

Competition Law in Central and Eastern Europe: Five Years Later

Russell Pittman
Antitrust Division
U.S. Department of Justice¹

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The first competition laws enacted in post-socialist Central and Eastern Europe (CEE) came into force in 1990 (Poland) and 1991 (Hungary, Czechoslovakia, Russia). Like other CEE competition laws enacted later, these laws were typically crafted and enacted among the first set of laws seeking to create the legal infrastructure necessary for the support of a market economy, and they tended to be modeled more-or-less closely on Articles 85 and 86 of the Treaty of Rome, which serve as the principal competition law of the European Union. Also like the laws enacted later, these pioneer laws have since been amended to a significant degree, reflecting several years of enforcement experience and (other than Russia) in response to the need for the "harmonisation" of competition laws under the various EU Association Agreements.² The Czech and Slovak laws, transformed from one law into two identical laws on the occasion of the "velvet divorce" of the two countries, were given significant amendments that went into force in November 1993 and August 1994, respectively; the Polish and Russian laws in May 1995; and the Hungarian law in January 1997.³

² Marie-Laure Djelic points out that the drafters of the original statutes may not have appreciated the degree to which differences in local economic situations from those of mature market economies called for differences in the provisions of competition legislation.

³ Danica Paroulková and Soňa Matochová point out that, although the Czechoslovak law became the identical Czech and Slovak laws upon the occasion of the country's split, in the Czech Republic the old law actually became the new law, so that the changes in 1993 were

indeed "amendments", while in the Slovak Republic the old law remained in force but only until replaced by a new *law* -- not "amendments" -- in 1994. I will for convenience continue to refer to all four of these legal changes as "amendments".

Early in the enforcement experience of these countries -- and before the enactment of any of the amendments -- I wrote two papers examining certain "critical provisions" in the laws.⁴ Other commentators followed with their own discussions and analyses.⁵ However, with the exception of small portions of a chapter in the book by Fingleton, *et al.*, and a few short (and not always published or widely circulated) country-specific examinations,⁶ there has been no systematic analysis of the changes that have been imposed by the amendments to the laws.

This paper seeks to fill that gap. Here I repeat the ten questions asked in my two earlier papers and discuss how amendments, enforcement experience, and statements of statutory

⁴ "Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe", *The International Lawyer* 26 (1992), 485-503; "Merger Law in Central and Eastern Europe", *The American University Journal of International Law and Policy* 7 (1992), 649-666.

⁵ Tadeusz Skoczny, *Competition Legislation in Post-Socialist Countries*, Warsaw: Friedrich Ebert Stiftung, 1992; Saul Estrin and Martin Cave, eds., *Competition and Competition Policy: A Comparative Analysis of Central and Eastern Europe*, London: Pinter, 1993; Christopher Saunders, ed., *The Role of Competition in Economic Transition*, London: MacMillan, 1993; Carolyn Brzezinski, "Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia, and Hungary", *Michigan Journal of International Law* 15 (1994), 1129-1178; Ben Slay, "Industrial Demonopolization and Competition Policy in Poland and Hungary", *The Economics of Transition* 3 (1995), 479-504 (with my "Comment" in *The Economics of Transition* 4 [1996]); John Fingleton, Eleanor Fox, Damien Neven, and Paul Seabright, *Competition Policy and the Transformation of Central Europe*, London: Centre for Economic Policy Research, 1996 (with my "Review" in *The Economics of Transition* 5 [1997]); Ben Slay, *Demonopolization and Competition Policy in Post-Communist Economies*, Boulder, CO: Westview Press, 1996.

⁶ Milan Banas, "The New Anti-monopoly Law in Slovakia", *European Competition Law Review* 7 (1995), 441-445; Andrei Kashevarov and Andrei Tsyganov, "Summary of the Most Important Recent Developments in Russian Competition Legislation", *Competition Policy Newsletter* 1 (1995), 57-58; Soňa Matochová, "The Act on the Protection of Economic Competition: Overview of Changes in the Act", unpublished paper, Czech Ministry of Competition, 1995; József Sárai, "The New Hungarian Competition Law", *European Competition Law Review* 17 (1996), 174-175; Marta Sendrowicz, "Poland's Revised Anti-Monopoly Law", *BNA's Eastern Europe Reporter* 6 (1996), 164-165.

interpretation have provided changed answers in the past five years.⁷ The questions focus on the importance of the development of a clear, predictable, and transparent process of competition law enforcement that will a) give confidence to investors both foreign and domestic that they will be protected from anticompetitive behavior by incumbent dominant enterprises and that they will be treated fairly in their own business operations by the authorities, while also b) giving confidence to the public that abusive and monopolistic behavior will not be the outcome of the transition to a market economy. The questions are organized around the three principal enforcement areas of these and nearly all other competition laws -- agreements among enterprises, the abuse of a dominant position, and combinations among enterprises -- and are stated as follows:

1. Agreements

- a. Does the law distinguish between horizontal and vertical agreements?
- b. Does the law treat naked cartel arrangements as *per se* illegal?
- c. Does the law restrict vertical agreements by firms lacking market power?

⁷ These questions, or subsets of them, have been adopted by other commentators as a framework of competition law analysis. See, e.g., "The Dimensions of Competition Policy: A Critical Examination of the Competition Legislation of Seven East European Countries", University of Maryland, Institutional Reform and the Informal Sector, IRIS-Mongolia Competition Law Project, March 1993; Slay (1995), *supra* fn. 5, at 489; Slay, "Industrial De-monopolization and Competition Policy in Poland", in Slay (1996), *supra* fn. 5, 123-158, at 138-139; and William Kovacic and Robert Thorpe, "Antitrust and the Evolution of a Market Economy in Mongolia", in Slay (1996), *supra* fn. 5, 89-122, at 96, fn. 27.

2. Abuse of a dominant position

- a. Do the provisions restricting the behavior of "dominant" firms make it too easy for a firm to be labeled dominant?
- b. Does the law protect potential entrants from exclusionary behavior by incumbent firms?
- c. Is it illegal to harm or "take advantage of" a competitor?
- d. Does the law seek to control the prices charged by dominant firms?

3. Combinations

- a. What, if any, are the requirements for the prior notification of combinations of enterprises?
- b. What are the time restrictions on agency analysis of proposals for combinations, and what are the consequences of agency inaction?
- c. What are the criteria by which proposals for combinations are judged?

As noted, my earlier papers discussed the Czechoslovak, Hungarian, Polish, and Russian competition laws. The breakup of Czechoslovakia increases this number by one. While it is beyond the scope of this paper to include a discussion of all of the many other CEE competition laws enacted since 1991 -- which would include Albania, Bulgaria, Estonia, Latvia, Lithuania, Romania, and Slovenia -- I do add Romania to the discussion here, as representative (and in some ways, I believe, exemplary) of this group, and increasing the number of laws discussed in this paper to six.⁸ Let us proceed with that discussion.

⁸ I have discussed the Romanian law in "Romania's New Competition Law", *BNA's Eastern European Reporter* 6 (1996), 230-233, and at greater length in "Competition Law and

1. AGREEMENTS AMONG ENTERPRISES

1.a. Does the law distinguish between horizontal and vertical agreements?

One of the most important distinctions in competition law enforcement in most market economies is that between horizontal agreements (that is, agreements among competitors) and vertical agreements (that is, agreements among enterprises that buy or sell to each other). As will be discussed below, further distinctions are often made within these categories -- especially, between horizontal cartel agreements and other horizontal agreements, and between vertical agreements where one firm is in a position of market power or "dominance" and vertical agreements where neither firm is in such a position -- but these rely on the prior distinction between horizontal and vertical agreements themselves.

In particular, horizontal agreements, constituting both communication and the reaching of an understanding among firms that are competing with each other, are almost inherently somewhat suspect from a competition law standpoint, since they almost inherently reduce competition, at least to some degree. Agreements among firms in a buyer-seller relationship involve no such inherent reduction in competition and are therefore less inherently suspect. The fact that in particular circumstances both horizontal and vertical agreements may turn out to be either quite harmful or quite benign with regard to competition does not alter this fundamental distinction.

Policy in Romania", in Lavinia Stan, ed., *Romania in Transition*, Aldershot, UK: Dartmouth Publishing, 1997, at 163-181.

My earlier paper⁹ identified the lack of a clear distinction between these two kinds of agreements as a potentially important weakness in some of the CEE competition laws. Interestingly, while some of the laws have been amended concerning this topic, none has been amended in precisely this direction. In fact, the principal direction of amendment has been to insure that language that might be read to apply only to horizontal agreements applies to vertical agreements as well. As strictly an analytical matter, this may appear puzzling, since most analysts and enforcers would agree that the most harmful vertical agreements involve firms in a dominant position in a market, and it was clear that the sections of the CEE laws concerning the abuse of a dominant position could be applied to vertical agreements. (Of course, as strictly as *descriptive* matter, this "duplicative coverage" may appear not puzzling at all, since the situation is not meaningfully different in U.S. or EU law.)

In practice, there are probably two reasons why CEE enforcers were not satisfied with this situation: first, as a philosophical matter, they wanted to insure their ability to attack particular vertical restraints even in a market lacking a dominant firm (despite some Western advice to the contrary), and second, as a practical matter, they wanted to insure their ability to attack particular vertical restraints in a situation where it might be difficult to prove the existence of dominance, even if enforcers are convinced that it is present. In other words, amending the law to insure that vertical agreements may be attacked either under the "agreements" section or under the "abuse of dominance" section -- again, as is the case under U.S. and EU law as well -- may remove one legal hurdle to the demonstration that an agreement is anticompetitive.

⁹ "Some Critical Provisions", *supra* note 4.

An example is the old Czechoslovak law. Neither that law nor the revised Czech and Slovak laws make the horizontal/vertical distinction explicitly. Each has language in its Article 3 (under the heading "Agreements Restricting Competition") forbidding agreements among "entrepreneurs" (in the Czechoslovak and Slovak laws) or "competitors" (in the Czech law, but this term is precisely defined in a previous article to include all firms present in some capacity in the market, not just those in a horizontal relationship to each other) "whose object or effect is or may be the restriction on competition" (Slovak law, Article 3.1). There follows in each law examples of practices that may be forbidden, including agreements setting prices or production levels or dividing the market.

