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MERGER LAW IN CENTRAL AND EASTERN EUROPE

Russell Pittman*

INTRODUCTION

Why analyze, or even give serious thought to, the merger laws of the emerging market economies of Central and Eastern Europe? These countries contain oversized, outdated monopoly manufacturing firms that require the application by government authorities of some combination of involuntary demonopolization, import discipline, and dominant-firm regulation. Surely, restrictions on mergers are, and ought to be, secondary regulatory priorities.

While the three above-named policies are critically important for countries making the transition from centrally planned to market economies, the provisions of the new antimonopoly statutes that regulate mergers in these countries have their own special significance for the success of the transformation. This is true for two reasons. First, to the extent that government authorities are successful in privatizing and demonopolizing certain sectors of the economy, one anticipates both cartel behavior and merger proposals among the newly independent firms. If the government does not have the means to prevent mergers that would significantly lessen competition, efforts at demonopolization may be frustrated in significant respects. Second, all of these countries are encouraging joint ventures between Western firms and domestic firms as a way to inject much-needed capital and expertise into the economy.¹ It appears that enforcers will utilize the merger provisions of the antimonopoly statutes to evaluate proposed joint ventures that threaten to have anticompetitive results. An excessively loose interpretation of these provisions will result in a loss of competition that will thwart the demonopolization effort. An excessively stringent interpreta-

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1. See e.g., Balcerova, *What Is Not Prohibited is Permitted: An Interview with Karel Dyba, Minister for Economic Policy and Development of the Czech Republic*, CZECH. ECON. DIGEST, January 1991, at 18 (discussing Czechoslovakia's dependence on foreign capital); Hare, *Hungary: In Transition to a Market Economy*, 5 J. ECON. PERSPECTIVES 195, 199 (1991) (describing Hungary's efforts to attract foreign capital and the relative success of its efforts).

tion, prohibiting ventures that in fact pose no threat to competition, will rob the economy of this vital outside capital and expertise.²

This Article analyzes the merger provisions of the new antimonopoly statutes of the Czech and Slovak Federated Republic (CSFR), Hungary, Poland, and the Russian Republic — all emerging market economies. Four aspects of these merger provisions deserve careful attention by United States and foreign firms subject to these laws. Additionally, these four may be crucial determinants of the success with which the young antimonopoly agencies of these countries enforce the laws. The four considerations include: what firms must notify the antimonopoly agency of merger proposals; what information must be included in such notification; how much time is the agency given to analyze a merger proposal, and what are the consequences of its failure to act within that time; and what criteria is the agency directed to use in evaluating the possible costs and benefits of a proposed merger. Where appropriate, these provisions will be compared and contrasted with the corresponding provisions of United States and European Community (EC) antimonopoly law.

Before proceeding, however, it is useful to emphasize certain limitations inherent in a textual analysis of Central and Eastern European statutes. Each of these countries is in the process of creating a new set of economic statutes as well as a new legal system. For roughly fifty years in these countries, the concepts of the rule of law, judicial independence, judicial precedent, and judicial interpretation of legislative language have had little practical meaning. To analyze the language of these statutes as if they were newly passed laws in the United States - to speak of burdens of proof, legislative intent, and judicial interpretation - is to make implicit predictions about the course of future events in Central and Eastern Europe.

There is a separate set of limitations inherent in this particular textual analysis. This inquiry is undertaken in the context of the United States experience with merger law and with the overarching goal of economic efficiency in view. If there are concepts in the statutes that require an understanding of the traditions of Eastern or Western European law for full appreciation, this paper is unlikely to do justice to them. Similarly, to the extent that the authors of the statutes intended

2. Economic policymakers may decide that some loss of competition is acceptable in return for the capital and expertise that a particular joint venture may provide. Even under these circumstances, however, careful application of the statutes is a prerequisite for an understanding of the tradeoff involved. *Cf.* Balcerova, *supra* note 1, at 19 (stating that the Czech government must evaluate each case on an individual basis rather than restricting itself to the tenets of the new antimonopoly law).

them primarily to address issues of fairness, income distribution, or national economic power rather than economic welfare as Western economists define that term, this paper is unlikely to address the issues satisfactorily. It will, however, serve to address the welfare implications of these provisions of the statutes, however intended.³

Finally, it should be kept in mind that the author, whose primary language is English, is working from English translations of the statutes. Close readings of particular English phrases may be misleading or mistaken where the translations from the original languages are inexact.

I. BACKGROUND⁴

The Polish legislature enacted the "Law on Counteracting Monopolistic Practices" on February 24, 1990 and it came into force soon thereafter.⁵ Article 11 of the law addresses "the intention to merge and transform economic subjects."⁶ The Hungarian legislature enacted the "Act on Prohibition of Unfair Market Practices" on November 20, 1990 and it went into force on January 1, 1991.⁷ Sections 23-27 address the "control of entrepreneurs' organizational mergers" and adopt several components of § 17 by reference.⁸ The CSFR legislature enacted the "Competition Protection Act" on January 30, 1991 and it went into force on March 1, 1991.⁹ Article 8 concerns "contracts be-

3. Cf. Fox & Ordovery, *Free Enterprise and Competition Policy for Central and East Europe and the Soviet Union* (forthcoming, proceedings of International Bar Association conference on Eastern Europe, Prague, 1990):

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

Id. at 10.

