Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe**

Society suffers when antimonopoly laws and antimonopoly 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 they are 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 indicators. Both 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 language 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.

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To analyze 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?

This article addresses these questions to four competition laws recently enacted in Central and Eastern Europe—those of the Czech and Slovak Federated Republic (hereinafter the CSFR), Hungary, Poland, and Russia. 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.

I. Background

The competition laws of the CSFR, Hungary, Poland, and Russia have all been enacted and come into force since early 1990. The laws have broad structural similarities, focusing their principal operational provisions on agreements among firms, dominant firm behavior, and mergers and organizational restructuring. The

1. As Andrew Gavil has pointed out, the following discussion is based on the assumption that the rationale for antimonopoly statutes 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 directed 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.

Hungarian and Russian 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 approval of the appropriate republic-level Office for Economic Competition before approving the privatization plan for individual firms.

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 practices that are forbidden; U.S. law is written in more general terms, with the case law developing the specific strictures. Not surprisingly, 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.


4. Adam Smith wrote the classic, and most-quoted, statement of condemnation:

People of the same trade seldom 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.

No such consensus exists on the subject of agreements between firms and their customers or suppliers, termed "vertical" because they involve firms at different levels in the production chain. Many commentators believe that vertical arrangements are harmful to society if they are made by firms holding large market shares in markets with entry barriers and reduce the availability of independent suppliers, customers, or distributors. Most commentators believe that vertical agreements among firms with no market power do not harm society. Serious disagreement exists on the subject of where to draw the line between those vertical agreements that are harmful and those that are benign.

There is very little disagreement, however, that the competitive implications of horizontal and vertical agreements demand different kinds of analysis. A competition law that does not distinguish between the two will require careful development of enforcement policies and court interpretations to avoid confusion among entrepreneurs and other business people.

The CSFR law is an example of a law that does not make the horizontal-vertical distinction. The law forbids "agreements and other forms of mutual understanding achieved by entrepreneurs which result... in the elimination or restriction of economic competition." The law proceeds to forbid "in particular" price fixing, the limitation or control of production or technological development, market division, agreements to use tying arrangements, agreements to discriminate among customers, and agreements to limit access to the markets to

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9. CSFR Law, supra note 2, art. 3(1).
parties not joining in the agreement.\textsuperscript{10} While the first three of these provisions appear to have been written with horizontal arrangements in mind, it would be easy to apply them to vertical arrangements as well, thus providing harsher treatment than may have been intended for, for example, resale price maintenance, agreements by distributors to sell minimum quantities of a manufacturer's product, or territorial restrictions imposed upon distributors by manufacturers. Similarly, a provision in the section of the law listing certain kinds of agreements that are exempt from the prohibition cites "contracts concerning . . . the granting of a rebate as long as it represents genuine compensation for performance and does not lead to discrimination among customers."\textsuperscript{11} This provision is obviously aimed at protecting from antimonopoly attack vertical contracts that include rebates (so long as they do not represent discrimination). As written, however, it would also appear to protect horizontal agreements to grant rebates to customers—a form of price fixing.

The Polish law makes some distinction between horizontal and vertical agreements, but the line is not a clear one. The law prohibits agreements between competitors that set prices or methods of formulating prices,\textsuperscript{12} but it also prohibits all agreements to divide markets, limit the volume of production or sales, or limit market access by firms not part of the agreement,\textsuperscript{13} without regard to whether the agreeing parties are competitors.

In contrast, the Hungarian and Russian laws make the distinction clear and complete. Each has a separate provision addressing just horizontal agreements.\textsuperscript{14} The Hungarian law states that "competitors are prohibited to coordinate their business conduct and to reach an agreement . . . which may result in the restriction or exclusion of economic competition."\textsuperscript{15} It proceeds to address this prohibition:

\begin{quote}
especially . . . to the setting of the commodity's price, the division of the market or the exclusion of a defined circle of consumer from the purchase and/or sale of some commodities, restriction of the options for sources of purchase or sales opportunities, restriction of the output of a commodity, restriction of technical development, prevention of access to the market and to bringing a market operator into a disadvantageous position.\textsuperscript{16}
\end{quote}

No specific section of the law deals with vertical agreements, although section 20, which regulates the behavior of dominant firms, includes some restrictions on vertical agreements.