In practice, it has become clear that both the Czech and Slovak competition authorities distinguish between horizontal and vertical agreements in their enforcement. One of the avowed purposes of the small language changes in the relevant article of the Czech law was to insure that, consistent with EU competition law and practice, vertical as well as horizontal agreements are subject to the law.¹⁰ The Slovak Competition Office has publicly stated both that "horizontal as well as vertical restraints are covered by this prohibition"¹¹ and that "vertical restraints will be evaluated more 'favorably'" under the amended law.¹² In addition, as will be discussed below, it is clear now that under both laws vertical agreements are subject not only to the provisions of the law concerning agreements but also to the provisions concerning the abuse of a dominant

¹⁰ Soňa Matochová, Director of the International and Legislative Department, Czech Competition Office, personal communication with the author.

¹¹ Banas, *supra* note 6, at 443.

¹² Milan Banas, letter to Carolyn Brzezinski, cited in Brzezinski, *supra* note 5, at 1135-36.

position.¹³

The situation is similar -- and has been clarified by the amendments -- in the Hungarian law. Article 11, on the "Prohibition of Agreements Restricting Economic Competition", has been rewritten to insure that both horizontal and vertical agreements are covered. In this case, the original language addressing agreements among "competitors" was in fact open to the interpretation that only horizontal agreements were addressed by the article,¹⁴ and this term has been replaced with the term "undertakings" (also translated as "entrepreneurs") to clarify that vertical agreements as well are subject to the provision forbidding "agreements or concerted practices ... which have as their object or potential or actual effect the prevention, restriction or distortion of competition" (Article 11.1). Vertical restrictions that do not constitute actual agreements remain subject to the restrictions on the abuse of a dominant position.

¹³ Soňa Matochová, *supra* note 9.

¹⁴ Pittman, "Some Critical Provisions", *supra* note 4, at 489; Ferenc Vissi, President, Hungarian Office of Economic Competition, "Approximation to the Competition Policy of the European Union", remarks at the "Competition Policy in Transition Economies" workshop, Centre for Economic Policy Research, Florence, June 1996, at 5; József Sárai, Director of the International and Policy Bureau, Hungarian Office of Economic Competition, personal communication with the author.

The Polish law is not much changed in its incomplete differentiation between the two types of agreements. Article 4.1 prohibits price agreements "among competitors" -- and while this language is unchanged by amendment, the amended law clarifies the horizontal context by explicitly defining competitors as firms that compete with each other (Article 2.8) -- but the remainder of Article 4 addresses other kinds of "agreements", including market division and output limitation, without using the word "competitors". The first president of the Polish Antimonopoly Office noted before the law was amended that "the 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."¹⁵

The Russian law has not changed in the clearness and completeness of the distinction it makes between horizontal and vertical agreements. Article 6.1 continues to address "agreements in any form (concerted practices) between competing economic entities (or potential competitors)", focusing on price fixing and market division, while Article 6.2 addresses "agreements in any form (concerted practices) between non-competing economic entities, one of which occupies a dominant position, while the other is its supplier or buyer (customer)".

Finally, the new Romanian law is similar to the Czech, Slovak, and Hungarian laws in not explicitly differentiating between horizontal and vertical agreements in its principal article

¹⁵ Anna Fornalczyk, "Competition Law and Policy in Poland: A Welcome and a Warning to International Business", remarks made at the International Bar Association meeting, Budapest, June 1992, published in *Butterworths Trade and Finance in Central and Eastern Europe* (London: Butterworths, 1993), 57-67, at 62, cited in Brzezinski, *supra* note 5, at 1134, fn. 31.

concerning agreements among enterprises; Article 5.1 prohibits "any agreements, expressed or tacit, between undertakings, ... which have as an objective or may have as an effect the restraining, prevention or significant distortion of the competition".

In sum, the language of most of the laws examined here -- like that of the U.S. and EU competition laws -- is not clear in differentiating between horizontal and vertical agreements. If anything, amendments to the laws have sometimes made the distinction less rather than more clear, in their intent to insure that the sections of the laws covering agreements were not limited in their application to horizontal agreements only. Nevertheless this section also illustrates a point made in both of my earlier papers: that close textual legal analysis is not likely to provide a complete picture of the likely interpretation of particular provisions of the competition laws of the CEE countries. Both the statements of competition officials and the enforcement experience -- to be discussed further below, and of course for the most part unavailable for examination five years ago -- also constitute valuable guides as to the operational meanings of the statutes, and in this case both make it clear that, despite the absence of specific statutory language, this distinction is a well-established part of CEE competition law enforcement.

1.b. Does the law treat naked cartel arrangements as *per se* illegal?

Per se treatment of cartel agreements can have important advantages both for competition law enforcers and for businesses. If any kind of agreement can under some circumstances be legal, then no kind of agreement is clearly illegal, and a potential element of certainty and clarity in the competition law is foregone.¹⁶ As I noted in my earlier paper, the CEE statutes as written

¹⁶ There is, however, a corresponding *cost* to *per se* cartel enforcement pointed out by Natalya Yachiestova: the creation of an incentive for combinations among small enterprises. As

followed EU competition law in not explicitly declaring any kinds of agreements (or other behavior, for that matter) *per se* illegal. While none of the amendments has completely changed that situation, there has been movement in the direction of statutory signaling of more serious treatment for blatant cartel agreements, and in practice there is in fact some *per se* treatment of cartels. The most notable change in the CEE laws in this regard is that where agreements horizontal or vertical may be justified, this is now typically in an EU-style context of the formal application to the competition authorities for an individual or group "exemption" from the prohibition on anticompetitive agreements.

The Hungarian law is probably the best example of the change in statutory language signaling a more serious and more formal approach. The original law allowed restrictive agreements among firms with a small collective market share and by firms seeking to counteract the dominance of a trading partner; firms in such situations held an "automatic exception" from the strictures of the law and did not have to apply to the Competition Office for permission to engage in such agreements. Exemptions could be requested from the Competition Office for firms that could demonstrate that their agreement met *any one of* a variety of categories of efficiencies, including lowering prices, improving product quality or distribution, and promoting technological development or exports.

she correctly notes, in the United States a price agreement between two small competitors could send both the entrepreneurs involved to jail, while a merger between the same enterprises might be judged to raise no competitive concerns whatsoever.

The amended law retains a categorical exemption for small market shares only and allows firms to apply for an individual exemption by demonstrating that their agreement meets *all of* a new list of conditions "quite similar to those of Art. 85(3) [of the Treaty of Rome]":¹⁷ the agreement must "contribute to a more reasonable organisation of production or distribution, the promotion of technical or economic progress, or the improvement of competitiveness or of the protection of the environment", while passing along to consumers a "fair share of the resulting benefit" and not restricting competition either for a substantial part of the market or to a greater degree than necessary to achieve the benefits. The amended Slovak law is almost identical to the amended Hungarian law in this respect, with the exception that the amendments also toughened enforcement by removing the automatic exception for agreements among firms with small market shares.¹⁸

The language of the Czech law has not moved as far as the Hungarian and Slovak in the direction of stricter treatment of cartels coupled with an EU-style exemptions regime. However, the differences remaining may be fairly inconsequential. The statutory language was, after all, fairly strict already; it continues to allow agreements only if the firms have small market shares or if the agreements are for the purpose of either

"a) unified usage of trading or payment conditions, with the exception of agreements on price or its components;

¹⁷ Sárai, *supra* note 6.

¹⁸ The enforcement of the Slovak law with respect to agreements is discussed in Danica Paroulková, "Protection of Economic Competition under the Act 188/1994 Coll. of Laws: The Principles of Application in Commercial Practice", paper prepared for the conference, "Competition Policy in Transition Economies", Moscow, February 1997.

b) rationalisation of economic activity, namely by its specialisation, unless it leads to a substantial restriction of competition on the market."

A third alternative, allowing agreements concerning "the granting of a rebate so long as it represents genuine compensation for performance and does not lead to discrimination among customers" was wisely decided to be too closely related to agreements on price and was removed by amendment. Enterprises may apply to the Competition Office in advance for permission to engage in agreements that satisfy the relevant conditions.

The Polish law is an example of the situation where the lessons to be learned are more in the enforcement experience rather than in the statutory language. In fact, the Polish "law" on horizontal agreements is now virtually in the English/American common-law tradition of control by precedent. To be sure, the statutory language itself is fairly strong, and it has been strengthened by amendment: an anticompetitive agreement is allowed under Article 6 only if it is both "*indispensable* from a technical/organizational or economic standpoint to the conduct of an economic activity" and "does not result in a *significant* restraint of competition" (emphasis supplied). Polish antitrust attorney Marta Sendrowicz¹⁹ reports that a) although the wording is unchanged, the strong "indispensable" is closer to the exact English translation of the relevant Polish term than is the word typically used in translations of the law, "necessary", and b) the change of qualifier from "substantial" to "significant" acts to make the law more restrictive as well. Sendrowicz reports that "it is very difficult to convince either the [Antimonopoly] Office or the [Antimonopoly] Court" that both of these conditions are met in a particular case, and this

¹⁹ *supra* note 6, and private communication with the author.

is the consistent with the report of Antimonopoly Office Vice President Elżbieta Modzelewska²⁰ that the Office in fact applies *per se* treatment to cartel agreements. In fact, Office President Andrej Sopoćko explains this development along the lines of precedent: the Polish Antimonopoly Court has ruled that cartel agreements are *per se* illegal, and therefore they have henceforth been treated as such.²¹

The amended Russian law may have moved in the opposite direction. Originally allowing "in exceptional cases" otherwise anticompetitive agreements that "promote the saturation of the goods market, the improvement of the consumer qualities of goods, and [or] an increase in their competitiveness, including on the international market" (Article 6[3]), the statute now is more generalized, allowing "in exceptional cases" those agreements whose "positive effect ..., including in the socioeconomic sphere, will exceed the negative consequences for the relevant goods market". This is certainly the farthest from *per se* treatment of the laws of these five countries -- and if anything, probably a step or two *away from* such treatment -- leaving a good deal of discretion to the Antimonopoly Committee and a good deal of uncertainty to businesses.

The Romanian law is broadly similar to all of these laws in not providing for specific *per se* treatment for cartel-type agreements. Agreements concerning prices are only one of many examples listed in Article 5(1) of agreements that are prohibited if their "objective ... or ... effect"

²⁰ private communication with the author.