4. See Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe*, 26 INT'L LAW. ____ (1992) (forthcoming) (discussing these statutes in greater detail); see also Langenfeld & Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 AM. U.J. INT'L L. & POL'Y 345 (1991) (providing a useful background to the enactment of the statutes).

5. Law of 24th February, 1990, on Counteracting Monopolistic Practices, art. 3 (Pol.) [hereinafter Polish Statute].

6. *Id.* art. 11.

7. Act LXXXVI: 1990 on Prohibition of Unfair Market Practices, § 67(1) (Hung.) reprinted in Ministry of Finance, *Public Finance in Hungary: Regulation of Competition 72* (1990) [hereinafter Hungarian Statute].

8. *Id.*

9. Competition Protection Act of January 30, 1991, No. 63/1991 Coll. of Law, art. 24 (CSFR) [hereinafter CSFR Statute].

tween entrepreneurs on merging their enterprises."¹⁰ The Russian legislature enacted the law "On Competition and the Limitation of Monopolistic Activity on Goods Markets" on April 16, 1991 and it came into force the following month.¹¹ Articles 17 and 18 of the law control "the creation, merger, unification, liquidation, and reorganization of economic subjects."¹²

The principal substantive statutory provisions concerning mergers of firms under United States law are contained in section 7 of the Clayton Act, which prohibits mergers that would "substantially lessen competition."¹³ The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires that merging firms which satisfy certain minimal thresholds notify the antitrust enforcement agencies in advance of consummation.¹⁴ This Act further requires a waiting period for consummation while the agencies consider the legal soundness of the proposed merger.¹⁵

The EC's Council Regulation No. 4064/89, adopted in December 1989, sets out the competitive criteria with which to evaluate the legality of a merger.¹⁶ Commission Regulation No. 2367/90, adopted in July 1990, spells out pre-notification requirements and a waiting period before consummation.¹⁷

10. *Id.* art. 8.

11. Law of the RSFSR, On Competition and the Limitation of Monopolistic Activity on Goods Markets [hereinafter Russian Statute]; Decree of the RSFSR Supreme Soviet, On the Procedure for Putting into Effect the RSFSR Law, 'On Competition and the Limitation of Monopolistic Activity on Goods Markets,' 19 VEDUROSTI: RSFSR 25 (1991).

12. Russian Statute, *supra* note 11, art. 17, 18.

13. 15 U.S.C. § 18 (1988). Section 7 provides in pertinent part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . [or] assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.

14. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a (1988)).

15. *Id.*

16. Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 32 O.J. EUR. COMM. (No. L 395) (1989) [hereinafter Council Regulation No. 4064/89].

17. Commission Regulation (EEC) No. 2367/90 of 25 July 1990 on the Notifications, Time Limits and Hearings provided for in Council Regulation (EEC) No. 4064/89, 33 O.J. EUR. COMM. (No. L 195) (1990) [hereinafter Commission Regulation No. 2367/90].

II. NOTIFICATION

A. WHO MUST PRE-NOTIFY?

In the United States, merging firms that satisfy two criteria are required by the Hart-Scott-Rodino Act to notify the enforcement agencies in advance of their merger. The first requirement is the "size-of-the-parties" test, which requires that one of the firms have annual sales or assets of at least \$100 million, while the other have annual sales or assets of at least \$10 million.¹⁸ The second criterion is the "size-of-the-transaction" test, which requires that the value of the assets of the acquired firm be at least \$15 million and that the firm be acquiring at least 15 percent of the assets of the acquired firm.¹⁹

Correspondingly, though less comprehensively, the EC requires pre-notification if combined annual world sales of the merging firms are at least 5 billion ECU (approximately \$6 billion), and combined annual EC sales of the merging firms are at least 250 million ECU (approximately \$300 million). Pre-notification is not necessary, however, if more than two-thirds of the annual sales of each party are made in a single EC member state.²⁰

There are two principal advantages to pre-notification provisions, such as those of the United States and the EC, that obligate compliance based upon annual sales volume. First, the merging firms can usually determine unambiguously whether they are subject to the requirements. Second, smaller firms, mergers of which usually would not cause

18. 15 U.S.C. § 12(a) (1988).

19. *Id.* See ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (SECOND) 214-18 (providing a more complete discussion of the statutory requirements of the Hart-Scott-Rodino Act) [hereinafter ABA ANTITRUST SECTION].

20. See BONER & KRUEGER, THE BASICS OF ANTITRUST POLICY: A REVIEW OF TEN NATIONS AND THE EEC 36-39 (World Bank, Industry Series Paper No. 43, 1991) (providing a more complete discussion of pre-notification); J. ROWLEY & D. BAKER, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 5-8 (1991) (discussing the jurisdictional threshold required by the merger control regulations); Schmidt, *The New EEC Merger Control System*, 6 REV. IND. ORG. 147 (1991) (examining the new EEC merger control system).

