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Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia, and Hungary

Carolyn Brezezinski
White & Case, London

COMPETITION AND ANTITRUST LAW IN CENTRAL EUROPE: POLAND, THE CZECH REPUBLIC, SLOVAKIA, AND HUNGARY

*Carolyn Brzezinski**

INTRODUCTION

Poland, the Czech Republic, Slovakia, and Hungary have enacted antimonopoly laws to stimulate and safeguard the competition necessary for market-based economies.[1] Under the bold decision made by each of these post-communist states to introduce market forces rapidly and to transform their non-competitive socialist systems to competitive market-based systems, competition plays a vital and unprecedented role.[2] Forming the principal component of the transformation process, the competition policies[3] of these countries permeate all areas of economic reform: restructuring and privatization, sustained economic growth and stability, improved systems of production and distribution, foreign investment, and gradual full integration with the European Union (EU).[4]

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* Associate, White & Case, London office; J.D. University of Virginia; M.A. University of Connecticut; B.A. University of Connecticut. Between 1991 and 1993, the author was an associate in the Warsaw office of White & Case. She would like to thank Ewa Szymanska of the Polish Antimonopoly Office, Ivo Bezecny of the Czech Ministry of Economic Competition, Danica Paroulkova of the Slovak Antimonopoly Office, and Joszef Sarai of the Hungarian Office of Economic Competition for their support and assistance in the preparation of this article.

1. As defined by Edwin Dolan, the term "socialism" means any system in which: (i) a major share of non-labor factors of production are owned in common by the state, and (ii) incomes are distributed at least somewhat more equally than under classical liberal capitalism. EDWIN G. DOLAN, BASIC MICROECONOMICS 428–32 (2d ed. 1980). The term "market-based economy" means any economic system based on private ownership of all factors of production in which owners of capital act as entrepreneurs and coordinate their activity through use of the market. *Id.* at 426–28.

2. As David Lipton and Jeffrey Sachs state, "[w]ith amazing rapidity, the post-communist politicians of Poland, Czechoslovakia and Hungary have dropped any support for an economic 'third way' — that is, some form of market socialism — and seem intent on moving instead to a full-fledged market economy based on private property." David Lipton & Jeffrey Sachs, *Creating a Market Economy in Eastern Europe: The Case of Poland*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 75, 76 (1991).

3. As defined by Eleanor Fox and Janusz Ordover, "[c]ompetition policy is comprised of policy, structures and incentives designed to inspire people and firms to be engaged in the economic enterprise and to be responsive, productive and inventive." Eleanor M. Fox & Janusz A. Ordover, *Free Enterprise and Competition Policy for Central and Eastern Europe and the Soviet Union*, *in* PRIVATISATION IN CENTRAL AND EASTERN EUROPE 85, 87 (Stephen A. Rayner ed., 1992).

4. Founded on the European Communities (EC), the EU was established by the TREATY ON EUROPEAN UNION art. A, *reprinted in* 31 I.L.M. 247 (1992) [hereinafter EU TREATY]. The

Prior to the collapse of communism, the economies of Poland, the Czech Republic, Slovakia, and Hungary[5] were geared toward heavy industry, were, in general, centrally planned,[6] and were integrated both horizontally and vertically.[7] Most decisions regarding allocation of wages, investment, and credit were made by the state bureaucracy pursant to a comprehensive and binding "plan."[8] Also, as a result of the socialist policy of mandatory full employment and insulation from international competition, productivity in large, industrial state-owned enterprises declined, and economic stagnation and inflation appeared.[9]

Recognizing the failures of their formerly non-competitive economies, Poland, the Czech Republic, Slovakia, and Hungary attach primary importance to competition as a means of economic transformation and growth. Accordingly, the competition authorities created under the antimonopoly laws of the post-communist states play crucial and diverse roles in market surveillance, demonopolization, import liberalization, restructuring of natural monopolies, and merger control.[10] With the

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EC, which is comprised of the European Economic Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EURATOM), was established pursuant to both the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, *reprinted in* 298 U.N.T.S. 11 (1958), *amended by* Single European Act, 1987 O.J. (L 169) 1 [hereinafter EC TREATY], and the EU Treaty. Under the EU Treaty, the EC Treaty became the treaty establishing the European Community. EU TREATY art. G. Accordingly, where discussed in the context of the EC Treaty, laws of the EU will be referred to as EC laws.

5. In general, the post-communist economic reform programs of Poland, the Czech Republic, Slovakia, and Hungary commenced in 1990. *See Eastern Europe: A Market Economy Takes Root*, BUS. WK., Apr. 15, 1991, at 46, 48.

6. In Poland and Hungary, however, the system of central planning had been gradually replaced in the 1980s with a system of negotiation between enterprises and financial authorities as to prices, interest rates, and taxes. Thus, although state enterprises became "self-governing" or "autonomous," autonomy as such did not equate with either free competition or the emergence of market-based relations among enterprises. *See, e.g.*, Law of Sept. 25, 1981, on Self-Governance of State-Owned Enterprises, Dziennik Ustaw [hereinafter Dz.U.] 1981 No. 24, Item 123. For a discussion of "plan softening" during the final years of the communist era, see Hubert Izdebski, *Legal Aspects of Economic Reforms in Socialist Countries*, 37 AM. J. COMP. L. 703, 722–40 (1989).

7. As stated by Lipton & Sachs, "[t]he organization of industry was designed to facilitate top-down planning, rather than market competition, with a heavy orientation toward large firms integrated both horizontally and vertically." Lipton & Sachs, *supra* note 2, at 82.

8. Remarking on the notion of "the plan," Professor Izdebski states that

> [a]lthough economic reforms were undertaken in particular countries in relatively different epochs and in relatively different circumstances, their starting point was always the same: the over-centralized system of a state planned economy, which . . . excludes substantial reform of the administrative allocation of resources and goods as if the entire national economy were a unique enterprise.

Izdebski, *supra* note 6, at 704.

9. Jeffrey Sachs, *Building a Market Economy in Poland*, SCI. AM., March 1992, at 34, 34.

10. As a result of their diverse roles and relatively small staffs, however, the limited resources of the competition authorities are extremely overburdened.

exception of the Czech Ministry of Economic Competition, the competition authorities have been established at the sub-ministerial level and thus serve as apolitical institutions capable of ensuring continuity in economic reform during turbulent periods of political and social transition.[11]

When the competition authorities were created, extremely high expectations surrounded their potential impact and effectiveness in facilitating economic transformation. Three years later, the progress and achievements of the competition authorities may feasibly be analyzed and assessed.[12] For instance, are these institutions fulfilling the roles for which they were originally created? Will these institutions be able to fulfill such comprehensive roles with their existing resources? Finally, do these institutions have the proper legal foundation upon which to pursue their mandates?

This article answers each of the above questions. First, this article briefly introduces the antimonopoly laws and competition authorities created in the four post-communist Central European countries of Poland, the Czech Republic, Slovakia, and Hungary.[13] Second, this article outlines the obligations and harmonization programs of the competition authorities under the Europe Agreements[14] recently signed by each country.[15] Third,

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11. Unlike heads of agencies, ministers, as members of government, normally are replaced following elections. Because elections have occurred frequently in the fragile post-communist democracies, ministries have been subject to larger shifts in policy than have agencies and other government offices.

12. As stated by Russell Pittman in 1991,

> [b]oth experience and theory also suggest that understanding the text of the law itself is only the first step in understanding how the law will affect businesses, consumers, and society; one must also know how the law will be enforced by the competition agencies and interpreted by the courts.

Russell Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe*, 26 INT'L LAW. 485, 485 (1992).

13. These four countries were selected for this article based on their cooperation in trade, competition, and other matters as members of the so-called "Visegrad Quadrangle." Eugeniusz Mozejko, *Quadrangle Trade*, ZYCIE GOSPODARCZE, No. 4, Jan. 24, 1993, at 23, *translated in* POLISH NEWS BULL., Jan. 26, 1993.

14. Europe Agreement with Poland, 1993 O.J. (L 348) 2 [hereinafter Poland Europe Agreement]; Europe Agreement with the Czech Republic, signed Oct. 4, 1993 (unpublished, on file with author) [hereinafter Czech Republic Europe Agreement]; Europe Agreement with Slovakia, signed Oct. 4, 1993 (unpublished, on file with author) [hereinafter Slovakia Europe Agreement]; Europe Agreement with Hungary, 1993 O.J. (L 347) 2 [hereinafter Poland Europe Agreement]. These agreements will be collectively referred to as the Europe Agreements. The Europe Agreements between the EC and Poland and the EC and Hungary were signed at the EC Council of Ministers in Brussels on December 16, 1991, ratified by the parliaments of each associated country, each EC member state, and the EC, and entered into force on February 1, 1994. *See Agreement with EEC To Be Signed Today*, GAZETA WYBORCZA, No. 291-2, Dec. 14–16, 1991, at 3, *translated in* POLISH NEWS BULL., Dec. 16, 1991. The Czech Republic and Slovakia each signed separate yet identical versions of the Europe Agreements on October 4, 1993, which are in the process of ratification. Telephone Interview with Willem Aldershoff, Administrator, DG 1, European Commission (Dec. 20, 1993).

15. Hereinafter these countries will be referred to collectively as the "associated countries."

this article assesses the role and importance of the antimonopoly laws and competition authorities in the post-socialist economic reforms currently underway. Fourth, this article describes proposals to amend the antimonopoly laws based on the initial period of their implementation. Finally, this article attempts to assess the post-reform role of both the antimonopoly laws and the competition authorities.

I. Overview of Antimonopoly Laws

During the past four years, Poland, the Czech Republic, Slovakia, and Hungary have each enacted an antimonopoly law.[16] Similar to antitrust law in the United States, antimonopoly law forms one of the principal cornerstones of competition policy in post-communist countries. As the Polish Office states, however, "the promotion and protection of competition in the process of transforming a centrally planned economy into a market economy requires going beyond the scheme of classical antitrust policy."[17] These antimonopoly laws therefore are designed to create, develop, and protect competition during the transition from a socialist to a market-based economy.[18] Each law establishes a competition authority that is entrusted with development and protection of competition and oversight and enforcement of competition law.[19] The Polish Antimonopoly Office, the Czech Ministry of Economic Competition, the Slovak Antimonopoly Office, and the Hungarian Office of Economic Competition all have similar mandates with regard to competition in the post-socialist economies.[20]

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16. Polish Act of Feb. 24, 1990, on Counteracting Monopolistic Practices, Dz.U. 1991 No. 89, Item 403 [hereinafter Polish Law]; Czech and Slovak Federal Competition Protection Act of Jan. 30, 1991, zákon č.63/1991 Sb. [hereinafter Czech Law]; National Council of the Slovak Republic Act of July 8, 1994, on the Protection of Economic Competition, Act No. 188/1994 Coll. of Laws [hereinafter Slovak Law]; Hungarian Act of Nov. 20, 1990, on the Prohibition of Unfair Market Practices, No. LXXXIV, MK No. 121, Dec. 5, 1990 [hereinafter Hungarian Law].

17. Polish Antimonopoly Office, Competition Law and Policy in Poland (1991–1993) 7 (Jan. 1994).

18. Polish Law, *supra* note 16, at preamble (ensuring development of competition, protecting economic entities from monopolistic practices, and protecting interests of consumers); Czech Law, *supra* note 16, at art. 1 (protecting economic competition against restriction, distortion, and elimination); Slovak Law, *supra* note 16, at art. 1 (protecting economic competition and creating conditions for its further development); Hungarian Law, *supra* note 16, at preamble (protecting freedom and fairness of competition).

19. Polish Law, *supra* note 16, at art. 17; Czech Law, *supra* note 16, at art. 11; Slovak Law, *supra* note 16, at art. 11; Hungarian Law, *supra* note 16, at arts. 52(1) and 53(1).

20. Hereinafter these authorities will be individually referred to as the Polish Office, the Czech Ministry, the Slovak Office, and the Hungarian Office and collectively referred to as the competition authorities. The name of the Czech Office for Economic Competition was changed to the Czech Ministry of Economic Competition. Act of Oct. 31, 1992, Act No. 474/1992 Coll. of Laws. In order to govern federation-wide application of the Act, the Czech Law also

Although certain provisions reflect the influence of the laws of the United States and individual EC member states, the dominant model upon which the competition laws of the post-communist countries are based is the EC model. The Czech and Slovak antimonopoly laws are both based on the former Czech and Slovak Federal Competition Protection Act.[21] Both countries have adapted the Act to their newly independent economies: on November 11, 1993, the Czech Parliament passed amendments to the Act proposed by the Czech Ministry,[22] and on July 8, 1994, the Slovak National Council adopted a new law modeled on the existing Act.[23] Since all of the laws were passed prior to the signing of the Europe Agreements, they do not mirror the format or substance of EC competition law as embodied in those Agreements.[24] For purposes of comparative analysis, however, the antimonopoly laws may be divided into provisions focusing on monopolistic practices, abuse of a dominant or monopolistic position, merger control, and demonopolization.[25]

A. *Monopolistic Practices*

In Central Europe, as the private economy develops and privatization continues to produce new commercial entities, free market business practices are replacing former command and control practices. Given the

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established a Federal Office for Economic Competition, which ceased to function upon the dissolution of the Czech and Slovak Federation. Czech Law, *supra* note 16, at art. 10.

21. Within the legal framework of the former Czech and Slovak Federal Republic, federal laws were enacted by the Czechoslovak Parliament, the Federal Republic's highest legislative organ. Upon dissolution of the Federal Republic, the Czech National Council, the highest legislative organ in the Czech Republic, enacted a so-called "Reception Law," pursuant to which all federal laws automatically became the laws of the Czech Republic as of January 1, 1993. Czech Reception Act, Act No. 4/1993 Coll. of Laws (1993). Thus, the legal regime of the new Czech Republic is comprised of former federal laws and any new laws passed by the Czech Republic. Since the Slovak Parliament did not adopt a special reception law, the transition rules are provided in Articles 152 and 153 of the Slovak Constitution, pursuant to which laws of the federation remain valid in the Slovak Republic until they are replaced or repealed. SLOV. REP. CONST. arts. 152 & 153.

22. Act of Nov. 11, 1993, on the Protection of Economic Competition, Acts No. 495/1992 and No. 286/1993 Coll. of Laws [hereinafter November 1993 Amendments]. The November 1993 Amendments became effective as of Jan. 1, 1994. Telephone Interview with Ivo Bezecny, Office of the Minister, Czech Ministry of Economic Competition (Feb. 1, 1994).

23. Slovak Law, *supra* note 16. The National Council is the formal name of the Slovak parliament.

24. The competition provisions of the Europe Agreements essentially comprise the EEC TREATY arts. 85, 86, and 92.

25. The Hungarian Law also contains sections on unfair competition and consumer protection that will not be examined in this article. However, it must be noted that the Hungarian Law heavily emphasizes the protection of consumers. *See, e.g.*, Hungarian Law, *supra* note 16, at preamble.

large "gaps" that exist in the commercial laws of the associated countries,[26] market surveillance provides an essential check on anticompetitive business practices.[27] Accordingly, each country has developed legal prohibitions against anticompetitive and monopolistic practices and has purposely constructed the laws with vague language to give the competition authorities discretion to weigh the benefits of a given economic activity against the harm from the activity's restriction on competition.[28]

The Polish Law provides an exhaustive list of practices that are prohibited unless they are "necessary to conduct an economic activity" and do not cause a "significant" restraint of competition.[29] The prohibited practices include imposition of onerous contract terms, tying arrangements, anticompetitive share and asset acquisitions, interlocking directorates, price fixing, market division, restriction of market access, limitation of production, sales or purchases, and agreements between competitors to fix contract terms concluded with third parties.[30] The general prohibition against all such practices applies regardless of the market share of the entity.[31]

Unlike the Polish Law, the Czech Law does not provide an exhaustive list of monopolistic practices. Instead, this law enumerates examples of monopolistic agreements and practices that are unlawful if they result

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26. As a result of four decades of non-use, in 1989, commercial law in the associated countries was generally obsolete or lacking; since that time the post-communist governments' efforts to address the need for sound commercial law have been largely interstitial. *See, e.g.*, Carolyn Brzezinski, *The EC-Poland Association Agreement: Harmonization of an Aspiring State's Company Law*, 34 HARV. INT'L L.J. 105, 115 (1993).

27. One often hears citizens of Central Europe comparing the post-socialist economies to economies at the turn of the century or to that of the "Wild West." Innovative means of market surveillance being used or considered by the competition authorities include a cartel register and registration questionnaires. *See, e.g.*, POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 31.

28. In the transition period when many state enterprises and fledgling new businesses fail to survive and aggregate production continues to decline, competition authorities are naturally wary to curb any economic initiative, believing that a strong, pro-competitive economy is useless in the absence of economic activity. For a discussion of the vagueness of the laws, see generally Pittman, *supra* note 12. Nonetheless, as stated by the Slovak Office, "[u]ntil now, the Office has allowed entrepreneurs time to adopt [sic]. But this time is over and the Office is beginning to apply sanctions." 1992 ANTIMONOPOLY OFFICE OF THE SLOVAK REPUBLIC ANN. REP. 1 [hereinafter SLOVAK 1992 REPORT].

