations within a carefully constructed competition framework.

The challenge lies in striking a balance that allows for the consideration of legitimate public interest concerns without compromising the independence and credibility of the competition authority. This requires clear legislative mandates that define the scope of public interest considerations, transparent guidelines on how these considerations will be weighed against competition concerns, and robust mechanisms for accountability and judicial review. Without such a balanced approach, an overly purist interpretation of competition law risks overlooking the broader societal impact of market dynamics, potentially leading to public scepticism and undermining the long-term legitimacy of competition enforcement. Therefore, while safeguarding against undue political influence remains paramount, a degree of flexibility and a well-defined framework for integrating carefully chosen public interest objectives can enhance the overall societal value delivered by competition authorities.

The Wal-Mart/Massmart Merger

The Wal-Mart Stores Inc. and Massmart Holdings Limited merger represents a pivotal moment in South African competition law. This case garnered widespread attention not only for its scale but also for the unprecedented depth of debate it stimulated regarding the intersection of competition law with broader government policies, notably industrial policy and foreign direct investment. The merger highlighted the evolving understanding and application of public interest considerations within the Competition Act, drawing in diverse stakeholders and leading to a highly scrutinized remedial process.

Wal-Mart's acquisition of a majority stake in Massmart, a prominent South African retailer, was initially viewed by the Competition Commission as warranting unconditional approval, with no significant competition concerns identified. However, the proposed merger quickly became a focal point for broader economic anxieties. A multitude of intervenors, including various government departments and organized labour, most notably the South African Commercial, Catering and Allied Workers Union (SACCAWU), voiced significant concerns. Their primary apprehension revolved around the potential for the merged entity to shift its procurement practices from domestic suppliers to imports. This import substitution was feared to have detrimental effects on Small, Medium, and Micro Enterprises (SMMEs) and Historically Disadvantaged Individual (HDI)-owned manufacturing and assembly firms. These vital components of the South African economy were seen as vulnerable to displacement by cheaper, imported goods. A reduction in demand for locally produced goods was directly linked to potential job losses. Furthermore, there was concern that sectors earmarked for economic development would suffer, ultimately hindering national development objectives. These concerns were deeply rooted in the prevailing government policy frameworks of the time, which prioritized local industrial development, job creation, and the empowerment of historically marginalized businesses.

Despite finding no competition concerns in the traditional sense, the Competition Tribunal, acknowledging the broader public interest issues raised, approved the merger with significant conditions. These remedies primarily focused on employment measures to mitigate potential job losses, local procurement (including stipulations to encourage the continued sourcing of goods from South African suppliers), and the establishment of a development fund specifically designed to support local South African suppliers.

The Tribunal's conditions were subsequently strengthened on appeal at the Competition Appeal Court (CAC). The CAC recognized the validity of the intervenors' concerns and sought to bolster the remedies, particularly in response to the looming threat of retrenchments and a decline in sales for local suppliers, especially SMMEs, due to import displacement. Key enhancements by the CAC included the reversal of retrenchments directly attributable to the merger. The CAC mandated a maximum allocation of R200 million by Massmart over a five-year period for the Massmart Supplier Development Fund (SDF). This was in addition to the R40 million already expended by Massmart post-Tribunal decision. While the quantum of the fund was a point of contention (merging parties proposed R100 million, while the state sought R500 million to R2 billion). The CAC underscored that "the quantum is not the sole touchstone; integration of local SMME's into the global value chain of Walmart is the core objective". This highlighted a forward-looking approach, aiming to leverage Wal-Mart's global reach for the benefit of South African SMMEs.

Crucially, the CAC acknowledged the broader challenges posed by global value chains to the South African economy. However, it also issued a significant caution: competition law should not be a substitute for a coherent industrial policy. The CAC, therefore, limited its consideration of merger conditions to addressing merger-specific risks, particularly the potential impact on local producer SMMEs, rather than attempting to address broader, systemic issues related to global value chains that fell outside the direct scope of Section 12A(3) of the Act. Following the Tribunal's decision in May 2011, Massmart established the Massmart Supplier Development Fund, committing initial funds to support small businesses from disadvantaged communities. By the time of the CAC hearing, R40.4 million had been committed to four major projects, alongside two smaller training and auditing initiatives.