²¹ private communication with the author.

is "the restriction, obstruction or distortion of the competition". An exemptions regime is created that appears just as strict than that of the Hungarian, Slovak, Polish, and Czech laws, with agreements allowed that meet *all of* a set of conditions similar to that of the Hungarian and Slovak laws and *one of* an additional set of conditions: the agreement must improve production or distribution, promote technical progress or quality improvement, assist small and medium-sized enterprises on the domestic market, increase the competitiveness of Romanian products on the international market, or result in an actual long-run fall in product price to consumers (Article 5[2]).

An additional clue to strict treatment for cartels may be found in Article 8, which removes application of the provisions against agreements for groups of enterprises with small market shares, but unlike the similar provisions in the Hungarian and Czech laws, then nullifies this removal for agreements "referring to prices, tariffs, market-sharing arrangements or bids". As I have noted elsewhere,²² there seems to be good reason to predict that the Romanian Competition Council will treat cartel agreements very seriously.

1.c. Does the law restrict vertical agreements by firms lacking market power?

Most economists believe that vertical restraints may be harmful to competition only if they are engaged in by firms in a position of market power or dominance (and not always even then). Indeed, scholars have identified a variety of *pro*-competitive rationales for various vertical restraints, including the promotion of point-of-sale services, the protection of relationship-specific investments, and the facilitation of entry into new markets. The list of likely *anti*-competitive rationales has grown correspondingly smaller, with the exploitation and/or

entrenchment of an existing position of market power the remaining items of principal concern.²³

It follows that a vertical restraint or agreement that does not involve a firm already in a position of market power or dominance is not likely to harm competition. However, as in the rest of the world, CEE competition law writers and enforcers do not always take the advice of economists.

²² "Competition Law and Policy in Romania", *supra* note 7, at 166-167.

²³ Another area of concern, particularly in industries characterized by strong "network" economies, is the possible extension or "leveraging" of a dominant position from one market to a related market. See, *e.g.*, Joseph Farrell and Garth Saloner, "Installed Base and Compatibility: Innovation, Product Preannouncement, and Predation", *American Economic Review* 76 (1986), 940-955; Stanley Besen and Garth Saloner, "The Economics of Telecommunications Standards", in Robert Crandall and Kenneth Flamm, eds., *Changing the Rules: Technological Change, International Competition, and Regulation in Communications*, Washington, DC: Brookings, 1989; Carl Shapiro, "Antitrust in Network Industries", address before the American Law Institute and American Bar Association conference, "Antitrust/Intellectual Property Claims in High Technology Markets", San Francisco, January 1996.

There is first of all the question of defining markets. An enterprise can have market power or a position of market dominance only in a defined market, so that the question of how a market is defined becomes a critical one for many aspects of competition law enforcement. It was apparent early on that any attempt to apply directly sophisticated Western-style market definition methodologies -- for example, the "five percent test" of the Merger Guidelines of the U.S. Department of Justice and Federal Trade Commission -- was doomed to failure, partly because of market imperfections and price restrictions and rigidities and partly because the lion's share of early enforcement activity in these countries has been in the area of the abuse of a dominant position, not mergers.²⁴ The amendments to the laws have, with one exception, clarified how markets are to be delineated, and that exception was the one instance examined

²⁴ Rose Anne Devlin and Stylianos Perrakis ("Legislating Competition in the Russian Federation: A New Challenge for Antitrust Policy", *Antitrust Bulletin*, winter 1996, 901-927) are in my view a little too willing to call for the application of such Western-style methodologies in the CEE countries, but they do concede that these methodologies "may give the wrong answers in a world where most, or even many, prices are administered, especially in a regionally fragmented system of competition law application" (p. 917). Regarding the application of such tests to different types of cases, use of the Merger Guidelines test in an abuse-of-dominance context, even if feasible, would result in a modern-day appearance of the "cellophane fallacy": if product prices are already above the competitive level, examining substitution possibilities at current or higher levels would result in market boundaries drawn artificially broadly, and would create a bias against the finding of market dominance.

here of a methodology already outlined in the law.

The original Polish and Czech competition laws provided no guidance to enforcers or businesses regarding market definition, and the Russian law gave only the barest hint, and that for geographic market definition only.²⁵ The revised Polish law has no specific provision for market definition but does define "competitors" in a way consistent with economic market definition: they are defined as "economic entities which introduce or are capable of introducing, acquiring or are capable of acquiring at the same time, on the same market goods of the same type, or different goods, which are perceived by consumers as substitutes (goods which may replace each other)" (Art. 2.8). The revised Slovak law includes a market definition provision in the abuse-of-dominance article, though it presumably applies to other contexts as well; the "relevant market is a geographical and temporal equilibrium of supply and demand of such group of goods, which are for the satisfaction of certain needs of users identical or mutually interchangeable. Relevant market is defined in product, geographical and time dimensions" (Art. 7.3). The revised Russian law goes farthest in defining both "substitutes" -- "a group of goods which may be compared as to their functional assignment, use, qualitative and technical properties, price and other parameters in such a way that the consumer actually substitutes or is prepared to substitute them by each other in the course of consumption (including industrial consumption)" -- and a "goods market" -- "the sphere of circulation of a good which does not

²⁵ The "Definitions" section of the original Russian law defined "republican goods market" as "the sphere of the circulation of goods within the boundaries of the [Russian Federation]", and a "local goods market" as "the sphere of the circulation of goods within the boundaries of a republic, autonomous oblast, autonomous okrug, krai, [or] oblast which is a

have substitutes, or of substitutes, on the territory of the Russian Federation or its part, defined on the basis of the economic ability of the consumer to purchase an article on a relevant territory and the lack of this ability outside such territory" (Art. 4). The revised Hungarian law is basically unchanged in defining "relevant market" in its section addressing agreements among enterprises, and in defining the market as including 1) "the goods which are subject to the agreement and the geographical area concerned", 2) "any goods that can reasonably substitute for them, ... [taking into consideration] intended use, price, quality and terms and conditions of fulfillment", and 3) the geographic area "outside which ... a consumer is unable to procure goods or is able to procure them only under considerably less favourable conditions", or "the seller of goods is unable to sell goods or is able to sell them only under considerably less favourable conditions" (Art. 14). It is difficult to quarrel with any of these revised definitions as setting the basis for a sound economic methodology for market definition.

Neither the revised Czech law nor the Romanian law have specific provisions describing market definition. However, the Czech Competition Office has published a "methodology", and the Romanian Competition Council has issued "guidelines", which address this point in great detail. Each likewise seems to provide a sound basis for a good market definition methodology.

Returning to the issue of vertical agreements by enterprises with and without market power: the Russian law as amended remains the most faithful reflection of the economic point of view. As noted in section 1.a., above, Article 6 of the law distinguishes clearly between the treatment of horizontal and vertical agreements, and vertical agreements are of concern only if they satisfy two conditions: they involve a firm occupying a dominant position *and* they "result

component part of the [Russian Federation]" (Art. 4.2-3).

or may result in a restraint of competition". Article 5 of the law continues to include vertical restraints and agreements such as tying, discrimination, refusals to deal, and interfering with competitive entry as possible offenses under the abuse-of-dominant provisions of the law.

Similarly, the amended Czech law is unchanged in excepting from prosecution all agreements, horizontal or vertical, of firms with small market shares and of specifically citing certain vertical restraints or agreements (such as tying and discrimination) among the examples of actions that may constitute an abuse of a dominant position. However, the safety of firms without dominance is not complete, since the market share threshold for exception is fairly low -- "5% of the nation-wide market, or ... 30% of the local market" -- and there is thus potentially a broad middle ground of firms that may have market shares above these thresholds but may still not possess any true market power or dominance.

The Slovak, Hungarian, and Polish laws, on the other hand, have seen important changes in this regard. The amended Slovak law, as noted in the previous section, removes the *de minimis* exception from the provision addressing agreements, meaning that in principle *any* two firms involved in a vertical agreement may be prosecuted if the agreement is judged to be one "whose object or effect is or may be the restriction on competition". The only protection here from overly aggressive enforcement of the law would be the judgment of the Antimonopoly Office as to whether a vertical agreement involving two firms with small market shares in fact was a danger to competition.

The amendments to the Hungarian and Polish laws, however, are in the direction of less likely prosecution of vertical agreements among firms lacking market power. It is true that the Hungarian law, as noted above in section 1.a., was amended to insure that the provisions

concerning agreements apply to vertical as well as horizontal agreements (despite the extant possibility of attacking vertical agreements under the abuse-of-dominance provisions of the law).

However, the Hungarian law's provisions on agreements, like those of the Czech law, create an exception for firms with a market share of less than ten percent.²⁶ Perhaps more importantly, the amended law sends a clear signal by removing the strictures against tying agreements from the "unfair competition" section and moving them to the "abuse of dominance" section, with the express rationale that customers of non-dominant suppliers seeking to impose tying would have other choices in the marketplace.²⁷ A similar change was made in the Polish law, where tying was moved by amendment from the "agreements" section to the "abuse of dominance" section.

The Romanian law is similar to the pre-amendment Hungarian law in opening up the danger of punishing firms lacking market power for engaging in vertical agreements and restraints. As noted above, both horizontal and vertical agreements are subject to Article 5, which addresses anticompetitive agreements. It is a good sign, at least with respect to vertical agreements, that this law includes a *de minimis* exception -- in this case both for firms of small absolute size and for firms with small market shares.²⁸ It is probably not such a good sign that the list of examples of illegal agreements includes tying agreements (moved by the Hungarians

²⁶ Unlike the Czech law, in the Hungarian law there is no explicit distinction between shares in a local market and shares in a national market. The presumption is that the ten percent level refers to whatever markets are determined as the relevant markets in the particular vertical relationship under investigation.

²⁷ Private communication between József Sárai of the Hungarian Office of Economic Competition and the author.

²⁸ The absolute size threshold is to be determined annually by the Competition Council. The market share threshold is five percent (Art. 8.1).

and Poles into the sections of their laws covering abuse of dominance). It is also probably not such a good sign -- again, at least with respect to vertical agreements -- that this *de minimis* exception does not apply to agreements "referring to prices, tariffs, market-sharing arrangements or bids". As noted above, this *appears* to be designed to toughen policy regarding certain *horizontal* agreements. However, if it is interpreted to toughen policy regarding vertical agreements as well -- even those among firms lacking market power -- it will likely lead to the prosecution of innocent and even procompetitive behavior. I have argued elsewhere²⁹ that the interpretation of this provision will be one important test of the promarket enforcement philosophy of the Romanian Competition Council.

2. ABUSE OF A DOMINANT POSITION

2a. Do the provisions restricting the behavior of "dominant" firms make it too easy for a firm to be labeled dominant?