The Russian law prohibits "agreements (coordinated actions) between competing economic subjects . . . occupying together a dominant position in the

\textsuperscript{10.} Id. art. 3(2).
\textsuperscript{11.} Id. art. 3(3)(c).
\textsuperscript{12.} Polish Law, supra note 2, art. 4(2)(1).
\textsuperscript{13.} Id. art. 4(2).
\textsuperscript{14.} Hungarian Law, supra note 2, §§ 14–18; Russian Law, supra note 2, art. 6(1).
\textsuperscript{15.} Hungarian Law, supra note 2, § 14(1).
\textsuperscript{16.} Id. § 14(2).
market... if such agreements (coordinated actions) have as their result, or may have, a significant limitation of competition." 17 The law then lists as examples of prohibited horizontal agreements those that set prices or price terms, divide markets, or exclude other firms from the market. 18 A separate section of the law (article 6(2)) addresses vertical agreements.

It appears, then, that the Hungarian and Russian laws are in this respect more encouraging to foreign investment than the CSFR and Polish laws, since they provide greater clarity concerning the treatment of vertical restraints. However, this conclusion is tempered below by an examination of the degree to which the laws allow firms without market power to engage in such restraints.

B. AGREEMENTS: PER SE TREATMENT OF CARTEL AGREEMENTS

Section 1 of the Sherman Act, the principal U.S. law addressing anticompetitive agreements, prohibits "every contract, combination... or conspiracy in restraint of trade or commerce among the several States." 19 In spite of the sweeping nature of this language, many kinds of agreements among competitors are subject to a delicate judicial and prosecutorial balancing as to whether the welfare losses arising from the restrictions that they impose on competition are outweighed by any welfare gains arising from the agreement. 20 However, some other forms of agreements among competitors, namely, agreements to set prices, to divide territories, or to allocate customers, if not ancillary to some procompetitive agreement like a joint venture, are considered so clearly harmful that no judicial balancing is required. These types of agreements are illegal per se, and all that is necessary for conviction is proof that an agreement existed. 21

The distinction in the United States between horizontal agreements that are illegal per se and those that are subject to a "rule of reason" analysis has been clarified through court decisions interpreting the Sherman Act. This distinction is important in two ways: (1) it provides certainty for economic actors by clearly defining certain behavior as illegal; and (2) it creates economy of enforcement

17. Russian Law, supra note 2, art. 6(1).
18. Id.
There are... two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.
See also Northern Pac. Ry., Co. v. United States, 356 U.S. 1, 5 (1958): "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."
resources by limiting the kinds of agreement that must be examined in detail for ultimate economic effect. If these benefits are to accrue to the societies of Central and Eastern Europe, they must likewise result from court or administrative decision, because this distinction appears in none of the laws here examined. All of the laws allow defendants accused of participating in any illegal horizontal agreement to demonstrate the public benefits of the agreement, and if successful, to avoid punishment.

The Polish and Russian laws contain the most straightforward provisions for this type of defense. The Polish law states simply that the agreements described are illegal "unless they are necessary to conduct an economic activity and do not induce a substantial limitation of competition." The Russian law exempts agreements "if the economic subjects concluding such agreements (taking such actions) show that they promoted, or will 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."

The CSFR law states that the prohibition in article 3(2) of certain kinds of agreements does not apply to contracts concerning:

(a) uniform application of conditions of trade, supply, or payment, excluding contracts on prices or their components,
(b) rationalization of economic activity, particularly its specialization, provided it does not lead to substantial restriction of competition in the market,
(c) the granting of a rebate as long as it represents genuine compensation for performance and does not lead to discrimination among customers,
(d) a share in supplying the market less than 5 percent of the respective republican market or less than 30 percent of the local market supplied regularly by the parties to the contract.

