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Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice

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Abstract

This Article gives an overview of the requirements that must be fulfilled before a Central and Eastern European Country ("CEEC") can truly claim to be willing and able to apply the *acquis communautaire* in the field of competition law and policy and thus to be ready for full membership in the European Union ("EU").

INTRODUCING EU COMPETITION LAW AND POLICY IN CENTRAL AND EASTERN EUROPE: REQUIREMENTS IN THEORY AND PROBLEMS IN PRACTICE

*Frank Emmert**

INTRODUCTION

This Article gives an overview of the requirements that must be fulfilled before a Central and Eastern European Country (“CEEC”) can truly claim to be willing *and able* to apply the *acquis communautaire*¹ in the field of competition law and policy² and thus to be ready for full membership in the European Union (“EU”).³

Specifically, the Article discusses some of the *practical* problems that appear in the context of adoption of the *competi-*

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1. The *acquis communautaire* is the body of written and unwritten rules and principles which represent the level of integration achieved in the EU to date. This includes the various treaties between the Member States, the regulations, directives and other acts adopted by the EU institutions, the case law of the European Court of Justice and the Court of First Instance, and various other measures and documents. It has always been a principle of the EU to maintain this *acquis* when negotiating with candidates for membership, i.e., the EU does not open the existing structure and substantive rules for renegotiation. On the problem of evolution of the *acquis* between application and admission of a new Member State, see Daniel D. Dobrovolec & Katrin Nyman-Metcalf, *Enlargement of the European Union — A Regatta with Moving Goal Posts?*, 3 EUR. J. L. REFORM 131 (2001).

2. The requirements in general have been spelled out in the Conclusions of the European Council Meeting held June 1993 in Copenhagen, and have subsequently been developed at the Council meetings in Corfu (June 1994), Essen (December 1994), Cannes (June 1995), Florence (June 1996), and Berlin (March 1999). See, e.g., PUSHING BACK THE BOUNDARIES — THE EUROPEAN UNION AND CENTRAL AND EASTERN EUROPE (Mike Mannin ed., 1999); PHEDON NICOLAIDES & SYLVIA RAJA BOEAN, A GUIDE TO THE ENLARGEMENT OF THE EUROPEAN UNION: DETERMINANTS, PROCESS, TIMING, NEGOTIATIONS (1997).

3. Although this is technically not correct, “European Union” shall be used throughout this Article, rather than “European Community.” The author shares a growing perception in academic circles that the two organizations overlap sufficiently so that their distinction can nowadays be limited to the cases where it actually makes a difference with respect to decision-making procedures, etc.

tion *acquis*⁴ by candidate countries on their road towards membership. There are many scholarly publications dealing with EU competition law and policy in great detail.⁵ There is also a growing body of literature on the competition laws of the various CEECs.⁶ However, there is still very little written about the impact of EU competition law on the development of national competition law in Central and Eastern Europe⁷ and most of what is written in this context deals with what may be called “the law on the books.” In virtually all candidate countries for EU membership, the difficulty of writing new legislative acts that not only conform to EU requirements but also pass national parliaments can be overcome with sufficient effort. These efforts sometimes included more than a bit of plagiarism, when West-

4. A complete treatment of all parts of the competition *acquis*, including State aids and the treatment of public enterprises would be beyond the scope of the present Article. Therefore, the focus of the analysis will be on Articles 81 and 82 of the Treaty establishing the European Community (“EC Treaty”). See Consolidated version of the Treaty establishing the European Community, arts. 81-82, O.J. C 325/33, at 64-65 (2002), 37 I.L.M. 79, at 93-94 (ex Articles 85 and 86) [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending Treaty on European Union (“TEU”), Treaty establishing the European Community (“EC Treaty”), Treaty establishing the European Coal and Steel Community (“ECSC Treaty”), and Treaty establishing the European Atomic Energy Community (“Euratom Treaty”) and renumbering articles of TEU and EC Treaty). Occasional remarks will be made about merger control.

5. The classic text in English is the book by CHRISTOPHER BELLAMY ET AL., EUROPEAN COMMUNITY LAW OF COMPETITION (Peter M. Roth et al. eds., 5th ed. 2001); see also JONATHAN FAULL & ALI NIKPAY, THE EC LAW OF COMPETITION (1999); ULRICH IMMENGA & ERNST-JOACHIM MESTMÄCKER, EG-WETTBEWERBSRECHT KOMMENTAR (1997). Other useful volumes include D.G. GOYDER, EC COMPETITION LAW (4th ed. 2003); ALISON JONES & B.E. SUFRIN, EC COMPETITION LAW: TEXT, CASES, AND MATERIALS (2001); VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE (7th ed. 2000) (providing student-friendly material).

6. See, e.g., Eleanor M. Fox, *ABA Section of Antitrust Law — Comments on Draft Bulgarian Antitrust Law*, 60 ANTITRUST L. J. 245 (1991); Ilona Nurmela, *Euroopa Liidu ja EV konkurentsioigusest Rooma lepingu artiklite 85 ja 86 ning uue konkurentsiseaduse eelnõu põhjal*, JURIDICA 352-58 (1997); Mihály Maczonkai, *Harmonisation of Competition Law and Judicial Practice in Hungary*, in ON THE STATE OF THE EU INTEGRATION PROCESS — ENLARGEMENT AND INSTITUTIONAL REFORMS 108-23 (Ferenc Mádl ed., 1997); MARJO OJALA, THE COMPETITION LAW OF CENTRAL AND EASTERN EUROPE (1999); John Clark, *Competition Law and Policy in the Baltics — A Progress Report*, 1 OECD J. COMPETITION L. & POL’Y 149 (1999).

7. For notable exceptions, see Phedon Nicolaidis & James Mathis, *European Community Competition Rules in the Associated Countries of Central and Eastern Europe: How to Ensure Effective Enforcement*, in 51 AUSSENWIRTSCHAFT 485-512 (1996); Tadeusz Skoczny, *Harmonising Polish Antimonopoly Law with EC Competition Rules*, in 1 Y.B. OF POLISH EUR. STUD. 89, 89-102 (1997).

ern European laws were used as models.⁸ They sometimes included more than a bit of blackmailing, when national parliaments were being warned that early membership might be jeopardized if a ministerial draft was scrutinized too carefully by parliament, let alone amended!⁹ However, as can also be seen in virtually every candidate country, the laws on the books are one thing, and the practical application is quite another.

The present Article aims to spell out the application problem in more detail and to show ways and means of improving the situation before and after accession. Those findings are based on ten years of experience as a university professor, legislative advisor, and private consultant, working with students, practicing attorneys, judges, public prosecutors, and civil servants in the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. The essence of the analysis, problems and suggested solutions, applies to all of these countries. However, there are obviously differences in detail and the development has been uneven yet dynamic throughout. This should be kept in mind whenever a particular problem does not seem to concern one country or a particular solution does not seem to fit in another. It would be beyond the scope of one short article to seek to provide comprehensive analysis of the situation in *any one* CEEC, let alone a fair analysis of the general situation in *all* CEECs.

The choice of competition law to illustrate the problems with application of the law in CEECs was quite arbitrary. The findings can be transferred quite easily into other areas of law, such as environmental or consumer protection, commercial law,

8. Until not too long ago, it was common practice in Latvia to simply translate EU directives into the Latvian language and then present them to the national parliament for adoption. A simple look at Article 249 of the Consolidated EC Treaty should show that such a practice is highly problematic because most directives are not — and are not meant to be — sufficiently clear and precise to be applied directly.

9. Estonian parliamentarians have repeatedly assured me that they were regularly confronted with draft legislation for the implementation of an EU directive with instructions that amendments cannot be done without making the draft incompatible with EU requirements. Furthermore, the sheer quantity of such implementing legislation often left them less than two hours for three readings of a new piece of legislation before the final vote was taken and the act entered into force. On the other hand, the fact that the Polish Sejm sometimes acted more like a sovereign legislator and exercised choices, some of which were not necessarily or clearly given to it by the EU directives, caused some dissatisfaction about Poland's willingness to dutifully adopt the *acquis communautaire*.

much of administrative law, etc. If anything, the area of competition law is less problematic from the legislative perspective because EU law exists largely in the form of directly applicable regulations. However, this same fact makes careful analysis of the interface of EU and national law in the context of competition law in practice very important. National actors will not be able to hide behind inadequate national legislation. To say it differently: in the context of competition law, the liability for breaches of EU law will bear more directly on the private sector — including the legal advisors of the larger undertakings — and less on the governments of the new Member States.

The analysis will begin with a review of obligations already binding upon the candidate countries under the association agreements with the EU concluded between 1993 and 1999. Their performance to date can give some insight into the problems yet to come when the full force of EU law becomes applicable on day one of membership, i.e., on May 1, 2004, when the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia are scheduled to join.

I. OBLIGATIONS UPON CANDIDATE COUNTRIES PRIOR TO ACCESSION IN THE FIELD OF EU COMPETITION LAW

In the 1995 White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union,¹⁰ the European Commission listed all essential legislative measures to be adopted by the candidate countries in order to fully implement the *acquis communautaire*. The White Paper also made suggestions as to the priorities to be taken — “Stage I”-measures. In particular, it pointed out basic rules that should be in place before more detailed legislation could be adopted.

The White Paper emphasized the importance of effective competition policy as a foundation of a successful transition to a market economy. Candidate countries were encouraged to harmonize their legislation to EU standards in four areas: the prohibition of cartels and anti-competitive agreements; merger con-

10. Commission of the European Communities, White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (95) 163 Final (March 1995) [hereinafter White Paper].

trol; State aids; and the behavior of (State) monopolies and enterprises with special and exclusive rights.