²⁹ "Competition Law and Policy in Romania", *supra* note 7, at 176-177.

CEE competition laws, modeled as they tend to be on Articles 85 and 86 of the Treaty of Rome, usually follow EU practice not only in prohibiting the "abuse of a dominant position on the market" -- a concept similar to the concept of "monopolization" under U.S. competition law but in design and practice more interventionist than that concept³⁰ -- but also of specifically listing among the examples of such abusive behavior such actions as "charging exorbitant prices" or "withholding production in order to increase price". Such provisions are rarely enforced in EU countries, but the CEE traditions of close economic regulation and suspicion of market outcomes have raised fears that such provisions in CEE laws would be used as means to "re-regulate" the economy.

³⁰ See, *e.g.*, Eleanor M. Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness", *Notre Dame Law Review* 61 (1986), 981-1020.

One aspect of such fears has been the apparent ease with which the CEE laws allowed firms to be labeled "dominant" -- and hence to have their actions more subject to competition office scrutiny and regulation, even in some countries (such as Russia) to be included on a formal "list" of firms subject to extra government oversight. The first generation of CEE laws tended to have both a low market share criterion for dominance -- usually 30 percent -- and sometimes to rely on that criterion alone. I argued in my earlier paper³¹ that any definition that focused strongly or exclusively on market share rather than on true market power -- which would include consideration both of the likely permanence of a high share and, in particular, the presence or absence of barriers to entry and expansion by other firms on the market -- risked over-regulating the economy and deterring investors who might fear that their success in achieving high sales would make them subject to close competition office regulation.

This is one area where the amended laws may be judged to be nearly universally improved. The Hungarian law is a good example. Whereas the original law defined as dominant a firm "whose commodity cannot be purchased in other markets or only under much less favorable conditions ...; *or*... who orders a commodity not marketable elsewhere or only marketable under much less favorable conditions than usual ...; *or* whose share of the market concerned ... exceeds thirty percent ...",³² the amended law essentially repeats the first two conditions but completely omits the third, instead expanding upon the condition of market power that constitutes dominance and listing the factors (including entry and market share) that should

³¹ "Some Critical Provisions", *supra* note 4, at 495-496.

³² emphasis supplied.

be taken into account in evaluating the presence of dominance.³³ It is an impressively crafted section of the statute.

The original Czechoslovak law labeled a firm as dominant if it was "subject to no substantial competition", and followed with what appeared to be an unambiguous market share determinant: "Dominant position in the market is held by an entrepreneur who supplies the relevant market ... with at least 30 percent of supply of identical, comparable or mutually commutable goods." The amended law of the Czech Republic is unchanged in this respect, but the Slovak law is tightened up considerably: the market share criterion is raised to 40 percent, and the possession of this market share is clearly identified as establishing a *presumption* of dominance rather than the *fact* of dominance.

³³ See Sáradi, *supra* note 6, at 174: "The new act has an entirely new concept for defining dominant positions [Art. 22]. Contrary to the previous one, this definition does not contain market share thresholds, but is built on the ability of the undertakings to act independently to a great extent from other market participants. Costs and risks of market entry and exit, financial strength of the undertakings, the structure of the relevant market and market shares are among the factors to be taken into account assessing the existence of dominance in a particular case."

The Polish law had already combined an economic definition of dominance -- "the position of an economic entity if it does not encounter significant competition on a national or local market" -- with a market share based *presumption* of a finding of dominance; the amendments to the law have simply followed the Slovak example of raising the presumptive level from 30 percent to 40 percent. Marta Sendrowicz notes that good evidence that the Polish Antimonopoly Office has not erred on the side of finding dominance lies in the fact that, as of April 1996, there had not been a single appeal of an Antimonopoly Office decision based upon the finding of dominance.³⁴

³⁴ letter to the author, April 24, 1996.

The original Russian law, like the original Polish law, combined an economic definition of dominance -- the ability to "exert decisive influence on the general conditions of the circulation of goods on the market" or to "impede access to this market by other economic entities" -- with a rebuttable market share presumption of dominance, the particular share to be determined each year by the Russian Antimonopoly Committee (but not to be less than 35 percent).³⁵ The revised legislation retains the economic definition but sets a more stringent numerical standard: market shares below 35 percent are never dominant; market shares between 35 and 65 percent are presumed to be nondominant, but may be proven otherwise by the Antimonopoly Committee; and market shares above 65 percent are presumed to be dominant, but may be proven otherwise by the enterprise. Irina Sokolova, Head of the Department of Commodity Markets and Development of Competition at the St. Petersburg Regional Office of the Russian Antimonopoly Committee, believes that this ability of an enterprise even with a very large market share to demonstrate that its position is not a dominant one, coupled with an announced policy of considering whether a particular high market share is "stable", reduces possibilities for the antimonopoly authorities and the judiciary to excessively

³⁵ "In fact, GKAP [the Antimonopoly Committee] has never established such a critical level, and Russian courts have required that the AMCs prove the existence of monopoly power before they will find dominance." Paul Joskow, Richard Schmalensee, and Natalia Tsukanova, "Competition Policy in Russia during and after Privatization", *Brookings Papers: Microeconomics* 1994, 301-381, at 336. However, Capelik and Slay report that both a percentage level (at 35%) and a methodology were finally published by the GKAP in late 1993 ("Antimonopoly Policy and Monopoly Regulation in Russia", in Slay, *De-monopolization and Competition Policy in Post-Communist Economies*, *supra* note 5, 57-88, at 72 [citing GKAP, "Methodological Recommendations for Determining Market Boundaries and Size", October 26, 1993]), and Marie-Laure Djelic confirms that "in practice, GKAP has generally chosen 35% as the threshold of dominance" ("Competition Regulation in Russia and the Legacy from One Century of Antitrust Legislation", unpublished working paper, Ecole Supérieure des Sciences

actively use this notion in enforcing subsequent prohibitive legal norms. In particular, companies which have achieved temporary success on the market thanks to the introduction of new products and technology may count on "condescending" attitude when their business practice is assessed.³⁶

Economiques et Commerciales [Paris], June 1995, at 23).

³⁶ Sokolova, "Specific Features of the Russian Competition Law and Law-Enforcement Practice", *Russian Business Law Journal* 4 (December 1996), 7-16, at 10.

In addition, Capelik and Slay note that the statutory amendments improved enforcement by better specifying how the boundaries of geographic markets were to be determined³⁷ -- and thus, by (my) inference, increased the likelihood that the question of dominance would be evaluated using a correctly defined market.

As for the Romanian law, it is nearly unique among CEE countries in the criteria for determining market dominance: there are no criteria presented in the law; rather, the Competition Council is empowered to *dictate* such criteria by regulation.³⁸ As of this writing, it has not done so.

2.b. Does the law protect potential entrants from exclusionary behavior by incumbent firms?

A good deal of the emphasis so far in CEE competition law enforcement has been, appropriately, on attacking abuses of dominant positions.³⁹ Economies previously organized along the principles of socialism typically have a large number of enterprises in dominant or monopolistic positions, integrated both vertically and horizontally beyond what would be

³⁷ Capelik and Slay, *supra* note 35, at 67.

³⁸ Ben Slay points out that the new Georgian law on competition also contains such a provision.

³⁹ Fingleton, *et al.*, *supra* note 5. See also my "Comment" on Slay, "Industrial Demonopolization and Competition Policy", *supra* note 5.

observed in a developed market economy, and these enterprises may be expected to take steps seeking both to protect these positions and to exploit them.

One of the potentially most effective (and hence most harmful to the public) methods of protecting a dominant position may be through the control of vertically related markets. It may be difficult enough in a transition economy, typically characterized by a variety of generalized barriers to market entry such as poorly operating capital, land, and labor markets and underdeveloped contract, collateral, and bankruptcy laws, for a new or existing firm to enter a market already dominated by an incumbent firm.⁴⁰ It may be that much more difficult to do so if the incumbent also controls either critical inputs to production or critical distribution channels. Hence the control of such vertically related markets -- either through vertical integration or through exclusive contracts -- may be an especially important area of competition law

⁴⁰ See in general Cheryl W. Gray, *et al.*, "Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe", World Bank Discussion Paper 209, July 1993; Cheryl Gray and Kathryn Hendley, "Developing Commercial Law in Transition Economies", World Bank Policy Research Working Paper 1528, November 1995; Janet Mitchell, "Bankruptcy as a Control Device in Economies in Transition", *Journal of Comparative Economics* 20 (1995), 265-301; Rumen Dobrinsky, "Enterprise Restructuring and Adjustment in the Transition to Market Economy: Lessons from the Experience of Central and Eastern Europe", *Economics of Transition* 4 (1996), 389-410, at 394-397; Cheryl Gray and Arnold Holle, "Bank-Led Restructuring in Poland: The Conciliation Process in Action", *Economics of Transition* 4 (1996), 349-370; Joseph Blasi, Maya Kroumova, and Douglas Kruse, *Kremlin Capitalism: Privatizing the Russian Economy* (Ithaca, NY: ILR Press, 1997). Two recent articles outline the underdeveloped state of real estate and labor markets in Russia: Oleg Kolomytchenko and Natalija Lukyanova, "Real Estate Market in the Light of Antimonopoly Rules", *Russian Business Law Journal* 4 (December 1996), 1-6, and David Hoffman, "Moscow Remains a Perk for Permit Holders", *Washington Post*, January 20, 1997, 20. According to Hoffman, Russians wishing to move to Moscow are unable to find either employment or residence unless they have a "propiska", or residency permit, and city officials have been charging about \$7,000 for such a permit. "Even with new freedoms and new choices -- including a constitutional guarantee of the freedom to live where they please -- millions of Russians are stuck in their tracks. They cannot legally migrate to a new city unless they are wealthy or are prepared for battles with Soviet-era

jurisdiction if the transformation from monopolized to competitive markets is to be effected.⁴¹

Although the CEE competition laws have not yet been frequently applied to this type of arrangement or behavior, it is clear from the statutes, from statements of enforcement intentions, and from the cases that do exist that the laws are capable of addressing such behavior. Two types of weapons seem to be available in the typical arsenal:

- a) general prohibitions against either agreements or abusive behavior that block or harm competition, and
- b) specific prohibitions against anticompetitive discrimination, where the discrimination

bureaucracy and procedures. ... Labor and housing markets are primitive or nonexistent."