29. Polish Law, *supra* note 16, at art. 6. For a criticism of the exhaustive list approach, see TADEUSZ SKOCZNY, COMPETITION LEGISLATION IN POST-SOCIALIST COUNTRIES 26–27 (1992).

30. Polish Law, *supra* note 16, at arts. 4.1–4.2.

31. Further, as Anna Fornalczyk, President of the Polish Antimonopoly Office, has stated, "[t]he Polish law does not make a clear distinction between horizontal and vertical restraints, but in practice we make distinctions based on what economics tells us about the likelihood that restrictions will injure consumers." Anna Fornalczyk, Competition Law and Policy in Poland: A Welcome and Warning to International Business, Speech to Budapest Conference 7 (June, 1992) (transcript on file with author) [hereinafter Fornalczyk Speech]. For a critical analysis of articles 4.1 and 4.2 of the Polish Law, see Pittman, *supra* note 12, at 489.

or may result in the elimination or restriction of competition.[32] If the practice is in the public interest, however (particularly in the areas of manufacturing or technological or economic development), the Czech Ministry may grant an individual exemption.[33] Examples of prohibited agreements and practices include price fixing, limitation of production, market division, tying arrangements, concerted discrimination, and restriction of market access.[34] Similar to the Polish Law, the general prohibition against such practices applies regardless of the offender's market share.[35] Following EC competition law, the Czech Law establishes block exemptions for cartels based on conditions other than price, rationalization cartels, and *de minimis* cartels.[36] Also, the Czech Law authorizes the Czech Ministry to grant by decree additional block exemptions.[37] Nonetheless, agreements covered by the block exemptions still require approval from the authorities in order to become valid.[38]

The Slovak Law enumerates examples of monopolistic agreements and practices that are unlawful if they have as their "object or effect" the restriction of competition.[39] Prohibited agreements and practices include price fixing, limitation of production, market division, concerted discrimination, and tying arrangements.[40] While the law makes no distinction between horizontal and vertical agreements, the Office has stated that "vertical restraints will be evaluated more 'favourably' " under the new

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32. Czech Law, *supra* note 16, at art. 3. The sample list of agreements and practices "disturbing competition" encompasses both vertical and horizontal restraints.

33. Czech Law, *supra* note 16, at arts. 5(1)–5(2).

34. *Id.* at art. 3(2).

35. For a critical analysis of Article 3, see Pittman, *supra* note 12, at 488–89.

36. Czech Law, *supra* note 16, at art. 3(4).

37. The Czech Ministry may grant by decree block exemptions for agreements other than agreements involving price setting "if the restriction of competition, to which the block exemption would lead, is outweighed by the advantages for other participants in the market, namely for the consumer." Czech Law, *supra* note 16, at art. 6a. According to the legislative record of the November 1993 Amendments, *supra* note 22, the Ministry may exercise its new authority in the interest of flexibility in business relationships. Stanislav Bělehrádek, Minister, Czech Ministry of Economic Competition, Introduction to the November 1993 Amendments (on file with author).

38. The Czech Ministry may refuse its approval if the contract contains commitments to sell exclusively the goods covered by the agreement or goods identical or interchangeable with those covered by the agreement, or if the contract contains commitments to exclude certain entrepreneurs from the sale of goods or supply of services covered by the agreement and where the restrictions do not represent a significant limitation of market competition. Czech Law, *supra* note 16, at art. 5(3).

39. Slovak Law, *supra* note 16, at art. 3. This new "object or effect" test appears to be much clearer than the former "result or may result" test. *Compare id. with* Czech Law, *supra* note 16, at art. 3 (prohibiting practices that result or may result in the elimination or restriction of competition).

40. Slovak Law, *supra* note 16, at art. 3(2). As in the Polish and Czech Laws, the general prohibition against such practices applies regardless of market share. *Id.*

law.[41] The Slovak Law exempts agreements that fulfill the following criteria: improve production and distribution, promote technical or economic progress, do not impose indispensable restrictions on competition, and do not allow the parties to eliminate competition substantially.[42] With the prime goal of promoting efficiency, the new Slovak Law no longer allows the Slovak Office to grant individual exemptions.[43]

Similar to the Czech and Slovak Laws, the Hungarian Law provides examples of prohibited anticompetitive agreements including agreements on price fixing, market division, boycotts, discrimination against purchasers or sellers, limitation of production or distribution, and restriction of market access.[44] These agreements are unlawful if they result in the restriction or elimination of competition within Hungary, but they are not unlawful if the resulting restriction of competition "does not exceed the extent necessary" and if the advantages flowing from the agreement outweigh the disadvantages.[45] The Hungarian Law also sets out block exemptions for agreements eliminating abuse of a dominant market position and for agreements of "minor significance."[46]

Despite differences in structure, in practice each law's differing prohibition against monopolistic practices has a similar impact. Specifically, because the types of monopolistic practices undertaken by commercial entities in post-socialist economies are often similar,[47] methods

41. Letter from Milan Banas, Slovak Antimonopoly Office, to author 3 (July 25, 1994) (on file with author) [hereinafter Banas Letter].

42. Slovak Law, *supra* note 16, at art. 5(1). While the exemption is automatic, when a substantial restriction on competition is suspected, the Slovak Office has the right to require entrepreneurs to prove that an agreement meets all of the criteria. Banas Letter, *supra* note 41, at 2–3. Based on the proof supplied, the Slovak Office will assess whether the harm to competition resulting from the agreement would outweigh its advantages for consumer welfare. *Id.* The parties may apply to the Slovak Office for negative clearance of a particular agreement. *Id.* at 3.

43. *Id. Compare id. with* Czech Law, *supra* note 16, at arts. 5(1)–5(2) (allowing individual exemptions). According to the Slovak Office, the new Slovak Law is modeled on the efficiency concern embodied in American and French competition laws, as opposed to the fairness concern embodied in German and other Central European laws, including those of Poland, the Czech Republic, and Hungary. By focusing on efficiency and by exempting certain agreements (particularly vertical ones) from the costly notification requirement, the Slovak Office hopes to facilitate business activity and investment, particularly foreign investment. Telephone Interview with Milan Banas, Slovak Antimonopoly Office (Aug. 15, 1994).

44. Hungarian Law, *supra* note 16, at art. 14.

45. The Hungarian Law provides that favorable impacts on prices, product quality, delivery terms, distribution, or technological development are considered to be advantages and that a joint market share exceeding 30% is a disadvantage. *Id.* at art. 17.

46. The Hungarian Law allows parties to apply to the Hungarian Office for negative clearance of their agreement. *Id.* at art. 15.

47. For example, many investors, well aware of the post-communist states' dire need for investment, assume that tying arrangements and exclusive distributorships as a means of market entry will not be prohibited.

of implementing and enforcing the laws tend to be similar. Further, different prohibitions apply interchangeably because vague language defines each prohibition.[48] For instance, in one decision, the Polish Office prohibited a franchise agreement whereby the franchise (a newsstand) agreed to purchase certain products only from the franchisor. In its decision, the Office discussed onerous contract terms, restriction of market access, and tying arrangements, without stating any one of the prohibitions as the basis for its decision.[49] Instead, the Office simply explained that "in an economy undergoing transformation, it would be likely that other distributors would be somehow forced into liquidation."[50] In another decision, the Polish Office prohibited a sales agreement where the manufacturer conditioned completion of the contract on payment to its development fund, citing the prohibitions against onerous contract terms and tying arrangements interchangeably.[51]

B. *Market Dominance and Monopoly*[52]

All of the post-communist countries' laws prohibit anticompetitive practices of entities occupying dominant or monopolistic positions. These provisions are particularly important for two reasons. First, they provide a means of controlling the legacy of state monopolies left behind by central planning. Second, they alleviate the fear that privatization of state monopolies will result in the creation of new private monopolies. Under each of the laws, the competition authorities control the activities of firms with dominant and monopoly positions and monitor concentration of the market. Interestingly, unlike monopolistic practices, dominant and monopolistic positions are not assessed by a balancing test. Instead, given the degree of monopolization of the post-socialist economies, the laws

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48. Examples of such vague language include "onerous contract terms," "restriction of market access," and "discrimination."

49. Notably, the Polish Office did not look at whether or not other distributors could also enter into similar vertical agreements, which was likely to be the case given the small amount of capital required to establish a newsstand in Poland. Polish Antimonopoly Office (Wanda Hauzer), Franchising (unpublished, available from the Polish Antimonopoly Office) (analyzing RUCH franchise agreement).

50. The Polish Office also mentioned the franchisor's dominant market position in the decision. *Id.*

51. Antimonopoly Office v. Jelcz Vehicle Factory (1990) (unpublished, available from the Polish Antimonopoly Office).

52. This section will not discuss problems involving natural monopolies in the post-socialist economies, the restructuring of which has proven to be an enormous task for the competition authorities. For an in-depth analysis of possible solutions to natural monopoly problems, see JANUSZ A. ORDOVER & RUSSELL W. PITTMAN, COMPETITION POLICIES FOR NATURAL MONOPOLIES IN A DEVELOPING MARKET ECONOMY (U.S. Department of Justice Economic Analysis Group Discussion Paper No. EAG 92-9, Nov. 9, 1992).

absolutely prohibit firms with substantial market power from engaging in anticompetitive practices.

Pursuant to the Polish Law, an economic entity dominates either the national or local market when it does not encounter "significant competition;" it is rebuttably presumed to have a dominant position if its market share exceeds forty percent.[53] If an economic entity does not encounter any competition on the national or local market, it has a monopolistic position. While mere possession of a dominant or monopolistic position does not violate the Polish Law per se,[54] dominant economic entities must not inhibit "the formation of conditions indispensable for the creation or development of competition, divid[e] the market," or sell commodities in a discriminatory manner.[55] Monopolistic economic entities must not limit production, sales, or purchases of commodities, refrain from the sale of commodities in a manner leading to an increase in prices, or demand excessively high prices.[56]

Pursuant to the Czech Law, an economic entity has a dominant position if it does not encounter "substantial competition" and if it supplies the relevant market annually with at least thirty percent of identical, comparable, or "mutually commutable goods."[57] A dominant or monopolistic entity must report its position to the authorities "without delay."[58] Furthermore, it must not enforce disproportionate conditions on other entities, impose tying arrangements, discriminate against other entities, or limit or cease the production, sale, or technological development of goods.[59]

Pursuant to the Slovak Law, an economic entity has a dominant position if it does not encounter "substantial competition" on the market or if it has the ability to behave independently from other entities and to

53. Polish Law, *supra* note 16, at art. 2(7). The Polish Office increased the dominance threshold from a 30% threshold, which was perceived to be below Western standards, possibly because the Office recognized that much of the post-socialist economy surpassed the 30% threshold. Interview with Ewa Szymanska, Advisor to the President of the Polish Antimonopoly Office, in Warsaw, Poland (Feb. 18, 1993).

54. Polish Law, *supra* note 16, at art. 2. The Polish Office, however, maintains a register of all economic entities having a monopolistic position; such entities are required to notify the Ministry of Finance prior to increasing their prices. 1992 ANN. REP. ON ACTIVITY OF THE POLISH ANTIMONOPOLY OFFICE 13 [hereinafter POLAND 1992 REPORT].

55. Polish Law, *supra* note 16, at art. 5.

56. The Polish Law absolutely prohibits abuse of a monopolistic position. *Id.* at art. 7.

57. Czech Law, *supra* note 16, at arts. 9(1)–9(2). It is unclear in the Law whether the two conditions to having a dominant position, one qualitative and the other quantitative, must both be satisfied in order for an entity to be restrained. SKOCZNY, *supra* note 29, at 40.

58. Czech Law, *supra* note 16, at art. 9(1). The Czech Law does not define the term "monopoly."

59. Czech Law, *supra* note 16, at art. 9(3).

restrict competition.[60] An economic entity is presumed to have a dominant position if its share of demand for or supply of "identical or interchangeable" goods in the relevant market is at least forty percent.[61] An economic entity having a dominant position is prohibited from enforcing disproportionate conditions on or discriminating against other entities, from imposing typing arrangements, and from limiting or ceasing production, sale, or technological development of goods.[62] The new Slovak Law does not distinguish between a dominant position and a monopolistic position.[63]

The Hungarian Law defines a dominant economic entity[64] as one who is the only seller or purchaser of particular goods or whose share on the market exceeds thirty percent.[65] Dominant economic entities must not impose onerous contract terms, refuse to conclude a contract "without justification," exert undue influence on another economic entity, restrict market access or technological development, or unjustifiably injure a competitor.[66]

Because a large number of enterprises in the post-socialist economy occupy dominant or monopolistic positions, the competition authorities have had to allocate carefully their enforcement resources to only those firms posing a substantial threat to competition and economic reform. The authorities have also had to begin developing a means of defining and regulating state monopolies, such as energy, transport, and communications monopolies. As large, state-owned monopolies naturally disintegrate and methods of market measurement improve, however, the authorities will be able to pursue abuse of market dominance more aggressively.[67]

C. *Merger Control*

Since mergers occurred infrequently during the early stages of economic transition, merger control initially was not a prominent function

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60. Slovak Law, *supra* note 16, at art. 7(1).

61. *Id.* at 7(2). The Slovak Law defines relevant market as a "geographical and temporal equilibrium of supply and demand for goods" which in terms of product, geography and time are "identical or mutually interchangeable." *Id.* at 7(3). According to the Slovak Office, the new definition of relevant market is intended to be as broad as possible. Banas Letter, *supra* note 41, at 4.

62. Slovak Law, *supra* note 16, at arts. 7(4) and 7(5).

63. Slovak Law, *supra* note 16, at art. 7(1).

64. This is referred to in the Hungarian Law as a position of "economic superiority." Hungarian Law, *supra* note 16, at art. 21.

65. *Id.*

66. *Id.* at art. 20. The Hungarian Law does not contain separate provisions for entities having a monopoly position.

67. Further, since the associated countries also seek to fully integrate into the EC, they will eventually have to "adjust" all state monopolies pursuant to the EEC TREATY arts. 37 and 90.

of the competition authorities.[68] The importance and frequency of merger control is increasing, however, as the private sector grows and foreign investment increases. Unfortunately, investors often are confused and overcautious because the merger control provisions, similar to the other provisions of the antimonopoly laws, contain vague language. Further, since the provisions are applied based on the market impact of the merger, market definition is an absolute prerequisite to enforcement; however, the transitional nature of the post-socialist economies makes it extremely difficult for the competition authorities to arrive at an appropriate choice of market, whether local, regional, or national.[69] As a result, the merger control provisions of all of the laws have undergone continual refinement and redefinition.

Under the Polish Law, the Polish Office can prohibit the merger, transformation, or creation of an economic entity based on its impact on competitiveness.[70] The Office must be notified of the intention to merge or transform economic entities[71] and of the intention to create a new economic entity if the new entity could gain a dominant position on the market or if one of the parties forming the entity already has such a position.[72] Within two months of receiving such notification, the Office may issue a decision prohibiting the transaction if the entity would gain or maintain a dominant position on the market.[73] The power to prohibit transformations effectively links the Antimonopoly Law to the Polish Privatization Law and provides the Antimonopoly Office with a significant role in pre-privatization decisions.[74] Specifically, the merger control

68. Throughout this article, the term "merger control" will be defined to include any provisions of the antimonopoly law that require prior notification of a transaction, including prior notification of joint ventures, mergers, acquisitions, and establishment of economic entities.

69. *See, e.g.*, Polish Antimonopoly Office (Elzbieta Modzelewska), Case Report: Polish Antimonopoly Office v. District Milk Co-op in Radzyn Podlaski (1991) (unpublished, available from the Polish Antimonopoly Office) (illustrating severe difficulties experienced by the Polish Office in determining a relevant geographic market).

70. Polish Law, *supra* note 16, at art. 11(2).

71. Anyone acquiring 10%, 20%, 33%, 50%, 66%, 75% or more, respectively, of the voting shares of any publicly-traded Polish corporation must notify the Antimonopoly Office within seven days after such holding is obtained. Act of Mar. 22, 1991, on Public Trading in Securities and Trust Funds, Dz.U. 1991 No. 35, Item 55, art. 72 [hereinafter Polish Securities Law].

72. Polish Law, *supra* note 16, at art. 11(1).

73. *Id.* at art. 11(2). This decision obliges the registration court to refuse to enter the economic subject into the commercial register. *Id.* at art. 11(5).

74. However, this power only applies to privatization through transformation, whereby the assets of a state-owned enterprise are transferred to a newly established company, wholly owned by the Polish State Treasury, and the company's stock is then sold to private parties through either an auction, an initial stock offering, or a privately negotiated trade sale. It also does not apply to privatization through liquidation, whereby state-owned assets pass directly

provisions provide the Office with a means of preventing the creation of new private monopolies during the process of privatization.