A post-evaluation of the Massmart merger, as documented by Mandiriza, T., Sithebe, T. & Viljoen, M. (2016), found that the Supplier Development Fund proved effective in addressing both competition and industrial policy concerns. The SDF successfully provided crucial assistance to industries at risk from increased imports, facilitated the integration of SMMEs into Massmart's supply chain, and ensured that the merged entity continued to source a significant portion of its goods locally. Overall, the SDF effectively responded to the merger-specific public interest concerns raised during the proceedings and, in doing so, contributed positively to broader industrial policy objectives as envisioned within the framework of the Competition Act.

The Wal-Mart/Massmart merger continues to serve as a landmark case in South African competition law, demonstrating the growing importance of public interest considerations beyond traditional competition concerns. It underscored the complexities of integrating national development objectives, particularly industrial policy and employment, into merger assessments. While the CAC cautioned against using competition law as a panacea for broader economic challenges, its judgment and the subsequent success of the Supplier Development Fund showcased how well-crafted merger remedies can effectively mitigate specific public interest harms and contribute to wider economic goals, particularly in safeguarding vulnerable sectors and fostering the growth of local enterprises within a globalized economy. The case continues to be a crucial reference point for understanding the evolving landscape of competition law and its intersection with public policy in South Africa and beyond. However, as alluded by Mandiriza et al. (2016), in the context of mergers, the Commission must exercise caution in applying public interest remedies to ensure a balanced approach. Remedies should be targeted and address only merger-specific public interest concerns, rather than broader policy objectives. It is essential to evaluate the net effect of the transaction as a whole, rather than focusing narrowly on individual public interest factors, whether positive or negative. From a competition policy perspective, careful consideration must be given to the implications of structuring remedies around public interest considerations, particularly where these may extend into broader industrial policy domains. Overreaching in this regard risks diluting the focus of merger control and could undermine its effectiveness.

Brazil's Application of Public Interest Remedies

Brazil's Conselho Administrativo de Defesa Econômica (CADE) primarily focuses its merger assessments on competition-related issues, consistent with global trends among competition authorities. However, Brazilian competition legislation, specifically Law No. 12529/2011 (the Brazilian Competition Law), provides mechanisms for incorporating broader public interest objectives, predominantly framed around efficiency gains that ultimately benefit consumers .

This framework is evident in Article 88 of the law, which permits the authorisation of mergers that might otherwise be prohibited if they are strictly necessary to achieve objectives such as increasing productivity or competitiveness, improving the quality of goods or services, or fostering efficiency and technological or economic development. A critical stipulation for such authorisation is that "a relevant part of the resulting benefits are passed on to consumers," ensuring that the net outcome for consumers remains non-negative . This consistent emphasis highlights CADE's discretion to consider public interest aspects, primarily through the lens of consumer benefits or the mitigation of competitive harm.

While CADE's core analysis remains competition-centric, non-competition issues, including public interest considerations, can become relevant if they align with broader economic policies or if a significant public interest concern is identified. CADE's strategic planning documents acknowledge its role in implementing competition policy in accordance with constitutional principles, which include consumer protection and deterrence of market power abuses.

Job preservation as a standalone merger remedy has been largely absent from CADE's recent practice; however, the authority has demonstrated a clear and increasing focus on ensuring competition within labour markets. This approach aligns with a growing international trend among competition authorities to address issues such as wage-fixing and no-poach agreements (OECD, 2019; US Department of Justice & Federal Trade Commission, 2020).

CADE's engagement with labour issues notably intensified in 2024 and is projected to remain a key area of focus in 2025 (CADE, 2024). The authority has actively pursued investigations and entered into settlement agreements concerning the exchange of competitively sensitive information between Human Resources departments, specifically targeting practices such as wage-fixing and no-poach agreements (CADE, 2024).

A significant development in Brazil is the ongoing preparation of a "Labor Antitrust Guideline" by the Secretariat for Competition Advocacy and Competitiveness (CADE, 2025). This guideline is designed to raise awareness of certain behaviours that can negatively affect the competitive environment within labour markets. It is expected to provide clarity on various issues, including contractual restraints like non-compete clauses and non-contractual collusive behaviours such as wage-fixing agreements, which are considered antitrust violations in the labour market..

