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Antitrust and developing and emerging economies

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ABSTRACT

The present contributions were gathered following up the 6th edition of the "Antitrust and developing and emerging economies" annual Concurrences review Conference held in New York on November 1st, 2019, at the New York University School of Law. The discussions revolved around four topics. The members of the first panel addressed the relationship between the fight against cartels and the fight against corruption. The second panel discussed the effects of data, digital networks and platforms on the economic development. The third panel focused on the evolution of merger control policies in developing countries. Finally, the fourth panel dealt with new developments in enforcement at play in the US, Argentina, the Philippines and South Africa, with a particular focus on international cooperation and the issue of effectiveness of competition authorities.

Les présentes contributions ont été recueillies à la suite de la 6e édition de la conférence annuelle de le la revue Concurrences "Antitrust and developing and emerging economies" qui s'est tenue à New York le 1er novembre 2019, à New York University School of Law. Les discussions étaient organisées en quatre thèmes. Les membres du premier panel ont abordé la relation entre la lutte contre les cartels et la lutte contre la corruption. Le deuxième panel a discuté des effets des données, des réseaux et des plateformes numériques sur le développement économique. Le troisième panel s'est concentré sur l'évolution des politiques de contrôle des concentrations dans les pays en développement. Enfin, le quatrième panel a traité des nouveaux développements en matière d'application du droit de la concurrence aux États-Unis, en Argentine, aux Philippines et en Afrique du Sud, avec un accent particulier sur la coopération internationale et la question de l'efficacité des autorités de la concurrence.

Mergers and economic development: What can developing countries expect?

Merger policy for developing countries: Is there a special role for the BRICS countries?

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The BRICS countries (Brazil, Russia, India, China, and South Africa) have sufficient clout to impose employment-related conditions on consummated mergers. Interventions with employment-related objectives are arguably consistent with the goal of maximizing worldwide consumer welfare. Going beyond that goal to demand country specific remedies to foster long-term domestic growth of individual industries is not.

1. In the face of a major merger whose impact transcends the boundaries of multiple countries, is there a special role to play for developing countries? From the perspective of worldwide economic efficiency the appropriate answer may well be no. A merger that passes inspection by the U.S. and the EU is, at least in theory, one whose worldwide benefits are likely to outweigh the costs. However, there may be instances in which the merger will impose substantial costs on countries outside the U.S. and the EU. An attempt to impose significant country-specific requirements on a merger by countries that are "small" (with the merger having relatively minor economic effects) can be countered by a credible threat not to do business with that country. The story is different for the BRICS countries (Brazil, Russia, India, China, and South Africa), whose book of business is often quite substantial. Now, the bargaining game between the U.S. and EU authorities and the countries at issue becomes much more complex.

* I wish to thank Eleanor Fox for her encouragement and support.

2. In what follows I offer some commentary on merger policy issues that are likely to arise when one or more BRICS countries are impacted. The discussion that follows relies heavily on the commentators at a Concurrences conference session at the October 2019 Concurrences–NYU Law "Antitrust in Developing and Emerging Countries" conference held at NYU Law School.

3. To begin with a hypothetical, assume that a proposed merger is likely to have a meaningful adverse impact on employment, perhaps with respect to disadvantaged workers. Is it appropriate to impose a requirement on the merger—either to modify the terms of the merger to avoid the adverse localized impact or to offer funds designed to retrain workers or support their relocation to areas in which there are suitable job opportunities?

4. George Paul, distinguished attorney at White & Case, has laid out a compelling economic (as well as legal) argument. To paraphrase his commentary, the purpose of merger control, indeed, the goal of antitrust law, is to promote consumer welfare, period. Any attempted governmental intervention that advantages individual groups or countries is likely to run counter to that social welfare goal. Merger policy is arguably best served through a competition policy that resists being captured by industry groups. To illustrate, a policy that includes higher wages as a policy goal when evaluating mergers may not help small business—indeed such a policy may reduce output and lead to fewer jobs in the long run.

5. Like George Paul I am keenly aware of the fact some BRICS countries have legal or constitutional requirements (the latter in the case of South Africa) that seek to protect domestic employment. The South African requirement appears to be directly contrary to EU law. Moreover, the merger hypothetical is one in which there is a clear externality in that the adverse employment effects arise outside the EU and the U.S.—those adverse effects are therefore outside of the legal purview of those two enforcement authorities. George Paul points to the substantial benefits that flow from consistency and clarity. Giving substantial weight to the vagaries that come with some of the localized public-interest standards is a difficult thing to do, and it comes with the possibility that doing so will add substantially to the cost of transactions. Indeed, the lack of consistency across jurisdictions will make it less likely that some deals will be accomplished in consumer-maximizing ways.

6. This commentary raises two distinct issues. First, if a merger will impact labor markets within the jurisdiction of the merger, should those labor effects be taken into account. Here, the answer offered by my NYU colleague Scott Hemphill is the appropriate one. Most labor market effects, like the effects on any production input, are likely to have adverse output effects. If so, these are naturally taken into account by traditional merger policy analyses. Of course, the merger may affect the relative bargaining power upstream, a subject of some interest, but that it is not the focus of the analysis here.