The Czech Ministry has the power to control mergers and acquisitions where they result or may result in a limitation on economic competition.[75] If the entities have a joint market share of thirty percent, mergers and acquisitions are subject to control. Pursuant to the Czech Law, mergers and acquisitions require prior approval of the Czech Ministry; other concentrative agreements covered by the merger control provisions are void unless approved.[76] The Ministry uses a balancing test and must approve a merger or acquisition where the economic advantages from the merger outweigh its potential harm to competition.[77]

In contrast to the Czech Law, the new Slovak Law provides two alternative tests for merger control. Specifically, the Slovak Office has the power to control mergers and acquisitions in two cases: (1) where the entities have a combined turnover of at least 300 million Slovak crowns and two or more of the parties achieved a turnover in the preceding year of at least 100 million Slovak crowns each, or (2) where the joint market share of the entities exceeds twenty percent.[78] By establishing quantitative criteria, the new Slovak Law closely parallels EC law.[79] Pursuant to the Slovak Law, a merger or acquisition covered by the Law's merger control provisions must be notified to the Slovak Office.[80] For one month following notification, the entities are prohibited from taking any

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from control of the ministry originally responsible for them to private control by asset sale, contribution as capital into a newly created company, or lease. Law of July 13, 1990, on Privatization of State-Owned Enterprises, Dz. U. 1990 No. 51, Item 298, arts. 5, 8, 23, 37. In Poland, most privatizations have been carried out through liquidation. *A Review of Privatisation Methods*, ZYCIE GOSPODARCZE, No. 51/52, Dec. 20–27, 1992, *translated in* POLISH NEWS BULL., Dec. 22, 1992.

75. Czech Law, *supra* note 16, at art. 8a(1). The Czech Law applies to a wide range of activities through which one entity may acquire control over another, such as interlocking directorates or joint ventures. Czech Law, *supra* note 16, at art. 8(2).

76. Czech Law, *supra* note 16, at arts. 8a(3)(a) and 8a(3)(b).

77. Czech Law, *supra* note 16, at art. 8a(2). The Czech Ministry has only begun to define the factors it will use in weighing the advantages and detriments of a merger or acquisition. It has, however, deemed access to foreign technology and markets as an advantage in its initial rulings.

78. Slovak Law, *supra* note 16, at art. 9(1). Joint ventures that are "full-function" enterprises will also be subject to merger control if they satisfy either of the tests. Banas Letter, *supra* note 41, at 4.

79. EC law requires prior notification where the combined annual world sales of the parties are at least ECU 5 billion (approximately U.S. $6 billion), and their combined annual EC sales are at least ECU 250 million (approximately U.S. $300 million). Council Regulation (EEC) No. 4064/89 of Dec. 21, 1989, 1989 O.J. (L 395) 1.

80. The entities must notify the Slovak Office of the proposed merger or acquisition within 15 days from the date of announcement of a public bid, the date of conclusion of the relevant agreement, or the date of acquisition of control over an enterprise or its part, as applicable. Slovak Law, *supra* note 16, at art. 8(4).

measures connected with the proposed merger or acquisition that would "lead to irreversible changes."[81] The Slovak Office must prohibit a merger or acquisition that "creates or strengthens" a dominant position, unless the entities can prove that the economic advantages from the merger or acquisition outweigh its potential restriction on competition.[82]

Similar to the new Slovak Law, the Hungarian Law provides two alternative tests for merger control. Specifically, the Hungarian Office has the power to control mergers and acquisitions where the joint share of the parties would exceed thirty percent on the market, or where their joint total sales would exceed 10 billion Hungarian forints [approximately U.S. $120 million].[83] By establishing quantitative criteria, the Hungarian Law also parallels EC law.[84] Moreover, by limiting the category of mergers and acquisitions subject to prenotification to only those likely to weaken competition substantially, the Hungarian Law has alleviated the workflow of the Hungarian Office and reduced the potential for investor overcautiousness.[85]

D. *Demonopolization*

Each of the competition authorities has developed a policy to address large, state-protected monopolies. Only the Polish Office and the Czech Ministry, however, have the legal authority to order the division or liquidation of an entity, commonly referred to as the power of "demonopolization."[86] Specifically, the Polish Office has the power to order the division, liquidation or limitation of a dominant entity's economic activity if it permanently limits competition or conditions of its existence.[87] The Czech Ministry can request a court to order the division

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81. *Id.* at art. 9(6). Within one month of notification, the Office must approve or deny the proposed merger or acquisition or, alternatively, issue a preliminary decision suspending the merger or acquisition for a further three months. If the Office fails to issue a final decision within three months of a preliminary decision, the merger or acquisition is deemed to be approved. *Id.* at 10(1).

82. *Id.* at art. 10(2).

83. Hungarian Law, *supra* note 16, at arts. 23–27.

84. See *supra* note 79 and accompanying text.

85. In the same vein, smaller mergers and acquisitions are not burdened by the prenotification requirement. RUSSELL PITTMAN, MERGER LAW IN CENTRAL AND EASTERN EUROPE (U.S. Department of Justice Economic Analysis Group Discussion Paper No. EAG 92-2, Jan. 9, 1992).

86. Polish Law, *supra* note 16, at art. 12; Czech Law, *supra* note 16, at art. 11(2).

87. Polish Law, *supra* note 16, at art. 12. Pursuant to two alternative criteria developed by the Polish Office, an entity "permanently limits competition" where either

> a) the size of the assets and degree of concentration of the structure of the economic entity creates a barrier to other economic entities taking up activity that would enable them to compete seriously with the given entity, for entry into a given market would

or transfer of one or more parts of an entity whose dominant or monopoly position seriously restricts, distorts, or prevents competition.[88]

The power of demonopolization comprises an extremely forceful tool for controlling and eliminating monopolies. Concurrently, however, this power potentially allows the Polish Office and the Czech Ministry to control market behavior, which is precisely the type of control that the post-communist governments are seeking to avoid. This power must be applied cautiously, therefore, in order for the competition authorities accurately to apportion the market among free competition, oligopoly, natural monopoly, and public property.[89] Although the work of the competition authorities of Slovakia and Hungary would be greatly facilitated by their acquisition of the power to divide, liquidate, or limit the activity of monopolies, it has proven difficult to convince the post-communist governments that such power will not be misapplied or abused, intentionally or otherwise.[90]

II. ENFORCEMENT POWERS

Established during the advanced stages of disintegration of central planning, the competition authorities play a larger and more ambitious role than their counterparts in market-based countries. These authorities must maintain and promote competition during the process of privatization by ensuring that state-owned monopolies do not simply become private ones.[91] The authorities must also ensure that as the private sector begins to function it will do so in a competitive manner. Armed with far-reaching enforcement powers, the authorities must balance full and

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> require too large investments, or
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> b) the given economic entity has a 'firmly established' market position through market contacts that entities just entering the market would have to establish.

Polish Antimonopoly Office, *supra* note 17, at 23.

88. Czech Law, *supra* note 16, at art. 11(2).

89. 1994 ANTIMONOPOLY OFFICE OF POLAND BULL. 13 (Preview Issue) [hereinafter POLAND BULL.].

90. Telephone Interview with Danica Paroulkova, Director of the Secretariat, Slovak Antimonopoly Office (Apr. 30, 1993); Telephone Interview with Jozsef Sarai, Coordinator for International Affairs, Hungarian Office for Economic Competition (Apr. 29, 1993).

91. As stated by British Member of Parliament John Redwood,

> [w]ithout careful handling, the problem of monopoly can bring privatisation into disrepute. . . . A monopoly transferred to the private sector without controls could easily fall into the hands of those who not only wish to perpetuate bad service and high prices but also to exploit the pricing power the monopoly enjoys to make even bigger profits.

OLIVER LETWIN, PRIVATISING THE WORLD: A STUDY OF INTERNATIONAL PRIVATISATION IN THEORY AND PRACTICE xv (1988).

aggressive enforcement against the practical limitations that stem from recession, double-digit inflation, political instability, and strong pressures from special interest groups.[92] Such limitations threaten the continuity of the economic reforms, despite the governments' proven firm resolve in seeing the reforms through to completion.[93] As economic reform programs become irreversible, however, the competition authorities are likely to enforce the competition laws in a more consistent, efficient, and aggressive manner.[94]

All of the antimonopoly laws facilitate the competition authorities' ability to monitor the market by obliging economic entities to provide assistance to the authorities as they perform their enforcement and control functions. Certain officials of the competition authorities have the power to enter the premises of an economic entity, inspect its documents, and compel disclosure of relevant information.[95]

A. *Available Enforcement Measures*

In connection with the competition authorities' discretion to deem practices as anticompetitive, all of the authorities have a wide choice of measures available to counteract monopolistic practices. The Polish Office may order practices to be ceased or prices to be lowered and may prohibit the implementation of an agreement.[96] The Office may also impose a fine of up to fifteen percent of the after-tax profit of an entity for the preceding year, decreased by the amount of turnover tax paid.[97] While decisions of the Office may be appealed to the Antimonopoly Court, the Office may declare its decision to be immediately effective.[98]

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92. For example, the Polish Office explains how the Office "declined to impose fines on the companies, considering the poor financial situation of the cartel participants." POLAND 1992 REPORT, *supra* note 54, at 5.

93. *See, e.g.*, Jane Perlez, *Leftist Leader Is Named Prime Minister of Poland*, N.Y. TIMES INT'L, Oct. 15, 1993, at A6. The Polish Office in particular has added the struggle against protectionism and special interests to its list of principal tasks. *Id.*

94. As stated by the Slovak Office, "[c]onsistent application of the competition protection act can enhance the progress of fair competition and by this way to secure freedom for economic competition." SLOVAK 1992 REPORT, *supra* note 28, at 1.

95. Polish Law, *supra* note 16, at arts. 19–20; Czech Law, *supra* note 16, at art. 11(i); Slovak Law, *supra* note 16, at art. 11(1); Hungarian Law, *supra* note 16, at art. 36.

96. Polish Law, *supra* note 16, at arts. 8–9. Agreements in violation of the prohibitions against monopolistic practices are invalid by law, in whole or in part. *Id.* at art. 8.2. The power to order an entity to lower its prices is equivalent to the price controls that existed under central planning.

97. *Id.* at art. 14. This sanction can be criticized as being ineffective because often entities, especially state-owned entities, do not have after-tax profit. A more effective sanction would be to look to total turnover for the preceding year, in accordance with EC law.

98. Polish Law, *supra* note 16, at art. 10. The decisions of the Antimonopoly Court are final. *Id.* at art. 25(4). The Antimonopoly Court was created in 1990 as a special court for cases

The Czech Ministry may order that any "irregularities" in activity with respect to the Czech Law be removed and may issue an injunction against prohibited activity upon commencement of proceedings before the Ministry.[99] The Czech Ministry may impose a fine of up to ten percent of an entity's turnover for the preceding year; such fine must at least equal the amount of profit gained by the entity from breaching the law.[100] Decisions of the Czech Ministry may be appealed to regular Czech courts.[101]

The Slovak Office may deem anticompetitive agreements to be void, order a dominant entity to refrain from abusing its position, and issue an injunction against prohibited activity upon commencement of proceedings before the Office.[102] The Slovak Office may impose a fine of up to ten percent of an entity's turnover for the preceding year; such fine must at least equal the amount of profit gained by the entity from breaching the law.[103] Decisions of the Slovak Office may be appealed to regular Slovak courts.[104]

In comparison with the other laws, the choice of enforcement measures available to the Hungarian Office is innovative. After a complaint is filed with the Office, an expert group examines the case and prepares a report. Three members of the Office's Competition Council examine the report and hold a hearing on the matter.[105] The Council has the power to confirm a violation of the law, prohibit continuation of an illegal practice, impose a fine,[106] or request "additional measures" as necessary.[107]

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involving monopolistic practices. Minister of Justice Decree of Apr. 13, 1990, regarding the Creation of the Antimonopoly Court, Dz.U. 1990 No. 27, Item 157.

99. Czech Law, *supra* note 16, at arts. 11(1)(e) and 11(1)(g).

100. *Id.* at art. 14(4). The Czech Ministry may also impose fines on an entity of 300,000 Czech crowns for failing to provide information to the Ministry, 100,000 Czech crowns for obstructing or failing to attend oral proceedings, and 1,000,000 Czech crowns for failing to comply with a decision of the Ministry. *Id.* at arts. 14(1)–(3). The Czech Law explicitly "does not exclude criminal liability" in addition to any fine imposed. *Id.* at art. 14(5).

101. *Id.* at art. 12(8).

102. Slovak Law, *supra* note 16, at arts. 11(1) and 12(6).

103. *Id.* at art. 14(1). The Slovak Office may also impose fines on an entity of 1 million Slovak crowns for failing to provide information to the Office or failing to comply with a decision of the Office and 100,000 Slovak crowns for obstructing or failing to attend oral proceedings. *Id.* at arts. 14(2)–(4).

104. *Id.* at art. 13(1).

105. The Vice President of the Hungarian Office, who serves as President of the Competition Council, selects a three member Competition Council for each case. The Competition Council is comprised of three employees of the Office, two of whom are lawyers or judges and one of whom is an economist. Telephone Interview with Gabor Szoboszlay, Hungarian Office for Economic Competition (Apr. 8, 1993).

106. A fine may be as much as double the amount of the financial advantage gained or damage caused by the wrongdoing. Hungarian Law, *supra* note 16, at art. 48(1).

107. *Id.* at art. 43. Pursuant to the Hungarian Law, parties planning to conclude an

Decisions of the Competition Council may be appealed to the Court of First Instance.[108]

B. *Enforcement Focus*

Under each country's antimonopoly law, the competition authority plays a crucial role in the creation, development, and protection of competition on the market. Increasingly, the competition authorities are assuming more active roles in the development of the emerging market economies by becoming more deeply involved in privatization and by establishing measures aimed at demonopolization. Unfortunately, some of the more painful effects of economic reform, such as rising unemployment and inflation, create political pressures that hinder full and aggressive enforcement in both of these areas. Given the similar nature of the transitions ongoing in each country and their synchronous pursuits of full EU membership, the problems faced by each authority share several features. Nevertheless, constrained by limited resources, each of their enforcement efforts has developed a distinct focus.

The Polish enforcement efforts are part of the overall policy of the Polish Office to develop competition and to protect enterprises and consumers against "anticompetitive practices."[109] The Office has focused most of its efforts on cases involving monopolistic practices, particularly those involving imposition of onerous contract terms and tying arrangements, although it has begun to devote a larger percentage of its enforcement efforts to the prohibition against abuse of a dominant or monopolistic position.[110] The Office has used the prohibition against imposition of onerous contract terms to combat monopolies and monopolistic behavior without the need for an investigation into market share.[111] The Office has

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agreement may request from the Hungarian Office a preliminary decision that "the contemplated agreement is not prohibited" or that it falls under one of the exemptions of the law. Once the Hungarian Office has issued such a decision, it may not later challenge the agreement or any activities undertaken by the parties pursuant to the agreement. *Id.* at art. 18.

108. Michael Reynolds, *Taking on the Competition*, INT'L FIN. L. REV., Oct. 1992, at 9, 9.

109. 1991 ANN. REP. OF POLAND TO THE OECD COMMITTEE ON COMPETITION LAW AND POLICY 5 (May 1992) [hereinafter POLAND OECD REPORT]. *See also*, POLISH ANTIMONOPOLY OFFICE, COMPETITION DEVELOPMENT PROJECT (1991–1993).

110. However, 20% of the cases involved an enterprise having a dominant or monopolistic position. POLAND OECD REPORT, *supra* note 109, at 5. The Polish Office only recently has begun to apply its power of demonopolization, and from 1991 to 1993 the Office initiated demonopolization proceedings in only four sectors: the grain-milling, wood, seed, and meat sectors. POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 23–24.

111. Thus, one sees the Polish Office charging monopolies with the universal prohibition against onerous contract terms, judged by a test of reasonableness, even though the law embodies per se illegality for anticompetitive practices of monopolies. This has been especially

relied on this approach where an investigation into market share has proven extremely difficult or even impossible, a situation not uncommon in the post-socialist economies where barriers to market entry are constantly changing, accounting systems are poor and inaccurate, and market data is generally hard to obtain. The prohibition against onerous contract terms has often been the Polish Office's only means for combatting monopolistic practices of state-protected monopolies.[112]

The Czech enforcement efforts stem from the desire of the Czech Ministry to pursue demonopolization while simultaneously preventing an increase in the concentration on the market.[113] In the absence of the express power of demonopolization,[114] the Czech Ministry has focused most of its enforcement efforts on combatting abuse of a dominant or monopolistic position.[115] In particular, the Ministry has focused on abuse of a dominant position in the context of privatization by analyzing the post-privatization competitiveness of state-owned entities undergoing privatization.[116] At the same time, the Ministry has begun to emphasize merger control as a means to prevent reconcentration of the market.[117]

Similar to the Czech Ministry, the Slovak Office is pursuing demonopolization and deconcentration of the market while having no

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true for the Polish telecommunications, transportation, and energy monopolies. *See, e.g.*, Polish Antimonopoly Office (Krzysztof Filinski), Case Report: Polish Antimonopoly Office v. Centrala Produktow Naftowych PP (Commercial Centre for Oil Industry Enterprise) (1992) (unpublished, available from the Polish Antimonopoly Office); Polish Antimonopoly Office (Zofia Wlodarczyk), Case Report: Polish Antimonopoly Office v. Telekomunikacja Polska (Polish Telecommunications) (1993) (unpublished, available from the Polish Antimonopoly Office).