As such, the White Paper did not create any binding obligations for the CEECs. Nevertheless, candidate countries knew that they would not be admitted into the EU unless they had achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities,”¹¹ and “the existence of a functioning market economy, as well as the capacity to cope with competitive pressures and market forces within the Union.”¹² Furthermore, membership requires “the ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union.”¹³ The Commission never left any doubt that the full implementation of the *acquis communautaire*, as outlined in the White Paper and as developed since, would be required to meet these targets.

Theoretically, this full implementation does not have to begin before day one of membership. However, it is also clear that it will not suffice just to write the required laws into the books and declare them applicable as of May 1, 2004. The criterion applied by the Commission was whether or not the candidate countries were “willing *and able*” to apply the *acquis communautaire*. That ability was to be demonstrated in real life — i.e., with a credible enforcement record — before the Commission issued a positive opinion. Thus, the candidate countries had little choice other than to approximate their legislation to EU standards already several years before their admission and to show in practice that they were able to apply it as well.

The good news in this context is that the great majority of EU law provides for perfectly sensible rules that the CEECs would have been well advised to implement, even if they had no intention of joining the EU in the foreseeable future.¹⁴

11. See Presidency Conclusions from the Copenhagen European Council, June 21-22, 1993, § 7(A)(iii), available at http://www.europarl.eu.int/enlargement_new/europeancouncil/pdf/cop_en.pdf (June 1993).

12. *Id.*

13. *Id.*

14. In the context of competition law, for example, research demonstrates “a robust positive relationship between effective competition policy implementation and expansion of more efficient private firms.” MARK A. DUTZ & MARIA VAGLIASINDI, COMPETITION POLICY IMPLEMENTATION IN TRANSITION ECONOMIES: AN EMPIRICAL ASSESSMENT (Eur. Bank Reconstruction & Dev., Working Paper No. 47, 1999). See also WENDY CAR-

Several bilateral agreements between the various CEECs on the one side and the EU on the other provided for additional or more specific “requirements” in the field of competition to be met by the CEECs even prior to their accession. Around the time of the White Paper, all of the CEECs concluded agreements on “free trade and trade-related matters” with the EU.¹⁵ All of these contained certain provisions dealing with competition. Those provisions essentially foresaw the application of Articles 81 and 82,¹⁶ as well as merger law and other rules, in the interpretation given to them within the EU, to the bilateral trade under the agreements. Bilateral “Cooperation Councils” were given the task to adopt the necessary rules for the implementation of the competition provisions.¹⁷ Due to a three-year transition period, the trade agreements were by and large superseded by more comprehensive bilateral association agreements between the EU on the one side and the individual candidate countries on the other,¹⁸ before they could develop significance in practice.

The main instruments, which are currently still regulating the relationship between the EU and the candidate countries of Central and Eastern Europe in matters related to the “first pillar” are, therefore, the bilateral association agreements, com-

LIN ET AL., COMPETITION AND ENTERPRISE PERFORMANCE IN TRANSITION ECONOMIES: EVIDENCE FROM A CROSS-COUNTRY SURVEY (Eur. Bank Reconstruction & Dev., Working Paper No. 63, 2001); Richard Lang & Sven Muller, *Privatisation, Perception of Success and Attitudes of Managers in the East German Transformation Process*, in ESTONIAN ECONOMY AND EUROPEAN INTEGRATION (Birgitta Berg ed., 1997); Eleanor M. Fox, *The Central European Nations and the EU Waiting Room — Why Must the Central European Nations Adopt the Competition Law of the European Union?*, 23 BROOK. J. OF INT’L L. 351 (1997).

15. See, e.g., Commission Decision No. 94/974/EC, O.J. L 373/1 (1994) (Estonia Free Trade Agreement); Commission Decision No. 96/752/EC, O.J. L 344/1 (1996) (Interim Agreement Slovenia). Prior to the trade agreements, the bilateral trade relations with some of the CEECs were already formalized as of 1992 in “Interim Agreements.” See, e.g., O.J. L 116/2 (1992) (Hungary), O.J. L 114/2 (1992) (Poland).

16. Articles without further specification are Articles in the EC Treaty. See Consolidated EC Treaty, *supra* note 4, O.J. C 325/33 (2002), 37 I.L.M. 79.

17. See, e.g., Commission Decision No. 94/974/EC, O.J. L 373, art. 32(3), at 1 (Agreement with Estonia), Council & Commission Decision No. 96/752 Euratom, ECSC, EC, O.J. L 344, art. 33(3), at 1 [hereinafter Agreement with Slovenia].

18. See, e.g., Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part, art. 130, O.J. L 68/3, at 33-34 (1998) [hereinafter Europe Agreement with Estonia]. The Europe Agreements were designed to “further develop[] and incorporate[] the essential provisions” and ultimately “replace the Agreements on Free Trade and Trade-Related Matters.” *Id.* art. 130, O.J. L 68/3, at 34 (1998).

monly called "Europe Agreements."¹⁹ They will continue to be the most relevant source of mutual obligations for Bulgaria and Romania, which will not become members of the EU in 2004, and probably will not for at least another five years. All of the ten bilateral Europe Agreements contain similar provisions regarding competition law and policy. The respective articles are similarly short, as in the earlier trade agreements and again refer to the interpretation of Arts. 81 *et seq.* as established within the EU. For example, the Europe Agreement between the EU and Estonia provides in Article 63:

(1) The following are incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Estonia: (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Estonia as a whole or in a substantial part thereof (2) Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85 (now Art. 81) [and] 86 (now Art. 82) of the Treaty

19. See Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Slovenia Estonia, of the other part, O.J. L 51/3 (1999); Europe Agreement with Estonia, *supra* note 18, at O.J. L 68/3 (1998); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part, O.J. L 51/3 (1998); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, O.J. L 26/3 (1998); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, O.J. L 360/2 (1994); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, O.J. L 359/2 (1994); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, O.J. L 358/3 (1994); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part, O.J. L 357/2 (1994); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, O.J. L 348/2 (1993); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, O.J. L 347/2 (1993).

establishing the European Community²⁰

The main question to be addressed when reflecting on the actual impact of these provisions of the Europe Agreements was that of direct effect, i.e., whether they were capable of creating rights and obligations for individuals that had to be respected and enforced by national and European competition authorities and courts. The literature on the possible direct effect of provisions contained in the Europe Agreements is plentiful and the practice is not always coherent.²¹ In the present context, however, the situation is quite unambiguous. The Europe Agreements themselves provided for the respective Association Councils to adopt, by a given deadline, “the necessary rules” to implement the articles dealing with competition. Thus, the provisions on competition in the Europe Agreements, in and of themselves, clearly did not have direct effect.²²

Pursuant to the European Court of Justice’s consistent practice, it is equally unambiguous that the decisions of the Association Councils may have direct effect.²³ This occurs whenever these decisions contain a clear and precise right or obligation, which is not conditional, in its implementation or effects, upon the prior adoption of another measure.²⁴

With regard to the competition provisions in the Europe Agreements, the Association Councils have indeed adopted certain decisions regarding implementation. One of the first decisions adopted by most of the Association Councils is aimed at

20. Europe Agreement with Estonia, *supra* note 18, art. 63, O.J. L 68/3, at 17 (1998).

21. See Frank Emmert & Erelin Kikas, *The Implementation of the Principle of Non-Discrimination on Grounds of Nationality in the Preparations for EU Membership*, in *ACCESSION NEGOTIATIONS — SELECTED RESULTS*, 237-64 (Janusz Swierkocki ed., 2001) (discussing the specific problems arising in Estonia, where the Constitution provides for supremacy of international agreements over parliamentary legislation).

22. See *Meryem Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719, ¶¶ 14, 17, 20-28; *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, Case 104/81, [1982] E.C.R. 3641; *R. & V. Haegeman v. Belgian State*, Case 181/73, [1974] E.C.R. 449. For further analysis see Ilona Cheyne, *Haegeman, Demirel and their Progeny*, in *THE GENERAL LAW OF EC EXTERNAL RELATIONS* 20-41 (Alan Dashwood & Christophe Hillion eds., 2000).

23. See *Sevince v. Staatssecretaris van Justitie*, Case C-192/89, [1990] E.C.R. I-3461, ¶¶ 13-26.

24. *Id.* at ¶ 15, citing *Demirel*, [1987] E.C.R., at ¶ 14. See also *Selma Kadiman v. Freistaat Bayern*, Case C-351/95, [1997] E.C.R. I-2133; *Ahmet Bozkurt v. Staatssecretaris van Justitie*, Case C-434/93, [1995] E.C.R. I-1475.

“adopting the necessary rules for the implementation” of the respective article in the Europe Agreement itself.²⁵ The decisions are largely uniform. In their annex, they contain articles on “general principles,” cases falling into the “competence of [EU and national] competition authorities;” cases falling under the “competence of one competition authority only;” mutual requests for information; secrecy and confidentiality of information; the application of the EU block exemption regulations; merger control; activities of minor importance; and various procedural rules for the Association Councils. In a nutshell, the decisions provide for the application of EU competition law and policy to the bilateral trade between the parties of the agreement. For cases falling under the jurisdiction of both the Commission and the competition authority in the associated country, the rules provide for mutual notification and collaboration. Furthermore, it is stipulated that “without prejudice to any of their rights or obligations, the competition authorities involved in consultations under this Article shall endeavor to find a mutually acceptable solution”²⁶ For activities of minor importance, the threshold is set at an annual turnover not exceeding 200 million Euro *and* a market share of less than five percent in *both* the EU internal market and the domestic market of the associated country.²⁷

25. For Association Council decisions between the European Communities and their Member States, and certain Republics adopting the necessary rules regarding the implantation of Articles 81 and 82 of the EC Treaty, see Association Council Decision No. 2001/504/EC, O.J. L 183/28 (2001) [hereinafter AC-Latvia]; Association Council Decision No. 2001/367/EC, O.J. L 130/35 (2000) [hereinafter AC-Slovenia]; Association Council Decision No. 1999/411/EC, O.J. L 156/33 (1999) [hereinafter AC-Lithuania]; Association Council Decision No. 1999/372/EC, O.J. L 144/16 (1999) [hereinafter AC-Estonia]; Association Council Decision No. 1999/249/EC, O.J. L 96/22 (1999) [hereinafter AC-Romania]; Association Council Decision No. 98/82/EC, O.J. L 15/37 (1997) [hereinafter AC-Bulgaria]; Association Council Decision No. 96/651/EC, O.J. L 295/25 (1996) [hereinafter AC-Slovakia]; Association Council Decision No. 96/494/EC, O.J. L 208/24 (1996) [hereinafter AC-Poland]; and Association Council Decision No. 96/133/EC, O.J. L 31/21 (1996) [hereinafter AC-Czech Republic].

