Recent Developments

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Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe[2]

Society suffers when antimonopoly laws and antimonoply enforcement are either too lax or too stringent. If they are too lax, consumers pay higher prices, as, for example, competing firms merge or collude with impunity, and dominant firms effectively bar entry into their markets by erecting vertical restraints. If theya re too stringent, consumers also pay higher prices, as, for example, those charged with enforcement stultify entrepreneurial initiative through their bureaucratic attempts to control prices and outputs, punish successful entrants into new markets for earning high profits or harming existing firms, and forbid firms that lack market power from extending their vertical scope of operations to its most efficient level.

In assessing the success with which the drafters of a competition law have walked this fine line, experience and economic theory provide several components of the law that serve as critical determinants and indisators. Boeth experience and theory also suggest that understanding the text of the law itself is only the first step in understanding how the law will affect businesses, consumers, and society; one must also know how the law will be enforced by the competition agencies and interpreted by the courts. At this time, the countries of Central and Eastern Europe have little such experience, so it is to the languag of the laws itself that we must turn for indications of the degree to which enforcement of the laws will help rather than hinder competition and welfare.

To analuze a new competition law's implications for welfare, consider the following seven questions:

(1) Does the law distinguish between horizontal and vertical agreements?
(2) Does the law treat naked cartel arrangements as per se illegal?
(3) Does the law restrict vertical agreements by firms lacking market power?
(4) Do the provisions restricting the behavior of “dominant” firms make it too easy for a firm to be labelled dominant?
(5) Does the law protect potential entrants from exclusionary behavior by incumbent firms?
(6) Is it illegal to harm a competitor?
(7) Does the law seek to control the prices charged by dominant firms?

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[2]The Editorial Reviews for this article was Wade Channell.

This article addresses these questions to four competition laws recently enacted in Central and Eastern Europe -- those of the Czech and Slovak Federated Republic (herinafter the CSFR), Hungary, Poland , and Russia.[3] Foreign firms interested in doing business in these countries should use these questions as a basis for evaluating whether behavior that would be regarded as blameless in other countries would be punishable under these laws. Alternatively, the questions and the answers discussed below may be taken as admonitions to those making the enforcement decisions at the agencies and the interpretation decisions in the courts.

1. Background

The competition laws of the CSFR, Hungary, Poland, and Russia have all been enacted and come into force since early 1990.[4] The laws have broad structural similarities, focusing their principal operational provisions on agreements among firms, dominant firm behavior, and mergers and organizational restructuring. The Hungarian and Russina laws attack "unfair" or "unscrupulous" competition; the CSFR and Polish laws do not. The Polish and Russian laws empower the competition agency to order involuntary breakups of monopolistic firms; the Hungarian law does not, while the CSFR law requires the appropriate republic-level Ministry of Privatization to seek the approbal of the appropriate republi-level Office for Economic Competition before approving the privatization plan for individual firms.

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[3] As Andrew Gavil has pinted out, the following discussion is based on the assumption that the rationale for antimonopoly statues is the enhancement of welfare, as that word is used by neoclassical economists. A separate and interesting inquiry could focus on the extent to which the statutes may be read as in fact directred toward this particular goal. See also Eleanor Fox & Janusz Ordover, Free Enterprise and Competition Policy for Central and East Europe and the Soviet Union (1991) (unpublished paper):

> We assume...that the nations want economic viability and that they do not mean to compromise this goal, or not very much, by nationalistic and protectionist tradeoffs. If we are wrong and if the main goal of the nations or some of them is to incubate a developing economy or to protect against inequality, then our recommendations would have limited meaning to the nation; our analysis could nonetheless be helpful by making costs more transparent.

[4] The Polish Law on Counteracting Monopolistic Practices was enacted on February24, 1990, and came into force "20 days after its publication" [hereinafter Polish Law]. The Hungarian Act on Prohibition of Unfair Market Practices was enacted on November 20, 1990, and came into force on January 1, 1991 [hereinafter Hungarian Law]. The CSFR Competition Protection Act was enacted on January 30, 1991, and came into force on March 1, 1991 [hereinafter CSFR Law]. The Russian Law on Competition and the Limitation of Monopolistic Activity on Goods Markets was enacted on April 16, 1991, and come into force the following month [hereinafter Russian Law]. For discussions of the background to the laws, see Fox & Ordover, *supra* note 1; James Langenfeld & Marsha W. Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?* 6 AM. U.J. INT'L L. & POL'Y 347 (1991).

The laws are closer in spirit and structure to the competition law of the European Community than to that of the United States, particularly in their delineation of specific individual business proactices that are forbidden; U.S. law is written in more general terms, with the case law developing the specific strictures.[5] Not suprisingly, given the current economic structure in Central and Eastern Europe, the new laws also tend to focus more than U.S. law on controlling the behavior of dominant firms.

The following discussion considers and compares critical provisions of these laws in terms of the questions posed above.

II. Assessing the Implications of Antimonopoly Laws

A. AGREEMENTS: HORIZONTAL VERSUS VERTICAL

Agreements among firms in the same market not to compete are among the most harmful of antitrust offenses. These agreements, termed "horizontal" because they involve firms at the same level in the production chain, by constraining or eliminating independent competition actions on the part of sellers typically reduce the choices available to consumers and result in higher costs and higher prices. Commentators and scholars conclude almost unanimously that, with an exception to be noted below, such agreements should be prosecuted aggressively by competition authorities.[6]

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[5] *See* ROGER BONER & REINALD KRUEGER, THE BASICS OF ANTITRUST POLCY: A REVIEW OF TEN NATIONS AND THE EEC (World Bank, Indus. Series Paper No. 42, Feb. 1991); Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness*, 61 NORTE DAME L. REV. 981 (1986); Heidi Kroll, *Monopoly and Transition to the Market*, 7 SOVIET ECONOMY 143, 149 - 50 (1991); Ingo Schmidt, *Different Approaches and Problems in Dealing with Control of Market Power: A Comparison of German, European and U.S. Policy Towards Market-Dominating Enterprises*, 28 ANTITRUST BULL. 417 (1983). One Eastern European reader of this article in manuscript has pointed out that some of the statutory provisions of which I am critical are similar to provisions in the EC competition statutes.

[6] Adam Smith wrote the classic, and most-quoted, statement of condemnation:

> People of the same trade seldon meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, VOL. 1, at 143 (Liberty Classics edition, R.H. Campbell, A.S. Skinner, W.B. Todd eds., 1981) *See also* ROBERT H. BORK, THE ANTITRUST PARADOX 263 (1978)