112. *See* cases cited *supra* note 111.

113. As stated in the Economic Bulletin of the Czech Ministry, "[t]he activities of the office focus on three areas of the protection of competition [abuse of dominant or monopoly position, merger control, and cartel agreements], all three of decisive importance, and generally accepted by the European Community." 1992 CZECH OFFICE FOR ECON. COMP. ECON. BULL. 3 [hereinafter CZECH BULL.].

114. While the Czech Ministry acquired the power of demonopolization pursuant to the November 1993 Amendments, the Ministry is likely, following the Polish example, initially to apply this power with extreme caution, if at all. *See supra*, note 110 (discussing the Polish example).

115. In the years 1991 and 1992, the Czech Ministry dealt with 181 cases involving abuse of dominant or monopolistic position, 39 cases involving mergers, and 29 involving cartel agreements. Czech Ministry of Economic Competition, Review of Czech Ministry of Economic Competition Decisions July 1991 through December 1992 (document on file with author).

116. As explained by one representative of the Czech Ministry, "we have had the largest number of cases stemming from abuse of dominant position because it is connected to privatization. [The Czech Republic] has monopolies from former times and their activities constitute abuse because they have no competition." Telephone Interview with Ivo Bezecny, Office of the Minister, Czech Ministry of Economic Competition (Sept. 1, 1993).

117. As further described by the representative, "mergers are also important to the Ministry because the Ministry prefers division over joining." *Id.*

express power to liquidate or divide economic entities.[118] Thus, the Slovak Office focuses much of its enforcement efforts on cases involving abuse of a dominant position, particularly those involving restriction of market access and tying arrangements.[119] Simultaneously, however, the Slovak Office has begun to focus on monopolistic practices and, in particular, on cases involving horizontal agreements either to fix prices or to restrict market access.[120]

The Hungarian Office also has focused most of its efforts on cases involving abuse of a dominant position and, in particular, on cases involving discrimination and restriction of market access by entities holding such a position.[121] According to the Hungarian Office, the number of cartel and merger control cases has remained small because of the continually evolving Hungarian economic situation and because of the extremely high rate of market entry and exit, both of which make it unfavorable or even impossible for firms to coordinate their behavior.[122] Similarly, since both newly established enterprises and enterprises that were divided during the process of privatization tend to be small in size, the scale of mergers has been relatively modest.[123] Nonetheless, as the number and size of new enterprises increases, the Office anticipates the emergence of a new market structure in Hungary that will allow viable

118. According to the Slovak Office, "[t]he new tendency in 1992, compared with last year, is that the abuse of monopolistic and dominant positions is growing as evidenced by the amount of complaints received by the Office from outside." SLOVAK 1992 REPORT, *supra* note 28, at 3.

119. 1991 SLOVAK ANTIMONOPOLY OFFICE ANN. REP. 17 [hereinafter SLOVAK 1991 REPORT].

120. Whereas abuse of dominant position cases accounted for 68 percent of the cases of the Slovak Office in 1991, cartel agreement cases accounted for 62 percent of the cases of the Office in 1992. SLOVAK 1992 REPORT, *supra* note 28, at 6–7, 21. In the first six months of 1993, however, the highest number of cases of the Slovak Office once again involved abuse of a dominant position. *Competition Policy*, FIN. TIMES E. EUR. BUS. L., Jan. 1994, at 9.

121. This statistic excludes cases focusing on unfair competition, in particular false advertising, which actually constitute the largest number of cases of the Hungarian Office. 1993 OECD ANN. REP. ON THE 1992 ACTIVITIES OF THE HUNGARIAN COMPETITION AUTHORITIES AND THE EXPERIENCE GAINED DURING THE APPLICATION OF THE COMPETITION ACT 9–10, app. 1 [hereinafter HUNGARY OECD REPORT].

122. As explained by one representative of the Hungarian Office, "when one's partners are always changing, it is extremely difficult to find a partner with whom one may enter into cartel practices." Telephone Interview with Jozsef Sarai, Coordinator for International Affairs, Hungarian Office for Economic Competition (Aug. 26, 1993).

123. Further, although many joint ventures between foreign investors and state-owned enterprises have been significant in size, the Hungarian Law does not regard foreign investors as Hungarian "market actors" since they are not registered in Hungary. Thus, much investment activity falls outside of the scope of the Law. However, a foreign investor that acquires a Hungarian enterprise and then, as a registered Hungarian entity, acquires a second Hungarian enterprise is regarded as a "market actor" under the law. HUNGARY OECD REPORT, *supra* note 121, at 14–15.

firms to engage in cartel practices and mergers. Consequently, the Office expects the number of cartel and merger control cases to increase.[124]

Each of these antimonopoly laws was designed to accommodate the special characteristics of the post-socialist economies, such as the high degree of monopolization and severe problems of market measurement. The vague language of the laws and the discretion of the competition authorities freely to shift their enforcement efforts comprise means of introducing and protecting competition in these highly transitional economies. While essential during the initial stages of economic transformation, such means create substantial uncertainty and unpredictability for market participants as to the decisions and direction of the competition authorities. Aware of this situation, the competition authorities currently are striving to balance their enforcement efforts more evenly between monopolistic practices, abuse of a dominant position, merger control, and demonopolization. As the economic transitions draw nearer to completion, the competition authorities will need to clarify the laws through consistent decisions and enforcement.

The above discussion brings us to the present stage of development of competition policy in the associated countries and the enforcement focus of the competition authorities. Having examined the internal competition regimes of each country, this article now examines some of the external factors that are shaping these regimes.

III. HARMONIZATION: THE EUROPE AGREEMENTS

Poland, the Czech Republic, Slovakia, and Hungary are all in the process of becoming Associate Members of the EU pursuant to nearly identical Europe Agreements.[125] In return for the possibility of becoming full EU member states upon expiration of the ten-year Agreements, these countries must open up their markets to the EU and harmonize their laws with EU law, including EC competition and trade law.[126] The commercial portions of the Europe Agreements, referred to as the Interim

124. *Id.*

125. Romania and Bulgaria signed similar Europe Agreements with the EC on Feb. 1, 1993, and Mar. 8, 1993, respectively. Telephone Interview with Klaus Schneider, Deputy Head of Unit, External Economic Relations, Relations With Russia, European Commission Directorate General 1 (Feb. 25, 1993). Russia and Belarus, and all of the other former Soviet republics apart from the Baltic States, are negotiating "Partnership Agreements" with the EC, which are structurally similar to the Europe Agreements but do not embody the potential for membership, the eventual creation of a free trade zone, or harmonization of their national laws with EC commercial law. *Id.*

126. Poland Europe Agreement, *supra* note 113, at art. 69; Czech Republic Europe Agreement, *supra* note 14, at art. 70; Slovakia Europe Agreement, *supra* note 14, at art. 70; Hungary Europe Agreement, *supra* note 113, at art. 68.

Agreements, were entered into effect in March 1992 and govern free movement of goods, current account payments, and competition between each of the associated countries and the EU.[127]

The Europe Agreements link many areas of previously domestic policy and decision-making of the associated countries to approval by the EU.[128] In addition to more concrete linkages, the Europe Agreements require the associated countries and the EU to undertake economic, cultural, and financial cooperation,[129] and they implement a framework for regular political dialogue between the associated countries and the EU.[130] While the Europe Agreements contain provisions addressing freedom of establishment,[131] fair competition,[132] labor force flow, balance of

127. Interim Agreement with Poland, 1992 O.J. (L 114) 2 [hereinafter Interim Agreement with Poland]; Interim Agreement with the Czech and Slovak Federal Republic, 1992 O.J. (L 115) 2 [hereinafter Interim Agreement with Czech and Slovak Federal Republic]; Interim Agreement with Hungary, 1992 O.J. (L 116) 2 [hereinafter Interim Agreement with Hungary]. Despite the defederation of the Czech and Slovak Federal Republic, the Interim Agreement between the EC and the Czech and Slovak Federal Republic remains in force with minor amendments to the provisions regarding the allocation of quotas between the Czech Republic and Slovakia. Telephone Interview with Dusan Ondrejicka, Director of the Phare Coordination Office, Bratislava, Slovakia (Dec. 10, 1993).

128. For an analysis of the legal basis, structure, and objectives of the Europe Agreements, see Marc Maresceau, The Association Agreements Between the European Community and Hungary, Poland and the Czech and Slovak Federal Republic (unpublished draft conference paper presented at the ECSA-Est conference on Sept. 14–15, 1994, in Brussels, Belgium).

129. Stated areas of cooperation include: investment promotion and protection, agricultural and industrial standards, science and technology, energy and environment, transport, telecommunications, banking, insurance and financial services, tourism, and small and medium-sized enterprises. The EC is to assist the associated countries in restructuring their economies and in developing their monetary policies, including the introduction of full convertibility of their national currencies and the approximation of their monetary policies with the European Monetary System (EMS). Poland Europe Agreement, *supra* note 14, at arts. 71–101; Czech Republic Europe Agreement, *supra* note 14, at arts. 72–103; Slovakia Europe Agreement, *supra* note 14, at arts. 72–103; Hungary Europe Agreement, *supra* note 14, at arts. 70–103.

130. The preamble to each Interim Agreement states that "the aim of the Europe Agreement is to provide an appropriate framework for political dialogue" between the EC and each associated country. Interim Agreement with Poland, *supra* note 127, at preamble; Interim Agreement with Czech and Slovak Federal Republic, *supra* note 127, at preamble; Interim Agreement with Hungary, *supra* note 127, at preamble.

131. Freedom of establishment means that companies organized in one member state must establish and maintain businesses in another member state under conditions no less favorable than those that the host country law accords to its own nationals and companies. Steven M. Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 LAW & POL'Y INT'L BUS. 293, 295–96 (1982). *See also* Clark D. Stith, *Federalism and Company Law: A "Race to the Bottom" in the European Community*, 79 GEO. L.J. 1581 (1991). To be achieved through harmonization, freedom of establishment was one of the main objectives of the momentous "EC 1992" program, pursuant to which the EC was required to take all measures necessary to establish the internal EC market by December 31, 1992. Claus-Dieter Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects*, 11 MICH. J. INT'L L. 1097, 1103 (1990).

132. Similar to the concept of antitrust legislation in the United States, the "fair competition" provisions deem the following practices to be "incompatible with the proper functioning" of the Association Agreements: (i) agreements between undertakings, decisions by associations

payments, and eventual free movement of goods,[133] services, capital, and individuals, they do not establish a true common market between the associated countries and the EU because they contain important limitations on the movement of persons, services, and capital.[134] Specifically, the movement of persons is limited to certain "key personnel" of companies established in the EU by each associated country pursuant to the freedom of establishment provisions.[135] Also, the freedom to establish companies on equal terms does not apply to air transport, inland waterway, or maritime cabotage transport services.[136]

In the legal sphere, the Europe Agreements require the associated countries to strive for complete harmonization within ten years of their respective national laws with EU law and evolving EU legal standards.[137]

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of undertakings, and concerted practices between undertakings having as their object or effect the prevention, restriction, or distortion of competition; (ii) abuse by one or more undertakings of a dominant position in the EC or in [the associated country]; and (iii) public aid which distorts or threatens to distort competition. Poland Europe Agreement, *supra* note 113, at art. 63; Czech Republic Europe Agreement, *supra* note 14, at art. 64; Slovakia Europe Agreement, *supra* note 14, at art. 64; Hungary Europe Agreement, *supra* note 14, at art. 62. For an analysis of competition policy as an instrument for assisting the former Soviet bloc nations to establish market economies, see Fox & Ordover, *supra* note 3.

133. The Interim Agreements require the EC to lift immediately duties on the majority of Polish, Czech, Slovak, and Hungarian goods, gradually lift duties on specific goods such as textiles and steel, and gradually abolish import quotas (effective immediately for steel import quotas). Poland, the Czech Republic, Slovakia, and Hungary must each lift duties on approximately 27% of EC imports, primarily raw materials, semi-finished products, and capital equipment, and must gradually lower the remaining duties by 20% each year from 1995. Eventually, each of the associated countries will create a free trade zone with the EC, excluding food products. Hungary has nine years, the Czech Republic and Slovakia each have nine years, and Poland has seven years to abolish import duties on imports from the EC. Interim Agreement with Poland, *supra* note 127, at art. 4(3); Interim Agreement with Czech and Slovak Federal Republic, *supra* note 127, at art. 4(4); Interim Agreement with Hungary, *supra* note 127, at art. 4(3).

134. Poland Europe Agreement, *supra* note 14, at arts. 37–43, 55–57, and 59–62; Czech Republic Europe Agreement, *supra* note 14, at arts. 38–44, 56–58, and 60–63; Slovakia Europe Agreement, *supra* note 14, at arts. 38–44, 56–58, and 60–63; Hungary Europe Agreement, *supra* note 14, at arts. 37–43, 55–57, and 59–61.

135. Poland Europe Agreement, *supra* note 14, at art. 52; Czech Republic Europe Agreement, *supra* note 14, at art. 53; Slovakia Europe Agreement, *supra* note 14, at art. 53; Hungary Europe Agreement, *supra* note 14, at art. 52.

136. While the EC member states must grant full freedom of establishment to Polish, Czech, Slovak, and Hungarian companies, exclusive of non-"key" employees, the associated countries are required to grant freedom of establishment only gradually. Poland Europe Agreement, *supra* note 14, at art. 44; Czech Republic Europe Agreement, *supra* note 14, at art. 45; Slovakia Europe Agreement, *supra* note 14, at art. 45; Hungary Europe Agreement, *supra* note 14, at art. 44.

137. The Europe Agreements state that

> [t]he approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.

The Europe Agreements expressly recognize that, for each country's economic integration into the community, "the *major precondition*" in the case of Poland and Hungary and "an *important condition*" in the case of the Czech Republic and Slovakia "is the approximation of that country's existing and future legislation to that of the Community."[138] Although the final goal of harmonization is the successful admission of the associated countries into the EU as full member states, from the point of view of competition, several of the interim goals are equally important. Specifically, harmonization with EU law should provide a stable legislative framework for economic reforms such as privatization of state-owned industry[139] and genuine encouragement of foreign investment.[140] Further, increased commercial activity and industrial cooperation with the EU should increase competitiveness in each of the associated countries.[141]

The Europe Agreements provide a timetable for implementation,[142] comprised of a maximum transition period of ten years that is divided into two successive stages of five years in principle.[143] The first stage commences on the date the Europe Agreements enter into force.[144] During the final year of the first stage, the respective "Association Councils" to

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Poland Europe Agreement, *supra* note 14, at art. 69; Czech Republic Europe Agreement, *supra* note 14, at art. 70; Slovakia Europe Agreements, *supra* note 14, at art. 70; Hungary Europe Agreement, *supra* note 14, at art. 68.

138. Poland Europe Agreement, *supra* note 14, at art. 68 (emphasis added); Czech Republic Europe Agreement, *supra* note 14, at art. 69 (emphasis added); Slovakia Europe Agreement, *supra* note 14, at art. 69 (emphasis added); Hungary Europe Agreement, *supra* note 14, at art. 67 (emphasis added).

139. Each of the associated countries has designed a variety of privatization programs to accommodate the wide range of state-owned enterprises inherited from the centrally planned economy.

140. Brzezinski, *supra* note 26, at 129.

141. DOLAN, *supra* note 1, at 105–08, 139–157, 390–398.

142. This timetable applies to the Europe Agreements in their entirety with the exception of those provisions governing the free movement of goods. Poland Europe Agreement, *supra* note 14, at art. 6(4); Czech Republic Europe Agreement, *supra* note 14, at art. 7(4); Slovakia Europe Agreement, *supra* note 14, at art. 7(4); Hungary Europe Agreement, *supra* note 14, at art. 6(4). The process of integration into the EC is spread over several years so that the aspiring member states, such as Poland, the Czech Republic, Slovakia and Hungary, may sufficiently adjust and improve their economies and competitive positions in order to adopt the rules of the EC. Romana Sadurska, *Reshaping Europe—Or "How to Keep Poor Cousins in (Their) Home": A Comment on the Transformation of Europe*, 100 YALE L.J. 2501, 2505 (1991).

143. Poland Europe Agreement, *supra* note 14, at art. 6(1); Czech Republic Europe Agreement, *supra* note 14, at art. 7(1); Slovakia Europe Agreement, *supra* note 14, at art. 7(1); Hungary Europe Agreement, *supra* note 14, at art. 6(1). Eschewing the notion of "gradual" integration, Poland, the Czech Republic, and Hungary are pressing for imminent integration. *See, e.g., Czechs Want Trade Link to EU Now*, INT'L HERALD TRIB., Mar. 11, 1994, at 2; *Hungary and Poland Bang on EU's Opening Door*, INT'L HERALD TRIB., Mar. 8, 1994, at 2.