26. Annexes of the Association Council Decisions, art. 2.3, ¶ 2. See AC-Latvia, *supra* note 25, O.J. L 183/28, at 30 (2001); AC-Slovenia, *supra* note 25, O.J. L 130/35, at 38 (2000); AC-Lithuania, *supra* note 25, O.J. L 156/33, at 35 (1999); AC-Estonia, *supra* note 25, O.J. L 144/16, at 19 (1999); AC-Romania, *supra* note 25, O.J. L 96/22, at 24 (1999); AC-Bulgaria, *supra* note 25, O.J. L 15/37, at 38 (1997); AC-Slovakia, *supra* note 25, O.J. L 295/25 (1996); AC-Poland, *supra* note 25, O.J. L 208/24 (1996); and AC-Czech Republic, *supra* note 25, O.J. L 31/21 (1996).

27. See AC-Latvia, *supra* note 25, O.J. L 183/28, at 31 (2001); AC-Slovenia, *supra* note 25, O.J. L 130/35, at 38 (2000); AC-Lithuania, *supra* note 25, O.J. L 156/33, at 36

What this means is that since the entry into force of the respective decisions, i.e., since their publication in the Official Journal of the EU ("O.J.") and the corresponding national gazette, the rules of EU competition law, in particular Article 81 (including the block-exemption regulations), Article 82, and the provisions on merger control, are already applicable in the associated countries, as far as trade between the internal market of the EU and the partner country may be affected. Concretely, an agreement between undertakings having such an effect may already be void and unenforceable for and against its parties. Also, competitors of participants to illegal agreements or companies affected by a dominant enterprise's abuse of power can already bring claims for discontinuation of restrictive practices and even for damages (under tort law) going back to the date of publication of the respective decision.

From practical experience, I can tell that this fact is still widely unknown among legal counsel of large enterprises in CEECs and attorneys in these countries, let alone among the judges and administrative officers. For the time being, the prevailing — and erroneous — attitude is that EU law is something to be analyzed after membership has actually been realized. Thus, we may safely presume that a good number of the inter-enterprise agreements that have been drafted by attorneys are being implemented without any regard to Article 81(1) and the relevant block exemption regulations. In other cases, attorneys and other legal counsel have endorsed — and will continue to do so — commercial practices that violate Article 82. As a result, clients are ill-advised, breaching binding legal standards, over- or under-utilizing commercial opportunities, and/or risking embarrassing litigation and damage claims from suppliers, clients, or competitors. As long as there is a kind of cartel, or at least concerted practice, on behalf of the attorneys in CEECs to bury their heads in the sand, the risk may seem small. But relying on similar willful ignorance on the other side is not a sound strategy when large commercial deals are at stake. Nevertheless, it will probably take a spectacular professional liability case to be brought against well-known attorneys or law firms in Central and

(1999); AC-Estonia, *supra* note 25, O.J. L 144/16, at 19 (1999); AC-Romania, *supra* note 25, O.J. L 96/22, at 24-25 (1999); AC-Bulgaria, *supra* note 25, O.J. L 15/37, at 39 (1997); AC-Slovakia, *supra* note 25, O.J. L 295/25 (1996); AC-Poland, *supra* note 25, O.J. L 208/24 (1996); and AC-Czech Republic, *supra* note 25, O.J. L 31/21 (1996).

Eastern Europe before the new realities are widely acknowledged and taken seriously by the legal communities in these countries.

II. OBLIGATIONS UPON NEW MEMBER STATES

As of day one of full membership, the CEECs will have to implement and apply the entire *acquis communautaire*, with the sole exception of those rules and provisions that have been specifically subjected to transitional periods by way of the accession treaties. The Commission has outlined all transitional periods agreed upon in the accession negotiations in a Spring 2003 report to the European Parliament.²⁸ According to this report, Estonia,²⁹ Latvia, Lithuania, and Slovenia did not ask for any transitional periods with respect to competition law. The other candidates asked for and obtained a few exceptions that are rather limited both in time and scope. The vast majority concern certain existing State aid schemes for certain sectors of the economy that have to be phased out. No candidate country has asked for and received any exceptions with regard to the application of Articles 81 and 82 or the merger control regulations.³⁰ Thus, all relevant articles of the treaties, almost all regulations, and almost all other legal instruments of EU competition law and policy will be fully applicable in and for the new Member States from the first day of membership onwards. It is useful, therefore, to examine in some detail what this means. What are the expectations to be met by CEECs as far as institutional preparations and substantive rules are concerned?

A. Institutional Requirements to Be Met Upon Accession

On the one hand, the EU has not spelled out to the candidate countries the respective institutional and substantive expectations which should be met before the doors to membership

28. See Commission of the European Communities, *Report on the Results of the Negotiations on the Accession of Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia to the European Union*, available at http://europa.eu.int/comm/enlargement/negotiations/pdf/negotiations_report_to_ep.pdf (2003).

29. On Estonia, see also Emmert, *supra* note 21.

30. See European Commission Directorate-General Enlargement, *Enlargement of the European Union — Guide to the Negotiations Chapter by Chapter*, available at <http://europa.eu.int/comm/enlargement/negotiations/chapters/negotiationsguide.pdf> (2003).

will open. It is a good European tradition to respect national sovereignty and differences, and to require harmonization only as far as it is indispensable.³¹ Consequently, comparative analysis of the institutional and substantive regimes in the “old” Member States will show many significant differences and it may safely be presumed that the “new” Member States would have to be granted similar leg room.

On the other hand, there is also the general principle that EU law has to be effectively implemented by the Member States.³² Hence, the Member States are under the obligation to create the necessary legal and institutional infrastructure to ensure that Community law will be applied and respected.³³ To a large extent, therefore, the expectations to be met by acceding countries can be gleaned from the existing legal rules and documents. Obviously, it makes a difference in this context whether the EU has resorted mainly to directly applicable regulations in a given area of law, for example in competition law, or whether it has relied on directives which need to be implemented by national legislation, as it is for the common rules applicable to trade in the internal market.

Furthermore, it makes a difference whether the EU institutions are provided with direct administrative powers, such as in

31. This tradition is reflected in but goes beyond the principle of subsidiarity. *See* Consolidated EC Treaty, *supra* note 4, art. 5, O.J. C 325/33, at 42 (2002), 37 I.L.M. at 80-81 (ex Article 3b). Article 5 states:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Id.

32. This follows from Article 10 of the EC treaty and its expansive interpretation by the European Court of Justice. *See id.* art. 10, O.J. 325/33, at 42 (2002), 37 I.L.M. at 81 (ex Article 5) (stating in part that “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the Institutions of the Community”).

33. *See, e.g.*, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland*, Joined Cases C-46 & C-48/93, [1996] E.C.R. I-1029, ¶ 67-74; *Comet BV v. Produktschap voor Siergewassen*, Case 45/76, [1976] E.C.R. 2043, ¶ 13-16; *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, ¶ 5; *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, Joined Cases 51-54/71, [1971] E.C.R. 1107, ¶¶ 3-4; *Otto Scheer v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 30/70, [1970] E.C.R. 1197, ¶ 8. *See also* KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 419-26 (1999).

the area of competition law, or whether they largely depend on the administrative capacity of the national authorities, as it is the case for the implementation of the Common Agricultural Policy ("CAP"). Institutional expectations upon the Member States will thus be lower in the area of competition law and policy when compared to most other areas of EU law. Nevertheless, a number of specific obligations imposed on the national competition authorities and upon the national courts can be identified.

With regard to the application of EU competition law and policy, institutional requirements upon the Member States were traditionally found in: (a) Articles 84 and 85 of the EC Treaty; (b) Regulation 17³⁴ and its interpretation by the European Court; (c) the 1993 Commission Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty;³⁵ and (d) the 1997 Commission Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 or 86 of the EC Treaty.³⁶ For the future, the dominant role will be played by Council Regulation No. 1/2003 of December 16, 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty,³⁷ which is replacing Regulation 17 and its implementing legislation.

The first conclusion to be drawn from these sources is the fact that each Member State should have a national competition authority.³⁸ However, there are no rules as to the institutional

34. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-1962, at 87, *amended by* Council Regulation No. 59/62, 58 J.O. 1655 (1962), *amended by* Council Regulation No. 118/63, 162 J.O. 2696 (1963), *amended by* Council Regulation No. 2822/71, 285 J.O. 49 (1971) [hereinafter Reg. 17].

35. *See* Commission Notice, O.J. C 39/6 (1993) [hereinafter 1993 Notice on Cooperation Between National Courts and the Commission].