The EC has served notice that it intends to seek a significant lowering of these thresholds and a corresponding increase in the number of mergers covered by its regulation. Address by Sir Leon Brittan, *Competition Policy in the European Community: The New Merger Regulation*, to the EC Chamber of Commerce (1990). "The thresholds are the key to the division of responsibilities between the Commission and the Member States. They are, in our view, too high and we will be proposing a very substantial reduction within the next four years." *Id.* Specifically, it has been reported that "the Commission will seek to lower these thresholds by 60% when, as required by Art. 1(3), the Council reviews them by the end of 1993." Stahl, *Competition-Oriented Merger Control: A Tool for Unifying the European Community*, 14 INT'L MERGER LAW 15 (1991).

competitive harm, need not delay their transactions to await bureaucratic approval.²¹

Only two of the anti-monopoly statutes for the Central and Eastern European countries use this approach. The Hungarian statute specifies a sales-volume criterion for merger prenotification (in addition to a market-share criterion). Firms must notify the Competition Supervising Organization in advance of a merger if:

- a) the joint share of the participants exceeded in the previous calendar year thirty percent in regard of any commodity they turnover in the market concern, or
- b) the joint (total) sales revenue of the participants exceeded in the previous calendar year ten billion forints.²²

Similarly, the Russian statute exempts from its prenotification requirement "joint stock societies, partnerships with limited responsibility, and other partnerships whose charter capital does not exceed 50 million rubles."²³

The other two statutes seek to achieve one of the goals just described for the U.S. and EC prenotification requirements, but at the expense of ignoring the other. The Polish statute requires *all* firms seeking to merge first to notify the competition authorities and to observe a waiting period before consummation.²⁴ This requirement eliminates all ambiguity as to which merging firms must prenotify, and ensures that no merger will occur without the opportunity for the Antimonopoly Office to assay its likely competitive effects, but it means that all mergers, even the smallest, must be delayed by bureaucratic requirements, thus slowing the economic adjustments required by the transition.

The CSFR statute takes the opposite tack, basing prenotification requirements upon market share or market power considerations. This is likely to cause problems, both for firms potentially subject to the statutes and for the enforcement authorities themselves.

The CSFR statute, for example, stipulates that "merger contracts" that "result or may result in limiting economic competition in the relevant market . . . are void unless approved by the authority to which

21. It is important to note that such firms are still subject to the substantive restrictions of the Clayton Act when they merge; they are simply not required to pre-notify. Enforcement actions must then be brought *ex post facto*. For an example of such an action, see *United States v. United Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991) (holding that there was a prima facie case of a violation of Section 7 of the Clayton Act, and that the Government demonstrated that the merger would have had anticompetitive effects).

22. Hungarian Statute, *supra* note 5, at art. 23(1).

23. Russian Statute, *supra* note 11, at art. 17.

24. Polish Statute, *supra* note 5, at art. 11(1).

they must be delivered."²⁵ The statute then expands upon this statement, explaining that "it is regarded as a danger to limiting competition . . . if the share of the participating enterprises exceeds 30 percent of the total turnover in the relevant market."²⁶

One imagines that the intent behind a pre-notification requirement based upon market share, rather than sales volume, has to do with restricting the class of firms so required to those whose mergers are likely to significantly reduce competition. Thus, the intended result is to maximize the class of firms that need not delay their transaction in order to comply with bureaucratic fiat. An inherent problem in following this strategy, however, is the virtual elimination of the first advantage, as many merging firms will not know their relative market share, and will not know whether they are required to pre-notify. Furthermore, they will have the incentive to interpret the rules in such a way as to avoid pre-notification, particularly in cases that might raise competitive concerns. Finally, firms that make a good-faith effort to estimate their market shares may be required to collect information from rivals that would facilitate collusion. This is precisely what merger review and enforcement are meant to avoid.

It may appear straightforward to impose behavioral requirements based upon market share. In fact, the United States devotes a good deal of enforcement resources and analysis to defining the market in which particular firms operate, and market definition issues often play a prominent role in litigated merger cases.²⁷ Does Coca-Cola operate in the market for cola drinks, for all soft drinks, or for all beverages?²⁸ Does the Santa Fe Railway operate in the market for railway freight transportation or for all freight transportation?²⁹ Answers to such questions require sophisticated economic analysis and may make an enormous difference in the measured market shares of the firms.³⁰

25. CFSR Statute, *supra* note 9, at arts. 8(1), 8(4).

26. *Id.* art 8(3).

27. See, e.g., *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989) (ruling that "automatic tampers" rather than a "cluster" of all railroad maintenance-of-way equipment is the correct product market); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990) (holding that the geographic market for two hospitals proposing merger is the hospitals' service area instead of a ten-county area).