144. Poland Europe Agreement, *supra* note 14, at art. 6(1); Czech Republic Europe Agreement, *supra* note 14, at art. 7(1); Slovakia Europe Agreement, *supra* note 14, at art. 7(1); Hungary Europe Agreement, *supra* note 14, at art. 6(1).

be established under each Agreement[145] must decide upon the transition to the second stage, including any modifications required for its implementation.[146] The Association Councils will also periodically examine the associated countries' progress toward implementation of the respective Agreements, creation of market economies, and harmonization of law.[147] In light of decisions made at the EC Copenhagen summit in June 1993, the actual time frame for implementation of the Agreements may be accelerated.[148]

The Europe Agreements directly incorporate the competition provisions of the Treaty of Rome, including Articles 85, 86, and 92, as well as the methods used by the EC to interpret and enforce them.[149]

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145. Each Agreement provides for the establishment of an Association Council, comprised of members of the European Council of Ministers, the European Commission, and the respective national governments, to supervise implementation of the Agreement. Poland Europe Agreement, *supra* note 14, at arts. 102–110; Czech Republic Europe Agreement, *supra* note 14, at arts. 104–112; Slovakia Europe Agreement, *supra* note 14, at arts. 104–112; Hungary Europe Agreement, *supra* note 14, at arts. 104–112.

146. Poland Europe Agreement, *supra* note 14, at art. 6(3); Czech Republic Europe Agreement, *supra* note 14, at art. 7(3); Slovakia Europe Agreement, *supra* note 14, at art. 7(3); Hungary Europe Agreement, *supra* note 14, at art. 6(3). The harmonization provisions of the Europe Agreement are governed by the two-stage timetable, with the exception of intellectual property law. Specifically, the Europe Agreements require the associated countries to provide within five years "a level of protection similar to that existing in the Community, including comparable means of enforcing such rights." Poland Europe Agreement, *supra* note 14, at art. 66; Czech Republic Europe Agreement, *supra* note 14, at art. 67; Slovakia Europe Agreement, *supra* note 14, at art. 67; Hungary Europe Agreement, *supra* note 14, at art. 65.

147. Poland Europe Agreement, *supra* note 14, at art. 6(2); Czech Republic Europe Agreement, *supra* note 14, at art. 7(2); Slovakia Europe Agreement, *supra* note 14, at art. 7(2); Hungary Europe Agreement, *supra* note 14, at art. 6(2).

148. Although the EC did not establish a date at the summit for the "mid-term review" of the Europe Agreements, it did state in its summit conclusions that

> '[t]he European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.'

Charles Goldsmith, *EC Summit Reaches Easy Accord on Steps To Strengthen Ties With Eastern Europe*, WALL ST. J. EUR., June 23, 1993, at 2.

149. Poland Europe Agreement, *supra* note 14, at arts. 63–67; Czech Republic Europe Agreement, *supra* note 14, at arts. 64–68; Slovakia Europe Agreement, *supra* note 14, at arts. 64–68; Hungary Europe Agreement, *supra* note 14, at arts. 62–66. The Agreements also contain prohibitions against: (i) preferential treatment of so-called public undertakings, Poland Europe Agreement, *supra* note 14, at art. 65; Czech Republic Europe Agreement, *supra* note 14, at art. 66; Slovakia Europe Agreement, *supra* note 14, at art. 66; Hungary Europe Agreement, *supra* note 14, at art. 64; (ii) prohibitions against dumping and other non-tariff barriers, Poland Europe Agreement, *supra* note 14, at arts. 29 and 35; Czech Republic Europe Agreement, *supra* note 14, at arts. 30 and 36; Slovakia Europe Agreement, *supra* note 14, at arts. 30 and 36; Hungary Europe Agreement, *supra* note 14, at arts. 29 and 35; (iii) prohibitions against discrimination in the award of public contracts, Poland Europe Agreement, *supra* note 14, at art. 67; Czech Republic Europe Agreement, *supra* note 14, at art. 68; Slovakia Europe Agreement, *supra* note 14, at art. 68; Hungary Europe Agreement, *supra* note 14, at art. 66; and (iv)

Importantly, the Europe Agreements mark the first time that the EU has included a competition section in an association agreement, thus greatly augmenting the role of the competition authorities in the associated countries. The Europe Agreements explicitly state that any practice contrary to the competition provisions of the Agreements shall be assessed on the basis of the rules of Articles 85, 86, and 92 of the Treaty of Rome.[150] Nonetheless, under the Europe Agreements, two important "exceptions" to the rules apply to the associated countries.

The first exemption is that the provisions do not have direct effect; rather, the Association Councils are to adopt the necessary rules for their implementation and enforcement, referred to as the "implementation measures."[151] Until such time as the implementation measures are adopted, the EU may apply the competition provisions of the Treaty of Rome under the "effects doctrine" articulated in the renowned *Wood pulp* case.[152] In the *Wood pulp* case, the European Court of Justice held that the European Commission[153] has extraterritorial competence to apply Articles 85 and 86 of the Treaty of Rome to an agreement made outside the EU by foreigners, if the agreement is implemented in the EU and regardless of whether the foreigners conduct activity within the EU.[154] Polish, Czech, Slovak, and Hungarian companies trading with the EU therefore may become subject to Articles 85 and 86 even before the implementation measures have been developed by the Association Councils.[155]

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requirements that the associated countries adjust any monopolies of a commercial character to eliminate any discrimination in procurement or marketing of goods by the end of the fifth year of entry into force of the Agreements, Poland Europe Agreements, *supra* note 14, at art. 32; Czech Republic Europe Agreement, *supra* note 14, at art. 33; Slovakia Europe Agreement, *supra* note 14, at art. 33; Hungary Europe Agreement, *supra* note 14, at art. 32.

150. Interim Agreement with Poland, *supra* note 127, at art. 33(2); Interim Agreement with Czech and Slovak Federal Republic, *supra* note 127, at art. 33(2); Interim Agreement with Hungary, *supra* note 127, at art. 32(2).

151. Interim Agreement with Poland, *supra* note 127, at arts. 37–38; Interim Agreement with Czech Republic and Slovak Federal Republic, *supra* note 127, at arts. 37–38; Interim Agreement with Hungary, *supra* note 127, at arts. 36–37.

152. Maresceau, *supra* note 128, at 14–15.

153. In 1965, the functions of the EEC, the ECSC, and the EURATOM were consolidated in the Commission of the European Communities [hereinafter European Commission] pursuant to the Treaty Instituting a Single Council and a Single Commission of the European Community, art. 9, 1967 O.J. (C 152) 2. The EEC, the ECSC, and the EURATOM are discussed *supra* note 4.

154. Commission Decision No. 85/202/EEC of Dec. 19, 1984, relating to a proceeding under Article 85 of the EEC Treaty. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, *reprinted in* 298 U.N.T.S. 11 (1958) [hereinafter EEC TREATY].

155. According to the Commission, "the decisive factor is where the agreement, decision or concerted practice is implemented whether or not the producers had recourse to subsidiaries, agents, subagents, or branches within the Community in order to make their contracts with purchasers within the Community." *Id.*

While the Association Councils have three years from their establishment within which to adopt the implementation measures, the Joint Committees established under previous agreements between the associated countries and the EU[156] have already begun to draft such measures.[157] In general, implementation measures govern the respective competencies of the national and EC competition authorities,[158] the secrecy and confidentiality of information, the applicability of block exemptions, and the participation of national competition authorities in EC merger control proceedings.[159] Uniformly, the jurisdictional limitation of the Europe Agreements to agreements and undertakings "in so far as they *may affect trade between* the Community" and the associated country has created significant drafting problems for the competition authorities.[160] In order to diminish the ambiguity created by this vague jurisdictional limitation, the draft Polish implementation measures expressly exempt activities "whose effects on trade . . . are negligible."[161] Effects on trade are presumed to be negligible where the aggregate turnover of the parties does not exceed ECU 200 million and where the market share of the goods or services in question does not exceed five percent in the area of the EU and Poland, respectively, affected by the agreement.[162]

The second exemption to the Treaty of Rome rules is that Poland, the Czech Republic, Slovakia, and Hungary must maintain transparency with regard to all public aid and must submit annual reports to the EU

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156. Under the provisions of the Interim Agreements, the Joint Committees previously established by the Agreement on Trade and Commercial and Economic Cooperation, signed between the EEC and Poland on September 19, 1989, and between the EEC and Hungary on September 26, 1988, and the Supplementary Protocols to the Interim Agreement on Trade and Trade Related Matters, signed between the EC and the ECSE and each of Czech Republic and Slovakia on December 16, 1991, are to perform the duties of the Association Councils prior to their establishment. Interim Agreement with Poland, *supra* note 127, at art. 37; Interim Agreement with Czech and Slovak Federal Republic, *supra* note 127, at art. 37; Interim Agreement with Hungary, *supra* note 127, at art. 36.

157. The Joint Committee for Poland has already completed its final draft of the implementation measures. Interview with Ewa Szymanska, Advisor to the President of the Polish Antimonopoly Office, in Warsaw, Poland (Aug. 5, 1993). The Hungarian Office has submitted to the EC its first draft of the implementation measures and hopes to complete a final version by mid-1994. Telephone Interview with Jozsef Sarai, Coordinator for International Affairs, Hungarian Office for Economic Competition (Dec. 13, 1993).

158. With regard to competency, the implementation measures generally cover notification procedures, consultation and comity, conflicts, and negative conflicts of competence.

159. *See, e.g.*, Draft Implementing Rules for the Application of the Competition Provisions Applicable to Undertakings Provided for in art. 33 of the Interim Agreement between the EC and Poland (1994) (on file with author) [hereinafter Poland Draft Implementing Rules].

160. Interview with Ewa Szymanska, *supra* note 157.

161. Poland Draft Implementing Rules, *supra* note 159, at art. 8.

162. *Id.*

detailing the total amount and distribution of aid granted.[163] During the first five years, any public aid granted by any of the countries shall be assessed under Article 92 of the Treaty of Rome as aid that "promote[s] the economic development of areas where the standard of living is abnormally low or where there is serious underemployment,"[164] and the aid shall be assessed by the European Commission under a lower standard of authorization.[165] Not surprisingly, the competition authorities are facing significant opposition to the notion of transparency from large state enterprises, which over the past four decades have become particularly adept at concealing their true financial health.[166]

Pursuant to the legal reforms required under the harmonization provisions of the Europe Agreements, the competition laws of the associated countries will increasingly resemble the competition laws of the EU and of EU member states. Simultaneously, however, the competition law regimes of each country are being shaped by the demands and conditions of the economic reforms underway in each associated country. This article now turns to these reforms, their interrelation with EU integration, and their impact on competition law.

IV. The Post-Socialist Role of Competition Law

Because competition policy forms the centerpiece for the transition from socialism to market-based economies in the post-communist Central European countries, the competition authorities naturally play vital roles in all areas of economic reform. The following discussion explores

163. Poland Europe Agreement, *supra* note 14, at art. 63(4)(b); Czech Republic Europe Agreement, *supra* note 14, at art. 64(4)(b); Slovakia Europe Agreement, *supra* note 14, at art. 64(4)(b); Hungary Europe Agreement, *supra* note 14, at art. 62(4)(b). The term "state aid" under Article 92(1) of the Treaty of Rome comprehensively includes grants, preferential state loans, favorable tax treatment, and financing from compulsory contributions of beneficiaries. Valentine Korah, An Introductory Guide to EEC Competition Law and Practice 21 (4th ed. 1990).

164. The Association Council shall, based on the progress achieved pursuant to the economic reforms of each country, decide whether the five year period should be extended for an additional five years. Poland Europe Agreement, *supra* note 14, at art. 63(4)(a); Czech Republic Europe Agreement, *supra* note 14, at art. 64(4)(a); Slovakia Europe Agreement, *supra* note 14, at art. 64(4)(a); Hungary Europe Agreement, *supra* note 14, at art. 62(a).

165. The provisions on public aid do not apply to the agricultural and fisheries sectors. Poland Europe Agreement, *supra* note 14, at art. 63(5); Czech Republic Europe Agreement, *supra* note 14, at art. 64(5); Slovakia Europe Agreement, *supra* note 14, at art. 64(5); Hungary Europe Agreement, *supra* note 14, at art. 62(5).

166. Further, most laws in force in the associated countries do not authorize the competition authorities to verify the level of subsidies being given to state enterprises. In the case of Poland, it is unlikely that the Polish Office will acquire the authority to verify the level and type of state aid being granted by the government. Instead, an inter-governmental group, comprised of several ministries and government agencies, will be formed for such purpose. Interview with Ewa Szymanska, *supra* note 53.

whether the competition authorities are fulfilling their roles by analyzing their respective efforts in the following areas: creation of the private sector economy, demonopolization, and harmonization of national law with EC competition law.

A. *Creation of the Private Sector Economy*

In the post-communist Central European economic transitions, restructuring and privatization are two key components of competition policy.[167] The goals of restructuring and privatization are mutually reinforcing: restructuring prior to privatization relieves an enterprise of unrelated and unproductive assets and ensures that state-owned monopolies do not become private ones;[168] privatization frees an enterprise from state involvement and subjects it to market forces.[169] Similar to competition policy goals, the policy goals of restructuring and privatization include adaptation to market forces, improved productivity, efficiency and transparency in operations, introduction of incentive pay systems, and creation or expansion of marketing programs.[170]

Under socialism, organization of industry was often artificially based on considerations other than supply and demand in order to facilitate command distribution methods and central planning.[171] Active restructuring seeks to decrease the size of artificially large enterprises, thereby reducing production concentration levels, and to separate unrelated portions of enterprises. Passive restructuring seeks to force enterprises to restructure spontaneously by exposing them to market forces. The competition authorities play an important role in the restructuring of industries and enterprises. Through demonopolization, merger control, and prosecution of abuse of market dominance, the competition authorities

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167. For purposes of simplicity, privatization will be broadly defined here to mean the transfer of state-owned property to private hands.

168. According to the Polish Antimonopoly Office, "[i]t turns out that privatization of an enterprise often involves replacing a state monopoly with a private one." *Anti-Trust Office on Monopolies*, ZYCIE WARSZAWY, No. 35, Feb. 11, 1993, at 11, *translated in* POLISH NEWS BULL., Feb. 28, 1993. Thus, as stated the President of the Polish Office, Anna Fornalczyk, " '[t]he Anti-Trust Office represents the interests of the competition, and not the public interest. . . . [T]he Office not only prevented monopolistic practices, but it also 'kept an eye' on structural changes in the economy.' " *Id.*

169. *See generally* ROMAN FRYDMAN, ET AL., THE PRIVATIZATION PROCESS IN CENTRAL EUROPE (1993).

170. As an intermediary step, the World Bank has advised Poland to place all state-owned enterprises under the commercial code, which would be tantamount to mass commercialization. World Bank, Report No. 10305-POL, Poland: Economic Transformation at a Crossroads 33 (Mar. 16, 1992) (on file with author).

171. DOLAN, *supra* note 1, at 428–32.

assist in active restructuring.[172] Through import liberalization and the counteraction of monopolistic practices, the competition authorities increase the exposure of enterprises to market forces and thereby contribute to passive restructuring.[173]

The competition authorities play a similar fundamental role in privatization. As explained by one of the principal authors of Poland's economic reforms, Professor Leszek Balcerowicz, privatization in the post-communist Central European countries may be defined and analyzed pursuant to one of two concepts.[174] Viewed narrowly, privatization comprises only transformation or the transfer of state-owned assets to private ownership.[175] Viewed broadly, privatization includes the narrow definition as well as the creation of new economic entities and so-called "greenfield" investment.[176] When analyzed under the narrow concept, privatization has been relatively unsuccessful, partly because the methods used, such as trade sales and public offerings, require efficient operation of advanced state institutions, the creation and development of which have been extremely difficult or lacking.[177] When analyzed under the broad concept, however, privatization has been extremely successful due to the rapid pace of new private investment and small-scale and asset privatization.[178] Because of the disparate nature of the two concepts of privatization, the role of the competition authorities under each concept varies. This articles explores the two roles separately, examining the narrow concept first.[179]

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172. Active restructuring corresponds to the "structural function" of the competition authorities, which involves eliminating the causes of monopolization. POLAND BULL., *supra* note 89, at 9–10.

173. Passive restructuring corresponds to the "regulatory function" of the competition authorities, which involves mitigating the consequences emanating from a highly monopolized economy. *Id.* at 7–8.

174. Leszek Balcerowicz, Address to International Professional Women's Group, Warsaw, Poland 3–4 (Jan. 18, 1993) (transcript on file with author).

175. Professor Jeffrey Sachs has referred to the narrow concept, pursuant to which "state assets are transferred to private owners," as "top-down privatization." Jeffrey D. Sachs, *Privatization in Russia: Some Lessons from Eastern Europe*, AEA PAPERS AND PROCEEDINGS 43, 44 (May 1992).