⁴¹ Garth Saloner, for example, has expressed pessimism concerning the ability of Russian product markets to be made more competitive, citing *inter alia* the fact that "new entrants would have to find access to vertical supply, a difficult proposition considering the high levels of vertical integration in the Russian economy" ("General Discussion" following the paper of Joskow, Schmalensee, and Tsukanova, *supra* note 35, at 376-377). David Dyker and Michael Barrow agree: Russia's "unique pattern of vertical integration" means that "any foreign entrant will also have to be vertically integrated, for there will be few or no suppliers of vital intermediate components. This might discourage entry and therefore protect the domestic industry." Dyker and Barrow, "Monopoly and Competition Policy in Russia", in Alan Smith, ed., *Challenges for Russian Economic Reform*, Washington, DC: Brookings (for the Royal Institute of International Affairs, London), 1995, 79-115, at 87, 102.

could take the form of an integrated enterprise refusing to sell inputs at equitable terms to non-integrated competitors or potential competitors.

Amendments to the laws have not changed this coverage in any important way.

The Polish law, for example, is unchanged in including in its list of examples of the abuse of a dominant position in Article 5 both "counteracting the formation of conditions indispensable for the emergence or development of competition" (a provision that could be used to attack either vertical integration with refusal to supply competitors or exclusive vertical contracts) and "refusing to sell or purchase commodities in a manner discriminating against certain economic entities when there are no alternative supply sources or outlets" (which could be used to attack vertical integration with refusal to supply). Exclusive vertical agreements would also be subject to the provision of Article 4 attacking "agreements ... restricting the market access of, or eliminating from a market, economic entities not included in the agreement." In addition, Article 12 of the Polish law provides that enterprises "that have a dominant position on a market can be divided or dissolved if they permanently restrain competition or the conditions for its emergence".

Similarly, Hungarian enterprises are forbidden by Article 21 of the Hungarian law to abuse a position of dominance by "refusing, without justification, to create or maintain business relations appropriate for the type of transaction", by "discriminating, without justification, against trading parties", by "creating, without justification, disadvantageous market conditions for competitors", and by "hindering, without justification, market entry in any other manner", and Article 11 lists as examples of agreements forbidden if they "have as their object or potential or actual effect the prevention, restriction or distortion of competition" those that hinder market

entry, restrict the marketing possibilities of other enterprises or discriminate. The *Borsod Brewery* case of the Hungarian Office of Economic Competition⁴² is a good case example of enforcement against this kind of practice: the Office attacked a brewer that had responded to entry by a competitor into its geographic market by forcing its distributors to sign (virtually) exclusive distribution contracts, thus denying to the entrant access to distribution channels.⁴³ Hungarian competition law does not provide for demonopolization as a remedy.

The Czechoslovak law was not much changed by amendment in its fairly general coverage of the issue of exclusive vertical agreements. The unchanged provisions addressing the abuse of a dominant position forbid generally abusive behavior that harms "other competitors or consumers, and ... the public interest" (amended Czech law, Article 9.3). Both the Czech and Slovak laws then list specific examples of abusive behavior that include discrimination but do not include any other language relevant to exclusive contracts. Both laws have provisions in their "agreements" sections that address discrimination in particular, but the Slovak law has nothing further on this topic except, again, the general language prohibiting agreements that harm competition. The Czech competition law is more direct here in addressing agreements "to restrict access to the market to competitors who are not members of the agreement", language that appears to be applicable to both horizontal and vertical agreements with such terms. Soňa Matochová of the Czech Competition Office confirms that such agreements could be attacked

⁴² Vj-52/1992.13.

⁴³ For more details, see my "Comment" on Slay's paper, *supra* note 5.

under either Article of the Czech law:

In general, "exclusive distributions" which have anticompetitive effects could be considered as agreements restricting competition if such written agreement exists as clear evidence or there are other kinds of evidence sufficient for the assessment of concerted practices. ... Where such evidence is not available, the only possible thing to prosecute is abuse of dominant position provided the respective firm has a dominant position⁴⁴

The Czech and Slovak laws have no provisions for demonopolization as a remedy.

⁴⁴ letter from Soňa Matochová to the author, October 26, 1996.

The Russian law is similarly unchanged in this regard. Article 5 labels as possible abuses of a dominant position both discrimination and "creating obstacles for other economic entities, as to their entry to or withdrawal from the market", and, as noted above, Article 6(2) prohibits vertical agreements involving a firm in a dominant position "where such agreements (concerted practices" result or may result in a restraint of competition". Article 29 allows for demonopolization by the Antimonopoly Committee when an enterprise in a dominant position has committed two or more violations of the competition law. However, Sokolova points out that the failure of the Antimonopoly Committee to issue regulations concerning demonopolization has limited the usefulness of this provision of the law.⁴⁵

Finally, this aspect of the Romanian law seems quite similar to the other CEE laws, perhaps closest in detail to the Czech and Slovak laws. Enterprises in a dominant position are forbidden to abuse that position "by using anti-competitive deeds whose aim is or whose effect may be to distort the trade or prejudice the consumers", but this general language is all that suggests the specific application of this provision to exclusive vertical agreements. Discrimination is listed as one example of the abuse of dominance. The section on illegal agreements forbids agreements "whose effect may be the restriction, obstruction or distortion of the competition on the Romanian market or on part of it", and one example listed is agreements "aiming to ... eliminate competitors from the market ; [or] limit or obstruct the access to the market." Unlike the Czechs and Slovaks, the Romanian competition enforcers may seek demonopolization of an enterprise abusing a position of dominance if other "measures and sanctions imposed by the Competition Council ... do not restore legality and remove the danger

⁴⁵ Sokolova, "Specific Features of the Russian Competition Law", *supra* note 36, at 14.

of repeating the abuse", though under Article 7 of their law they must seek a court order to do so.

2.c. Is it illegal to harm or "take advantage of" a competitor?

As I noted in one of my earlier papers,⁴⁶ the generalized language cited in the previous section that may be so useful in enabling the CEE competition authorities to attack competitively harmful vertical restraints and integration is something of a two-edged sword. While it is important that the authorities have the tools necessary to stop behavior that prevents the development of competition and in the process harms both competitors and customers, it is critically important that such tools not be used to intervene in every contract dispute or to attack behavior that is merely strongly competitive -- behavior that may harm competitors, to be sure, but only through the process of selling a good product at a good price, and hence does not harm but rather helps both the competitive process and customers. If enterprises believe that they will be punished for achieving a high market share by competing aggressively but fairly, they will hesitate to do so, and it will be the public that pays the price.

The Polish law, as mentioned above, prohibits a dominant firm from "counteracting the formation of conditions indispensable for the emergence or development of competition" (Art. 5.1). The Hungarian law prohibits a dominant firm from "hindering, without justification, market entry" and from "creating, without justification, disadvantageous market conditions for competitors" (Art. 21.i, j). The Czech law is unchanged in defining the abuse of a dominant position as abusive behavior that harms "*other competitors* or consumers, ... to the detriment of the public interest" (Art. 9.3, emphasis added), and the Russian law is unchanged in defining abuse partly as the "impingement upon the interests of other economic entities" (Art. 5). As

noted above, the Romanian law prohibits agreements "aiming to ... eliminate competitors from the market; [or] limit or obstruct the access to the market" (Art. 5.1.g). Only the Slovak amendments seem to display a specific determination to move away from such notions, as the language just cited as unchanged in the Czech law has been removed from the Slovak law. And none of the laws contains the useful caveat present in the competition law of Brazil that "achievement of market control as a result of competitive efficiency does not" constitute a violation (Art. 20.1).

What is the experience in interpreting this language? Have firms indeed been penalized for simply gaining market share by being more efficient than their competitors? The evidence is somewhat mixed. Marta Sendrowicz believes that the Polish authorities have avoided this trap:

⁴⁶ "Some Critical Provisions", *supra* note 4, at 499.

I must admit that reading the provisions of the Law, ... fears with regard to the proper application of the Law could reasonably have arisen. Fortunately, the practice of the Office and the Court does not leave any room for doubt that a procompetitive behavior could be considered unlawful by Polish antimonopoly agencies, and that harming a competitor is a violation of the Law. According to the Court it is competition *per se* which requires the protection under the Law.... A firm is free to sell a high-quality product at a low price unless such a firm (enjoying a dominant position) offers the price unfairly in order to eliminate competition.⁴⁷

⁴⁷ letter to the author, April 24, 1996.

However, Milan Banas points out that one of the focuses of Slovak competition enforcement is the prevention of the *exploitation* of a dominant position at the expense of consumers, and he makes this comment in the context of the distinction between "exclusionary" abuses that harm the competitive process and "exploitative" practices that represent merely the exercise of market power in the form of high prices, tying, and other practices.⁴⁸ The judgment of Fingleton, *et al.*, the only authors who have done a comprehensive study of the CEE competition law enforcement experience, is decidedly less benign: they believe that the competition authorities of all four countries that they examine (the Czech Republic, Hungary, Poland, and Slovakia) have focused excessively on questions of "fair treatment" and the "taking of advantage" of one enterprise by another, with a real opportunity cost of the devotion of insufficient resources to the investigation and attack of more serious competitive problems.⁴⁹

Such a focus may be understandable, given the number of markets in the CEE countries where dominance is present, given the weakness of the conditions necessary for the forces of competition to check or erode particular conditions of dominance, and even given the importance attached by CEE competition authorities to harmonization of their law and practice with those of the European Union. (EU abuse-of-dominance control has always been more focused on the protection of small competitors and less on the protection of customers than has U.S. monopolization control.)⁵⁰

Nevertheless I believe there is the potential for serious harm from the not infrequent

⁴⁸ Banas, *supra* note 6, at 441-444.

⁴⁹ Fingleton, *et al.*, *supra* note 5, at 107-147, particularly 139-140.

⁵⁰ See, *e.g.*, Fox, *supra* note 30.

practice of these competition authorities of voiding contracts on the grounds that one party took advantage of its economic power to extract unfair terms from the other. It is not merely, as I argued above, that in the long run a competitive market works best if enterprises are allowed to compete aggressively, even if some competing enterprises may suffer as a result. It is not merely, as Fingleton, *et al.*, argue, that the limited resources of CEE competition authorities would be utilized more productively if devoted to creating and preserving the competitive operation of markets rather than to second-guessing particular economic outcomes.