28. See White, *Application of the Merger Guidelines: The Proposed Merger of Coca-Cola and Dr Pepper*, in *THE ANTITRUST REVOLUTION 80-98* (J. Kwoka & L. White eds. 1989) (analyzing the FTC's decision to oppose the Coca-Cola and Dr Pepper merger).

29. See Pittman, *Railroads and Competition: The Santa Fe/Southern Pacific Merger Proposal*, 39 J. INDUS. ECON. 25 (1990) (analyzing the competitive implications of the ATSF/SP merger).

30. See, Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 DUKE L.J. 514 (providing a general discussion of the difficult issues in-

A workable, though imperfect, solution to this problem may be for the enforcement agencies to issue or adopt particular statistical categories as "presumptive" markets for purposes of premerger notification and, perhaps, for other restrictions on dominant firm behavior. This solution would operate similar to the way that the four-digit classification level of the Standard Industrial Classification system of the United States Bureau of the Census is sometimes used in both empirical research and antitrust analysis. This strategy would have the advantages of generally eliminating ambiguity in reporting requirements and removing such requirements for many transactions. It would have the disadvantage, however, of achieving these advantages somewhat capriciously, because antitrust markets are not easily defined and recent case experience in the United States has shown that such markets tend to correspond poorly to the Census categories.³¹ Furthermore, any such categories would have to be continually updated to reflect both economic and technological changes.

B. CONTENT OF THE NOTIFICATION

In the United States, the Hart-Scott-Rodino Act (the "Act") authorizes the Federal Trade Commission to issue, with the concurrence of the Department of Justice, regulations implementing the Act's requirements. These regulations detail the information that enforcement agencies require, as well as the mandatory waiting period before consummation. The information requirements are quite specific and extensive, as they include plant locations, sales by product line, directors and owners of large blocks of shares, and the existence of any commercial relation-

involved by exploring the practical applications of the 1982 Merger Guidelines' market delineation principles released by the United States Department of Justice); Werden, *Market Delineation Under the Market Guidelines: A Tenth Anniversary Retrospective*, U.S. Dept. of Justice, Antitrust Div., Econ. Analysis Group Disc. Paper 92-1 (1992) (discussing the most important issues raised concerning market definition in the ten years since the issuance of the Guidelines).

31. The latter, for example, are often much too broad for antitrust purposes. See Werden, *The Divergence of SIC Industries from Antitrust Markets: Some Evidence from Price Fixing Cases*, 28 ECON. LETTERS 193 (1988) (concluding that the economic markets implied in federal price fixing cases from 1970-1980 were substantially smaller than four-digit SIC industries); Pittman & Werden, *The Divergence of SIC Industries from Antitrust Markets: Indications from Justice Department Merger Cases*, 33 ECON. LETTERS 283 (1990) (noting that the economic markets cited in federal merger cases from 1982-1989 were substantially smaller than four-digit SIC industries). The discussion here has considered only product market issues; similar "presumptive" markets would have to be defined on a geographic basis as well. See e.g., Bartik, *The Relevant Market — A New Concept in Czech Legal and Economic Practice*, HOSPODARSKÉ NOVINY 5 (Aug. 1, 1991). Mr. Bartik is deputy chairman of the Czech Republic Office for Economic Competition. *Id.*

ship between the merging firms. Additionally, the firms must provide copies of any internal documents that analyze the markets served by the firm and/or the rationale for and likely impact of the merger.³² EC pre-notification requirements are even more extensive.³³

Of the four statutes discussed, only the Russian statute specifies what information must be included in merger notifications.³⁴ However, both the Polish and the Hungarian competition authorities have issued regulations stipulating what information must be included, and as of this writing the CSFR office reportedly has draft regulations under consideration. All three are broadly similar in requiring detailed information concerning firm ownership, plant locations, firm sales by product, and other information.

An important consideration here is whether merging firms may notify the enforcement agencies of their intentions without providing all of the information specified in the pre-notification regulations - without, that is, providing sufficient information for the agencies to evaluate the competitive implications of the proposal. To be sure, the antimonopoly statutes empower the agencies to gather the information necessary for enforcement. The CSFR statute allows the agency to request background material and relevant information from enterprises.³⁵ The Hungarian statute provides for the agency, in the course of an official investigation, to require the entrepreneur to provide certain relevant information.³⁶ The Polish statute allows staff members of the Antimonopoly Office who are empowered to carry out official investigations to demand documents and collect data at the premises of the inspected subject.³⁷ The Russian statute allows the Antimonopoly

32. 16 C.F.R. §§ 801, 803 (1991).

33. Commission Regulation No. 2367/90, *supra* note 17, at 33-35; J. ROWLEY & D. BAKER, *supra* note 20, at 38-40; See Reasoner, *Comments of the American Bar Association Section of Antitrust Law with Respect to the Draft Form Notification of a Concentration*, 59 ANTITRUST L.J. 263 (1990) (expressing the section's concern over the draft's increased filing requirements); See also, Thieffry, Van Doorn, & Nahmias, *The Notification of Mergers Under the New EEC Merger Control Regulation*, 25 INT'L LAW. 615, 628-29 (1991) (discussing mandatory notification of mergers as a significant part of the merger control regulation).