176. Professor Jeffrey Sachs has referred to the broad concept, pursuant to which "private firms are established and grow," as "bottom-down privatization." *Id.* at 44.

177. *See, e.g.*, Lucja Swiatkowski Cannon, *Privatization Strategy and its Political Context in* TRANSITION TO DEMOCRACY IN POLAND 123 (R. Staar ed., 1993).

178. *See, e.g.*, 1992 EUR. BANK FOR RECONSTRUCTION AND DEV. ANN. ECON. REV. 38–48, 62–69 (Feb. 1993) [hereinafter EUR. BANK ANN. ECON. REV.] (noting, however, that small-scale privatization in Hungary has lagged behind that in other Central European countries). Asset privatization essentially involves lease or sale of assets by large, state-owned enterprises to the private sector.

179. Although separable, the two concepts are naturally related in that the new private sphere must often rely on existing distribution arrangements and suppliers which have protected

1. Privatization and Restructuring

Each of the associated countries has developed national privatization programs geared toward deep and fundamental transformation of the state-owned economy.[180] In 1990, Poland initiated several privatization programs having different scopes and time frames, including "mass," so-called "sectoral," and "fast-track" programs.[181] The mass privatization program involves the simultaneous privatization of several hundred large, state-owned enterprises through the formation of national investment funds.[182] The sectoral program involves dividing the Polish economy into sectors and developing privatization schemes for each sector.[183] The fast-track or "quick" program involves privatization of small- and medium-sized enterprises through direct negotiations with investors.[184]

Similarly, while still a federation in 1991, Czechoslovakia commenced a variety of privatization programs. In 1992, the federal government initiated a mass privatization scheme of approximately 1,500 of the federation's largest enterprises.[185] Aside from mass privatization, the so-called Large Privatization and Transformation Law allows large state-owned enterprises to select their own privatization strategy, subject to governmental approval.[186] The so-called Small Privatization Law allows

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market positions. Similarly, with the continual disintegration of the socialist network, existing enterprises often have to procure supplies and sales in the competitive market comprised of the new private businesses.

180. Similar to the French privatization program commenced in 1986, the privatization programs of the associated countries are modeled on general laws designed to provide flexibility and expediency in the overall process. LETWIN, *supra* note 91, at 15.

181. Wladyslaw Jermakowicz, Privatization in Poland: Aims and Methods, Ministry of Privatization 25–30, Paper presented at the U.S. Poland Chamber of Commerce (May 18, 1992).

182. Ustawa z dnia 30 kwietnia 1993r. o narodowych funduszach inwestycynych i ich prywatyzacji, Dz.U. 1993 No. 44, Item 202. *See generally*, Case Program, Poland's Mass Privatization Program, John F. Kennedy School of Government, Harvard University (1992).

183. For these purposes, the Polish economy was initially divided into 34 sectors, such as shoes, machine tools, cables and conductors, construction, rubber products, breweries, fat, sugar, etc. Jermakowicz, *supra* note 181, at 25–30.

184. MINISTRY OF PRIVATIZATION, INFORMATION GUIDE TO THE MINISTRY OF PRIVATIZATION 11 (1991).

185. The program is based on vouchers sold in two phases to citizens for nominal sums. In the first phase, nearly 80% of the population purchased vouchers, and enterprises accounting for a third of the federation's output were subjected to privatization. Holders were entitled to bid their vouchers for shares in any of approximately 1500 state-owned enterprises. To encourage and assist voucher holders in their investments, several hundred private investment funds pledged to buy vouchers for up to 10 times their purchase price. *Financial Times Survey: Privatisation in Eastern Europe*, FIN. TIMES, July 3, 1992, at 1, 3.

186. Undertaken in two phases comprised of 2000 enterprises each, the first phase was slowed after the government received nearly 13,000 privatization proposals from the first group of enterprises. EUR. BANK ANN. ECON. REV., *supra* note 178, at 40.

small companies to privatize themselves through auctions.[187] After the federation ceased to exist, the two nations enacted legislation modifying the second phase of the mass privatization program to require that citizens invest in companies only in their respective countries.[188]

Hungary formally commenced its privatization programs in 1990 with the establishment of the State Property Agency.[189] The State Property Agency developed the First Privatization Program, for the privatization of twenty enterprises from the manufacturing, hotel, tourism, commerce, trade, and transportation sectors, and the Second Privatization Program, for the privatization of forty to sixty enterprises that had transferred most of their assets to joint venture companies with foreign partners.[190] In addition, under the so-called Transformation Act, which provides for trade sales, the State Property Agency receives twenty percent of the shares of a transformed enterprise while the remaining eighty percent may be sold to investors.[191] The Hungarian government also formulated the Small Investors Shareholders' program, a mass credit scheme whereby each Hungarian citizen over the age of eighteen years eventually can borrow up to 100,000 forints in order to purchase shares in Hungarian enterprises.[192]

Programs such as those created by the post-communist Central European governments provide for nationwide privatization on multiple levels. Each country faces similar challenges in implementing its privatization programs, and each competition authority faces similar oversight

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187. The Small Privatisation Act applies to small businesses and parts of businesses in the spheres of services, trade and production. ERNST & YOUNG, EAST EUROPEAN COUNTRY PROFILES 40 (Aug. 1992).

188. *Czechoslovakia to Split Privatizations*, INT'L HERALD TRIB., Aug. 1–2, 1992, at 9; Cacilie Rohwedder, *Slovakia's Leader Seeks to Revamp Nation's Image*, WALL ST. J. EUR., Mar. 1, 1993, at 4.

189. Act VII of 1990 on the Foundation of the State Property Agency, as *amended by* Act LIV of 1992 on the Sale, Utilization and Protection of Assets Temporarily Owned by the State.

190. Hubertus V. Sulkowski et. al., *Privatisation in Hungary: The Art of the Possible*, INT'L FIN. L. REV., Apr. 1991, at 32, 34.

191. Most privatizations of Hungarian state-owned enterprises have proceeded in this manner, with multinational companies comprising over 85% of the investors. The first enterprises to be purchased were consumer goods enterprises, many of which had pre-existing trade and licensing relationships with their foreign purchasers. *Financial Times Survey*, *supra* note 185, at 4.

192. In order to be eligible, citizens will have to pay a 1000 forint fee and repay the loan over five years, after which time they will be the owners of the shares in which they have invested. Tim Smart, *Eleventh-Hour changes for Small Investors' Program*, BUDAPEST WK., Aug. 26, 1993, at 7. The Hungarian government has also devised a plan of mass commercialization, pursuant to which the State Property Agency may order, or a state-owned enterprise may volunteer for, the transformation of a state-owned enterprise into a limited liability company or a company limited by shares. Act LIV of 1992 on the Sale, Utilization and Protection of Assets Temporarily Owned by the State, Hatalyos MJ 1992 No. III/20.

responsibilities with regard to each of the privatization programs. Specifically, the competition authorities must ensure that asset sales and acquisitions are conducted in a competitive manner and through competitive tenders, while avoiding any unfair disadvantage to their nationals. Also, the competition authorities must prevent, in each country's drive to attract foreign investors, monopolistic practices and investments that effectively replace state monopolies with new private ones.[193] Finally, the competition authorities must monitor the practices of privatized firms to ensure that they do not resume their former monopolistic practices.[194]

Rather than the competition authorities, governmental authorities almost exclusively control privatization policy and decision-making in the post-communist Central European countries. Although privatization decision-makers uniformly assess privatization proposals on the basis of offered price, investment plans, access to markets, employment, and environmental protection considerations, they generally do not evaluate seriously a proposal's effect on competition.[195] To introduce a competition-based component into the privatization analysis, the competition authorities have applied the antimonopoly laws' prohibitions against acquisition and maintenance of market dominance to entities undergoing privatization. Toward this end, the Polish and Hungarian Offices similarly approach privatization under their merger control provisions. The Polish Office, however, may prevent a new company from forming if a first-time foreign investor would acquire a monopoly, while the Hungarian Office may only interfere in cases of "merger or fusion."[196] Further, while neither the Polish nor the Hungarian Laws require notification in cases of share acquisitions,[197] the Polish Law expressly provides that an acquisition of shares or assets may be a prohibited monopolistic practice "when such

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193. In Poland, Italy's Fiat Company was coming dangerously close to acquiring a monopoly position on the Polish car market, a factor the government finally took into account in deciding between investors. Often foreign investors demand conditions to investment that they would not demand in the West, such as guarantees of "temporary" local monopolies and protection from imports. *See, e.g.*, Fornalczyk Speech, *supra* note 31, at 6.

194. In this regard, the experience of Great Britain in the 1980s, with the privatization of state electricity, water, gas, airline and telephone monopolies, may be instructive. In order to prevent exploitation of monopoly power by the privatized monopolies, the government established regulatory authorities to govern the privatized entities. *See generally* RICHARD WHISH, COMPETITION LAW 30 (1989).

195. POLAND BULL., *supra* note 89, at 9.

196. Hungarian Law, *supra* note 16, at arts. 23–27. The Hungarian Office curiously states that "[i]n privatisation cases where a particular owner appears for the first time on the Hungarian market, there are no concentrations, only ownership changes. Therefore, in such cases it is logical that privatisation cannot be assessed from the point of view of competition law." HUNGARY OECD REPORT, *supra* note 121, at 14–15.

197. Compare the Polish Securities Law, *supra* note 71, and see the text accompanying note 71.

acquisition could lead to a significant weakening of competition."[198] Since neither of the laws provides for notification in the case of liquidation, which is the most frequent and expedient form of privatization, they potentially allow investors to purchase and consolidate assets that effectively confer market dominance.

The Czech and Slovak authorities deal with privatization outside of the law's regular merger and control provisions. Specifically, the Czech and Slovak Laws contain "transitory provisions" that require state administrative bodies during the process of privatization to submit to the competition authorities an analysis of the post-privatization competitiveness of an entity.[199] The analysis must contain sufficient guarantees that any pre-transfer monopolistic position of an entity will be eliminated and that any new entity created will not obtain a monopolistic position.[200] If the state administrative body disagrees with the ruling of the relevant competition authority on the analysis, then the analysis must be submitted to the respective Czech or Slovak government for approval.[201] While this approach is extremely progressive in comparision with the Polish and Hungarian approaches, its impact in the Czech Republic has been greatly diminished by the law's exclusion of "state enterprises and organizations beneficial to the public [and] state monopolies created by law."[202] By excluding state protected monopolies, the law risks condoning that which it seeks to prohibit, the creation of private monopolies.[203]

Because a competitive post-privatization economy is significant for the various privatization programs to succeed, the competition authorities should participate more in pre-privatization decisions. The arrangement between the Hungarian Office and the Hungarian State Property Agency provides an instructive model for other competition authorities to follow.

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198. Polish Law, *supra* note 16, at art. 4.1.3.

199. Czech Law, *supra* note 16, at art. 19(2); Slovak Law, *supra* note 16, at art. 19(2).

200. Czech Law, *supra* note 16, at art. 19; Slovak Law, *supra* note 16, at art. 19. The duty to submit such an analysis also applies to the transfer of state-owned property to a state-owned joint stock company.

201. Czech Law, *supra* note 16, at art. 19(2); Slovak Law, *supra* note 16, at art. 19(2).

202. Czech Law, *supra* note 16, at art. 19(3)(a). The merger control provisions of the Czech Law also exempt the Czech National Property Fund (the main privatization agency of the Czech Republic) and the Czech Land Fund, but only for a period of one year. *Id.* at art. 8a(4).

203. This risk became a reality in the Czech tobacco sector when, as a result of special protection, Philip Morris acquired a solid 85% market share of the Czech tobacco sector through its acquisition of a majority stake in the sole Czech tobacco producer, Tabák. Craig Karmin, *Where There's Smoke . . .*, BUS. CENT. EUR., July/Aug. 1993, at 25. Under intense pressure from the Czech Ministry, the Czech Parliament passed legislation abolishing the state monopoly as of January 1, 1994. Vladimir Petrus, *End of Tobacco Monopoly*, FIN. TIMES E. EUR. BUS. L., Feb. 1994, at 3 (discussing Tobacco Act 303/1993).

In Hungary, all state-owned assets are concentrated under the control of either the State Property Agency or state holding companies, which have the authority to restructure and privatize such assets. The Hungarian Office holds a seat on the State Property Agency's board of directors, which affords the Office the opportunity to hear and influence privatization decisions.[204] This formal link between the competition authority and the privatization authority allows for greater consistency between privatization and competition policy.

2. Development of the New Private Sector

Although competition was introduced slowly into the state sector, it arose swiftly and spontaneously during the formation of the burgeoning new private sectors. The success of competition in spurring entrepreneurial initiative has not gone unnoticed by either the consumers of the associated countries, who now enjoy the fruits of greater abundance and variety, or other newly-emerging entrepreneurs, who realize that they too may fruitfully engage in competition. The new private sectors were formed largely through foreign investment, trade liberalization, and entrepreneurial initiative.

(i) *Foreign Investment*

In the area of foreign investment, the competition authorities' main focus has been on exclusive distributorships, acquisitions, and joint ventures between domestic enterprises and foreign firms seeking to take advantage of an existing dominant position.[205] In the absence of adequate means for gathering and analyzing investment information, the competition authorities have struggled to monitor such transactions.[206] Despite intense pressure to allow foreign investment at any price, the competition

204. Telephone Interview with Janos Stadler, Vice President for Investigation, Hungarian Office for Economic Competition (Aug. 10, 1993).

205. Interview with Director Leon Biegunski, Director of the Department of Antimonopoly Policy, Analysis and Control, Polish Antimonopoly Office (Feb. 24, 1993); Interview with Sarai, *supra* note 122.

206. In general, the competition authorities tend to approve such mergers, due to the considerable benefits flowing from foreign investment, such as foreign know-how and technology. *See, e.g.*, POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 26 (Polish Office approved all merger applications during 1990–1993). Nevertheless, merger control provides an important check on economic activity in the state-owned sector and sends an important message to all parties that foreign investment must be undertaken in compliance with the antimonopoly laws. *See, e.g.*, SLOVAK 1991 REPORT, *supra* note 119, at 26–72 (reporting the approval of a merger between Slovak Cases Tesla Liptovsky Hradok and Standard Elekrik Lorenz A.G., the denial of a merger between Hydrostav s.p. Bratislava and Haupler Brau A.G., and the denial of a merger between Hydrostav s.p. Bratislava and Volksbank Wien); HUNGARY OECD REPORT, *supra* note 121, at 22 (discussing the LINDE Gaz Hungary PLC merger approval).

authorities are seeking to limit anticompetitive foreign investment incentives.

The Czech Ministry's merger control is the most aggressive. The Ministry maintains a systematic and detailed filing procedure for mergers that "result or might result in a restriction on competition in the relevant market."[207] Under such a broad formulation, and in the absence of a market share threshold, most joint venture parties feel compelled to apply for clearance from the Czech Ministry. By contrast, since the Polish, Slovak, and Hungarian thresholds for merger notification are much higher,[208] notification is a less routine practice in Poland, Slovakia, and Hungary than in the Czech Republic.

(ii) *Import Liberalization*

Each competition authority exerts control over import liberalization by establishing and dismantling tariff and non-tariff trade barriers.[209] In each of the associated countries, import liberalization has increased successfully the competitiveness of both state and private economic entities, which benefits suppliers, distributors, employees, and consumers.[210]

All of the competition authorities resist growing pressures and excessive attempts to expand domestic market protection against imports.[211] To resist such pressures, representatives of the Polish Office

207. Czech Law, *supra* note 16, at art. 8(a)(1). The Czech Ministry furnishes parties to a merger with the following documents: (i) an instruction form specifying the requirements of a filing with the Office; (ii) a detailed questionnaire; and (iii) a supplemental question form to be completed only by the foreign party to the transaction. CZECH BULL., *supra* note 113, at 9–10. *See also* Czech Ministry of Economic Competition, Model Study, Topic: Horizontal Agreements/International Joint Venture (1992–1993); Vladimír Bártů, Director of the II Executive Department, Czech Ministry of Economic Competition, International Joint Venture: General Remarks (1992–1993).

208. Polish Law, *supra* note 16, at art. 11(1); Slovak Law, *supra* note 16, at 9(1); Hungarian Law, *supra* note 16, at arts. 23–27. According to the Polish Office, a joint venture is only treated as a "merger" if the investor invests in one Polish company and uses that Polish company to purchase a second Polish company; thus, joint ventures are essentially exempt from the Polish Law's merger requirement. Interview with Biegunski, *supra* note 205.

209. See Fornalczyk Speech, *supra* note 31, at 5–6.

210. For a discussion of this phenomenon, see Fox & Ordover, *supra* note 3, at 12. As stated by Anil Sood, Head of the World Bank's Financial Department,

> '[o]nly now it has become clear how profitable it was to liberalise trade. Perhaps the World Bank would have advised Poland to liberalise its trade gradually and to spread it out over a three to four year period. Now it has turned out, however, that the liberalisation of trade has greatly increased the competitiveness of Polish products. The Hungarians, whom we have praised so much for their caution, have turned out to be overly cautious.'