7. Ultimately, the presence of externalities is what makes the analysis particularly difficult—as, for example, with the sharp tension between the U.S. and South Africa constitutions. Liberty Mncube, former chief economist at the South African Competition Commission, offered a thoughtful response. Liberty points out that, unlike in the U.S., markets do not work very well because there are barriers to entry, the presence of powerful state-owned enterprises, and a population that has largely been excluded from economic activity. When discussing South Africa, one cannot talk about policy without acknowledging the high levels of unemployment, the high levels of poverty, and the high levels of inequality. In South Africa competition is defined broadly—it includes economic development and it includes public interest considerations. In South Africa the goals of the competition law include "equity, justice and efficiency." To generalize, for many developing countries, including the BRICS countries, the goal of competition is not just consumer welfare, it is consumer welfare plus the public interest.

8. Marcio de Oliveira Jr., former commissioner at CADE, the Brazilian competition authority, offers a somewhat different perspective. He points out that in Brazil competition policy is focused on consumer welfare and not on the public interest. He does not recall any cases in Brazil in which the protection of employment per se became an issue, although there have been mergers in which the merging companies would likely leverage their bargaining power to reduce salaries (as in hospital mergers). But, that is a related competition issue and does not involve the protection of employment per se.

9. For Alexey Ivanov, a former commissioner of the Russian competition authority, the evidence is slightly different. For Russia, the evolution of competition law has led to the inclusion of the goal of boosting economic development, a goal that could in principle include the employment effects that I have emphasized. Alexey suggests that when the architects of ecosystems merge or entrench their power within ecosystems, one must account for the public interest, which includes employment. He points out that there is a substantial upside to cooperation among the BRICS countries, which would increase their bargaining power when negotiating merger remedies.

10. To illustrate the tensions that these issues raised I asked panel participants to comment on three large mergers, each of which arguably raised substantial employment-public interest issues. The first is *Lafarge/Holcim*, the merger of two large cement companies, a $50 billion deal that was completed in July 2015. (LafargeHolcim has 80,000 employees and is headquartered in Switzerland.) The question at hand is whether the merger should have been allowed given that:

– There had been a history of collusive activity by cement companies.

– Lafarge allegedly had paid taxes to ISIS in 2013 and 2014 to keep their Syrian factory in Jalabiya open.

11. The second merger is the *Dow/DuPont* merger, which combined crop protection, agrochemicals, and seeds. The new DowDuPont has been split into three companies, materials science, specialty products, and agriculture. The third merger is the *Bayer/Monsanto* merger. Interestingly, this life-science merger (seeds and fertilizers) has created problems for Bayer, which was required by the U.S. to sell off its Roundup-competing Liberty herbicide business, but was allowed to keep Roundup, despite concerns about the safety of glyphosate.

12. With respect to *Bayer/Monsanto*, Liberty Mncube identified a theory of harm relating to genetically modified cotton seeds. To remedy this merger to monopoly South Africa insisted that Bayer divest its cotton business in South Africa, which they did. To coordinate with other countries, South Africa asked for the merged entity to divest and sell the entire global Liberty Link trait technology and the associated Liberty branded agrochemicals business of Bayer, the so-call "Liberty remedies." These were accepted. However, there was also a concern about jobs and a job-related remedy was imposed. First, there was a freeze on the number of jobs that would be lost. Second the merged entity must offer a discount to small emerging farmers in relation to seeds, a discount of 25% for the first three years.

13. According to Marcio de Oliveira Jr., CADE asked the merging companies to divest the seed business assets held by Bayer in Brazil as well as part of the herbicide business. Marcio pointed to Brazil's limited market power, given that the parties could carve out Brazil and proceed with the transaction.

14. Alexey Ivanov noted that the Russian Federal Antimonopoly Service (FAS) paid attention to the rise of digital agriculture as a new global market. For the FAS, the key issue was whether the merger would allow competitive seed producers and agrochemical producers to participate in the newly developing digital platform.

15. George Paul, who worked on the deal, noted that there was eventually $9 billion in divestitures. George pointed out that the Russian fix could be viewed as a means of helping Russian farmers and Russian companies to be able to complete on technology and to be more active and dynamic in the field.

16. *Lafarge/Holcim* is interesting, if only because Lafarge was one of the companies competing to build Donald Trump's wall. Russia took no specific action, but CADE, where there was a history of collusive activity, reached an agreement for assets to be divested in a manner that would allow the smaller competitors to expand and compete effectively. For South Africa, the story was similar, given a history of collusion—but eventually the parties were no longer active in South Africa and the issue disappeared.

17. The *Dow/DuPont* merger raised no employment or public interest issues for South Africa. For Brazil the transaction generated overlaps and high concentration, mainly in material science related products. The products are used in a variety of end applications including pesticides, insecticides, herbicides, and in corn seeds. The merged company committed to divest its global acid copolymer businesses and other activities to undo the overlap between the companies' activities in these markets. The companies also proposed to divest DuPont's assets for herbicide and insecticide production and there was a divestment of assets in the corn seed business. Finally, CADE demanded a series of behavioral remedies.

18. George Paul pointed out that positions taken by India and China became important because they were related to the EU's theory that the merger was five to four in innovation. His concern was that jurisdictions might jump at the opportunity to obtain access to technology, while running the risk that their agency will no longer be viewed as a neutral and serious antitrust enforcer.

19. To sum up, the BRICS countries fill an important niche with respect to worldwide merger policy. There are instances where the mergers will have meaningful impacts outside the U.S. and the EU. Whether individual BRICS constitutions suggest a special role for considerations of employment and public interest (as in South Africa) or not, the BRICS countries have the power to be active participants in the worldwide review of mergers. In the cases that have been discussed, interventions with immediate and limited objectives are arguably consistent with the goal of maximizing worldwide consumer welfare and the countries should be commended for doing so. Going beyond that goal to demand country specific remedies to foster long-term domestic growth of individual industries should not. ■