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RECENT DEVELOPMENTS ARTICLE

IS COMPETITION POLICY THE LAST THING CENTRAL AND EASTERN EUROPE NEED?

James Langenfeld and Marsha W. Blitzer*

INTRODUCTION

State-owned monopolies currently pervade the economies of every country in Central and Eastern Europe. In many sectors these state-owned and sanctioned monopolies can prevent the development of a healthy free-market economy and inhibit reform. Merely transforming state monopolies into private ones, however, could only do very little to benefit consumers and workers in these countries. Among other efforts, Central and Eastern European countries must introduce competition to replace centralized pricing systems that have led to prices that do not reflect the costs of production and have reduced the incentives for managers to provide products that citizens in these countries want. To be

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able to correct these inefficiencies, newly-created government agencies charged with competition policy enforcement are likely to be critical in ensuring competition. With the myriad of problems associated with transforming an economy from centrally planned to market based, however, one could legitimately question how competition policy fits into the broad array of significant economic transformations. Should it be the highest priority, the lowest, or somewhere in between? Moreover, what type of competition policy and analysis might be useful and how would it relate to the other reforms?

Accordingly, several Central and Eastern European governments implementing economic reforms requested assistance from the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) in order to ensure a smooth transition into a market economy. The FTC and the DOJ are the two agencies of the United States government that are responsible for enforcing antitrust laws. As such, they are in a unique position to advise foreign governmental agencies charged with the same tasks. Moreover, the FTC and the DOJ are experts in the economic analysis of industrial organizations.

In 1990, the Support for East European Democracy Act (SEED Act)[1] and the Agency for International Development (AID) granted the FTC and the Antitrust Division of the DOJ funding to implement technical assistance projects in the area of competition policy and law enforcement in Poland and Czechoslovakia. In 1991, a mission to Bulgaria took place. In addition, several countries requested that the staff of the two United States agencies provide informal analyses of draft antimonopoly legislation.

In September 1990, the two agencies sent to Poland a team composed of a lawyer and an economist from the FTC, a lawyer and an

1. Support for East European Democracy Act, Pub. L. No. 101-179, 103 Stat. 1299 (1989) (codified at 22 U.S.C. § 5401). The purpose of the Act is as follows:

> to promote political democracy and economic pluralism in Poland and Hungary by assisting those nations during a critical period of transition and abetting the development in those nations of private business sectors, labor market reforms, and democratic institutions; to establish, through these steps, the framework for a composite program of Support for East European Democracy (SEED).

Id. The SEED Act authorized money for a variety of different programs for three fiscal years. *Id.* Specifically, the FTC and DOJ received their funding from the Technical Business Assistance Working Group (TEBAG), an inter-agency group chaired by the Commerce Department, the objective of which is to aid the transition of the East European countries to private market economies by channeling technical business assistance to them in non-financial sectors.

On November 5, 1990, President Bush signed the Foreign Operations Appropriations for 1991. Appropriation No. 101-968. The appropriation includes assistance for Eastern Europe in order to implement the SEED Act. *Id.*

economist from the Antitrust Division of the DOJ, and an administrative officer from the FTC. The lawyers and the economists were responsible for explaining how investigations are carried out, the legal and economic analyses applied, and the eventual resolution of cases. The FTC dealt with the industries which it normally handles in the context of civil proceedings, such as the petroleum, food processing and distribution, and chemical processing industries. The Antitrust Division of the DOJ addressed industries that the DOJ ordinarily investigates both in the civil (mergers) and criminal (price fixing) contexts, such as the steel and construction industries. The administrative officer addressed antitrust enforcement from a management perspective. He advised antimonopoly officials on administrative management, and shared his experience in the supervision of finance and administrative service activities. He also reviewed the Poles' plans with an eye toward insuring that the Antimonopoly Office acquires and effectively utilizes the labor, financial resources, physical facilities, and management tools necessary to accomplish its mission. In addition, the Polish antimonopoly officials requested that the team analyze the antitrust dimensions of restructuring specific industries such as oil, food distribution, and telecommunications.

In October 1990, a team of two economists and one lawyer travelled to Czechoslovakia[2] to consult with the Czechoslovak officials responsible for drafting antimonopoly legislation for presentation to Parliament. In addition, the Czechoslovaks requested that the team discuss how the government might identify those enterprises with an unjustified monopoly position that require dismantling.