World Bank on Polish Economy, RZECZPOSPOLITA, No. 146, June 25, 1993, at 9, *translated in* POLISH NEWS BULL., June 30, 1993.

211. Notably, foreign investors have been major opponents of the competition authorities

participate on the Inter-Ministry Commission for Updating and Modifying Customs Tariffs on Imports and on other commissions that prepare regulations introducing foreign trade quotas and concessions.[212] In the experience of the Polish Office, liberalizing foreign trade and consequently imposing competitive pressure on the Polish economy is "a more efficient tool [than administrative commands] for introducing market functions and behavior."[213] The Hungarian Law, on the other hand, requires the government to invite comments from the Hungarian Office on any draft legislation that influences competition, including trade legislation.[214] The Hungarian Office also participates in all cases submitted by Hungarian companies to the Hungarian Ministry of Trade that involve claims of unfair trade protectionism.[215] Similarly, the Slovak Office monitors the impact of tariff and non-tariff trade-regulation measures with regard to the competition level for each industry in the economy.[216]

(iii) *Entrepreneurial Initiative*

The pace of entrepreneurial initiative in the post-socialist economies in the form of new trade, manufacturing, and service businesses is astounding. For example, in Poland more than 500,000 private sole proprietorships were created from December 1989 to October 1991, and approximately 34,000 private companies were created from the end of 1989 to the end of 1991.[217] New private businesses in the Czech

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in this area. As stated by President Fornalczyk,

> [i]t is interesting that although protectionism in our economy is opposed by foreign firms wanting to make shipments into Poland, much of the support for protectionism has come from foreign investors. . . . This has been one of the most common requests for more than two years. There is a serious dilemma for us, because we need foreign capital, know-how and new methods of management.

Fornalczyk Speech, *supra* note 31, at 6.

212. POLAND 1992 REPORT, *supra* note 54, at 11.

213. *Id.* Further, in 1991 Poland commenced its Competition Development Project aimed at consistently reducing protection from foreign competition for domestic producers. POLISH ANTIMONOPOLY OFFICE, *supra* note 109, at 5.

214. In 1992, the Hungarian government invited comments from the Hungarian Office on over 200 pieces of draft legislation. HUNGARY OECD REPORT, *supra* note 121, at 11.

215. Interview with Stadler, *supra* note 204.

216. SLOVAK 1991 REPORT, *supra* note 119, at 76. While the Czech Ministry regularly presents suggestions to the Ministry of Trade, the two ministries as co-equal bodies do not formally cooperate. Letter from Ivo Bezecny, Office of the Minister, Czech Ministry of Economic Competition, to author 2 (July 31, 1993) (on file with author).

217. Sachs, *supra* note 175, at 44.

Republic, Slovakia, and Hungary also developed rapidly.[218] With regard to the new private sectors, the competition authorities have focused on enforcement of the prohibitions against monopolistic practices and agreements.[219] Initially, seventy percent of the Polish Office's decisions[220] involved monopolistic practices or agreements of entities that usually did not have dominant or monopolistic positions.[221] Recently, however, the Polish Office has attempted to balance its enforcement efforts more equally among the three areas.[222]

Enforcement of the prohibitions against monopolistic practices and agreements under the antimonopoly laws forms a relatively flexible component of competition policy partly because it may be used selectively. Two special factors influence enforcement in these areas. First, entrepreneurial or productive initiative could be stifled if the competition authorities rigidly oppose potentially anticompetitive agreements. Second, market measurement problems often preclude enforcement of the prohibitions in many borderline cases. As the number of new businesses continues to rise and competition on the market increases, the potential for collusion will naturally intensify. As a result, the role of the competition authorities in monitoring and enforcing the prohibitions against monopolistic practices and agreements is certain to expand.

B. *Demonopolization*

The overall structure of the socialist economy was purposely anticompetitive, designed to facilitate central planning through control of large-scale production units and large firms integrated both horizontally and vertically. To facilitate control, factories were grouped together into

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218. Survey, *Business in Eastern Europe*, THE ECONOMIST, Sept. 21, 1991, at 14.

219. POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 47–57; 1993 SLOVAK ANTIMONOPOLY OFFICE ANN. REP. 32–33 (1994).

220. POLAND OECD REPORT, *supra* note 109, at 5. A typical case involved an attempt to restrict market access through an exclusivity clause in a contract between a fast-food caterer and a railway station. Polish Antimonopoly Office (Piotr Kryczek), Case Report: Railway Station Catering Case (1991–1992) (unpublished, available from the Polish Antimonopoly Office).

221. In contrast, 11% of the cases of the Hungarian Office involved monopolistic practices and agreements. HUNGARY OECD REPORT, *supra* note 121, at app. 1. In addition, the Hungarian Office has made use of the Hungarian Law's prohibition against unfair competition and of the so-called blanket clause, which declares that "freedom and fairness of economic competition must be respected" and prohibits unfair market practices, to regulate new businesses. Hungarian Law, *supra* note 16, at art. 3. *See, e.g.*, HUNGARY OECD REPORT, *supra* note 121, at 17–18 (discussing 1992 ALVORADA Ltd. Case and 1992 SIGNAL DISCOUNT Ltd. Case).

222. POLAND 1992 REPORT, *supra* note 54, at 3–8; SLOVAK 1992 REPORT, *supra* note 28, at 2.

large enterprises employing several hundred individuals. The socialist economies were broken down into broad sectors, such as steel, sugar, textiles, trucks, and rubber. Individual enterprises used generic names such as "truck enterprise" or "rubber factory" in order to preclude brand name distinction that might stimulate competition. Moreover, "enterprise associations" between firms at the industry level often functioned as cartels and reinforced the anticompetitive nature of industry.[223]

One of the competition authorities' prime tasks is to ensure that existing monopolies divide into efficient, autonomous parts.[224] Prohibiting monopolistic practices, controlling market dominance and monopoly, and engaging in merger control all inadequately address the monopolistic legacy of central planning.[225] Similarly, privatization and restructuring programs generally proceed too slowly to combat monopoly problems and exclude many sectors of the economy.[226] Thus, a more forceful instrument, such as the "power of demonopolization," was sought and created by the competition authorities, most successfully by the Polish Office.[227]

Several problems arise from demonopolization. First, due to the scale of its effects, the competition authorities must possess sufficient information to support a division or liquidation decision, and they must avoid focusing on individual sectors without paying proper attention to the economy as a whole.[228] Thus, the Polish Office has been extremely cautious in using its power to divide or liquidate enterprises, stating that "hitherto undertaken partitioning operations showed a great number of methodological problems connected first of all with the concept of the local market and the methods of defining its range and also problems the source of which is the insufficiency of the informational base."[229]

Second, without concurrent restructuring and privatization within an industry, a phenomenon may occur known as "reconcentration," which is

223. *See generally*, DOLAN, *supra* note 1, at 446–48.

224. In 1990, Lipton and Sachs advised in their reform proposals for these countries that the second step of reform can be undertaken in parallel with the macroeconomic austerity program and that it should be a step to create market competition that is based on the deregulation of prices, free trade, the full liberalization of the private sector, and the demonopolization of the state sector. Lipton & Sachs, *supra* note 2, at 100.

225. POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 22.

226. *Id.*

227. *See, e.g.*, *supra* note 86 and accompanying text.

228. This is particularly true for the post-socialist economies in transition. When trying to restructure, it is important to a given sector to maintain the structure of a separate but related sector until the restructuring process has been completed. For instance, in restructuring a manufacturing sector, the government may have to maintain a temporarily guaranteed inflow of inputs from a second sector so that investor interest remains high.

229. Andrzej Szablewski, Polish Antimonopoly Office, Activity of the Antimonopoly Office in the Year 1991 8 (1992).

the re-emergence of collusive behavior between recently divided firms.[230] Divided firms, experiencing for the first time real competitive forces, try to fight competition through collusion, in particular through horizontal agreements and mergers, rather than try to adapt to the market economy and compete individually.[231] In this case, one sees recently divided firms conspiring to lower their production levels below capacity and, also, pressing for government protection through subsidies, custom tariffs, and border taxes.[232]

Finally, the competition authorities must proceed cautiously in the case of state protected monopolies such as telecommunications, oil and gas, and agricultural monopolies.[233] Many state-owned monopolies have tried to survive economic transition through monopolistic practices and coercion of customers rather than adapting to the market economy through measures aimed at increasing productivity and efficiency.[234] The role of competition authorities in such cases has been to prosecute these "survival tactics" under the general prohibition against monopolistic practices, at least until such monopolies are either restructured or privatized.[235]

Thus, while the Polish Office considers the role of demonopolization to be an important part of the nation's transformation from a socialist economy to a market-based one, the Office has been apprehensive in its

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230. Interview with Biegunski, *supra* note 205.

231. The Polish Office had such an experience in connection with its division of the Polish sugar industry, with resulting firms repeatedly trying to collude since the division. POLAND OECD REPORT, *supra* note 109, at 10. In the grain-milling industry, however, demonopolization proved to be very successful, resulting in several smaller, more versatile enterprises capable of adapting to changing market considerations. In fact, "[a]fter the initial resistance was overcome, a real domino effect took place; enterprises of these [sic] branches not slated for division by AMO came forward on their own with the request to make such a division." POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 25.

232. As Director Leon Biegunski of the Polish Office states, "The sugar industry typifies the syndrome. It dates back to the 19th century and wants to preserve its traditional structure and methods." The Polish sugar industry is only producing at 70 percent of its capacity. Interview with Biegunski, *supra* note 205.

233. *See, e.g.*, SLOVAK 1991 REPORT, *supra* note 119, at 16, 26–72 (discussing cases including the Slovakian Agronakup case regarding a forced tying arrangement in sale contracts of agricultural products with 41 state enterprises, Slovak Case No. 1340/SPU/1991 regarding the Administration of Posts and Telecommunications, and Slovak Case No. 102/V 02/1991 regarding a forced tying arrangement in sale contracts of natural oil-based gas); CZECH BULL., *supra* note 113, at 4–5 (discussing the Power Monopolies cases); Polish Antimonopoly Office (Kszysztof Filinski), Case Report: Centrala Produktów Naftowych PP (Center for Oil Industry State Enterprise v. Local Gas Enterprise) (1992) (unpublished, available from the Polish Antimonopoly Office); Polish Antimonopoly Office (Zofia Wlodarczyk), Case Report: Polish Telecom (1992–1993) (unpublished, available from the Polish Antimonopoly Office).

234. Interview with Biegunski, *supra* note 205.

235. *Id.*

approach toward demonopolization.[236] The Polish Office has only recently begun to apply its power of demonopolization to various industries,[237] stating that

> in spite of expectations and pressures the Office did not decide to put into effect a broad, radical deconcentration policy using its legal authority to do so. The caution of the Office was a result of the belief that division procedures are very slow by their nature and also there is a major threat of making a mistake, since it is hard to define a proper balance between a more competitive structure and possible loss of advantages of economies of scale and scope.[238]

Whether and to what extent other competition authorities will follow the Polish example and acquire and utilize the power of demonopolization is still unclear. In any event, all of the competition authorities will continue to proceed with extreme caution in their efforts toward demonopolization.

C. *Harmonization with EC Competition Law*

As national economies continue to converge into one universal, symbiotic world economy, economics and international relations also begin to merge. On a national level, policy makers become constrained by internal and external economic considerations. On an international level, relations become defined within the economic parameters established in the trade relations between nations.

Reflecting on this emerging interrelationship between competition law and international relations, EC Commissioner Sir Leon Brittan had this to say about the influence of EC competition law on the associated countries: "We have to provide an example for the fragile democracies of Eastern Europe. When they look at what binds the twelve member-States together in a Community, they notice that at the heart of its successful market economy lies a sound competition policy."[239] This statement captures the essence of the emerging relations between the associated countries and the EU. By agreeing to develop and adapt their

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236. The Czech Ministry is also likely to apply initially its newly-acquired power of demonopolization with considerable caution. *See supra* notes 110 and 114.

237. The Polish Office has focused its demonopolization efforts on the agricultural industry, in particular on the grain milling, seed trading, sugar, and meat processing sectors. POLAND 1992 REPORT, *supra* note 54, at 8–9.

238. POLAND OECD REPORT, *supra* note 109, at 10.

239. Speech of Commissioner Sir Leon Brittan to the EC Chamber of Commerce in New York on Mar. 26, 1990, *extracted in* [1990] 4 C.M.L.R. 324, *quoted in* David P. Fidler, *Competition Law and International Relations*, 41 INT'L & COMP. L.Q. 563 (1992). For a discussion of the symbiosis between competition law and international relations, see Fidler, *supra*.

competition laws in conformity with EC competition law, Poland, the Czech Republic, Slovakia, and Hungary have predetermined the nature and organization of their national economies.[240]

A variety of political and economic motivations drive the associated countries to join the EU. First, each country would like to return to their "traditional place" among European nations.[241] Second, each country would like to achieve the higher standard of living found in the EU, which sharply contrasts with the standards found in the post-communist Central European countries.[242] While the first goal is a sound and realistic expectation on the part of these countries, the second goal may reflect a misconception about the short-term results of integration, namely, that a higher standard of living instantaneously and automatically follows integration.[243] Nonetheless, in the long-term, these countries will achieve a higher standard of living through a speedy transition and adjustment to a market economy, with a heavy emphasis on free trade, competition, and foreign investment.[244]

With regard to achieving their economic objectives for EU integration, the associated countries are striving to develop competition regimes that complement and facilitate the transition from socialism to a market economy, promote efficiency, and maximize consumer welfare. During the fragile states of economic development, competition regimes should provide clear rules, consistent enforcement, and sufficient flexibility in order to foster economic initiative. Each of these objectives is congruent with the objectives of EC competition law and harmonization policy. As Articles 2 and 3 of the Treaty of Rome state:

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240. The principal motivation behind the commitments of the East European countries to harmonize their competition laws is the opportunity for full EU membership; thus it is possible that these countries, in their eagerness to prove their commitment to the EU, will harmonize their national laws with EU law to an even greater extent than is found in 'older' EU member states.

241. As stated by Professor Sachs, "[t]he urge to harmonize with and eventually join the European Community has deep roots. Poland desires to regain its place in the mainstream of European society and culture. The slogan of the revolutions of 1989, after all, was 'return to Europe.' " Sachs, *supra* note 9, at 34.

242. Lipton & Sachs, *supra* note 2, at 76.

243. Indeed, in light of global recession and the geographical proximity of the associated countries to an economically and politically tumultuous East, achievement of Western standards may take many years.

244. As postulated by Lipton and Sachs in 1991,

> [s]keptics often ask whether the austerity cum liberalization program outlined here can produce stable prices and economic growth. They observe that in Latin America similar programs have indeed ended inflation, but at the expense of hampered growth. In the case of Eastern Europe, however, one can identify the primary engine of growth in the coming years: economic integration with Western Europe.

Lipton & Sachs, *supra* note 2, at 101–02.

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[245]

On a policy level, the harmonization process seeks to enhance member states' economies by facilitating transnational commercial transactions and by eliminating unfair competition, restrictive trade practices, and distortions of competition on a Community-wide scale.[246] Because harmonization promotes free and fair competition, it should alleviate shortages, improve productivity, and thereby enhance both consumer welfare and the standard of living in the associated countries.[247] The associated countries have already begun to introduce these notions into their competition policies through harmonizing their emerging national competition laws with EC law.

EC competition law provides additional benefit to the associated countries because it also seeks to promote small and medium-sized businesses and to protect consumers.[248] In contrast to the enormous enterprises established under socialism,[249] small and medium-sized businesses, generally employing between 50 and 100 individuals, comprise the most

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245. EEC TREATY arts. 85–94 and accompanying regulations. The competition policy embodied in the Treaty of Rome arises from its notions of freedom of establishment and free movement of goods and services. As Fox and Ordover stated in 1991, "[f]rom the point of view of nations moving from controlled economies, the most important part of competition policy will be breaking down government barriers to competition, to the free movement of goods and services, and to the freedom of business establishment." Fox & Ordover, *supra* note 3, at 87.

246. Thomas E. Abeltshauser, *Towards a European Constitution of the Firm: Problems and Perspectives*, 11 MICH. J. INT'L L. 1235, 1249 (1990). The EC program of harmonization of commercial law is considered to have "industrial policy functions" in that uniformity in commercial laws can "considerably facilitate cooperation between companies with different nationalities and very different board structures." *Id.* at 1252.

247. For an economic model of the shortage economies of the East European countries, see Lipton & Sachs, *supra* note 2.

248. As Professor Fox states, "European jurisprudence has a long tradition of protecting opportunities for small and middle-size business as well as protecting consumers . . . and U.S. law is quick to declare that any antitrust policy that has regard for the interests of small business must be protectionist and hurt consumers." Eleanor M. Fox, *Merger Control in the EC: One Year of Enforcement*, N.Y.L.J., Apr. 9, 1992, at 5, 7.