Just as serious in the long run, it seems to me, is the threat posed by this pattern of contracts to the development of contract use in a transition economy. It is widely agreed upon that the honoring of contracts, both short term and long term, is a necessary component of business behavior for the development of a market economy -- or rather, of a market economy that can use the efficiency of long-term investment projects, particularly those devoted to relationship-specific assets, rather than the inefficiency of spot markets and barter.⁵¹ If enterprises learn that they may sign contracts and then, upon further reflection, have these same contracts voided by a competition authority because of some asymmetry of strength in the original bargaining, other enterprises will begin to treat contracts as vague statements of intention

⁵¹ See, e.g., Armen Alchian and William Allen, *Exchange and Production: Competition, Coordination, and Control*, 2d ed., Belmont, California: Wadsworth: 1977, at 113-115. Russian presidential hopeful Grigory Yavlinsky makes a similar point concerning the protection of private property in a transforming economy: "A market economy must be based on private property and competition. In Russia, this cannot work properly because there are no genuine private property rights and rules of competition. If one knows that one's purse may be stolen at any moment, all one's energy is devoted to protecting oneself from this threat. Similarly, if a would-be businessman knows that everything he creates is likely to be stolen, he will produce only for himself and his family. Under such circumstances there can be no division of labour and no economic progress" ("A Chain of Calamities", *Financial Times*, January 31, 1997, at 18).

rather than as firm commitments. The result will be an unwillingness to engage in long-term contracting and -- it must follow as the night the day -- an unwillingness to make long-term investments. Foreign investors in particular -- so sought after in CEE economies, both for their financial commitments and for their accompanying know-how -- will divert their money to countries where long-term investments may be made with greater certainty of legal protection.⁵² CEE competition authorities should give serious thought to the question of whether the short-term gains in terms of fairness and equity are worth such long-term costs.

2.d. Does the law seek to control the prices charged by dominant firms?

The issue of competition office control of aspects of the pricing decisions of enterprises in a dominant position is not an easy one.

On the one hand, legislators seeking to harmonize CEE competition laws with Articles 85 and 86 of the Treaty of Rome would find in Article 86 the following two price-related examples of abuses of dominance:

⁵² See especially Brian Levy and Pablo T. Spiller, "Regulation, Institutions, and Commitment in Telecommunications: A Comparative Analysis of Five Country Studies", *Proceedings of the World Bank Annual Conference on Development Economics 1993*, 215-252, and Pablo T. Spiller, "Institutions and Regulatory Commitment in Utilities' Privatization", *Industrial and Corporate Change* 2 (1993), 387-450. Hans-Peter Lankes and A.J. Venables show that not only the amount but also the nature of foreign direct investment is sensitive to the legal and regulatory infrastructure of a country: "Foreign Direct Investment in Economic Transition: The Changing Pattern of Investments", *Economics of Transition* 4 (1996), 331-347.

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b) limiting production, market or technical development to the prejudice of consumers.

Furthermore, the standard microeconomic argument that high prices in conditions of shortage will call forth additional supplies may be less applicable in a developing market economy, with some of the institutional impediments to market entry discussed above. Finally, CEE economies frequently are only early on in the process of creating independent regulatory commissions for controlling the prices of natural monopoly enterprises,⁵³ and under such circumstances, one may argue that competition authorities, applying the abuse-of-dominance provisions of the competition laws, should act as the quasi-regulators of last resort.⁵⁴

⁵³ As of this writing, Hungary has independent regulatory bodies for both the energy and telecommunications sectors; the Russian regulatory authority for the energy sector is gradually coming into serious operation; and Poland's Sejm has recently passed legislation creating a regulatory institution for the energy sector. See the European Bank for Reconstruction and Development, *Transition Report 1996*, for a discussion.

⁵⁴ This is the position taken by Janusz Ordovery, Russell Pittman, and Paul Clyde in "Competition Policies for Natural Monopolies in a Developing Market Economy", *Economics of Transition 2* (1994), 317-343, reprinted in Ben Slay, *De-monopolization and Competition Policy*, *supra* note 5, at 159-193.

On the other hand, enforcement actions are taken under these provisions of the Treaty of Rome quite rarely. The reason, presumably, is that enforcers have learned that markets *do* work to correct shortages: that in the face of shortages, the two most desirable policy responses are the economizing on existing supplies by customers and the creation of new supplies by enterprises, and these are precisely the responses evoked by price increases.⁵⁵ There is the fact that CEE governments in general -- and sometimes the personnel of the competition authorities in particular -- have vast experience in the control of prices, and may be only too ready to succumb to temptation and slip back into such familiar patterns of analysis and enforcement if given the opportunity. And there is the corresponding fact that CEE enterprise managers need to learn that success lies in marketplace performance, not in lobbying and developing political connections.

⁵⁵ See, e.g., the excellent discussion by E.J. Mishan in *21 Popular Economic Fallacies*, 2d ed., Washington: Praeger, 1973, at Chapter 1, "Rent Controls Are Necessary During a Housing Shortage", pp. 19-31.

The enforcement experience in this area is somewhat mixed, and may be summarized as a slow movement away from attempts to control enterprise pricing (perhaps with the exception of natural monopoly enterprises). The authoritative Fingleton, *et al.*, survey paints an overall picture of frequent competition office intervention in the pricing decisions of dominant enterprises.⁵⁶ More sympathetic observers, such as (insider) Anna Fornalczyk and (outsider) Ben Slay, believe that an early tendency of such intervention has more recently given way to other enforcement priorities. Slay credits the pivotal loss by the Polish Antimonopoly Office in the appeal to the Antimonopoly Court of the FSO automobile price decision,⁵⁷ while Fornalczyk argues that many of the remaining cases involve natural monopoly enterprises and that, in any case, the Polish Antimonopoly Office has been a reluctant and restrained price regulator:

In fact, we do not use this provision against firms without market power. Moreover, a contractual term does not become "onerous" simply because the firm seeking it has market power and the other firm would like a lower price or some other better deal. And if a firm with power has legitimate reason for seeking the term, we would not say that any

⁵⁶ *supra* note 5, at 139-140.

⁵⁷ Slay, "Industrial Demonopolization and Competition Policy in Poland and Hungary", *supra* note 5, at 490; Slay, "Industrial De-monopolization and Competition Policy in Poland", in Slay, *Demonopolization and Competition Policy*, *supra* note 5, 123-158, at 140.

money it earns is an undue benefit.⁵⁸

⁵⁸ Fornalczyk, "Competition Law and Policy in Poland", *supra* note 15, at 63.

Similarly, the Hungarian Office of Economic Competition has taken the position that it will focus its pricing enforcement on enterprises in natural monopoly positions, and further that it will not seek to set or regulate correct price levels for such enterprises, only to attack excessive price *increases*.⁵⁹ Furthermore, the amendments to the Hungarian law removed two especially notable price-control provisions: a prohibition in the section addressing unfair competition of "withdrawing a commodity from circulation or withholding it prior to a planned price rise and/or with an aim to induce a price increase", and a prohibition in the section addressing the abuse of a dominant position of setting a price such that "the difference in value between the service and its compensation ... is markedly high".

The Russian experience has been persuasively described as one of continued and intrusive Antimonopoly Committee investigation and enforcement in the area of price-setting, but here, too, things may be changing. Both Joskow, *et al.*, and Capelik and Slay paint a devastating picture of the degree of detail with which prices and profit margins have been regulated in Russia under the guise of "competition policy",⁶⁰ and the overall judgment of Stephen Lucas is particularly scathing:

Once the concept of state planning was discredited, state institutions looked to alternative ways to regulate the vast state monopolistic enterprises. The answer they found in the

⁵⁹ "While not pronouncing on the correctness of the prices the [Tribunal of Judges] ... decided that Defendant did offend the law when increasing their prices far beyond what would seem reasonable. ..." Office of Economic Competition, *National Sports Swimming Pool*, Vj-74/1991/17. The Polish Antimonopoly Office was similarly successful in rolling back price increases by Polish Telecom. See Decision of the Antimonopoly Office, DK-53-S/56/94/ZW, January 26, 1994.

⁶⁰ Joskow, *et al.*, *supra* note 35, at 355-358; Capelik and Slay, *supra* note 35, at 70-76.

form of anti-trust law. By labeling an enterprise "a monopoly" the state institution in charge of anti-trust policy could then be involved in the regulation of its activities: its prices could be deemed monopolistic, any price over the state-determined "market price" could be appropriated to the state budget and any of its contracts which the state wanted to regulate directly could be deemed "anti-competitive". ... Anti-trust law has not lived up to its expectations because its conception was the regulation of enterprises by the state

....⁶¹

⁶¹ Lucas, "Mergers, Market Share and Monopolies: The State of Anti-trust Law in Russia", *European Competition Law Review* 3 (1995), 199-203, at 199.

Dyker and Barrow may be more terse but are not in disagreement: "Russian anti-monopoly policy has often seemed to reduce to not much more than price control."⁶²

On the other hand, Sokolova, of the St. Petersburg office of the Antimonopoly Committee, argues that the early reliance on price controls as antimonopoly policy has been recognized as an error and abandoned (though it is unclear to what extent she can speak for others of the Committee's regional offices).⁶³ The Antimonopoly Committee's Natalya Yachiestova agrees that the trend is clearly away from price control as an antimonopoly weapon and notes as one example of this trend the fact that the infamous cartel register,⁶⁴ while still in existence and still in use as a general monitoring tool, is no longer used for price control.⁶⁵ Private attorney Gerd Lenga also believes that dominant enterprises in Russia "currently face little price regulation".⁶⁶

⁶² Dyker and Barrow, *supra* note 62, at 86.

⁶³ Sokolova, "Specific Features of the Russian Competition Law", *supra* note 36, at 15.

⁶⁴ Capelik and Slay, *supra* note 35.

⁶⁵ personal communication with the author.

⁶⁶ "The Control of Unfair Pricing in the Russian Federation: Legal Aspects", remarks at the conference, "Competition Policy in Transition Economies", Moscow, February 1997.

The Romanian competition law contains provisions for the direct control of prices, but the limitations placed upon such control are sufficient to make one optimistic that it may not be used "to do the job of state planning through the back door".⁶⁷ Article 4 specifies that prices in the economy are to be set "freely, through competition", with the exception of those charged by natural monopoly enterprises, which will be supervised (at least in the absence of regulatory agencies) by the Competition Council. (This stated reliance on the market, by the way, is consistent with the Romanian Constitution, which states that "Romania's economy is a free market economy", and that "the State must secure ... free trade" and the "protection of ... competition" [Title IV, Art. 134]). Formal sectoral price controls may be instituted by the government only upon the recommendation of the Competition Council, and only in the following situations:

4.2. In the economic sectors or markets where competition is excluded or substantially reduced by law or by the presence of a monopolistic position, the Government may institute, by decree, appropriate forms of price control for periods not exceeding three years, which may be successively extended for periods not exceeding one year, if the circumstances leading to it continue to prevail.