36. *See* Commission Notice, O.J. C 313/3 (1997) [hereinafter 1997 Notice on Cooperation Between National Authorities and the Commission]. For analysis see J.H. Maitland-Walker, *Commission Notice on Co-operation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 and 86 of the E.C. Treaty*, 2 EUR. COMPETITION L. REV. 124, 124-26 (1998).

37. Council Regulation No. 1/2003, O.J. L 1/1 (2002). This regulation will replace the old regime established by Regulation 17 as of May 1, 2004. For more detailed analysis see below.

38. This follows from many provisions of EU law that refer to "the authorities of the Member States." *See, e.g.* Consolidated EC Treaty, *supra* note 4, arts. 84, 85, O.J. C 325/33, at 66 (1997), 37 I.L.M. at 94 (ex Articles 88, 89). *See also* Reg. 17, art. 9 et seq., 13 J.O. 204 (1962), Reg. 1/2003, art. 3 et seq. O.J. L 1 (2003).

structure of such an authority; hence it could be an independent agency or a sub-unit of a ministry. Furthermore, it is not immediately evident what kind of powers an authority should have in order to be considered the appropriate national competition authority. On the one hand, the Commission strongly desires that the competition authorities of the Member States should have the power to apply Articles 81 and 82³⁹ — besides applying their national law — since these provisions have long been held to be directly effective and, therefore, capable of creating enforceable rights and obligations directly for and against individuals in the Member States that have to be respected by the national courts. On the other hand, the competition authorities of a number of Member States did not have the power to apply Articles 81 and 82 in the past⁴⁰ and the European Court has held that such differences between the application of EU competition law in the Member States do not violate the principle of equal treatment under Article 12.⁴¹ It seems that this is changing with the entry into force of Regulation 1/2003.⁴²

In this respect, the candidate countries have all done their homework. Every CEEC has adopted some kind of national competition law and all of them have created or designated competition authorities.⁴³ The second conclusion to be drawn from

39. See 1997 Notice on Cooperation Between National Authorities and the Commission, ¶ 5 *et seq.*, in particular ¶ 15, O.J. C 313 (1997).

40. Only the authorities of Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, and Spain have had this power. The authorities of Austria, Denmark, Finland, Ireland, Luxembourg, Sweden, and the United Kingdom did not have the power to apply Community competition law. See August J. Braakman, European Commission, *The Application of Articles 85-86 of the EC Treaty by National Courts in the Member States*, available at http://europa.eu.int/comm/competition/publications/art8586_en.pdf (July 1997); see also European Commission, *Surveys of the Member States' Powers to Investigate and Sanction Violations of National Competition Laws* (1995) [hereinafter *Competition Surveys*]; Ute Zinsmeister et al., *The Application of Articles 85 and 86 of the E.C. Treaty by National Competition Authorities*, EUR. COMPETITION L. REV. 275, 275-79 (1999).

41. See *Wilhelm v. Bundeskartellamt*, Case 14/68, [1969] E.C.R. 1, [1969] C.M.L.R. 100.

42. Art. 35(1) of the new regulation stipulates: the "Member States shall designate the competition authorities or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with." Council Regulation No. 1/2003, art. 35(1), O.J. L 1/1, at 21 (2003).

43. For information on the respective authorities and laws, see *Anti-trust and State Aid Authorities and Legislation in the Candidate Countries*, available at http://europa.eu.int/comm/competition/enlargement/candidate_countries. For more specific information on the timing of competition law adoption, with Hungary and Poland taking

the aforementioned sources is the fact that each Member State must provide for courts that are competent to handle cases of infringement of EU competition law.⁴⁴ Again, there are no specific criteria as to how these courts should be organized. Therefore, it is possible to designate specific courts or to entrust the task to general administrative or commercial courts. However, the expectation would be that the application be *effective*.⁴⁵ At a minimum, this seems to require that the competent courts are aware of their power, which must be exercised *ex officio* and not only upon application,⁴⁶ and that the jurisdiction of the designated courts is stipulated by law and thus “that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts.”⁴⁷

B. *Substantive Requirements with Regard to the Application of EU Competition Law*

As mentioned above, there are no formal rules as to the powers and procedures of national competition authorities when acting in an area (also) covered by EU competition law.

the lead in 1990, see Dutz, *supra* note 14. The most comprehensive source for information on current and future administrative capacity in the CEECs and on those legislative changes which still have to be made, can be found in the National Programmes for Adoption of the Acquis 2002-2003, which were adopted by each candidate country. See, e.g., Office of Europe Integration, *National Programme for the Adoption of the Acquis 2002-2003*, available at <http://www.eib.ee/pages.php/02030103> (Estonia) (2002-2003). However, the information in the respective NPAA's is certainly not the most self-critical. Interestingly, a similar program has also been drawn up by Croatia already at a time when that country was not formally even a candidate country. See THE REPUBLIC OF CROATIA, ACTION PLAN FOR EUROPEAN INTEGRATION OF THE REPUBLIC OF CROATIA (1999). Finally, comparative analysis of national competition laws of the “old” Member States can be found in IMMENGA & MESTMÄCKER, *supra* note 5, at 41-52.

44. This follows from the direct effect, which has been attributed to Articles 81 and 82. See *Belgische Radio en Televisie v. SV SABAM*, Case 127/73, [1974] E.C.R. 51; *Stergios Delimitis v. Henninger Bräu AG*, Case C-234/89 [1991] E.C.R. I-935, ¶ 45. As of May 1, 2004 it will follow directly from Article 6 and other provisions of Reg. 1/2003.

45. For a comprehensive analysis of the principle of effective remedies in national courts, see TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW*, 276-312 (1999).

46. This was clearly spelled out by the European Court of Justice in *van Schijndel & van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430 & C-431/93 [1995] E.C.R. I-4705, ¶¶ 14-15.

47. The requirement of implementation of Community rights by national law — and not only by administrative order or practical application — has been affirmed many times. The quoted passage is taken from the judgment of the E.C.J. of May 30, 1991 in *Commission v. Germany*, Case C-361/88, [1991] E.C.R. I-2567, ¶ 20.

However, analysis of the relevant passages of EU law and the Notices published by the Commission can provide some insights about the expectations placed upon new Member States.

The distribution of powers and responsibilities between the Commission and the national authorities will change dramatically as of May 1, 2004 under Regulation 1/2003. It is no coincidence that this is also the day when the EU will grow from fifteen to twenty-five Member States. The Commission has had problems keeping up with its workload and did not see itself in a position to handle ten additional countries, particularly since the majority of those emerged only relatively recently from Communist planned economies and will have their share of difficulties with the implementation of EU law. Therefore, the Commission pressed for a radical re-distribution of responsibilities, and the national authorities will have many new responsibilities as of next May. This will be analyzed in more detail below. For now, it is also worthwhile to look at the old rules because their implementation record by the candidate countries can provide insights into specific problems that may impact the implementation of the future rules.

1. Substantive Requirements Imposed on National Authorities by the Law in Force

Again, we shall first look at the competition authorities, i.e., the administration. Article 84 places an obligation on “the authorities in Member States [to] rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and . . . Article 81 . . . and 82” until the entry into force of the necessary powers for the European Commission. This provision largely lost its importance with the entry into force of Regulation 17. However, it is still applicable to commercial sectors which are exempt from the application of EU competition powers, such as air and sea transport between the EU and third States. More substantial powers were given to national authorities by Article 9(2) of Regulation 17. According to this provision, the authorities of the Member States were called upon to apply Articles 81(1) and 82 “as long as the Commission has not initiated any procedure.”

The incentive for national authorities to apply EU competi-

tion law on their own was nevertheless limited. First, they might open proceedings concerning Articles 81 or 82 only to lose their competence if and when the Commission also opened proceedings.⁴⁸ In case they terminated their proceedings and decided the case, the Commission might still open proceedings and decide the case differently. The principle of supremacy of EU law would in such a case render the national decision inapplicable. Finally, the national authorities could only enforce Articles 81(1) and 82. Until May 1, 2004, when Regulation 1/2003 becomes applicable, they will not have the authority to grant individual exemptions under Article 81(3). They were thus more likely to apply *national* competition law,⁴⁹ which can generally be applied alongside EU competition law. Yet, even when applying national rules, the national authorities have had to keep an eye on EU competition law since they must not bring about conflicting results. Thus, they cannot exempt a certain conduct on the basis of national law if the Commission wants to prohibit it and they cannot prohibit a conduct on the basis of stricter national law if the Commission has already exempted it or has at least received a notification from the enterprise(s) involved and there is a good chance that an exemption will be granted. In the interest of procedural economy therefore, it has been advisable for national authorities to suspend their procedures as soon as the Commission opened a formal investigation.

Regulation 17 contained a number of provisions on collaboration between the EU Commission and national competition authorities. Article 10 of Regulation 17 provided for mutual information or liaison between the Commission and the national authorities. Under Article 11, the Commission could request information from the national authorities and had to inform them about any requests for information sent directly to undertakings and associations in their territory. If the Commission wanted to conduct a general inquiry into a sector of the economy, it had to inform the respective national authorities according to Article

48. See Council Regulation No. 17/62, art. 9(3), 13 J.O. 204 (1962), O.J. Eng. Spec. ed. 1959-1962 (stating “[a]s long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85(1) or Article 86”). It should also be noted, however, that the national competence can be restored if the Commission decides to terminate an investigation without adopting a final decision on the matter.