The Hungarian law does not prohibit a horizontal agreement "intended to prevent the abuse of an economic superiority," that is, apparently, agreements that seek to create market power to counteract market power already enjoyed by

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22. Polish Law, supra note 2, art. 6.
23. Russian Law, supra note 2, art. 6(3).
24. See the discussion supra in part II.A. concerning the confusion that may be caused by this provision.
25. CSFR Law, supra note 2, art. 3(3). There is some distinction in the CSFR law between forms of agreement that are not illegal (Id. art. 3(3)) and forms of agreements for which the parties may receive advance approval from the Office for Economic Competition (Id. art. 5). Such approval "must not exceed limits necessary to satisfy public interest, and it is required that special attention be paid to the interests of customers." Id. art. 5(2). In addition,

the contract in question . . . [may] not contain commitments

1. to sell exclusively such goods which are the object of the contract,
2. to sell goods which are either identical or commutable with the goods constituting the object of the contract exclusively subject to certain price or volume restrictions,
3. to exclude certain entrepreneurs in the sale of goods or supply of services which constitutes the object of the contract, even if they are willing to meet prescribed conditions, provided their qualification meets the requirements of valid regulations.

Id. art. 5(3).
another firm. (Whether this other firm would be in a horizontal or vertical relationship with the parties to the agreement is not stated.) It does not prohibit an agreement "if the parties concluding it have together a less than 10 percent share of the total respective market."\(^{27}\) It does not prohibit an agreement if:

\begin{itemize}
  \item [(a)] the concomitant restriction or exclusion of economic competition does not exceed the extent required for achieving the economically justified common targets; and
  \item [(b)] the advantages exceed the disadvantages associated with it.\(^{28}\)
\end{itemize}

In turn, the following are qualified as being advantages from the point of view of exemption from the prohibition:

\begin{itemize}
  \item [(a)] a favorable development of the prices; or
  \item [(b)] an improvement of the product’s quality or the maintenance of the high quality already achieved; or
  \item [(c)] an improvement of the conditions of delivery . . . ; or
  \item [(d)] a shortening of the way of distribution, a more rational development of the purchase- and sales-organizations, an improvement in the supply of the given product; or
  \item [(e)] promotion of technological development, of the environmental situation or enhancement of competitiveness on external markets.\(^{29}\)
\end{itemize}

Thus, as these laws are written, any horizontal agreement, even the most naked and straightforward agreement to set prices or rig bids among competitors, may be entered into and honored with the hope that the antimonopoly authorities may be convinced that it is, to use the Polish example, "necessary to conduct an economic activity and . . . [does] not induce a substantial limitation of competition."\(^{30}\)

Deterrence may be compromised, and the enforcement agencies and courts may be crowded with cartel members arguing that their cartel prices are "reasonable"\(^{31}\) or that absent the agreement competition in this industry would be "ruinous."\(^{32}\)

\begin{itemize}
  \item 27. Id. §§ 15(1) (b), 16(1).
  \item 28. Id. § 17(1).
  \item 29. Id. § 17(2). The exemption for agreements which improve the "environmental situation" may be especially troublesome, since agreements to raise prices are likely to result in lower levels of production, which are likely to result in lower levels of pollution.
  \item 30. Polish Law, supra note 2, art. 6.
  \item 31. This was a common defense in the early days of U.S. antitrust enforcement. See United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927):
    
    \begin{quote}
    The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.
    \end{quote}
  \item 32. This was another common early defense. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940):
    
    \begin{quote}
    Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price fixing case. In that event the Sherman Act would soon be emasculated . . . Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.
    \end{quote}
\end{itemize}
Similarly, parties to a horizontal agreement in the CSFR or Hungary, even if they could demonstrate no public benefits at all from the agreement, could hope and seek to escape prosecution by demonstrating that their collective market shares were below the threshold levels of the law. Since a significant portion of the time and resources devoted to U.S. antitrust cases concerns the issue of the definition of the market, these de minimus exceptions to the strictures of the law may cause considerable uncertainty. The fledgling market economies would be better served by stronger and clearer rules.

C. AGREEMENTS: ARE FIRMS WITHOUT MARKET POWER FREE TO MAKE VERTICAL AGREEMENTS?

As noted above, most commentators on U.S. law have concluded that vertical restraints and agreements involving firms without market power cannot harm welfare and so should be permitted. United States courts have moved in this direction, with the *GTE Sylvania* decision decreeing that, since vertical nonprice restrictions can increase efficiency and reduce costs at the same time that they reduce some forms of competition, they should be analyzed under a rule of reason rather than treated as illegal per se. On the other hand, vertical restraints on price, for example, resale price maintenance, are still subject to per se illegality, in spite of widespread scholarly opinion that such restraints are, at worst, no more likely to be socially harmful than are vertical nonprice restraints.