The creation of the Labor Antitrust Guideline is a pivotal step, as guidelines serve as a primary tool for competition authorities to enhance transparency and predictability in their enforcement activities (OECD, 2005). Its development signifies a formalisation of CADE's approach to labour markets, likely codifying its focus on anti-competitive practices (e.g., wage-fixing, no-poach agreements) and potentially outlining how labour market concentration will be assessed in merger reviews.

Russia’s Federal Antimonopoly Service (FAS): Application of Public Interest in Strategic Sectors

The Federal Antimonopoly Service (FAS) of Russia, serving as the country's principal competition authority, operates within a legal framework that explicitly permits the consideration of public interest in its antitrust enforcement, particularly in relation to strategic sectors. This approach reflects a broader state policy that prioritises national security, technological sovereignty, and social welfare alongside the promotion of competition (UNCTAD, 2023).

The foundational principles of antitrust regulation in Russia are outlined in the Law "On Protection of Competition" (No. 135-FZ of July 26, 2006). However, the interpretation and application of public interest are further shaped by other pertinent legal provisions, including the Constitution of the Russian Federation and various federal laws pertaining to natural monopolies, foreign investment in strategic industries, and public procurement.

Public interest in the Russian context is multifaceted and particularly salient in sectors deemed strategic, such as defense, aerospace, nuclear energy, and certain natural resources. Foreign investment in these critical areas is subject to rigorous review under the Law on Foreign Investment in Strategic Sectors (Clifford Chance, 2014). A key objective is to ensure that critical technologies remain under national control and to foster domestic innovation. This imperative can significantly influence decisions concerning mergers and acquisitions.

The FAS actively monitors markets for socially important goods, such as food and pharmaceuticals, and addresses issues like price spikes. It also oversees natural monopolies (e.g., electricity, gas, public transport) to ensure fair access and pricing for consumers (OECD, 2019). While competition is recognised as a driver of growth, the FAS may consider the broader impact of its decisions on the stability of key industries, especially during periods of economic volatility or sanctions (UNCTAD, 2023). Combating cartels and collusion in public tenders, particularly in sectors like construction and healthcare, is a significant focus, as this directly impacts the efficient use of public funds and the quality of public services (K&L Gates, 2020).

The FAS integrates public interest considerations through several mechanisms. The Law on Foreign Investment in Strategic Sectors identifies 49 strategic industries where foreign investors (including those with indirect Russian ownership or state control) require prior approval from a government commission chaired by the Prime Minister. The FAS plays a crucial role in the initial review of these applications. If a transaction is blocked under this law, it automatically constitutes grounds for the FAS to deny merger clearance (Clifford Chance, 2014). In merger reviews, especially for transactions involving strategic sectors, the FAS frequently issues conditional approvals. These conditions often extend beyond standard competition remedies (such as divestitures) to include obligations that serve broader public interests, such as technology transfer or non-discriminatory access to essential infrastructure or data (UNCTAD, 2023; White & Case LLP, 2021).

FAS Application of Public Interest

Bayer/Monsanto Merger significantly impacted markets for agricultural goods, including seeds, crop protection products, and digital agricultural offerings. Recognising the potential for competition restriction in both Russian and global markets, the FAS imposed stringent remedies. These included provisions for the transfer of molecular selection and germplasm technologies to Russian companies to foster the creation of new varieties and hybrids. Crucially, remedies also mandated non-discriminatory access for Russian companies developing agricultural software and applications to digital farming platforms, including historical data related to the Russian market. This case illustrated the FAS's emphasis on technological sovereignty and the development of domestic innovation as a public interest objective, extending beyond mere market concentration concerns (UNCTAD, 2023).

In the context of Schlumberger's acquisition of Eurasia Drilling Company (EDC), the FAS imposed conditions that reflected public interest concerns, particularly given the importance of the oil and gas sector for Russia. The FAS required Schlumberger to provide EDC with a number of innovative drilling technologies and to guarantee that EDC would retain these technologies even if Schlumberger had to exit the Russian market due to sanctions. This demonstrates a clear focus on preserving critical technology within Russia and ensuring the continued operational capability of a strategic domestic asset, aligning with the public interest in energy security and technological independence (Kluwer Competition Law Blog, 2019).