4.3. For specific fields and exceptional circumstances, as well as in situations of crisis, major unbalance between demand and supply, or obvious market disfunction, the Government may enforce temporary measures aimed at reducing or even blocking excessive price increases. These measures may be adopted by decree, for periods not exceeding six months, and may be successively extended for periods not exceeding three

⁶⁷ Lucas, *supra* note 61, at 199.

months, as long as the circumstances leading to them continue to prevail.

Of course, "the proof of the pudding is in the eating", and, as with the older statutes examined here, we will not have a determination of how these provisions will be interpreted until there is a period of enforcement experience. Nonetheless the firmly stated policy of reliance upon the market for prices, the specific limitations set upon any price controls that are imposed, and the strongly pro-market sentiments that I have observed in my work with the Romanian Competition Council all seem to me reasons for optimism.

3. COMBINATIONS

3.a. What, if any, are the requirements for the prior notification of combinations of enterprises?

Merger⁶⁸ prenotification requirements are one of the great inventions of modern competition law enforcement. When well crafted, as in the U.S. and the EU, they provide several substantial public benefits:

- a) They allow the competitive impacts of mergers to be analyzed before rather than after the consummation of the merger, thus substantially reducing the private costs imposed by a negative finding;
- b) They provide incentives for the merging enterprises to provide information to the authorities in a timely fashion -- usually by "stopping the clock" on the deadlines for action by the authorities until the information is provided;
- c) Subject to that limitation, they force the authorities to act in a timely fashion by

⁶⁸ As is the custom among Western enforcers, I use the term "merger" here to refer to any transaction that combines the heretofore independent interests of two parties, whether by true

(typically) allowing the merger to proceed after a certain period of time has elapsed following prenotification; and

d) They may even, if accompanied by the requirement of filing fees, provide a nontrivial source of revenues to governments lacking sophisticated systems of public finance.⁶⁹

The CEE competition laws are generally fairly well designed in this respect.

merger, takeover, purchase of assets, purchase of shares, and so on.

⁶⁹ Concerning public finance in CEE countries, see, e.g., Athar Hussain and Nicholas Stern, "The Role of the State, Ownership and Taxation in Transitional Economies", *Economics of Transition* 1 (1993), 61-87; David Newbery, "Tax and Expenditure Policies in Hungary", *Economics of Transition* 1 (1993), 245-272.

The weakest of the original laws was probably the Czechoslovak law, which was hampered both by a loophole in coverage (so that some mergers were not covered by the law)⁷⁰ and by a requirement for prenotification based upon the combined market shares of the merging parties (which assumes both that the delineation of product and geographic markets is straightforward -- often it is not -- and that enterprises will not act upon biased estimates if it is in their interest to do so -- they will).⁷¹ There was no specification of the information to be provided to the authorities in a merger prenotification -- merely the authorization of the authorities to "request or demand" any documents or other information necessary for its investigation (Art. 11.1.i)⁷² -- and no incentive for the timely provision of what information was demanded. The result, in the first major merger investigation of the Czechoslovak Federal Competition Office, was impotence and frustration, as Volkswagen and Škoda announced their planned merger, thus triggering deadlines for Competition Office action, but delayed as long as possible in providing the Office with any additional information.

⁷⁰ Matochová, *supra* note 6.

⁷¹ Pittman, "Merger Law", *supra* note 4, at 655-656.

⁷² As I noted in *Ibid.*, the Czech word here is "ziadost". It is typically translated into English as "request", but it constitutes more than a request. At the same time, it constitutes less than a "demand". However, the fact that there are penalties for noncompliance with this "request" (Art. 14.1) may make "demand" the more accurate translation in this context.

The amended Czech law is strengthened only by the closing of the loophole in coverage. There is no change in the use of market share only as a criterion for prenotification or in the lack of specification of prenotification content, and there remains no incentive for enterprises to supply the information needed for an investigation in a timely manner.

The Slovak amendments resulted in broader improvements. Not only is the merger definition loophole closed (Art. 8.1), but the premerger notification requirement is now triggered by *either* an enterprise size criterion or a market share criterion (Art. 9.1, 9.2). Furthermore, the notification is defined as including a detailed list of information (including information from balance sheets and financial statements, information on sales of particular products, and lists of principal suppliers and customers), meaning that if the parties have not supplied the information, then a "notification" has not taken place, and therefore no agency deadlines are triggered and no significant combination of assets may take place.⁷³ The Antimonopoly Office of course also retains its general authority to "request or demand" (see above) any additional information that it requires for its investigation, though there remain no incentives for the timely supply of this information.

In amending their law in this regard, the Slovaks may have been following the examples provided by the Hungarians, Russians, and Poles, all of whom had good notification requirements to begin with and all of whom have strengthened them since.

⁷³ Art. 10.1: "The stipulated time period does not begin if the notification is incomplete and the Authority shall call participant's attention on insufficiency of the notification in written form."

The Hungarian law originally required prenotification if an enterprise met either a market share or a volume of sales criterion; the amended law keeps only the sales criterion. Both the old law (Art. 33.2) and the amended law (Art. 68.1, 68.2) specify that notification takes place only upon the submission to the Office of Economic Competition of the information required for its analysis; the amended law clarifies that this requirement is met by the completion and filing of the Office's premerger notification form (and by the paying of the filing fee). The Office is in the process of revising the notification form that it originally issued, both to make the information demanded more consistent with what is required by investigators and to better explain to enterprises what information is required, and in what form. Enterprises filing premerger notification forms pay a filing fee upon submission of the forms (as do enterprises seeking exemption for agreements, but the latter fee is only one-fifth the former).⁷⁴

The original Russian law required notification of mergers of enterprises satisfying a certain asset size criterion (Article 17.1, 17.7) as well as notification of the acquisition of a significant quantity of shares in enterprises satisfying a market share criterion (Article 18). The amended law improves upon those provisions to some degree by retaining the asset size criterion for mergers of enterprises (Article 17.1), by closing a loophole in the measurement of asset size for mergers,⁷⁵ and by requiring prenotification of share acquisitions of firms that satisfy either an asset size or a market share criterion (Article 18.2). To protect against the effects of inflation, the asset sizes specified are a multiple of the average wage in the economy rather than a number of rubles. Both the original and amended laws provide general guidance as to the information that

⁷⁴ Art. 62.1.

⁷⁵ Sokolova, "Specific Features of the Russian Competition Law", *supra* note 36, at 14.

is to be included in the prenotification (Article 17.2).

The Polish statute originally required *all* merging enterprises to notify the Antimonopoly Office prior to consummation, but this requirement was quickly understood to impose unnecessary burdens upon both the Office and the private sector, and the amended law sets sales and assets criteria for the requirement of prenotification (Art. 11.2). To protect against the effects of inflation, the sales and assets levels specified are in units of ECUs rather than zloty. While the original law stated simply that the content of a notification was to be defined by resolution of the Council of Ministers, the revised law (at Art. 11.8) specifies directly the types of information that must be included in the notification, and in July 1995 the Council of Ministers approved a detailed premerger notification form.⁷⁶

The new Romanian competition law requires merger prenotification by enterprises with a certain minimum annual sales level, and delegates to the Competition Council the task of enacting regulations for "the notification procedure, terms, documents and information to be submitted" (Art. 16.1, 16.3). As in Hungary, both enterprises applying for merger permission and enterprises applying for agreement exemptions pay a filing fee. In Romania, rather than a fixed fee, the enterprises in each case pay a fee calculated as a percentage of their annual turnover (Art. 33.1-3).

3.b. What are the time restrictions on agency analysis of proposals for combinations, and what are the consequences of agency inaction?

Each of the original statutes provided a strict deadline for competition authority action in

⁷⁶ "Regulation of the Council of Ministers of 13 July 1995 on Particular Requirements for Notification on the Intended Merger or Transformation of Economic Entities and Entities' Bodies

response to a merger notification. However, the deadlines differed a good deal across countries, and there were also some differing legal inferences and consequences if the agencies took no action within the specified time period. This situation is not much changed.

Obliged to Notify", *Journal of Laws (Dziennik Ustaw)*, June 1995, No. 87, Item 438.

The longest time for analysis permitted by the original statutes was in Hungary, where the Office of Economic Competition had three months following notification to analyze a merger proposal and the possibility, at its sole discretion, of extending this time period by an additional six months (Art. 45.1). If the agency failed to meet one or the other deadline, it was considered to have granted permission for the merger to take place (Art. 45.2). The amended law maintains the original three month period but shortens the optional additional period to only two months (Art. 63.2, 63.5). Agency inaction within the appropriate time period continues to constitute the granting of permission (Art. 64).⁷⁷

The original Czechoslovak statute also provided for a three month period of post-notification analysis -- though without the Hungarian Office's luxury of an additional six month option -- and also provided that if the authorities failed to issue a decision within that time period, the merger "is regarded as approved" (Art. 8.4). The Czech law is changed in this respect, removing all explicit deadlines from the competition law and instead adopting the deadlines (and other procedural directions) from the Administrative Code. The Code generally requires a government agency to issue a ruling within one month of receiving a petition (or notification), but also provides for the possibility of extending this time period when necessary.

The amended Slovak law shortens the standard period for agency analysis to one month, but then allows for an extension at the option of the agency of up to three months (Art. 10.1). "If the authority shall not decide within the stipulated time period, then it means that it shall

⁷⁷ Or, as the gloss in the Office's edition of the new law summarizes: "Silence gives consent."

acquiesce to the concentration" (Art. 10.1).

The original time period for agency analysis in the Polish law of two months is not changed in the amended law, except that the amended law is explicit in noting that "deadlines ... do not incorporate periods when the Office awaits deficiencies to be filled, [or] information to be completed" (Art. 11a.6). Curiously, the specification in the original law that the merger could proceed after two months if there were no agency decision, but that this did not imply agency approval of the merger, was removed in the amendment and not statutorily replaced. The law now orders the Antimonopoly Office to notify the merging enterprises within two months if it has no objection to the proposal, but is silent on the consequences of Office non-action. However, the Polish Supreme Court has ruled that a failure by the Office to take action within the specified time period is equivalent to a statement of no objection to the merger.⁷⁸

The Russian law, though still requiring the quickest action among these laws, has been amended to add to the original thirty days for analysis an option for fifteen additional days (Art. 17.2). As before, agency inaction does not allow the enterprises to proceed with the merger (much less to assume it approved); rather, they may appear before a general or arbitrazh (economic) court to force an agency response (Art. 20).