34. *See also Dep. Ass't Att'y Gen. Robert D. Willig, Anti-Monopoly Policies and Institutions, Remarks to Conference on The Transition to a Market Economy, Institutional Aspects, Institutional Reform and Informal Sector, Institute for Policy Reform, Prague, CSFR (Mar. 24–27, 1991) in The Emergence of Market Economies in Eastern Europe 191 (Christopher Clague & Gordon C. Rausser eds., 1992) [hereinafter Emergence of Market Economies]*: In view of the critical importance of competitive conduct to an emerging free market economy, there is a strong case for an anti-monopoly law that includes bright-line rules against cartel behavior. . . . Only in this way can the government deliver the clear and powerful statement of what business conduct is expected, and what is forbidden, and thereby make plain the linkage between the drive for free markets and the requisite new business code of conduct.


36. *ABA Antitrust Section, supra note 20, at 68–72."


Some vertical nonprice restraints, for example, tying arrangements and exclusive distributorship arrangements, may be especially useful as devices to facilitate entry. Since the markets of Central Europe are for the most part in serious need of entry, and since a new entrant into a market has by definition no market power in any meaningful sense, these countries would benefit from competition laws that exempt from prosecution vertical agreements involving firms without market power.

To what extent can the competition laws of the countries under discussion be so characterized? Subject to some concerns about how a firm is characterized as a dominant firm (which is addressed below), the answer is: to a large extent. The Russian law’s provision concerning vertical agreements is the most straightforward in this respect; it reads simply as follows:

Agreements (coordinated actions) concluded in any form, between noncompeting economic subjects, one of which occupies a dominant position (in the market), and the other of which is its supplier or customer, if such agreements (coordinated actions) have or may have as their result a significant limitation of competition, shall be forbidden and held void by the established procedure, in whole or in part.

In addition, the provisions of the law that address the behavior of dominant firms forbid such firms from engaging in tying arrangements or discriminatory practices.

The CSFR law, as noted above, exempts all agreements, horizontal or vertical, from prosecution if the agreements concern firms with low market shares. In addition, as in the Russian law, tying arrangements and discrimination between customers are illegal, but only if engaged in by dominant firms.

The Polish and Hungarian laws are somewhat less satisfactory in this respect. Both prohibit certain vertical actions by dominant firms (for example, discrimination in the Polish law, taking actions to block entrants in both laws), but both also prohibit tying arrangements imposed by any firm, regardless of market share or market power. Since tying is probably not harmful to society when engaged...
in by firms without market power, and since it may be beneficial to society when used to facilitate entry, the provisions concerning tying in these two laws may be counterproductive, and may in particular discourage new foreign investment in these economies.

D. What Is a Dominant Firm?

One danger of a statute that restricts the behavior of dominant firms is that enforcement agencies or courts may label as dominant firms that really possess no market power except, for example, the temporarily high market share that comes with being a successful new entrant into a market. As discussed throughout this article, each of the laws contains restrictions on the behavior of dominant firms that are not imposed on other firms, including the possibility of price controls, output controls, and contract review. If the enforcement authorities and courts are too quick to attach the label of "dominance" to a firm, if the simple act of temporary success in entering or competing in a market brings on a regime of government controls and strictures, then firms will not be so eager to succeed in the market, and consumers in particular and society in general will be the poorer.

How easy is it for a firm with a large market share, however transient, to be labelled "dominant" under these laws? Under the Hungarian and CSFR laws, it appears to be very easy. The Hungarian law defines as dominant a firm:

(a) whose commodity cannot be purchased in other markets or only under much less favorable conditions . . . ; or
(b) . . . who orders a commodity not marketable elsewhere or only marketable under much less favorable conditions than usual . . . ; or
(c) whose share in the market concerned . . . exceeds thirty (30) percent concerning the given commodity during the period investigated.