The FAS has also uncovered and prosecuted cartels in state procurements, especially in the defense and healthcare sectors. For instance, in May 2017, the FAS identified a cartel of shell companies that "won" orders for military cantonment management totalling over 23 billion rubles, violating anti-monopoly regulations. Similarly, in January 2020, criminal convictions were handed down for cartel agreements involving medical device companies that manipulated bids in 94 public auctions for medical equipment and supplies (K&L Gates, 2020). These cases directly serve the public interest by aiming to help government procure goods and services at competitive prices, ensuring access to essential services.

The FAS has investigated leading global IT companies for anti-competitive practices, often related to abuse of dominant position in digital markets. For example, the FAS issued a warning to Microsoft concerning discriminatory conditions that allegedly prevented users from easily installing third-party antivirus software, following a complaint from Kaspersky Lab (Kluwer Competition Law Blog, 2019). Similarly, Apple was investigated for alleged price fixing with Russian resellers (ALRUD Law Firm, 2017). These interventions helped promote consumer choice, ensuring that consumers are not restricted from using alternative products. By creating a more open and competitive environment, the FAS aimed to ensure opportunities for Russian IT companies to develop and thrive.

This approach reflects a broader state policy that balances traditional competition goals with national security, technological sovereignty, and social welfare objectives.

India: Public Interest in Competition Policy

The Competition Commission of India (CCI) operates under the Competition Act, 2002, which not only aims to prevent anti-competitive practices but also explicitly seeks to "promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto" (Competition Act, 2002, Preamble). This broad mandate grants the CCI significant flexibility to consider wider public interest objectives, particularly those related to the "contribution to the economic development of the country," in its merger assessments (Bonakele, 2016).

Section 20(4) of the Competition Act, 2002, outlines the factors that the CCI must consider when evaluating whether a proposed merger causes or is likely to cause an "Appreciable Adverse Effect on Competition" (AAEC) in the relevant market. While many of these factors directly pertain to market dynamics (e.g., market share, entry barriers, countervailing buyer power), sub-clause (g) of Section 20(4) specifically mandates consideration of "whether the combination would result in the accrual of benefits to the consumers in the form of improvements in production or distribution of goods or provision of services, or promotion of technical or economic progress by a combination having or likely to have appreciable adverse effect on competition."

Furthermore, legal interpretations suggest that the CCI possesses extensive authority to clear combinations, even those with potential AAEC, if the benefits to economic development outweigh the anti-competitive effects. This is perceived as a "sweeping authority" that enables the CCI to balance the pro-competitive and pro-development aspects of a merger. This aligns with the Competition Act's preamble, which explicitly references the economic development of the country.

The CCI acknowledges that mergers can lead to substantial efficiency gains (e.g., economies of scale, rationalisation of operations, research and development synergies) that may ultimately benefit consumers and contribute to economic progress. The assessment process involves carefully weighing these potential benefits against any anti-competitive harms. In vital sectors such as telecommunications, infrastructure, or emerging digital markets, the CCI may consider how a merger could impact national priorities like digital inclusion, infrastructure development, or the growth of specific industries (Lawful Legal, 2025).

When a merger is identified as having potential AAEC, the CCI can approve it with modifications, which may involve structural or behavioural remedies. These remedies can be designed not only to address competition concerns but also to ensure the realisation of promised public interest benefits, such as continued investment in research and development, job protection, or non-discriminatory access to essential facilities.

While the CCI's orders primarily focus on the AAEC assessment, the underlying public interest and economic development considerations often inform the nuances of its decisions, particularly in cases involving significant market players or strategic sectors. Explicit pronouncements on public interest are frequently made when the CCI imposes specific conditions to mitigate anti-competitive effects while preserving potential development benefits.

CCI Application of Public Interest

The Vodafone / Idea Cellular Merger was a landmark merger in India's highly competitive and capital-intensive telecommunications sector. The CCI approved the merger unconditionally, recognising the significant synergies and efficiencies that could arise from the combination. While the primary focus was on preventing AAEC in relevant telecom markets, the approval implicitly acknowledged the broader economic development benefits. The merger created a stronger third player in the Indian telecom market, which was deemed crucial for robust competition against Reliance Jio and Bharti Airtel. The combined entity was expected to leverage larger spectrum holdings and network scale to offer improved services, wider coverage, and potentially more affordable plans to a vast consumer base, thereby contributing to digital inclusion across the country .