49. See KORAH, *supra* note 5, at 23-24.

12 and then could request information from them. The corresponding duty not to disclose business secrets and other confidential information could be found in Article 20(2) of the Regulation. Article 13 of Regulation 17 placed an obligation upon “the competent authorities of the Member States”⁵⁰ to undertake investigations at the request of the Commission and to issue the necessary authorizations to their officials. More importantly in practice, Article 14 required the national authorities to assist the Commission’s own officials when making investigations in the territory of the Member States. These investigations became famous as “dawn raids” and played an important role in the enforcement of EU competition law.⁵¹

In the field of merger control, Article 9 of Regulation 4064/89⁵² provides detailed criteria for cases in which a planned concentration that has been notified to the Commission can be referred to the national authorities. Many more useful hints on the expectations upon national competition authorities could be found in the Commission Notice of 1997, including elaborate guidelines on the allocation of cases which (potentially) fell into both the competence of the Commission and of the national authorities.

As far as national courts were concerned, the obligations placed upon them by EU competition law were even more straightforward. On the basis of the direct effect of Articles 81(1) and 82, the national courts not only had the power, but also the obligation of applying these provisions in cases that came before them.⁵³ This meant that individuals and companies who complained about other individuals or companies potentially violating EU competition law had to “have access to all procedural remedies provided for by national law on the same con-

50. *See supra* note 48.

51. An illustrative example for the problems that may arise in practice when an enterprise does not cooperate in an investigation and the national authorities are requested to provide police powers can be found in *Hoechst AG v. Commission of the European Communities*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859.

52. Council Regulation No. 4064/89, O.J. L 257, at 13 (1990), *amended by* Council Regulation No. 1310/97, O.J. L 180 (1987) [hereinafter *Merger Regulation*].

53. *See Belgische Radio en Televisie v. SV SABAM*, Case 127/73, [1974] E.C.R. 51, ¶ 16 (holding that “as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard”).

ditions as would apply if a comparable breach of national law were involved.”⁵⁴

Articles 81 and 82 may come before national courts in particular in the following scenarios: a) in contract law, a party to an agreement may claim that this agreement is anti-competitive and thus unenforceable under Article 81(2); b) a victim of abusive behavior by a dominant firm may seek an injunction to end the infringement; and c) individuals or undertakings who have suffered damages due to the application of anti-competitive agreements or abusive behavior may seek compensation under tort law. As noted above, in such cases the national courts were under an obligation to ensure the effective application of EU competition law. This could require careful analysis of secondary EU law in force, the case law of the ECJ and the CFI, as well as decisions by the Commission in similar cases. Whenever such analysis might have left important questions unanswered, which had to be resolved in order to allow the national court to render judgment, the latter had to consider the preliminary reference procedure under Article 234 of the Treaty. In light of the average twenty-four month duration of a 234-procedure in Luxembourg, provisional measures might have been necessary in the interim, to prevent irreparable damage to the parties. Again, the respective Commission Notice provided additional practical guidance.

2. Substantive Requirements Imposed on the National Authorities as of May 1, 2004

The Commission has long been overburdened with thousands of notifications and requests for individual exemptions. To cope with the caseload, the Commission has adopted a number of block-exemption regulations and has resorted to the practice of responding with mere “comfort-letters,” rather than binding decisions (negative clearance or exemption), to the bulk of the inquiries and applications. Nevertheless, the caseload cannot be handled any more in a proper manner and the Member State representatives, in the context of the budgetary negotiations, have refused to allocate significantly larger re-

54. See 1993 Notice on Cooperation Between National Courts and the Commission, O.J. C 39, at 6, ¶ 11 (1993).

sources for additional staff.⁵⁵ Therefore, the Commission proposed in 1999 to delegate more powers to the authorities of the Member States. The concrete proposals were outlined in the White Paper on Modernization of the Rules Implementing Art. 85 and 86 of April 28, 1999⁵⁶ and can be summarized as follows. First of all, the need for prior notification of an agreement which might infringe Article 81(1) — and thus the possibility to get a comfort letter, a negative clearance, or an exemption from the Commission and be protected from possible sanctions — will be abolished. This will place the responsibility for lawful conduct on the undertakings without offering the previous help so frequently asked for from the Commission. Secondly, the national competition authorities will be enabled to grant individual exemptions under Article 81(3). This will give them important responsibilities that may often be difficult to exercise, considering the need to avoid contradicting decisions in different Member States and discriminatory treatment of internationally operating enterprises.

Finally, the responsibility for the effective enforcement of EU competition law will be placed primarily upon the national competition authorities and the national courts. This will not only substantially increase the work load of the national authorities; it will also, for better or worse, put the protection of the European competition system, as a whole, largely into the hands of the Member State competition boards and their courts. Even though the European Commission will obviously retain important supervisory powers and decide those cases which are of pan-European interest or raise entirely new legal issues,⁵⁷ and even if the national courts can avail themselves of the procedure under Article 234 to get help from the European Court of Justice, it is clear that this “modernization” will have far-reaching consequences, not only for the expectations upon the old and new Member States, but also for the very project of the internal market and workable competition in it.

55. The problems are explained in greater detail in JONES & SUFRIN, *supra* note 5, at 1015-37.

56. Commission White Paper on Modernization of the Rules Implementing Art. 85 and 86 of the EC Treaty, O.J. C 132/1 (1999).

57. For a critical analysis of the discretionary power foreseen for the Commission to take up cases it considers important, see Fritz Rittner, *Kartellpolitik und Gewaltenteilung in der EG*, 2 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 129 (2000).

After a broad and sometimes controversial international debate amongst practitioners, academics, and Member State representatives, the reforms were finally adopted by the European Council as Regulation 1/2003 on December 16, 2002. This Regulation replaces Regulation 17 and amends a range of other regulations that used to refer to Regulation 17. It effectively implements the proposed re-nationalization of the supervisory powers in competition law but also retains broad powers for the Commission to intervene in procedures before the national authorities. In a nutshell, the new system, which will become applicable as of May 1, 2004, places many more responsibilities on the national authorities, not only by making them the primary enforcers of EU competition law, but also by requiring them to collaborate both horizontally with the competition authorities of the other Member States, as well as vertically with the Commission itself. If anything, the requirements to be met by the national authorities have become more serious and more complicated.

Concretely, the system retains the principle that anti-competitive agreements and concerted practices are prohibited if they do not satisfy the requirements of Article 81(3).⁵⁸ What is new is the stipulation that anti-competitive agreements and concerted practices that do fulfill the requirements of Article 81(3) are lawful without a need to obtain an individual exemption or to conform to a block exemption. As mentioned earlier, it will now be left to the undertakings to assess their current or intended future conduct in light of existing rules and case-law. The notification procedure will be eliminated.

Article 3 of the new Regulation specifically deals with cases where the national authorities apply national competition law, even though the case may affect trade between Member States. It spells out the obligation of the national authorities in these cases to also apply Articles 81 and/or 82 of the Treaty. For agreements and concerted practices, the second paragraph of Article 3 makes it clear that national authorities must not prohibit something that either does not restrict competition in the sense of Article 81(1) or qualifies for exemption under Article 81(3). Stricter national rules are allowed only for the treatment of unilateral conduct that is primarily in the context of Article 82.

58. Council Regulation No. 1/2003, art. 1(1), O.J. L 1/1 (2002).

Article 5 of the new Regulation spells out the powers of the national authorities in the application of EU competition law, that is for cases that may affect trade between Member States. The authorities are specifically given the power to require “that an infringement [of EU competition law] be brought to an end,” the power of “ordering interim measures,” the power of “accepting commitments,” and the power of “imposing fines, periodic penalty payments or any other penalty provided for in their national law.” Since Regulation 1/2003 “shall have general application” and “be binding in its entirety and directly applicable in all Member States,”⁵⁹ these powers of the national authorities come into being as of May 1, 2004 for cases that may affect trade between Member States even if national law does not provide for them. The same is true for the national courts, which are given “the power to apply Articles 81 and 82 of the Treaty.”⁶⁰

Naturally, the new powers do not come without responsibilities. Since anti-competitive behavior that may affect trade between Member States is illegal *per se*, contracts to this end must not be enforced, distortions of competition must be terminated and proven damage must be compensated. If the authorities — administrative and or judicial — of a Member State fail to fulfill these obligations, the Member State is in breach of its obligations and may become subject to proceedings under Article 226 of the Treaty, and claims for State liability under the Francovich doctrine.⁶¹

Under the new Regulation, the Commission retains important supervisory powers. It can establish whether an infringement of EU competition law has occurred and order its termination.⁶² The Commission has this power after receiving a complaint or on its own initiative and regardless of whether or not the case has already been taken up or even decided by the national authorities. Article 7(2) specifically stipulates that the Commission can receive complaints from Member States and also from “natural or legal persons who can show a legitimate

59. Consolidated EC Treaty, *supra* note 4, art. 249, ¶ 2, O.J. C 325/33, at 132 (2002), 37 I.L.M. at 128 (ex Article 189).

60. See Council Regulation No. 1/2003, art. 6, O.J. L 1/1 (2002).

61. *Francovich and Bonifaci v. Republic of Italy*, Joined Cases 6 & 9/90, [1991] E.C.R. I-5357, 2 C.M.L.R. 66 (1993).

62. See Council Regulation No. 1/2003, art. 7, O.J. L 1/1, at 9 (2002).

interest.”⁶³ This opens a direct avenue for review of national authorities’ action or inaction.