In addition, a group of three firms may be classified as dominant if they hold a combined 50 percent market share. The use of the disjunctive suggests that the market share criterion alone may suffice for dominance, leaving only the process of market definition (necessary for measuring market share) and the definition of the time period of measuring market share ("during the period investigated") as safeguards against a swift and arbitrary classification of a successful firm as a dominant firm.

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44. See Schwartz & Eisenstadt, supra note 5, at 87–88.
45. In addition, the laws of both Poland and Russia provide for the antimonopoly authorities to turn down a merger proposal if the merged firm would hold a dominant position in a market. Polish Law supra note 2, art. 11; Russian Law supra note 2, art. 11; Russian Law supra note 2, art. 17. See Russell Pittman, Merger Law in Central and Eastern Europe, 7 AM. U. J. INT'L L. & POL'Y (1992, forthcoming).
46. See Pittman, supra note 8; see also Willig, supra note 34, at 195 ("Anti-monopoly laws with broad provisions permitting intervention against dominant-firm behavior . . . pose the danger of chilling the very investment and entrepreneurship that emerging economies sorely need.").
47. Hungarian Law, supra note 2, § 21(1) (emphasis added).
48. Id. § 21(3).

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The CSFR law is even more clear in its reliance on market share alone. While a dominant firm is defined implicitly as one "subject to no substantial competition," the market share requirement appears to be unambiguous: "Dominant position in the market is held by an entrepreneur who supplies the relevant market in the course of the calendar year with at least 30 percent of supply of identical, comparable or mutually commutable goods." Again, only the market definition process and the time period (here, one year) stand between success in selling a new product and the strictures of dominant firm regulation.

The Polish law leaves more room for analysis and judgment on the part of the enforcement agencies and the courts. The law defines a dominant position as "the position of an economic subject where it does not encounter substantial competition on the home or local market: it is supposed that the economic subject has a dominant position, when its market share exceeds thirty percent." The key word here, of course, is "supposed." The Polish word thus translated, "domniemywa sie," is typically interpreted in the legal context as establishing a presumption that may be refuted by contrary evidence. Such a presumption would then leave the final determination of dominance to agency and court investigation as to whether "substantial competition" is encountered in the market—exactly as one would prefer.

The Russian law goes even a step further than the Polish law in this regard. Dominance is defined as "the exclusive position of an economic subject in a given market which gives him the ability to exert decisive influence on competition, impede access to the market on the part of other economic subjects, or in some other way to limit the freedom of their economic activity." The Russian Antimonopoly Committee is then directed to define annually a presumptive market share criterion for dominance for particular markets, with a further provision allowing a firm that exceeds the threshold level in its market to demonstrate that it is not a dominant firm. Finally, the committee is forbidden to declare a firm dominant whose market share does not exceed 35 percent.

The Polish and Russian laws leave ample room for enforcers and courts to avoid labelling and regulating as dominant those firms that have merely competed well and succeeded in achieving a high market share. Whether enforcers and courts will take advantage of this room, of course, remains to be seen. The same is true of the extent to which the Hungarian and CSFR laws will be interpreted as requiring, and the extent to which enforcers and courts will be eager to extend, dominant-firm treatment of such firms. Firms considering making investments in these countries will eagerly await any indicators as to how these questions will be resolved.

49. CSFR Law, supra note 2, art. 9(1).
50. Id. art. 9(2) (emphasis added).
51. Polish Law, supra note 2, art. 2(7).
52. Russian Law, supra note 2, art. 4(7).
E. AGREEMENTS AND DOMINANT FIRMS: WHEN FIRMS DO HAVE MARKET POWER, CAN THE LAW PROHIBIT THE MOST HARMFUL OF THEIR BEHAVIOR?

Firms with market power can impose significant harm on consumers and on society as a whole. They may raise prices to monopoly levels, fail to keep costs low, and fail to engage in technological progress. Most of Western antimonopoly law is aimed at either preventing the creation of market power or regulating its exercise once it has been created.