The teams also encountered significant interest in consumer protection in Poland, Czechoslovakia, and Hungary, because various forms of deceptive and unfair business practices have arisen with the deregulation of prices and privatization.[3] While the discussions focussed primarily on competition issues, we explained our view of the advantages of having one government agency enforce both competition and consumer protection laws. Much of the information presented in this article was obtained during FTC staff travels in Central and Eastern Europe or from discussions and correspondence with the officials and experts of the relevant countries. This article will discuss the progress of economic reform in several Central and Eastern European countries. Part I of the

2. Czechoslovakia has been renamed "the Czech and Slovak Federal Republic." *See Czechoslovakia Picks New Name*, Wash. Post, April 21, 1990, at A21.

3. *See Eastern German Buyers Learning the Hard Way*, N.Y. Times, Feb. 24, 1991, at 10 (stating that consumers in East Germany have discovered some unfair and deceptive business practices in their new capitalistic economy).

article will discuss the major elements of economic reform. Part II will examine the importance of competition policy in creating a market economy. Part III explains some key differences in analyzing competition in the United States and countries in Central and Eastern Europe. Part IV examines the problem of how to achieve consumer choice. Part V analyzes the progress of economic reform in Poland, Czechoslovakia, Bulgaria, Hungary, and the Soviet Union. Part VI concludes the article, suggesting that the competition policy of the United States will be useful in the reform process taking place in Central and Eastern Europe.

I. MAJOR ELEMENTS OF ECONOMIC REFORM

The basic elements of economic reform crucial to a successful transition to a free-market economy are not greatly disputed.[4] These basic elements include price liberalization, privatization, banking and fiscal reform, liberalization of foreign trade and investment, and exchange rate reform.[5] We, as well as many analysts, believe that demonopolization and strong antitrust policies are also critical elements in this process.[6]

There is disagreement, however, concerning the timing and order in which these reforms should take place. Many believe that the Central and Eastern European countries should pursue these reforms simultaneously and as quickly as possible.[7] Poland, for instance, has come closest to implementing this approach. The government utilized "shock therapy" to attempt to cure hyperinflation and the other effects of ten years of partial reforms, although key areas such as privatization have progressed very slowly.[8]

4. *See* THE INST. OF INT'L FIN., INC., BUILDING FREE MARKET ECONOMIES IN CENTRAL AND EASTERN EUROPE: CHALLENGES AND REALITIES (1990) [hereinafter BUILDING FREE MARKET ECONOMIES] (recognizing that Central and Eastern European countries will not realize economic gains without far-reaching reforms).

5. *Id.* at 29-30.

6. *See* M. HINDS, ISSUES IN THE INTRODUCTION OF MARKET FORCES IN EASTERN EUROPEAN SOCIALIST ECONOMIES 100 (1990) (asserting that Eastern European markets cannot function without private ownership and advocating rapid privatization of socialized businesses); *see also* R. RAHN & R. UTT, THE NATIONAL CHAMBER FOUNDATION, REPORT OF THE BULGARIAN ECONOMIC GROWTH & TRANSITION PROJECT ch. 2, at 8, ch. 4, at 18 (1990) [hereinafter BULGARIAN ECONOMIC GROWTH & TRANSITION] (advocating the breakup of Bulgarian monopolies for the establishment of a competitive economy in Bulgaria and explaining that substituting private monopolies for state-owned monopolies will only perpetuate their inefficiencies).

7. BUILDING FREE MARKET ECONOMIES, *supra* note 4, at 30.

8. *See generally* House, *In East Europe, Only Poland Makes Hard Decisions*, Wall St. J., June 5, 1990, at A24; Engelberg, *First Sale of State Holdings a Disappointment in Poland*, N.Y. Times, Jan. 14, 1990, at D1; Harden, *Poland's Bittersweet*

Other analysts suggest that the logistical difficulties of such a major transition require implementation at a slower pace, accomplishing each critical element or set of critical elements in turn.[9] Trade liberalization, for example, may yield unacceptably high unemployment as consumers buy high quality Western goods instead of the inferior, high cost domestic goods. Moreover, certain reforms require time to implement, such as the creation of a banking system, and the government may be able to take transitional steps prior to full reform. Further, countries may accomplish some aspects of reform, such as training management and consumers in how to function in a market environment, more effectively if all of the changes do not occur simultaneously. In fact, both Hungary and Bulgaria slowed their privatization process because of perceived "sweetheart" deals in sales of tourist and other enterprises.[10] This slower approach, however, runs the risk of extending the transition process, and accordingly, extending existing and imposing new hardships on the populace. Such delays undermine the expectations of the people and can cause political unrest as politicians promise "quick fixes" to the country's ills.