34. The petition to the Anti-Monopoly Committee must include "information concerning the basic forms of economic activity of each of the merging economic subjects, their share of the corresponding goods market, and the agreement for entry into an association." Russian Statute, *supra* note 11, at art. 17.

35. CSFR Statute, *supra* note 9, art. 11(i). The terminology here is not completely clear. The Czech word "ziadost" is here translated as "request," but it is also sometimes translated as "demand." The exact meaning appears to be something more formal than a mere "request" and something less powerful than a "demand."

36. Hungarian Statute, *supra* note 7, § 36(1).

37. Polish Statute, *supra* note 5, art. 20(3).

Committee to demand documents, written and oral explanations, and other information from economic subjects and their officials.³⁸

However, unless the start of the premerger waiting period is conditional on the provision of particular information, as is required in both the U.S. and EC regulations, firms may attempt to use delays in the provision of information to thwart the investigation of a merger proposal.

Here there is a sharp dichotomy in the statutes under examination. The Hungarian statute states that any petition to the agency - apparently including merger pre-notification - must include "all information required for the judgment of the case," and that the time period specified for agency deliberations does not commence until such information is supplied.³⁹ The Polish statute is apparently the same, since "the Council of Ministers defines the requirements to be met by the notification," and the Council's regulation specifies this detailed information.⁴⁰ Similarly, the Russian statute specifies that the merger notification must include the relevant information;⁴¹ if a notification lacks this information, it presumably does not qualify as an official merger petition. On the other hand, there is no obvious provision in the CSFR statute to protect the agency from this problem.

III. TIME FOR ANALYSIS: DEADLINES FOR AGENCY DECISIONS AND CONSEQUENCES OF AGENCY INACTION

Each of the statutes under examination provides a deadline by which the enforcement agency must reach a decision on the merger proposal. There is, however, considerable variation in both the deadline timing and the consequences if the authorities take no action before the deadline.

The CSFR and Hungarian agencies have the longest time in which to analyze a merger proposal. The CSFR statute imposes a three-month deadline on the agency, and renders the contract approved if the agency fails to make a determination within three months after the contract has been delivered.⁴² The Hungarian statute provides the same three-month period for initial agency analysis, but then allows, at the

38. Russian Statute, *supra* note 11, at art. 15.

39. Hungarian Statute, *supra* note 7, § 33(2).

40. Polish Statute, *supra* note 5, at art. 11(6); *Rozporządzenie Rady Ministrów z dnia 11 lipca 1990r* (Directive of the Council of Ministers of July 11, 1990).

41. Russian Statute, *supra* note 11, at art. 17.

42. CSFR Statute, *supra* note 9, at art. 8(4).

agency's option, an additional six months if necessary.⁴³ Permission to merge is considered granted if the Competition Supervising Organization fails to meet either the original or the extended deadline.⁴⁴

By contrast, the Polish agency is allowed only two months from prenotification to decision. If the agency has issued no decision within that time period, the merger may proceed, but there is no presumption that it has been approved.⁴⁵ The Russian agency has just thirty days to inform the merging parties of its decision. Within this time the agency is directed either to give written notice of its agreement or to send an explanation of its refusal to the petitioner.⁴⁶ Unlike the other statutes, however, if the agency does not provide an answer, the merger may not take place; rather, the parties must appeal to a court or state arbitrator to compel an answer.⁴⁷

The proper time period for agency analysis of a merger proposal is clearly a matter of balance: one seeks to provide the authorities with sufficient time to engage in a thorough analysis, without unnecessarily slowing the many changes and reorganizations that will inevitably accompany the transformation of these economies. There is no evidence that U.S. enforcement agencies are unable to analyze merger proposals adequately in the shorter time periods provided by the regulations, but the processes of both information provision and agency analysis have been institutionalized and routinized in this country to a degree not yet contemplated in Eastern Europe. It may be that with the passage of time and accumulation of experience, the legislatures of these nations will shorten the longer time periods provided for in these statutes.

The difference among the CSFR, Hungary, and Poland in the consequences of the agency's failure to act before the deadline may be important. In all three, the merger may proceed if there is no agency decision or action by this time. In Poland, however, because there is no presumption that the merger has been approved, the agency would appear to retain the power to challenge the merger after the entrepreneurs have completed the transaction. By contrast, in the CSFR and Hungary there is the presumption of approval once the deadline has passed. Hence, the agency appears to lack the power to challenge after the entrepreneurs complete the transaction. It would, in many cases,

43. Hungarian Statute, *supra* note 7, at § 45(1). "The Competition Supervising Organization [CSD] may once extend this deadline by at most six (6) months and has to inform hereof the interested parties before the expiry of the original deadline." *Id.*

44. *Id.* § 45(2).