However, law enforcers in Central and Eastern Europe will face some unique problems with respect to market power. One set of problems will arise from the fact that many firms will have market power derived not from anything remotely related to their success in satisfying consumer needs but only from their history as a state-owned and state-protected monopoly. Such monopolies, if they survive the privatization process (or as they await the privatization process), will typically be unable to compete with the products of western manufacturers\(^\text{53}\) and so may seek to prevent the entry of such manufacturers (whether by import or by setting up new manufacturing facilities) into their markets. A likely strategy for this purpose may be the effectuation of exclusive supply arrangements with suppliers of critical raw materials and exclusive distributorship arrangements with wholesalers and retailers. An alternative strategy would be ownership of either such input sources or outlets; such ownership may be an artifact of the command system, in which state-owned firms were typically "overly" integrated in order to assure themselves of input supplies.\(^\text{54}\) Such arrangements


would then require a firm seeking to enter a market at one stage, already a daunting proposition in these countries, with their underdeveloped financial, transportation, and housing infrastructures and markets, to enter at other stages as well, thus making entry that much more difficult. One determinant of the success of antimonopoly laws in helping to build efficient market economies will be the degree to which the laws prohibit such entry-blocking behavior and the authorities enforce such provisions.

Each of the laws under examination in this article contains provisions that may be used by prospective entrants or antimonopoly authorities to attack this kind of behavior by dominant market incumbents; each also has language whose interpretation will be an important determinant of the success of these attacks.

The Polish law prohibits dominant firms from "refusing to sell or purchase commodities in a manner discriminating [against] certain economic subjects when there are no alternative supply sources or outlets" and from "countering the formation of conditions indispensable for [the] emergence or development of competition." The first could be used only against dominant firms that are vertically integrated, since if a dominant firm signed an exclusive distributorship arrangement with a network of wholesalers it would not be the dominant firm that was "refusing to . . . purchase commodities" from the prospective entrant. In addition, proving to a court that "alternative supply sources or outlets" are available, may be a difficult task; presumably the law is intended to address situations where there are no economically relevant alternatives, or alternatives that would allow the discriminated-against firm to compete in the relevant market. Nevertheless, the second provision, if appropriately interpreted by enforcers and the courts, may be ideally suited for the protection of competition in this way.


56. Polish Law, supra note 2, art. 5(4).

57. Id. art. 5(1).
Similarly, the Hungarian law has a provision that may apply to vertically integrated dominant firms refusing entrants access to their captive suppliers or distributors: dominant firms are forbidden to "refuse in an unjustified manner to enter into an agreement." 58 Nonintegrated dominant firms that seek to use vertical agreements to deny to prospective entrants inputs or distribution may be prosecuted under the provision prohibiting "hamper[ing] access to the market" 59 or "creat[ing] an unmotivated disadvantageous market position for the competition." 60 Also similar to the Polish law, words like "unjustified" and "unmotivated" will be important ones for the enforcers and the courts to define in a procompetitive manner. 61

The CSFR law addresses vertically integrated dominant firms with the provision that dominant firms may not apply "differing conditions for equal or comparable fulfillment towards individual members in the market, which results in their disadvantage in economic competition." 62 Exclusionary behavior by nonintegrated dominant firms, however, will apparently be checked only by the general language stating that "[m]onopolistic or dominant position must not be misused by an entrepreneur to the detriment of other entrepreneurs or consumers, or to detriment of public interests." 63 Again, the words "comparable" and "disadvantage" in the first provision, and the word "misused" and the concept of public "detriment" in the second, await enforcement agency and court interpretation.

Finally, the Russian law forbids dominant firms, vertically integrated or not, from the "creation of obstacles to market entry . . . for other economic subjects." 64 It also addresses exclusionary behavior by nonintegrated dominant firms in the already-discussed prohibition of "agreements . . . between noncompeting economic subjects, one of which occupies a dominant position . . . , and the other of which is its supplier or customer, if such agreements . . . have or may have as their result a significant limitation of competition." 65

If such provisions in these four laws are interpreted procompetitively, prospective entrants will be protected from entry-deterring agreements, restraints, and other behavior on the part of incumbent dominant firms.