Whichever approach countries choose to adopt, each element of economic reform is integrally linked to the others. Thus, both trade liberalization and competition are necessary to replace government price controls.[11] Similarly, a convertible currency promotes both trade liberalization and price reform.[12] Furthermore, if the countries cannot accomplish all reforms simultaneously, the order in which the reforms

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Chocolate Woes, Wash. Post, Nov. 17, 1990, at A1; Newman, *Poland Unlocking Mysteries of Privatization*, Wall St. J., Dec. 18, 1990, at A11 (stating that although many small retail establishments have rapidly developed and been privatized, and over half of Poland's trucks, for instance, have been sold to private individuals, only five state-owned enterprises had been privatized by the beginning of 1991); Harden, *East Europe's Effort to Sell State Firms off to Slow Start*, Wash. Post, Feb. 12, 1991, at C1 (noting that one of the reasons for slow privatization is lack of domestic capital needed to buy the companies); *Poland Pioneer of Capitalism*, N.Y. Times, Jan. 30, 1991, at A22 (discussing the novel approaches the Polish legislature is considering to speed up privatization).

9. *See, e.g.*, *The Value Subcontractors of Eastern Europe*, ECONOMIST, Jan. 5, 1991, at 51 (suggesting that the Eastern European countries should privatize immediately but slowly implement trade reforms).

10. *See* Greenhouse, *Paths to Capitalism: Remaking Eastern Europe*, N.Y. Times, Dec. 31, 1990, at 1 (stating that the Hungarian government has avoided taking some of the harsher measures required for privatization); BULGARIAN ECONOMIC GROWTH & TRANSITION, *supra* note 6, ch. 2 at 2 (discussing the sequence of various plans relating to Bulgaria's transition to a market economy). In the Bulgarian tourist industry, the concern was primarily that the old Communist *nomenklatura* would become the biggest capitalists, rather than a concern about foreign ownership.

11. BULGARIAN ECONOMIC GROWTH & TRANSITION, *supra* note 6, ch. 4 at 30.

12. *Id.* at 34.

take place can prove critical. As suggested in recent press accounts, Czechoslovakia's freeing of prices on January 1, 1991, without adequate trade and competition reform, may have contributed to substantial price increases, at least some of which do not appear to be based on costs or competitive market forces.[13] The Czechoslovak example highlights not only the significance of the timing of reforms, but also the importance of demonopolization, as well as strong antitrust policies in the transition toward a market economy.

II. THE IMPORTANCE OF COMPETITION POLICY IN CREATING A MARKET ECONOMY

A. WHAT IS THE GOAL OF COMPETITION POLICY?

In the United States and other nations with developed antitrust policies, there is debate concerning the goal of competition policy. Although there are various subtleties in the positions of many scholars and policy-makers on this subject, two major categories are important for purposes of the inquiry: (1) consumer welfare and economic efficiency, or (2) protection of individual competitors, often from control by larger, dominant firms.[14] Governments largely base the consumer welfare standard on the existence or creation of "market power" by enterprises, which enables them to raise prices above costs. The exercise of such power usually reduces economic efficiency by reducing output and growth, effectively limiting the size of the economy and redistributing wealth from consumers to producers and managers. Protecting competitors from the abuses of dominant firms can achieve the same goals as promoting consumer welfare and efficiency, but only when the dominant firm has monopoly power and is exercising that power to reduce output and raise prices.[15]

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13. *Prices up Sharply in Czechoslovakia*, N.Y. Times, Jan. 30, 1991, at A5 (reporting that Czechoslovak officials blame the doubling of retail prices on the failure to dismantle Czechoslovak retail monopolies before freeing prices).

14. *See* R. BORK, THE ANTITRUST PARADOX 7 (1978) (discussing the disagreements among scholars regarding the fundamentals of antitrust law and advocating a total social welfare analysis to judge antitrust conflicts); *see also* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 151 (1982) (arguing that Congress enacted antitrust laws to improve consumer welfare by implementing broad and flexible economic controls rather than to increase corporate efficiency at the cost of the natural corporate redistributive tendencies).

15. *See generally* BONER & KRUEGER, THE BASICS OF ANTITRUST POLICY: A REVIEW OF TEN NATIONS AND THE EEC (1991) (succinctly describing the contrast of these two standards).