In light of the fact that anti-competitive behavior that may affect trade between Member States by necessity concerns at least two Member States, potential conflicts between the authorities of different Member States are built into the system. This could become a source of many problems, including procedural overlap, contradictory decisions with regard to one and the same case, different standards for similar types of cases, and other forms of discriminatory treatment of enterprises in the internal market. To reduce the probability and scope of these kind of problems, Chapter IV of Regulation 1/2003 imposes a range of cooperation procedures and obligations on the various national authorities. The application of EU competition law shall be done “in close cooperation” of all competition authorities of the Member States and the Commission.⁶⁴ The Member State authorities must always inform the Commission “before or without delay after commencing the first formal investigative measures” when acting under Article 81 or 82.⁶⁵ The Member State authorities are also given the power to exchange information horizontally with their counterparts in the other Member States.⁶⁶ Article 13 specifically addresses the cases where the authorities of two or more Member States are contemplating to act, are in the process of acting, or have dealt with a case. The Regulation envisages “a network of public authorities applying the Community competition rules in close cooperation.”⁶⁷ The national courts are also receiving specific powers to request information from the Commission and/or their national competition authorities, and the national competition authorities not only receive the corresponding powers to provide such information upon request but even of their own motion.⁶⁸ Last but not least, any national court judgment deciding “on the application of Article 81 or 82” has to be forwarded “without delay” to the Commission.⁶⁹

63. *Id.* art. 7(2), O.J. L 1/1, at 9 (2002).

64. *Id.* art. 11(1), O.J. L 1/1, at 10 (2002).

65. *Id.* art. 11(3), O.J. L 1/1, at 10 (2002).

66. *Id.* art. 12, O.J. L 1/1, at 10 (2002).

67. *Id.* pmb., ¶¶ 15-18, O.J. L 1/1, at 4 (2002).

68. *Id.* art. 15, O.J. L 1/1, at 12 (2002).

69. *Id.* art. 15(2), O.J. L 1/1, at 12 (2002).

Without going into further detail, it is clear that the new supervisory system will only succeed if two central requirements are fulfilled: 1) the competition authorities and the competent courts of all Member States have to be able to exercise the powers bestowed upon them by Regulation 1/2003 when they are applying or have to apply EU competition law; and 2) the competition authorities of all Member States and the competent courts have to be willing to cooperate fully with their counterparts in the other Member States and with the Commission.

With regard to the *ability* to fulfill these requirements, problems may arise in particular for those national authorities that have not traditionally exercised these kinds of powers and are insufficiently prepared for it. This is not only the case in CEECs but also in several of the old Member States.

With regard to the *willingness* to fulfill the requirements, problems may arise in particular for those national authorities that are not fully independent from political processes and may come under pressure to treat national undertakings differently from foreign undertakings. Again, this is potentially the case both in CEECs and in several of the old Member States.

The remaining parts of this Article will look closer at ways and means to reduce these risks and to create a network of national authorities of all twenty-five Member States that truly fulfills its mission.

III. SUBSTANTIVE REQUIREMENTS WITH REGARD TO THE DEVELOPMENT AND APPLICATION OF NATIONAL COMPETITION LAW

On the one hand, EU law does not provide any detailed obligations for the content and administration of national competition law. Again, the candidate countries can rely on differences which continue to exist among the "old" Member States.⁷⁰ Thus, for example, some Member States have the same principles as provided for in Article 81(1) and (3) in their national laws, i.e., a *per se* prohibition of anti-competitive agreements with a possibility of exemption. In other Member States, such agreements are not illegal as such and can only be prohibited on a case-by-case basis. Some Member States provide different rules for horizon-

70. The following information is based on IMMENGA & MESTMÄCKER, *supra* note 5, at 46-52. See also Competition Surveys, *supra* note 40.

tal and vertical agreements, others do not. In some Member States, decisions regarding the prohibition of certain types of agreements or behavior must be taken strictly on the basis of legal and economic criteria, in other Member States considerations of economic or even social policy are explicitly permitted or even required. Furthermore, there are many differences as far as the institutional architecture of the national competition authorities is concerned.

On the other hand, it is nevertheless possible to identify some mistakes which should be avoided and some principles which should be followed by CEECs who want to create effective national competition rules and procedures.

In several CEECs, the competition authorities are weak institutions by design. Either the supervisory functions are spread out between several different units with unclear delimitation of competencies and powers or competition supervision is entrusted to departments under the authority of a ministry and thus subject to political directives.

Virtually all over Central and Eastern Europe, the public service, and hence administrative units such as competition boards, has been suffering from a shortage of qualified lawyers and economists. Relatively low salaries, insufficiently attractive working environments, and traditionally low prestige of "State jobs" did not help in attracting the best graduates from national universities, let alone experts with practical experience or Western training. Furthermore, as shall be developed below, in-house training programs have often not been very effective.

Structural weaknesses of the institutions and their staff are frequently exacerbated by poorly drafted laws which are either home-made and reflect the drafter's lack of experience, or they are imported and basically just translate EU or Western statutes. To give but one example: those who have worked with Articles 81 and 82 of the Treaty in practice will appreciate the indispensable guidance on the interpretation of these provisions which has to be drawn from the case law of the European Court of Justice, including the more recent decisions of the Court of First Instance, and to some extent the decisions of the European Commission. Only the most basic and straightforward cases can be dealt with by looking at the Articles themselves, as written into the Treaty. All "interesting" questions, such as whether or

not a national pension fund can be considered to be an “undertaking” for the purposes of Articles 81 or 82, or whether instructions from the mother company to a fifty percent owned subsidiary must be seen as an “agreement” under Article 81, will require extensive knowledge of the practice of the EU institutions. Nevertheless, several CEECs have pretty much translated only these Treaty articles and are using this as the core of their national competition laws.

The practice of merely translating EU laws or the laws of a Member State such as Germany is also inadequate in light of the fact that these Western competition rules have not been designed for and are ill-suited to deal with certain problems that are distinct and typical for transition economies.⁷¹ Such distinct problems may seem short-lived, such as privatization and the dissolution of State monopolies, but even where privatization was successful,⁷² lack of broadly distributed national wealth has already led to concentration of economic power in the hands of a few national or foreign investors. In other areas, privatization was less successful or has not happened yet⁷³ and State aids to ailing monopolists may still be rampant. For these areas, the CEECs will have no choice but to develop their own solutions and legal rules.

Other problems which are not fully taken into account by Western rules include the widespread lack of transparency in the Central and Eastern European markets, lack of reliable statistics, and the absence of a culture of cooperation and communication. At least some of these issues will only be solved via genera-

71. See Nicolaidis & Mathis, *supra* note 7, at 487.

72. For an early analysis, see PETAR ŠARĚVIĀ, PRIVATIZATION IN CENTRAL AND EASTERN EUROPE (1992). See also Stijn Claessens & Simeon Djankov, Ownership Concentration and Corporate Performance in the Czech Republic (Univ. of Mich. Bus. Sch., Working Paper No. 227, 1999); EVZEN KOCENDA & JAN SVEJNAR, THE EFFECTS OF OWNERSHIP FORMS AND CONCENTRATION ON FIRM PERFORMANCE AFTER LARGE-SCALE PRIVATIZATION (Univ. of Mich. Bus. Sch., Working Paper No. 471, 2002) (presenting a more specific analysis); Rainhart Lang & Sven Müller, *Privatisation, Perception of Success and Attitudes of Managers in the East German Transformation Process*, in 3 TEN YEARS OF ECONOMIC TRANSFORMATION — SOCIETIES AND INSTITUTIONS IN TRANSITION 391-407 (Kari Liuhto ed., 2001); Nandini Gupta et al., Priorities and Sequencing in Privatization: Theory and Evidence from the Czech Republic (Univ. of Mich. Bus. Sch., Working Paper No. 323a, 2001).

73. See, e.g. Vijai Maheshwari, *Derailed: Estonia's Pioneering Railway Privatization Ends in Turmoil*, BUS. CENT. EUR., Feb. 2001, at 27.

tional change.⁷⁴

A. *Other Problems in Practice*⁷⁵

As the present Article has shown, the requirements placed upon the competition authorities and courts in the Member States are manifold and often complex. On May 1, 2004, the system will take another quantum leap in that same direction. The effective application of EU competition law, therefore, requires that administrative authorities, prosecutors, attorneys, and judges collaborate in a sensible manner domestically and with their counterparts in other Member States and with the Commission. If there is a cartel of silence among national lawyers, where legal counsel of both sides is either oblivious to the fact that EU competition law should be applied to the case at hand or where counsel feels it might be relevant but hopes — for lack of any specific knowledge — that the other side in the same position will not raise the issue either, we cannot expect *effective* application of the law. This, sadly, is still happening every now and then even in the “old” Member States, where lawyers should have had enough time to inform themselves and gain practical experience in the application of EU law. Clearly, the problem will be much more challenging in the “new” Member States as CEECs join the Union.

Legal education in CEECs has been slow to reform. In contrast to East Germany, where not a single law professor was retained after re-unification, it was neither considered necessary nor possible in the other countries of the region to replace Soviet-era professors with Western-trained lawyers and academics.⁷⁶

74. See Frank Emmert & Jorma Heinonen, *Challenges to Estonian Economic Development Provided by the Forthcoming EU Membership*, in 1 TEN YEARS OF ECONOMIC TRANSFORMATION — SOCIETIES AND INSTITUTIONS IN TRANSITION 342, 354-71 (Kari Liuhto ed., 2001).

75. See Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EUR. L.J. 288 (2003) (presenting a more detailed analysis); NETHERLANDS SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY, *TOWARDS A PAN-EUROPEAN UNION: REPORTS TO THE GOVERNMENT* (2001); Saule Voluckyte, *Why is Lithuania Lagging Behind in Terms of Economic Development? A Legal Analysis from the FDI (Foreign Direct Investment) Point of View* (2002) (unpublished thesis, Concordia International University, Estonia) (on file with author).

76. As a consequence, I have come across many “colleagues” in CEECs who spent most of their lives teaching subjects such as scientific communism and have now shifted into more timely fields, such as constitutional law, without, however, having necessarily acquired real in-depth knowledge.