F. DOMINANT FIRMS: IS INNOCENT, PROCOMPETITIVE BEHAVIOR SUSPECT?

The provisions just discussed are a double-edged sword. They may indeed be used to protect competition, if they are enforced against existing monopolies that

58. Hungarian Law, supra note 2, § 20(b).
59. Id. § 20(d).
60. Id. § 20(e).
61. On this point, see also the discussion in the next section concerning the harming of competitors.
62. CSFR Law, supra note 2, art. 9(3)(c).
63. Id. art. 9(3).
64. Russian Law, supra note 2, art. 5(1).
65. Id. art. 6(2).
seek to deny inputs or outlets to prospective entrants into their markets, but they may harm competition if they are enforced against normal, procompetitive behavior by a firm with a large market share. In particular, there is a danger in the language of all of these laws that harming a competitor is a violation of the antimonopoly laws. Since competitors are typically harmed when a firm lowers the price of its product or improves its quality, such an interpretation would discourage the outcomes that policymakers are seeking with their conversion to a market economy.

The Polish law prohibits a firm in a dominant position from "countering the formation of conditions indispensable for emergence or development of competition."\(^6\) If a firm sells a high-quality product at a low price, that is presumably less conducive to the "emergence or development of competition" than if it sells a low-quality product at a high price. Is it an antitrust offense for a dominant firm to sell products that satisfy consumers?

Similarly, the Hungarian law prohibits a firm in a dominant position from "hamper[ing] access to the market"\(^6\) or "creat[ing] an unmotivated disadvantaged market position for the competition."\(^6\) Further, the provisions of the law concerning unfair competition prohibit any firm from "appeal[ing] to another person in an unfair manner so as to prevent somebody from entering into a business relation or to cause an existing relation [to be] terminated."\(^6\) In the same spirit, the CSFR law prohibits the use of a dominant position "to the detriment of other entrepreneurs,"\(^7\) and the Russian law proscribes a dominant firm from "encroachment upon the interests of other economic subjects."\(^7\) Is producing such a good product that market entry is "hampered" an antitrust offense? Should "detriment" to one's competitors or "encroachment upon [their] interests," be regarded as antitrust offenses?

Private litigants may try to convince both the enforcement agencies and the courts that this should indeed be the case, and it will be important for the protection of the competitive process that they fail. For if firms are punished simply for entering a market and succeeding too well, other firms will be deterred from entering other markets, and the economy will stagnate.\(^7\)

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6. Polish Law, supra note 2, art. 5(1).
67. Hungarian Law, supra note 2, § 20(d).
68. Id. § 20(e).
69. Id. § 6.
70. CSFR Law, supra note 2, art. 9(3).
71. Russian Law, supra note 2, art. 5(1).
72. Cf. Ass't Att'y Gen. James F. Rill, The Role of Antitrust Law in the United States Economy, Remarks to Seminar on Competition Policy, Ministry of Commerce & Industrial Development, Mexico City, Mexico (Nov. 15, 1990) ("A fundamental and long-recognized principle of antitrust law, at least as it has evolved in the United States, is that its purpose is to protect the process of competition, not to protect individual competitors at the expense of efficiency and innovation."); Fox & Ordover, supra note 1 ("The danger should be recognized that firms will complain about competition itself and will use the process of government to protect themselves from efficient and legitimate rivalry. If competitors' complaints are all treated as worth, rivals will be induced to pull their punches lest they be penalized for their procompetitive acts.").
G. **Does the Antimonopoly Committee Control the Prices of Dominant Firms?**

Central and Eastern European enforcers need no lectures from westerners concerning the efficiency of markets in determining prices and the advantages of markets over governmental price controls; they have been reading (and writing) such lectures in their own countries for some time now. Still there are indications that policymakers have not entirely abandoned the habit of seeking to use government to control the individual economic decisions of firms, and this is evident in the four antimonopoly laws under examination here. All have provisions that call either explicitly or implicitly for government control of the prices of some firms, and if these provisions are strictly enforced the economies may suffer in three ways: first, from continued bureaucratic interference with the market mechanism; second, from increased costs as firms devote resources to dealing with regulators; and third, from structural improvements forgone, as hard-pressed antimonopoly agencies devote resources to regulating prices at the expense of other antimonopoly enforcement.