45. Polish Statute, *supra* note 5, at arts. 11(2), 11(3).

46. Russian Statute, *supra* note 11, at art. 17(2).

47. *Id.* at art. 20.

retain the ability to attack an exercise of market power by the firm under the provisions controlling the behavior of dominant firms.⁴⁸ All three statutes, therefore, provide useful protection to merging firms from arbitrary bureaucratic delays. The CSFR and Hungarian statutes, however, may provide the strongest protection, as they penalize an agency for its inaction by removing one weapon from its antimonopoly arsenal — the possibility of attack on the merger itself under the merger-control provisions of the statute.

Similar to the Hungarian statute, United States regulations provide for a two-step investigative process. As noted above, however, the allotted time periods are shorter. In most cases, firms must wait thirty days after pre-notification before consummating the merger; if the transaction is a cash tender offer this period is shortened to fifteen days. At any time during the initial waiting period, one of the enforcement agencies may request specific additional information from the merging parties, and the waiting period is then extended for twenty days after the information is submitted (ten days in the case of a cash tender offer). Once the relevant time period has elapsed, the merger may be consummated; however, there is no presumption of legality or agency approval conferred. The fact that the waiting period commences only when the information is fully submitted means that it is in the merging parties' interest to comply with the information request process expeditiously rather than to delay the process.

EC regulations provide for a longer time period for analysis of a merger proposal than do United States regulations. The EC allows the competition authority one month after pre-notification to determine whether to initiate investigatory proceedings, and four months after pre-notification to determine whether the merger would be anti-competitive. The EC regulations do not provide for the routine issuance of a second request for information if the first round is insufficient, but such a request may be issued in exceptional circumstances.⁴⁹ As in the United States, the EC regulations provide a time-related incentive for firms to comply with agency requests for further information; when such information is requested, the four-month "clock" is stopped until the information is supplied, at which time it resumes.⁵⁰ As in the United States and most of the Central and Eastern European countries,

48. See Pittman, *supra* note 4, at ___ (giving a more extensive discussion of these provisions).

49. Council Regulation No. 4064/89, *supra* note 16, at art. 10.

50. *Id.* at arts. 10-13; Commission Regulation No. 2367/90, *supra* note 17, art. 9. See also Schmidt, *supra* note 20, at 155 (examining the heightened requirements under the new EEC merger system).

if the agency has not acted within the time period allowed for study, the merger may go forward. In this case, the merger is "deemed declared" approved "without prejudice to" the possibility of attack by individual member states.⁵¹

IV. CRITERIA FOR EVALUATION OF MERGER PROPOSALS

The statutes are relatively straightforward in their delineation of enforcement agency criteria to evaluate merger proposals. The criteria differ significantly across countries, and some may be so all-inclusive as to become unwieldy. Moreover, there appear to be differences in types of enforcement decisions that are subject to appellate review.

A. THE CZECHOSLOVAKIAN STATUTE

The CSFR statute provides that "merger contracts . . . are subject to control by the authority if they result or may result in limiting economic competition in the relevant market."⁵² However, "the authority will approve the contract if it can be proved that the potential damage it may cause by restricting competition will be outweighed by economic advantages, brought about by the merger."⁵³ Since these "contracts . . . are void unless approved by the authority,"⁵⁴ it appears that the authority may make a *prima facie* finding that there will be a loss of competition resulting from the merger, at which point a burden of proof shifts to the merging parties to demonstrate countervailing efficiencies from the merger. Because the authority "will" allow the merger if these efficiencies outweigh the competitive loss, it appears that the authority's balancing of these costs and gains is subject to appeal. However, the statute provides no guidance regarding the kinds of "economic advantages" that are to be taken into account; the agency and the courts would likely find some such guidance useful if the legislature amends the statute.

B. THE RUSSIAN STATUTE

The Russian and particularly the Hungarian statutes set out substantive review criteria. The Russian Anti-Monopoly Committee may refuse to give permission to the merging parties "if it may lead to their

51. Council Regulation No. 4064/89, *supra* note 16, art. 10(6).

52. CSFR Statute, *supra* note 9, art. 8(1).

53. *Id.* at art. 8(4).

54. *Id.*

dominant position and/or to a significant limitation of competition.”⁵⁵ The Russian Committee “may give permission even in the presence of the above indicated unfavorable consequences, if the establishment of the association substantially facilitates the saturation of goods markets, the improvement of the consumer/user characteristics of goods, and the bolstering of their competitiveness, including in foreign markets.”⁵⁶ Since the Russian Committee has the *option* of giving merger permission in the presence of such benefits, while the CSFR agency *must* give permission, it may be that any appellate review of the Russian Committee’s decision to prohibit a merger would have to be based upon the *prima facie* ruling of competitive harm rather than on the overall balancing of this harm with benefits from the merger. It is not clear, in other words, that under this language an appeals court could require the agency to reconsider its overall balancing of factors in a particular case.