To this day, remuneration in the public sector and, consequently, in almost all universities in CEECs is not only lower than in the private sector but also low in absolute terms. This has made it difficult for the law schools to attract highly qualified younger teachers, in particular those who had the chance of spending a year in Western Europe or the United States for a Master's program. Most of those who did come back to teach are simultaneously pursuing a career at the bar or in business. This is not bad as such but limits the amount of time available for research, publications, supervision of students, and preparation of lectures.

Academic research is consequently a low priority all over Central and Eastern Europe. Those who would be qualified are often too busy, receiving lucrative offers from many sides; and those who are not qualified often produce results that are not up to international standards. Many of the younger professors do not have doctorates and have never produced substantial publications that would satisfy international standards of quality.

Teaching is another problem. Probably more than half of the professors I have met across Central and Eastern Europe are teaching by sitting in front of the class, reading and explaining the respective codes and statutes to their students. Textbooks are often not available since few who would be qualified to write them actually find the time and since the laws are being amended so often that many books would be outdated before they were printed. In exams, the students are expected to recite the codes and statutes by heart and repeat the explanations provided by the professor in class. Those who repeat best get the highest grade, the others get a passing grade. And when seminar papers and final theses are due, it is not only common but even commonly accepted that the bulk of the papers are either completely descriptive or straightforward plagiarized.⁷⁷ Real

77. At Concordia, we had very strict rules about plagiarism and academic honesty. We taught international standards of academic research and publishing in a separate course and still had to fail a certain percentage of our students on their final papers. I often heard comments from the students that our standards were far beyond what was commonly expected or tolerated in other Estonian universities, where their friends were studying. To give but one concrete example: a well known professor of business at the State university in Tartu instructed the students in a seminar to translate various chapters of an American textbook by an American author into Estonian as their seminar papers and to hand in the results on diskette. Subsequently he published an Estonian textbook with these translated chapters under his own name as the author. Ironi-

analysis and critical thinking are seldom taught and hardly ever encouraged.

As a result, many lawyers in CEECs lack skills that we would consider essential in the West. The law is frequently applied in a very positivist manner, just looking at the law in the books. Where there are lacunae in the statutes, justice may be denied.⁷⁸ General principles of law and justice, as well as constitutional and international standards of human rights and due process — and the way they can enter into a “normal” case — are little known and in practice largely irrelevant.⁷⁹ Furthermore, there is no tradition of administrative law as in the West. The concept of individual rights against State measures did not exist in Soviet times.⁸⁰ Even today, administrative procedure codes are underdeveloped in most CEECs and substantive law is often patchwork. The lack of textbooks, or even just student collections of the most important statutes, is worse in administrative law than in any other area of law.

In addition, there is a strange custom in certain CEECs that precedent is not only not binding but completely ignored.

cally, the scandal which followed was only about the question whether he should have shared the royalties with his students. Nobody even mentioned the problem of plagiarism and the man certainly did not lose his job. From all my travels and teaching in other CEECs, I think that I can conclude that the situation there is not fundamentally different.

78. A well known case in Estonia concerned the legal counsel of a large bank that was taken over by an even larger bank. In the course of the take-over, the lawyer managed certain securities transactions after which bank assets in excess of 1 million USD found themselves in one of his personal bank accounts. After the take-over, the new owners took the man to court on criminal charges and for repayment of the money. The case went all the way to the Estonian Supreme Court but ended with a complete defeat of the bank. The judges had not found any legal rules breached by the lawyer and thus no legal basis for ordering a repayment of the money. Notions such as unjust enrichment were either not argued or not accepted. For more detailed analysis, see Emmert, *supra* note 75, at 295.

79. In another case from Estonia, a journalist had publicly criticized a female politician, calling her a bad mother because she left small children at home to pursue her career. He was taken to court on charges of libel. All the way up to the Supreme Court his conviction was upheld without anybody ever thinking of the freedom of opinion and the press. Unfortunately, the journalist was poorly advised and lost his case even before the European Court of Human Rights in Strasbourg. For a more detailed analysis, see Emmert, *supra* note 75, at 291-92.

80. When a student of mine doing an internship with a large Swedish law firm in Lithuania recently represented a client in an administrative court, she was asked whether she realized that the State measure at issue had been taken in the public, or rather “State” interest. This alone seemed to settle the case for the judge who probably blamed “the oversight” on the youth and lack of experience of the intern.

Judges seem to consider it part of their independence not being bound or even influenced by precedent. They may actually be upset when precedents are cited in a legal brief, seeing this as an attack on their independence. They certainly do not consider it necessary to explain when and why they deviate from precedent. As a consequence, judgments are often not systematically published since only students would be interested in them. Furthermore, the outcome of a case is often completely unpredictable and a court may deviate from another — or even from its own earlier practice — without a single word of explanation.⁸¹

When it comes to EU law, the weaknesses of the education systems are even more evident. While EU law is nowadays taught at most — if not all — law schools in CEECs, the courses are often limited to a descriptive introduction of the institutions and a historic overview of the integration process. Good textbooks in domestic languages are often lacking; the situation is even worse for collections of judgments of the ECJ that go beyond one or two dozen leading cases. Consequently, EU competition law and policy, if it is taught at all, focus on superficial analyses of the Treaty articles, Regulation 17, and the Merger Regulation.

We must not be surprised, therefore, to find relatively few people who have received a Western-style education and broad training in EU law during their student years in the national administrations and in the competition authorities. This shortcoming has been realized by the CEECs themselves and has repeatedly been criticized by the Commission.⁸² The standard re-

81. When questioned whether or not they thought that Estonian judges were sufficiently independent, a majority of the respondents actually stated that in their opinion the judges were *too independent*. The only logical explanation for such an opinion would seem to be the fact that the general public does not understand why many cases are decided the way they are and does not see continuity or coherence in the practice of the courts. Quite to the contrary, many judgments are seen as arbitrary and accusations of corruption and other forms of undue influence are quickly circulated. See Frank Emmert, *The Independence of Judges—A Concept Often Misunderstood in Central and Eastern Europe*, 4 EUR. L. J. 405, 405-09 (2002); Open Society Inst., *Judicial Independence in the EU Accession Process* (2001). These findings are also supported by the ABA's Central and East European Law Initiative ("CEELI"), which has developed a Judicial Reform Index for a number of Central European Countries. See, e.g., CEELI, *Judicial Reform Index for Slovakia 2002*, available at <http://www.abanet.org/ceeli/publications/jri/home.html> (June 2002).

82. See, e.g., Commission of the European Communities, *Agenda 2000—Commission Opinion on Estonia's Application for Membership of the European Union*, DOC/97/12, at 13 (1997) available at http://europa.eu.int/comm/enlargement/intro/ag2000_opinions.

sponse has been the organization of ever more training seminars on EU law for civil servants, judges and prosecutors. However, as I have written earlier, theoretical seminars, often conducted by foreign lecturers with little or no familiarity with local circumstances, can only do so much towards real reform of administrative and court procedures.⁸³ All too often, the seminars have been offered in an unstructured manner or to an ever changing group of participants. And, most definitely, there was no systematic benchmarking and assessment of successful learning.

In my own experience with seminars for civil servants, judges, and prosecutors, anywhere between Romania and Estonia, I have typically found myself in front of a group of maybe sixty participants. Ten to fifteen of those were obviously interested, had the required background knowledge and actively participated with sensible and even challenging questions. Another ten to fifteen seemed interested but were too shy to participate and would not volunteer answers when approached directly (even where simultaneous interpretation was available). And the remaining thirty to forty persons could best be described as merely physically present, if at all, since they were also drifting in and out or did not come back after coffee or lunch breaks. It was pretty obvious that these people either did not want to be in the seminar but had to attend, used the seminar as an excuse to be absent from their office, or were completely unable to follow for lack of linguistic skills or legal knowledge.

Twinning projects between authorities in CEECs and "old" Member States could have been an answer to the weaknesses of lecture-style seminars. However, typically the Central and Eastern European authorities were unable to send their most qualified staff for internships to the West for months at a time and, similarly, when Western experts were visiting, they were rarely able to stay long enough in order to understand the local institutional and regulatory setting in sufficient detail to be able to give concrete advice. The Annual Conferences Between the Candidate Countries and the European Commission have also been useful in bringing the experts together and providing a forum

htm, and the corresponding opinions about the other candidate countries. The progress reports of 2001 and 2002 have emphasized the problem in even clearer language.

83. See Emmert & Heinonen, *supra* note 74.

for discussion of concrete issues,⁸⁴ but again, one two-day conference per year can hardly turn the tide.

I am sure that there were other activities of which I am unaware and I do not want to diminish the value of the work that is being done. Nevertheless, I think it is fair to say that progress has been too slow and that there is simply no way that the (competition) authorities and courts in the CEECs can be trusted to dutifully apply the *acquis communautaire* by May 2004. Therefore, preparations have to be changed in a qualitative manner and not only intensified in a quantitative sense. And they have to be continued for years into membership. In this context we must also remember that shortly after accession, considerable numbers of the most qualified lawyers with training in EU law will move from national capitals to Brussels.⁸⁵ This brain drain will not only leave painful gaps at home, it will also be a problem for those who go West, as they will not easily find contacts back home who can provide qualified information and guidance for the best defense of national interests during negotiations in Brussels. Therefore, training programs should be offered for at least two or three persons for every person needed later.

In light of these observations, the reform of EU competition enforcement sought by Regulation 1/2003 could hardly come at a worse time. Many have expressed doubts regarding whether the national authorities of the old Member States would be willing and able to safeguard competition in an adequate manner.⁸⁶

84. The sixth such conference took place in Tallinn on September 25-26, 2000. See Commission Press Release (Sept. 26, 2000). The seventh in Ljubljana on June 18-19, 2001. Commission Press Release, IP/01/858 (June 19, 2001).