The Polish and Hungarian laws are most explicit in their provisions for controls on the prices charged by some firms. The Polish law forbids firms in a monopolistic position, that is, firms "not encounter[ing] any competition on the home or local market," from "limiting production, sales or purchase of commodities, despite the capacities they have, in particular when it leads to [a] price increase; refraining from the sale of commodities to increase prices; [or] asking extremely high prices." The Polish Antimonopoly Office has already issued several orders seeking to enforce these provisions, including a decision that the District Cereal Mill Plant "PZZ" in Bialystok "should stop restricted and discontinued sale of rapeseed, despite being able to do so, in order to raise its price," and a similar decision against the passenger automobile factory FSO. In both of these cases the Antimonopoly Court has overruled the decision of the Antimonopoly Office.

The Hungarian law provides that no firm, regardless of market share, may "withdraw a commodity from circulation or withhold it prior to a planned price rise and/or with an aim to induce a price increase." Dominant firms are guilty

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74. Polish Law, supra note 2, art. 2(6).

75. Id. art. 7(1).


77. The FSO case is described in Fox & Ordover, supra note 1, at 21.

78. POLISH ANTIMONOPOLY OFFICE, supra note 76.

79. Hungarian Law, supra note 2, § 8 (part of the chapter of the law addressing "unfair competition").
of violating the law "if the difference in value between the service and its compensation . . . is markedly high." As if to confirm that enforcing such provisions requires the expenditure of significant resources on the part of the enforcement authorities, the law goes on to note that "[i]n order to identify this, the circumstances of the agreement's conclusion, its overall contents, the turnover- and price-relations as well as particular features of the business and the mode of defining the service and its compensation, shall be investigated."  

The CSFR and Russian laws may also be interpreted as calling for or permitting price controls, but here the language is at least open to interpretation. The CSFR law prohibits dominant firms from "enforcing of disproportionate conditions in contracts with other members of the market, particularly enforcing of fulfillment which, at the time of the concluding of the contract, is strikingly out of proportion as against provided compensation," and "closing or limiting production, sale or technological development of goods in order to achieve unjustifiable economic advantage at the cost of customers."  

Similarly, the Russian law prohibits to dominant firms the "withdrawal of goods from circulation with the goal of creation or support of a shortage on the market, or the increase of prices;" and the "violation of established normative acts on the procedure for price formation."  

One may argue that such provisions, and their enforcement, are part of the political compromises necessary to alleviate popular concerns about the costs of transition to a market economy. One may argue too that during the formative period of a market economy, when the lack of infrastructure renders entry difficult into most markets in the economy, completely free prices should not be insisted upon even by the economic purist. One also may be hopeful that the preconditions for application of these provisions, monopoly in the Polish law, dominance (for the most part) in the others, will be less easily satisfied as time passes. And one may urge that any enforcement under these provisions be aimed at incumbent monopolists left over from the socialist economy rather than at successful new market entrants. The point is that price controls are one more enforcement weapon that, if resorted to excessively by the authorities, will discourage the entry of new firms into the economy and prevent the realization of the hopes of the populace for economic improvements.

80. Id. § 22.
81. Id.
82. CSFR Law, supra note 2, art. 9(3)(a).
83. Id. art. 9(3)(d).
84. Russian Law, supra note 2, art. 5(1).
85. Id.
86. High prices perform two important functions in a market economy: (1) they signal to potential suppliers that more of a good may be profitably sold in a market, thus inducing entry; and (2) they allocate the scarce good among demanders. If the overall difficulty of entry renders the first function ineffectual, it is not obvious that the second is always better performed by high prices than by other mechanisms (for example, rationing by coupon or queue). See Pittman, supra note 8.
III. Conclusion

Even within Western societies, people disagree concerning both the appropriate goals of antimonopoly law and the appropriate analytical framework for their achievement. However, most Westerners agree on two principles: such laws should seek to discourage monopolistic and collusive behavior that genuinely harms the public, but such laws should also create an atmosphere conducive to the entry of new firms and the hard, fair competition of existing firms. In this article I have examined four Central and Eastern European antimonopoly laws in the context of these principles and suggested enforcement and judicial interpretations of statutory language consistent with them. Economist Ronald Coase has been quoted as saying that "if an economist delays the adoption of a bad law by one week, he has earned his lifetime salary several times over." Although the goal of this article is to encourage the adoption of good laws and good interpretations of existing laws, the measure of a successful outcome will be the same.