249. Under socialism, enterprises often employed several hundred individuals. For instance, in Poland in 1990, the average state enterprise had 1132 employees. Lipton & Sachs, *supra* note 2, at 83. Further, enterprises were extensively geared toward heavy industry and most of the output produced by one sector of the economy was used as input for another. Such a system placed a low priority on the consumer and resulted in severe shortages of consumer goods. *Id.* at 79.

productive sector of the post-socialist economies.[250] Far beyond their importance in the EU, small- and medium-sized businesses indispensably help create market-based economies.[251] Additionally, they receive special treatment under the antimonopoly laws of the associated countries.[252] Through harmonization of their laws, the associated countries will inevitably adopt the provisions of EC competition law that accord special treatment to small- and medium-sized businesses[253] and the policies embodied in the European Commission decisions under Article 86 that evidence such special protection.[254] Since the associated countries have already begun to follow the European tradition, further harmonization with EU law should only assist the post-socialist economies in their reform efforts.

V. Recent and Proposed Amendments to Antimonopoly Laws

Based on four years' experience under the original antimonopoly laws, each country, with the exception of Slovakia, is working on a set of amendments to improve their laws and to facilitate the efforts of the competition authorities toward fulfillment of their roles: the Czech Ministry is implementing the November 1993 Amendments while the other competition authorities are formulating new amendments.[255] Each

250. *See, e.g.*, Jane Perlez, *Poland's New Entrepreneurs Push the Economy Ahead*, N.Y. Times, June 20, 1993, at F7 (describing how 1.5 million private businesses have been registered in Poland, employing nearly 56% of the Polish workforce and producing nearly 50% of Poland's GDP, and thus, "[c]ounter to early expectations, the turnaround in Poland . . . has been prompted not by large scale Western investment . . . but by medium sized Polish enterprises").

251. *Id.*

252. For example, some special treatments are in the form of *de minimis* and other exemptions. Indeed, viewing small and medium sized businesses as vital to growth, the associated countries are closely following the European tradition through programs designed to facilitate the establishment and operation of small and medium sized businesses.

253. *See, e.g.*, Regulation No. 418/85, 1986 O.J. (L 53) 5 (research and development block exemption); Regulation No. 417/85, 1985 O.J. (L 53) 1 (specialization block exemption); Commission Notice on Agreements of Minor Importance, 1977 O.J. (C 313) 3.

254. While in Poland 10% of state workers were employed in firms with fewer than 100 workers, in Korea 33% of the labor force is employed in establishments with fewer than 100 workers. Lipton & Sachs, *supra* note 2, at 83–84.

255. The Czech Parliament approved amendments to the Czech Law on November 11, 1993. *See supra* note 22 and accompanying text. This fall, the Polish Office plans to submit amendments to the new Polish Parliament formed in Fall 1993, and the Hungarian Office hopes to submit draft amendments to the new Hungarian government formed following the May 1994 elections.

competition authority is preparing various amendments to emphasize the goals of privatization, demonopolization, and harmonization.[256]

A. *Privatization*

Generally, privatization amendments strive for deeper involvement of the competition authorities in privatization policy-making and implementation. For instance, the Polish Office proposes to subject additional transactions to merger control. Specifically, suggested amendments to the Polish Law subject the following to merger control: share and asset acquisitions, interlocking directorates, and transformations of state enterprises into commercial companies wholly-owned by the State Treasury.[257] By expanding merger control to include pre-notification of share acquisitions, liquidations, and commercializations, the Polish Office would gain greater control over privatization decisions and capital movements.[258] At the same time, the amendments exclude establishment of companies from merger control, thereby reducing the administrative burden on the Polish Office that stems from pre-notification of new private businesses.[259]

The Czech Ministry is implementing the new merger control provisions of the November 1993 Amendments, which define the term "merger" to include all forms that "may have negative impact on the structure of the market," including joint ventures between entities and "gaining control" over another entity through a share acquisition or interlocking directorates.[260] While this new definition of merger is nearly identical to the definition in the EC Merger Regulation,[261] it exempts speculative acquisitions or acquisitions of shares for the purpose of resale

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256. The Hungarian Office has prepared amendments for three principal reasons: first, to harmonize fully Hungarian competition law with EC law; second, to account for the experience gained by the Office during the initial three years of applying the Hungarian Law (the Hungarian Office heard over 500 cases during this period); and third, to use the advice of foreign advisers to the Hungarian Office (from the EC and the U.S.). Interview with Sarai, *supra* note 157.

257. Share and asset acquisitions and interlocking directorates would cease to be expressly included under the general prohibition against monopolistic practices. POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 15.

258. Interview with Szymanska, *supra* note 157.

259. *Id.* Between 1990 and 1993, approximately 1,600,000 new firms were established in Poland. POLISH ANTIMONOPOLY OFFICE, *supra* note 17, at 6.

260. While the November 1993 Amendments did not alter the threshold for merger control, i.e., a 30% market share, in practice the Czech Ministry will assess mergers included in the new definition on the basis of their impact on 'market structure' and will seek to prevent 'undesirable concentration' of the market through a decline in the number of competitors. Letter from Bezecny, *supra* note 216.

261. Council Regulation No. 4064/89 on Merger Control, 1989 O.J. (L 395) 1.

in order to accommodate the rapidly developing Czech capital markets.[262] The new definition does, however, include "transition or transfer of a company or a substantial part of it," which apparently encompasses liquidations.[263]

Finally, the Hungarian Office proposes either to lower the law's thirty percent market share threshold for merger control or to base the threshold on joint sales.[264] The Hungarian Office also proposes to introduce mandatory pre-acquisition registration in order to facilitate its control over contemplated transactions.[265]

As privatization progresses in the associated countries and as the state-owned portion of the economy is transformed and transferred into the private sector, the role of the competition authorities in the privatization process will diminish. Nonetheless, to the extent that the methods of privatization determine the nature and structure of the post-privatization economy, the competition authorities should remain actively engaged in all stages of the privatization process. To the extent that they are actively seeking greater involvement in share acquisitions and liquidations, the competition authorities are exhibiting substantial foresight and will likely achieve a more competitive post-privatization economy as a result.

B. *Demonopolization*

As discussed earlier, the Polish Office and the Czech Ministry currently are the only competition authorities that possess the express power of demonopolization. The Slovak Office and the Hungarian Office continue to contemplate such power. However, for political and other reasons, neither the Slovak Office nor the Hungarian Office currently proposes to acquire the power of demonopolization, given its potential for misapplication as well as its potential to confer the type of control that the post-communist Central European governments are seeking to avoid.[266] Instead, these Offices will cautiously observe the Polish Office and the Czech Ministry as they gain experience in demonopolization.

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262. The narrower definition also avoids significant measurement problems connected with such acquisitions. Czech Law, *supra* note 16, at art. 8(3). The new merger control provisions also exempt the National Property Fund for a period of one year. *Id.* at 8a(4).

263. Czech Law, *supra* note 16, at art. 8(1)(b). Unlike the Czech Law, the new Slovak Law does not include liquidations. Slovak Law, *supra* note 16, at art. 8(4)(b).

264. Given the rapid and continual transformation of the Hungarian economy, the Hungarian Office believes that it will be easier for parties to a merger to calculate a level of joint sales than to calculate a market share percentage. Interview with Sarai, *supra* note 157.

265. Specifically, the Hungarian Office would introduce registration questionnaires and, following the approach used in the Netherlands, would only prevent a share acquisition where it would "harm competition." Interview with Stadler, *supra* note 157.

266. HUNGARY OECD REPORT, *supra* note 121, at 14–15.

C. *Harmonization*

Indicative of the overall orientation of the competition authorities, the most extensive amendments contemplated by the authorities are geared toward harmonization.[267] In accordance with EC law, the Polish Office is proposing block exemptions to its general prohibition against monopolistic practices; the block exemptions are for agreements of minor importance and for agreements involving production specialization, joint research and development, cooperative joint ventures, and franchising.[268] In addition to harmonizing the merger control provisions of the Polish Law with EC law, the Polish Office suggests introducing obligatory notification of all types of mergers, including share and asset acquisitions exceeding a certain level of ECUs.[269] Finally, the Polish Office would like to amend the current law to distinguish clearly between vertical and horizontal agreements, for instance by exempting certain exclusive purchasing and distribution agreements.[270]

In accordance with EC law, the Czech Ministry's proposed November 1993 Amendments change the heading "cartel agreements" to "agreements disturbing economic competition," which clarifies that the Czech Law applies to both horizontal and vertical agreements.[271] To distinguish the two types of agreements the Ministry applies a *per se* type of approach to horizontal agreements and a *rule of reason* type of approach to vertical agreements.[272] In particular, the Ministry explains that

> [b]oth the theory and practice of the anti-monopoly efforts shall without doubt concentrate on banning any agreements between competing companies (those of a horizontal nature). . . . But the ban

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267. According to the Polish Office, "the amendments are being prepared in light of the harmonization process." Interview with Szymanska, *supra* note 157. According to the Czech Ministry, the main purpose of the amendments is "connected especially with the removing [of] all incompatibilities with EC competition law." Letter from Bezecny, *supra* note 216.

268. POLISH ANTIMONOPOLY OFFICE, INFORMATION ON HARMONIZATION OF POLISH ANTIMONOPOLY LAW TO THE EEC COMPETITION RULES 3–5 (1992). The advantages of the block exemptions to Article 85 of the Treaty of Rome include greater certainty for investors and their advisors, standardization of agreements, and a substantial reduction in the number of notifications received by the competition authority from individual investors. WHISH, *supra* note 194, at 262–67.

269. POLISH ANTIMONOPOLY OFFICE, *supra* note 268, at 3.

270. *Id.* at 6–8.

271. Some commentators previously criticized the heading "cartel agreements" for including only agreements between competitors (horizontal agreements). Letter from Ivo Bezecny, *supra* note 216, at 4. Nonetheless, other commentators found that although unclear, when read in its entirety the law implied that vertical agreements were included. Pittman, *supra* note 12, at 487–88.

272. Letter from Bezecny, *supra* note 216, at 5.

on exclusive dealership rights between manufacturer and distributor in some cases could limit the access of many new products to a large number of customers. It is proposed therefore that besides the possibility of individual exemptions . . . to grant the ministry full powers to permit by decree a block exemption . . . for certain types of agreements as long as they contribute to the improvement or distribution of the goods, or to the promotion of the technical or economic progress. The basic condition for such block exemptions is that they be of mutual benefit to both the manufacturer and the consumers.[273]

In accordance with Article 85(1) of the Treaty of Rome and pursuant to the November 1993 Amendments, the Czech Law now expressly protects competition against "restriction, distortion or prevention"[274] and applies to individuals, legal entities, and trade associations.[275] The Amendments also broaden the scope of activities covered by the prohibition against anticompetitive agreements to include "decisions by trade associations," "concerted practices," and "agreements" and "other forms of mutual understanding" between entrepreneurs.[276]

Similar to the Czech November 1993 Amendments, the new Slovak Law is largely focused on harmonization with EC law. The Slovak Law expressly protects against the "prevention, restriction or distortion" of competition[277] and applies to individuals as well as legal entities.[278] Further, the Slovak Law amends the heading "cartel agreements" to "agreements restricting competition"[279] and includes "decisions by trade associations" and "concerted practices" as prohibited anticompetitive activities.[280] In accordance with EC law, the Slovak Law eliminates the distinction between dominant position and monopolistic position and redefines "dominant position." Pursuant to the Slovak Law, an entity is deemed to have a dominant position where the entity does not encounter substantial competition or where the entity has sufficient economic power to "behave independently" and "restrict competition."[281]

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273. *Id.*

274. Czech Law, *supra* note 16, at art. 1(1).

275. Czech Law, *supra* note 16, at arts. 2(a) and 2(b). Formerly, the Czech Law applied only to 'entrepreneurs.'

276. Czech Law, *supra* note 16, at art. 2.

277. Slovak Law, *supra* note 16, at art. 1.

278. *Id.* at art. 2(1).

279. *Id.* at art. 3.

280. *Id.* at art. 3(1).

281. *Id.* at art. 7(1). This definition closely resembles the definition provided by the Commission in Case 6/72, Europemballage Corporation and Continental Can Co., Inc. v.

Similar to the Czech Ministry and the Slovak Office, the Hungarian Office is reformulating the general provisions of its law to resemble more closely EC law. Specifically, the Hungarian Office suggests amending the law to prohibit all "agreements between competitors, decisions of competitors, decisions of associations of competitors and mutually harmonizing proceedings,"[282] which mirrors the language of Article 85(1) of the Treaty of Rome.[283] The Hungarian Office also proposes harmonizing the Hungarian "individual exemption system," under which an agreement is exempt from the prohibition against anticompetitive agreements if its restriction on competition "does not exceed the extent necessary" and if the advantages flowing from the agreement outweigh the disadvantages,[284] to resemble more closely the EC system of block exemptions under Article 85(3) of the Treaty of Rome.[285]

While the antimonopoly laws of the associated countries are largely modelled on EC law, the competition authorities are seeking, through amendments geared toward harmonization, to satisfy the "approximation of laws" obligation of the Europe Agreements.[286] Aside from fulfilling the provisions of the Europe Agreements, amendments aimed at harmonization with EC law should lead to greater clarity in the antimonopoly laws of the associated countries.[287] This certainly is the case with amendments that create block exemptions, that distinguish between horizontal and vertical agreements, and that define more clearly the scope of the antimonopoly laws. To the extent that such amendments enhance clarity, they will also improve predictability and certainty for market participants.

Commission, 1973 E.C.R. 215, [1973] C.M.L.R. D11 (1972).

282. Interview with Sarai, *supra* note 157.

283. EEC TREATY art. 85.

284. Hungarian Law, *supra* note 16, at art. 17. *See supra* notes 45 and 46 and accompanying text.

285. Interview with Sarai, *supra* note 157.

286. *See supra* notes 137 and 138 and accompanying text.

287. A further advantage of the harmonization process with the associated countries is to enhance the EU economy and the economies of its member states by facilitating transnational commercial transactions and by eliminating unfair competition, restrictive trade practices, and distortions of free market operations on a Community-wide scale. Abeltshauser, *supra* note 246, at 1249. Moreover, as a ready-made model, EC law can provide clear guidance to the East European post-communist countries, whose peoples "find it excruciatingly difficult to emerge from the tangle of political and economic collapse, uncertain property rights, and differences of opinion about the best course for the future." Gerhard Casper, *European Convergence*, 58 U. CHI. L. REV. 441, 443 (1991).

CONCLUSION

Although only four years old, the antimonopoly laws of Poland, the Czech Republic, Slovakia, and Hungary lay the foundation for the competition regimes of these post-communist Central European states. The aim of the antimonopoly laws is to create and protect competition in the newly emerging private sectors and to introduce competition into the existing state sectors. The competition authorities created under each of the laws face tasks unparalleled in the West: the creation of a competition regime capable of facilitating and enduring the transition from a socialist economy to a market-based one. Through their broad oversight responsibilities, the competition authorities substantially control the economic reforms underway in each country and simultaneously acquire deep knowledge about the market and its functioning that is crucial to the success of the reforms.

Although the antimonopoly laws and competition authorities were designed and established by each individual country, their nature and direction have been largely predetermined by the overall goal of each nation to become a full EU member state. The structure of the laws and the close cooperation between the competition authorities and the European Commission make it inevitable that the competition regimes of these countries will increasingly embody the letter and the spirit of EC competition law and policy.[288]

Given the degree of political, social, and economic instability still being experienced by the post-communist Central European countries,[289] the competition authorities have achieved impressive progress toward creating and maintaining a competitive environment and toward demonopolizing the former socialist economy. As the competition authorities continue to assist these countries in their efforts to create market-based economies and in their drive to join the EU, they will achieve stable competition regimes that benefit from the experience of the West and from their unique experience under socialism.

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288. *See, e.g.*, POLAND 1992 REPORT, supra note 54. As one commentator notes with regard to the East European countries, "[t]he [competition] laws they have enacted are more advanced than exist in a number of EC member states, one or two of which have no competition law of substance at all." Michael Reynolds, *Anti-Trust Comes to Eastern Europe*, INT'L FIN. L. REV., Aug. 1991, at 11, 12.

289. Frequent strikes, changes in government, refugee problems and calls for lustration are all prominent features of these fledgling new democracies. *See, e.g.*, *Strikes Fomented*, RZECZPOSPOLITA, No. 212, Sept. 9, 1992, at 2, *translated in* POLISH NEWS BULL., Sept. 9, 1992; *Ex-Communists Rebound in Polish Vote*, INT'L HERALD TRIB., Sept. 20, 1993, at 1; *Citizenship: One of Us or One of Them?*, THE ECONOMIST, July 31, 1993, at 31; *Slovakia: Downhill and Out of Control*, THE ECONOMIST, Aug. 7, 1993, at 50; *Hungary: Tea Anybody?*, THE ECONOMIST, June 12, 1993, at 59.