85. According to my own estimation, a small country like Estonia will send some seventy-five A-level officials into the institutions within the first two years of membership. In addition, it seems that some 180 lawyer/linguists from each country, including Estonia, will be required in the translation and interpretation services of the institutions.

86. For critical analysis of the Commission's proposals, see Jürgen Basedow, *Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation*, 2 EUR. BUS. ORG. L. REV. 443 (2001); Arved Deringer, *Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)*, 11 EUZW, No. 1, at 5-11 (2000); Claus Dieter Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 COMMON MKT. L. REV. 537 (2000); Damien Geradin, *Competition Between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law*, 9 COLUM. J. EUR. L. 1 (2002); Ulrich Immenga, *Eine Wende in der gemeinschaftsrechtlichen Kartellpolitik*, 10 EUZW, No. 20, at 609 (1999); Ernst-Joachim Mestmäcker, *Versuch einer kartellpolitischen*

For the competition authorities in the CEECs, as they are joining the EU, this, for the time being, is not even a question.⁸⁷

CONCLUSIONS AND SUGGESTIONS FOR CEECS

Neither Article 49 of the TEU, in the interpretation given to it by the Copenhagen Council in 1993, nor the White Paper or the Agenda 2000, nor any other elements of the Pre-Accession Strategy are giving specific instructions to the candidate countries on how they *must* design their competition authorities, the structure and content of their national competition laws, or the powers to be given to the administrative authorities and courts. The information, which is available to CEECs on these issues is either laconic or very general. It basically boils down to the requirement of being *willing and able* to *effectively* apply the *acquis communautaire*. Similarly, comparative analysis of the institutional and substantial rules applicable in the “old” Member States provides little guidance for CEECs.

Historically, the “old” Member States have had quite different approaches to competition supervision and the limitation of EU competition law to those cases that have an impact on trade *between* the Member States — rather than just on the market *within* one Member State — has meant that the national structures, while losing “international” cases to the Commission, have not been required to change in spite of internal market integration.

Consequently, the candidate countries *de facto* enjoy wide discretion when it comes to the creation of national competition authorities and their supervisory powers. However, the liberal use of that discretion is neither historically necessitated nor in the best interest of the CEECs. Scientific analysis and empirical evidence clearly demonstrate a direct relationship between effec-

Wende in der EU, 10 EuZW, No. 17, 523 et seq. (1999); Ernst-Joachim Mestmäcker, *The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order*, 1 EURO. BUS. ORG. L. REV., No. 3. For a defense of the proposals see, e.g., Andreas Geiger, *Das Weißbuch der EG-Kommission zu Art. 81, 82 EG - eine Reform, besser als ihr Ruf*, 11 EuZW, No. 6, 165-69 (2000).

87. This view is shared, in essence, by Ieva Azanda, *From Ex Ante to Ex Post Enforcement of Article 81: Efficiency, Legal Certainty and Community Enlargement* (2003) (unpublished thesis, Concordia International University, Estonia) (on file with author); Dovile Vaigauskaite, *Implementation of the EC Competition Law in Lithuania: Is the State Able to Apply the Acquis Effectively?* (2002) (unpublished thesis, Concordia International University, Estonia) (on file with author).

tive protection of competition in the market on the one hand, steady and sustainable development, general economic growth, progress, and rising living standards for broad sections of the population on the other.⁸⁸

In conclusion, I will try to make some suggestions regarding how competition laws and authorities *should* be designed and implemented in CEECs to maximize their positive impact on economy and society.

1) National competition law should be concentrated in one single law of parliament. This law should contain the rules about anti-competitive agreements, abuse of dominance, concentrations, public undertakings, and anti-competitive State aids.⁸⁹ It should also contain all required provisions on the creation of a competition authority, the procedures to be followed by this authority, and its powers of investigation and enforcement. Guidelines for the substantive range of such a law can be found by looking at the combination of the manifold provisions of EU competition law. Thus, the national competition law should also include rules on individual and block exemptions, the block exemptions themselves, as well as all necessary information on the definition of markets, calculation of turnover, *de minimis* and rule of reason exceptions, etc. As part and parcel of such more detailed rules, it would seem strongly advisable to incorporate certain definitions and interpretations of terms as they have been developed by the case law of the European Court of Justice and the Commission. Finally, the national competition law should provide for the powers of the national courts and for the collaboration between the national authorities and courts and the European Commission and Court of Justice. In light of the prevailing positivist traditions in Central and Eastern Europe and in light of the fact that competition authorities regularly interfere with individual rights and commercial freedoms, the law can hardly be too clear or too specific.

2) The national competition authority should be concentrated into one single and coherent administrative unit. This body should be completely independent and insulated from politically motivated interference, separated organizationally and physi-

88. See SIMON BISHOP & MIKE WALKER, *THE ECONOMICS OF EC COMPETITION LAW* (2d ed. 2002).

89. Rules on market-oriented and competitive procurement by the various State authorities might also be included.

cally from the respective ministries. Its mission should be the balanced development of competition based on market forces. For the achievement of this mission, it should be equipped with sufficient resources and powers, including the power to defend its prerogatives against interference by the executive or legislature.

3) The powers and obligations of the national courts in the area of competition law and policy should be clearly spelled out in the national law on competition. The courts must have full powers of review of implementing regulations and individual decisions adopted by the competition authority. They have to secure the rights of individuals and undertakings, in particular when it comes to safeguarding their procedural rights and the principle of equality of arms. At the same time, the courts also have to safeguard the independence of the competition authority and, where necessary, assist in the enforcement of its decisions. In light of the limited experience many courts in CEECs have with effective review of administrative decisions and the application of general principles of justice and due procedure, and with a view to cumbersome and antiquated procedures in many places, it would seem advisable to create a number of pilot courts where younger and Western-trained judges participate on a voluntary basis and receive special rights to experiment with new techniques of case-flow management, as well as formal and procedural simplifications.⁹⁰

4) Since all CEECs find themselves at different stages but ultimately in the same process of development of national competition laws and authorities, it would also seem opportune to include in the national competition laws specific rules and procedures for the development of the network of public authorities foreseen by Regulation 1/2003. The bilateral association agreements with the EU essentially established a hub-and-spine model where the Commission alone had a good overview of the problems encountered and solutions found in all candidate countries. This kind of information now needs to be much more broadly distributed and utilized via functioning networks

90. See Maria Dakolias & Javier Said, *Judicial Reform: A Process of Change Through Pilot Courts*, 2 EUR. J. L. REFORM 95, 96-117 (2000) (detailing usefulness of pilot courts in this context); see also Russell B. Sunshine, *Technical Assistance for Law Reform: Co-operative Strategies for Enhancing Quality and Impact*, 2 EUR. J. L. REFORM 61, 61-93 (2000); RUSSELL B. SUNSHINE, *MANAGING TECHNICAL ASSISTANCE — A PRACTITIONER'S HANDBOOK* (1995).

of civil servants and judges dealing with competition law and policy. Regular opportunities for exchange of experiences can only improve and speed up the learning process; furthermore, such networks facilitate the exchange of information on markets and the conduct of multinational enterprises.

5) With regard to education on competition law and policy, there is first and foremost a need for high-quality textbooks on EU competition law in Central and Eastern European languages. In some countries, even basic textbooks on general EU law are still not available in domestic languages. Good collections of cases, particularly decisions of the Commission and rulings of the Court of Justice and the Court of First Instance, are hardly available anywhere in the region. In economic terms, the reason is market failure. Academics who have the necessary skills can sell them for much higher reward in the consulting markets, while such highly specialized books would sell only in very small numbers. Hence, government intervention with subsidies would be called for.

6) The need for training of large numbers of civil servants and judges in EU law has been addressed so far by more or less structured seminars and workshops. I have often come across a perception that civil servants and judges have already had more than enough lectures on general aspects of EU law and should now be trained on highly specific questions of, for example, customs law, standard setting, comitology, etc. At the same time, I have not met many civil servants or judges who had a sufficient understanding of the practical impact of supremacy, direct effect, the preliminary reference procedure and the so-called Francovich liability on their legal system and their own work.⁹¹ On the basis of these observations, I have concluded that training has been largely inefficient. Of course, most of those who have participated in such seminars will be able to explain the difference between the European Council and the Council of Europe and how the European Commission and Parliament are structured. But already when it comes to a true understanding of the Cassis-de-Dijon principle and what it means for the free movement of goods, the feedback is disappointing. What is really required, therefore, are rules about a systematic education

91. See *Joined Cases 6 & 9/90, Francovich and Bonifaci v. Republic of Italy*, [1991] E.C.R. I-5357, 2 C.M.L.R. 66 (1993).

to be taken by civil servants who are dealing with EU related matters and who want to rise to executive positions. This training should begin with courses on the institutions, decision-making procedures, and general principles of EU law, in particular supremacy and direct effect. Attendance must be controlled and comprehension must be monitored via class-room discussion and oral and written examinations. On the second level, judges and civil servants should learn about the internal market; on the third level about legal remedies in the EU; and on the fourth level about competition law and policy. Progression from one level to the next should be conditional upon successful demonstration of skills in the examinations and all levels together should amount to at least 200-250 hours of in-class instruction. Last but not least, the instruction must preferably be done by nationals of the respective country and in the national language, as long as standards of quality can be ensured. Only when sufficient numbers of civil servants and judges have been trained in such a manner, can we expect *effective* application of the *acquis communautaire*, including the competition *acquis*, in the CEECs, and if the bar associations would require, their members to participate as well, we could actually expect Central and Eastern Europe to get into gear for the full utilization of the great opportunities of the European integration process.

Last but not least, the old Member States would be well advised to consider similar training programs, as continuing education, for their civil servants, attorneys, and other legal professionals.