C. THE HUNGARIAN STATUTE

The situation is similar in Hungary. The Hungarian Competition Supervising Organization “shall not approve an organizational merger . . . which would hamper the formation, maintenance or development of economic competition,”⁵⁷ particularly if the parties involved will obtain a joint share that exceeds thirty per cent.⁵⁸ However, the statute provides that,

[n]otwithstanding the . . . provisions . . . above, an organizational merger may be approved by the Competition Supervising Organization, if

- a) the advantages of the effects on competition of such a merger become dominant over the disadvantages, or
- b) the organizational [merger] does not exclude economic competition in regard of the majority of the commodities concerned, or
- c) the organizational merger promotes the penetration into foreign markets and it is advantageous in national economic terms.⁵⁹

The statute then incorporates a list of possible cartel agreement benefits into a list of possible merger benefits, namely:

- a) a favorable development of the prices; or
- b) an improvement of the product’s quality or the maintenance of the high quality already achieved; or

55. Russian statute, *supra* note 11, at art. 17(3).

56. *Id.*

57. Hungarian statute, *supra* note 7, § 24(1).

58. *Id.* § 17(3), adopted by § 24(3) (addressing cartel agreements).

59. *Id.* § 24(2).

- c) an improvement of the conditions of delivery (e.g. shorter period of delivery);
or
- d) a shortening of the way of distribution, a more rational development of the purchase- and sales-organizations, an improvement in the supply of the given product; or
- e) promotion of technological development, of the environmental situation or enhancement of competitiveness on external markets.⁶⁰

As in the Russian case, since the Hungarian agency has the option of approving an otherwise anti-competitive merger in the presence of benefits from the merger, it appears that a disappointed applicant may appeal the agency's *prima facie* finding of competitive harm from the merger, but may not appeal the agency's overall weighing of costs and benefits.

It remains to be seen whether the Hungarian enforcement agency will be able to establish a clear enforcement policy in considering this wide-ranging set of possible merger consequences. In particular, it is not clear that a specialized competition enforcement agency will have the expertise to analyze the "promotion of technological development, or the environmental situation or enhancement of competitiveness on external markets" or whether a merger would be "advantageous in national economic terms." Similarly, it is not clear that such an agency will have the political clout to legitimize the weighting scheme used to balance such merger benefits against competitive harms. If the Hungarian government desires to weigh such a broad set of merger consequences, it may wish to adopt the German model of an antitrust enforcement agency, where the Federal Cartel Office (the German antitrust enforcement agency) considers the competitive implications of mergers, while the Federal Ministry of Finance retains the power to overturn a denial on broader policy grounds.⁶¹

The provision in the Hungarian law that an otherwise anti-competitive merger may be allowed if it "does not exclude economic competition in regard of the majority of the commodities concerned" may be unnecessarily tolerant of anticompetitive consequences. In the United States, it is frequently possible to alter a merger transaction so as to exclude those assets that would cause competitive problems, while allowing the remainder of the transaction to occur. The inclusion of environmental improvements in the Hungarian list of efficiencies, while understandable given the serious environmental problems facing Central

60. *Id.* § 17(2), adopted by § 24(3). See Pittman, *supra* note 4, at ____ (discussing the cartel restrictions).

61. See J. ROWLEY & D. BAKER, *supra* note 20, at 153, 175-77; Schmidt, *supra* note 20, at 153-54; Stahl, *supra* note 20, at 17-18.

and Eastern Europe,⁶² may be equally unfortunate. An anti-competitive reduction in output following a merger, accomplished, for example, by closing a plant operated by one of the parties, would very often be accompanied by a reduction in pollution.

D. THE POLISH STATUTE

In sharp contrast to the extensive list of possible merger benefits that the Hungarian statute directs its enforcement agency to consider, the Polish statute contains no explicit provisions for the consideration of countervailing benefits to the loss of competition from a merger. The statute simply states that "the Anti-Monopoly Office may issue a decision prohibiting a merger . . . when such a merger . . . would give the subjects a dominant position on the market."⁶³ This formulation appears to provide the Office with prosecutorial discretion in considering merger benefits on its own, but does not appear to allow applicants to appeal an adverse decision on the grounds that such benefits outweigh competitive harms. As with the CSFR statute, the Polish Anti-Monopoly Office may benefit from guidance provided by statutory amendments concerning the decision-making criteria for merger prohibition.

The Polish statute is thus similar to United States law, in that Section 7 of the Clayton Act prohibits mergers that would "substantially lessen competition,"⁶⁴ and the Supreme Court has declined to allow merger benefits in the affected market or other markets to counterbalance competitive harm.⁶⁵ Both The Antitrust Division of the Justice Department and the Federal Trade Commission have announced that under some circumstances they will consider the likely public benefits in deciding whether to challenge a proposed merger.⁶⁶ The discussion of

62. See e.g., Hardin, *Poland Faces Communist Legacy of Pollution*, Wash. Post, Dec. 15, 1991, at A33 (reporting on Warsaw's dangerously polluted tap water).

63. Polish Statute, *supra* note 5, art. 11(2).

64. 15 U.S.C.S. § 18 (1991).