China: Application of Public Interest in Competition Law

The Chinese Anti-Monopoly Law (AML), enacted in 2008 and subsequently amended, identifies among its objectives not only “protecting fair competition in the market” and “the interests of consumers,” but also “promoting the healthy development of the socialist market economy,” and protecting the “lawful business operations” of undertakings in industries “controlled by the State-owned economy and concerning the lifeline of national economy and national security” (Anti-Monopoly Law of the People's Republic of China, 2015, Article 1 and 7; Bonakele, 2016).

Article 7 of the AML specifically states that industries controlled by the state-owned economy and those concerning the national economy's lifeline or national security, as well as industries with lawful exclusive operation and sales, shall be protected. It further mandates that the state regulate and control the prices of commodities and services provided by undertakings to safeguard consumer interests and promote technical progress. This provision underscores a unique balancing act between promoting competition and serving strategic state interests.

The Chinese competition authorities, including the State Administration for Market Regulation (SAMR), considers public interest elements in their enforcement activities, particularly in merger reviews involving strategic sectors or state-owned enterprises. While the primary assessment remains on the elimination or restriction of competition, the broader policy objectives relating to economic development, industrial policy, and national security can influence decisions. For instance, the AML allows for exemptions from prohibitions on monopoly agreements if they are for the purpose of, among other things, improving product quality, reducing costs, enhancing efficiency, or "safeguarding public interests such as energy conservation, environmental protection and disaster relief" (Anti-Monopoly Law of the People's Republic of China, 2015, Article 15).

In the context of concentrations, the AML also provides for review based on national security. The State Council has established a mechanism for national security review of foreign investments, which includes a role for the anti-monopoly enforcement agencies. This dual approach ensures that transactions impacting national security are scrutinised not only from a competition perspective but also through a broader strategic lens. This integrated approach reflects China's unique economic structure, where state control in key sectors is prevalent, and competition policy is a tool for achieving both market efficiency and broader national objectives.

Recommendations

To ensure that public interest considerations meaningfully contribute to the broader socioeconomic and developmental objectives of BRICS countries, this paper advocates for a more structured, transparent, and context-sensitive approach to the design, implementation, and evaluation of public interest remedies within competition enforcement. Central to this is the development of comprehensive guidelines that clearly define criteria such as employment protection, industrial development, access to essential goods and services, and inclusive growth, and ensure their consistent application alongside traditional competition metrics. The institutionalization of ex-ante and ex-post impact assessments is critical for measuring the effectiveness of these remedies and for refining policy tools over time. Moreover, effective public interest enforcement requires inter-agency coordination, particularly with entities responsible for economic planning, labor, and industry, to align competition policy with national development strategies. Enhanced stakeholder engagement, including civil society, SMEs, labor unions, and consumer groups, is essential to bolster the legitimacy and responsiveness of competition decisions. Strengthening institutional capacity through multidisciplinary expertise, dedicated public interest units, and continuous training will enable authorities to better assess and monitor the socioeconomic dimensions of enforcement. Finally, deeper BRICS cooperation and knowledge-sharing can facilitate peer learning, the development of context-specific tools, and the advancement of a shared vision for inclusive and sustainable development. Ultimately, public interest considerations should be operationalised in a manner that reflects the developmental imperatives of BRICS economies while preserving the integrity of competition enforcement.

Conclusion

By questioning orthodox paradigms that prioritize narrow economic efficiency, this paper underscores the necessity of situating development and transformation at the center of competition policy in emerging economies like BRICS. The proposed conceptual framework aims to guide the contextual implementation and ex-post evaluation of public interest remedies, recognizing the complex socio-economic environments in which BRICS competition authorities operate. These authorities are often caught in a precarious position, accused of not doing enough to pursue transformative goals, while simultaneously criticized for neglecting their core competition mandates. Yet, rather than viewing development and competition as mutually exclusive, this analysis argues that the pursuit of inclusive growth must be viewed as intrinsic to the mission of competition enforcement. As BRICS members continue to shape and refine their regulatory architectures, aligning public interest with competition objectives will remain both a strategic imperative and a normative commitment.

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