The Romanian Competition Council has one month from the date of notification to decide whether to open a formal investigation. If it chooses to open a formal investigation, it has a total of five months from the date of notification to reach a decision. If the Council does not reach a decision within its allotted time, the merger may take place, but the Council retains the right to investigate and rule on the merger in the future, "if and when it considers necessary" (Art.

51).

3.c. What are the criteria by which proposals for combinations are judged?

The CEE competition laws are generally fairly clear in outlining both the anticompetitive effects of a proposed merger that will cause it to be blocked by the authorities and the benefits of a proposed merger that may allow an anticompetitive merger nevertheless to be permitted. These conditions have been changed by amendment, but not in a major way. (Typically the changes are designed to bring the statutory language more in line with EU practice.) The most important changes brought by amendment in this area are the specific provision for the authorities to permit a merger to take place subject to conditions that would mitigate or remove some competitive harm contained in the original merger proposal. While this ability is not uncommon among Western enforcement agencies, it was not included in the original versions of most of the laws under examination here.

The Polish law is a good example. A literal merger of two enterprises may be prohibited "if, as a consequence of the merger, the entities gained or consolidated a dominant position on the market" (Art. 11a.4.1). A different set of criteria apply for the assumption by one person of a management position in competing enterprises (which also constitutes a merger under the Polish law): this may be prohibited

if, as the consequence of this combination, competition were significantly weakened; it is presumed that the competition is significantly weakened if a joint market share of these economic entities exceeds 10% (Art. 11a.4.2).

⁷⁸ Marta Sendrowicz, personal communication with the author.

As in the original Polish law, there is no specific provision for the weighing of public benefits against competitive costs and thereby declining to prohibit an anticompetitive merger with large benefits; however, this discretion for the Antimonopoly Office may be implied by the consistent use of permissive rather than compulsory language in the statute: the Office "may issue", "may prohibit", and so on. What is completely new in the amended law is the authorization of the Office "to present to economic entities, prior to issuing the decision prohibiting the merger, conditions under which the merger may be performed" (Art. 11a.2).

The Russian law is unchanged in its primary competitive criteria for merger evaluation, continuing to provide the Antimonopoly Committee with the "right" to reject a merger proposal if the merger "could lead to the emergence or consolidation of the dominant position of the respective entity and/or to a restraint of competition" (Art. 17.3). However, the old specific list of counterbalancing efficiencies that may be considered has been replaced by a more general provision that the Committee may approve a merger, "regardless of the abovementioned unfavourable consequences", if the merging parties can prove "that the positive effect of their actions, including in the socioeconomic sphere, will exceed the negative consequences for the relevant goods market" (Art. 17.3). The specific inclusion of the "socioeconomic sphere" as a dimension of merger benefits to be considered seems to provide the Committee with a great deal of discretion and thus may render the Russian law the least predictable in terms of merger outcomes in the group examined here. As with the Polish law, the amended Russian law contains new language providing for the approval of an otherwise anticompetitive merger under

"conditions" created to insure that competition will be preserved (Art. 17.3).⁷⁹

The original Czechoslovak law called for the prohibition of mergers "if they result or may result in limiting economic competition in the relevant market" (Art. 8.1), with such a competition limitation presumed "if the share of the participating enterprises exceeds 30 per cent of the total turnover in the relevant market" (Art. 8.3). Mergers otherwise anticompetitive were to be approved if it could be demonstrated that the public benefits of the merger exceeded any competitive harm (Art. 8.4). Uniquely in the four original laws examined here, the statute states that merger "approval may be conditioned" (Art. 8.4).

The language in the amended Czech law concerning both competitive harm and the balancing of benefits is unchanged from the original law. The discussion of the authority's setting conditions on merger approvals is fleshed out just a bit: the authority "can set limitations and obligations necessary for the protection of economic competition" (Art. 8a.2).

Consistent with its weakening of the role of market share in the determination of dominance, the amended Slovak law removes market share altogether from the merger provision: The Authority shall prohibit the concentration if it creates or strengthens a dominant position in the market unless the participants prove that the harm which results from the restriction on competition will be outweighed by overall economic advantages of the concentration (Art. 10.2).

Again the discussion of the setting of conditions is augmented slightly: "The authority can

⁷⁹ Sait Tazhetdivov, "Acquisition Issues in the Russian Antimonopoly Legislation", *Russian Business Law Journal* 4 (December 1996), 18-22, at 22.

impose conditions for completion of concentration connected to competition" (Art. 10.3).

Unusually in the well-crafted amended Hungarian law, the new provisions seem not quite as straightforward as they might be. Unlike the original law, which called for the Office of Economic Competition to block a merger "which would hamper the formation, maintenance or development of economic competition" (Art. 24.1), the amended law does not directly state what factors or results would render a merger unlawful. The criteria are rather stated in the negative:

The Office of Economic Competition may not refuse the authorization of a concentration if ... it does not create or strengthen a dominant position, does not impede the formation, development or continuation of effective competition on the relevant market ... or on a considerable part of it (Art. 30.2)

Thus -- stated positively -- a merger may be illegal if it creates or strengthens a dominant position, or if it impedes the formation, development or continuation of effective competition in a market -- not unlike the criteria of the other CEE laws examined here, perhaps closest in exact terms to the Russian law. A separate provision provides a useful list of the most important issues to be considered in the investigation, including existing market structure, potential competition, entry conditions, and the effects on suppliers and customers (Art. 30.1).

The original Hungarian law provided a lengthy list of possible merger benefits to be considered and balanced against competitive harms (Art. 24.2 and 17.2, the latter adopted by 24.3). The amended law simply states that the Office may not refuse authorization of the merger "if the concomitant advantages outweigh the concomitant disadvantages " (Art. 30.2) -- like the Russian law, very general language that provides a good deal of discretion to the Office. However, while the amended Russian law provides that the Antimonopoly Committee has "the

right" to approve a merger if it judges the benefits to outweigh the costs (Art. 17.3), the amended Hungarian law states that the Competition Office "may not refuse ... authorization" if the benefits outweigh the costs. This suggests that a Hungarian enterprise may have the right to appeal a negative Competition Office merger decision to the courts, while a Russian enterprise may not.

Finally, as with most of the other amended laws examined here, the amended Hungarian law adds (in Art. 30.3) a quite specific provision for the imposition of conditions in the granting of merger authorization: the Competition Office "may, as a condition for the authorization, demand ... the divestiture of specified parts of the undertakings or specified assets."

The Romanian competition law declares a merger illegal only if it *both* creates or consolidates a dominant position on the market *and* "may cause a significant restriction, obstruction or distortion of competition on the Romanian market or on part of it" (Art. 13).⁸⁰ There follows a list similar to that in the Hungarian law of factors that are to be taken into account in the analysis of the likely impact on competition of a merger (Art. 14.1). An otherwise anticompetitive merger may nevertheless be approved if the parties can prove that it will "help increase the economic efficiency, improve production, distribution, technological progress, or export competitiveness", that these benefits outweigh the competitive harm from the merger, and that a significant portion of the benefits will be passed along to consumers (Art. 14.2). The law also specifically empowers the Competition Council to approve a merger proposal subject to conditions that will alleviate or eliminate the competitive problems.

4. CONCLUSION

⁸⁰ I discuss some details of this prohibition in Pittman, "Competition Law and Policy in Romania", *supra* note 7, at 173-174.

Just about any analyst examining the first generation of CEE competition laws would have noticed their overall resemblance to the competition law of the European Union, that is, Articles 85 and 86 of the Treaty of Rome. Just about any analyst examining these amended laws a few years later, noting the bilateral agreements between most of the countries and the EU for harmonization of its competition law with the EU law, would expect, and would find, that a leading focus of the amendment exercise was to make the laws look *even more* like Articles 85 and 86. In this effort and focus, the authors of the amendments have no doubt succeeded.

In terms of the substance of the amendments, my earlier papers suggested one framework for analysis. Using this framework, we might summarize the changes in the five laws under examination as follows:

1. *Agreements*. Most of the laws have been amended to insure that vertical agreements are subject to challenge under the same terms as horizontal agreements. (This is in spite of the fact that vertical agreements where one of the enterprises held a dominant position were already subject to challenge under abuse-of-dominance provisions.) While the laws do not typically distinguish formally between vertical and horizontal agreements -- in fact, one result of the just-mentioned change has been to blur this distinction somewhat -- it is clear that in practice enforcers understand the distinction perfectly well, and act accordingly. This is demonstrated by a toughening -- slight in statutory language, stronger in practice -- of the treatment afforded cartel agreements.

2. *Abuse of a dominant position*. There has been a strong movement away from the statutory classification of an enterprise as "dominant" simply because of its share of sales in the market. Many of the CEE laws have adopted more sophisticated criteria that make the implicit

distinction between market *share* and market *power* -- where the latter includes the ability to prevent the development of competition that would erode the former. This development is a most welcome one from the standpoint of foreign investors, who will be discouraged by a competition regime that threatens to penalize them simply for performing "too well" and thereby capturing a large market share. Unfortunately some of the enforcement experience has leaned in precisely that direction.

3. *Combinations.* The laws under examination here have moved to a greater uniformity and clarity in using objective rather than subjective data as a criterion for merger prenotification - in particular, sales or asset levels rather than market shares. They have also, in EU fashion, clearly identified the creation or strengthening of a dominant position as the anticompetitive outcome of a merger most to be feared, and they have likewise clarified the ability of enforcement agencies both to take into account merger benefits when deciding whether to block a merger and to insist upon the fulfillment of certain competition-protecting conditions before approving a merger.

These kinds of amendments go to the heart of the issues raised in my two earlier papers: the importance of a clear, predictable, and transparent competition law enforcement regime that will a) give confidence to investors both foreign and domestic that they will be protected from anticompetitive behavior by incumbent dominant enterprises and that they will be treated fairly in their own business operations by the authorities, while also b) giving confidence to citizens that they will be protected from abusive and monopolistic enterprise behavior. I have suggested further steps in these directions in particular contexts, but both the original laws and the amendments discussed here are generally quite satisfactory in this respect.