65. See e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-71 (1963) (affirming that Congress intended to prevent anticompetitive mergers in spite of potential social and economic benefits); see also, ABA ANTITRUST SECTION, *supra* note 19, at 166-67 (discussing the balancing of merger benefits with competitive harm); ABA ANTITRUST SECTION, HORIZONTAL MERGERS: LAW AND POLICY 219-24 (1986) (discussing this balancing in greater detail).

66. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, April 2, 1992 [hereinafter 1992 Merger Guidelines]. See also 1984 Merger Guidelines, 49 Fed. Reg. 26,823, 26,834 (1984); FTC, Statement Concerning Horizontal Mergers (June 14, 1982), reprinted in 2 TRADE REG. REP. (CCH) ¶ 4516 (1982).

this subject in the enforcement guidelines of the agencies, however, focuses exclusively on firm-specific cost savings rather than on broader benefits to the economy.⁶⁷ Conversely, the CSFR, Hungarian, and Russian statutes more closely resemble the EC regulations, which direct the government authority to prohibit "a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it"⁶⁸ but also to "take into account . . . the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition."⁶⁹

CONCLUSION

The statutes examined here appear to provide a solid foundation for the control of mergers as part of a broader antimonopoly policy in the developing market economies of Central and Eastern Europe. In examining four key aspects of Central and Eastern European merger law —

67. 1984 Merger Guidelines, *supra* note 67, at 26,834. The Department of Justice Merger Guidelines contain an explicit, although admittedly not all-inclusive, list of the merger benefits that may be considered by the agency. *Id.* The Guidelines state in pertinent part:

Cognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms. The Department may also consider claimed efficiencies resulting from reductions in general selling, administrative, and overhead expenses, or that otherwise do not relate to specific manufacturing, servicing, or distribution operations of the merging firms, although, as a practical matter, these types of efficiencies may be difficult to demonstrate.

Id.

Firm-specific cost savings like those enumerated here may be necessary for achievement of economy-wide benefits as enumerated in the Russian, CSFR, and Hungarian statutes, but this does not render the two equivalent, either analytically or practically.

68. Council Regulation No. 4064/89, *supra* note 16, at art. 4(3).

69. *Id.* at art. 2(1)(b). *See also* Schmidt, *supra* note 20, at 151-54 (discussing the European Regulations). The Vice President of the EC Commission has stated his intention to construe this provision narrowly:

[R]ecognition of other [than competition] policies is wholly proper and appropriate. What competition policy cannot be asked to do, however, is to become an instrument of another Community policy which is regarded as having greater priority. For example, there are those who might argue that we should use competition policy as a means of building up strong "national" or "Euro" champions or that the rules on the grant of state subsidies should be relaxed so as to permit the protection of "strategic" or failing industries. Such courses of action cannot be permitted. It would not represent an "adaption" of policy, it would be an abandonment of policy altogether. Moreover, such a course of action would ignore the significant evidence which points to the fact that healthy domestic competition is one of the main factors in producing healthy international competitors.

Address of Sir Leon Brittan, *Competition Policy*, Centre for European Policy Studies (July 15, 1991).

notification of merger proposals, pre-notification content, analysis time period, and evaluation criteria — potential problems come to light, however. Multiple refinements will become necessary as the statutes' procedures become common practice.

Regarding the question of which firms must approach a given antimonopoly agency with merger proposals, several problems will likely arise by basing pre-notification requirements on merging firm market shares, as is the case in the CSFR. It will be difficult for either the merging firms or the reviewing agencies to calculate market share with the certainty apparently required by the statutes. In addition, firms in these two countries will have an incentive to assume that markets are broad, and therefore that they are not subject to pre-notification requirements. Conversely, the Polish requirement that *all* firms notify the authorities and observe the waiting period before merging is likely to slow the economic transition unnecessarily by placing bureaucratic roadblocks in front of transactions unlikely to harm competition. In order to correct these problems, these countries may wish to amend their merger statutes in order to base pre-notification on firm size or sales volume.

As for the content of pre-notification, the CSFR statute does not provide for implementing regulations that specify what information must be provided to the enforcement authorities as part of the pre-notification procedure. Until these regulations are in place, domestic and foreign firms will have both the incentive and the ability to provide minimal amounts of information in an effort to frustrate agency investigations.

With regard to the criteria used by the agencies, only the Polish statute lacks an explicit provision discussing the cost-benefit analysis of the competitive loss versus the likely public benefit resulting from the merger. The statutes vary in detailing the grounds on which an agency decision is subject to appellate review. Whether the broad grounds provided in the Russian and Hungarian laws for the approval of an otherwise anticompetitive merger can be addressed adequately by a specialized competition agency remains to be seen.

The procedures for analyzing and regulating merger behavior will increase in importance as the Central and Eastern European economies develop. Regulatory agencies must be careful not to overregulate growing markets and therefore prevent much needed outside capital and expertise from reaching these developing countries. A combination of discrete changes in statutory language and a judicious application of implementing regulations would serve to make the merger laws of the CSFR, Hungary, Poland and the Russian Republic more effective.