Market power is a function of market share and economic market structure. Market structure analysis examines the number of competing suppliers, the ease of entry into a market, the existence of trade barriers, and the presence of markets for substitute goods.[16] Dominance, on the other hand, is a function of the supplier's absolute size, its customer and direct supplier links, and its ability to gauge its trading partners' economic strength.[17] Laws of competition derived from market power and efficiency theories develop from consumer welfare concerns. Conversely, laws rooted in dominance theories often serve to protect competitors rather than competition, although their enforcement can benefit consumers.[18]

The European Community (EC) and the German Cartel Office, for example, have implemented competition laws designed more to prevent the abuse of a dominant firm than to encourage structures and private incentives to encourage competition.[19] In contrast, competition laws, current case law, and policy of the United States focus more on market power and efficiency as the keys to consumer welfare.[20] Both approaches have merit, particularly with respect to economies in the process of transformation from a centrally planned to a market economy.

The emerging market economies of Eastern and Central Europe may find the EC approach, outlined in articles eighty-five and eighty-six of the Treaty of Rome,[21] of particular interest. These newly-created markets may find some of the post-war experiences of Germany and the other European economies especially relevant. These newly-created markets also want to become part of the united European Community scheduled for 1992. Similar competition laws would help ease this transformation. Nevertheless, we believe that the United States model is very well suited for Eastern and Central Europe. It offers a more explicit weighing of anticompetitive effects and efficiencies that will encourage growth and benefit consumers in the long run. Moreover, a similarity of Eastern and Central European competition rules to United States competition rules will encourage American business to become more active in selling to and investing in these countries, both for ana-

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 31; Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness*, 61 NOTRE DAME L. REV. 981, 982 (1986) (explaining different antitrust law theories).
20. BONER & KRUEGER, *supra* note 15, at 27.
21. Treaty of Rome, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation).

lytic reasons, discussed below, and because the presence of similar rules facilitates American firms' ability to learn about the system.

The evolution of competition policy is extremely instructive in demonstrating the advantages of the approach of the United States. Germany, France, Spain, the United Kingdom, and the EC founded their competition laws on the concept of market dominance. To a large and increasing extent, however, market power and economic efficiency have become important in other market economies with competition laws—even in Germany and the EC.[22] As discussed below, there may be reasons why new entrants into the market should receive some special privileges as a centrally planned economy moves to a market economy. Over time, however, many governments that had believed antitrust laws should attack dominance to protect competitors have reconsidered and have, at a minimum, deemphasized this as the proper goal of antitrust law.

The major challenge in approaching competition policy from a consumer welfare viewpoint is the potential trade-off between competition and growth. In Japan and South Korea, for example, consumer welfare oriented competition policies were less important than growth and exclusively pro-business policies.[23] In Japan, the Ministry of International Trade and Industry (MITI) attempted to coordinate business activities and defeat the normal workings of competitive markets.[24] The success of these countries may in part be due to such activities, although many question this conclusion.[25] Even if this conclusion is correct, such policies, at best, have helped investment by creating monopolies and coordinating oligopolies without sharing many of the benefits with the population.[26] Central European countries, driven by a desire for democracy and freedom and a wish that the general population share in the benefits of a market economy, have initiated reforms. Consumer welfare

22. BONER & KRUEGER, *supra* note 15, at 18 (stating that the EC and Germany originally enacted their laws in order to prevent dominant power abuses, and have both instituted market share criteria in their definitions of joint dominance). Additionally, several countries, such as Australia and Canada, have amended their laws to follow the United States model more closely. *Id.* at 23.

23. *See id.* at 23 (observing that South Korea designed its antitrust laws after those of Germany and Japan, thereby relying predominantly on economic development policy and the furtherance of economic liberalization).

24. *Id.* at 32.

25. *See generally*, Porter, *The Competitive Advantage of Nations*, HARV. BUS. REV., Mar.-Apr. 1990 (refuting conventional theories of competitive success and suggesting that countries gain a competitive advantage through innovation).

26. *See* BONER & KRUEGER, *supra* note 15, at 32 (stating that in the 1970s the Japanese public was unsatisfied with the exercise of market power, particularly regarding resale price maintenance and administered pricing in oligopolies).

and efficiency, as embodied in a market power approach to competition policy, are extremely important to Central Europe because only competition policy based on this premise ensures that the general population of these emerging democracies will share fully in the benefits of a market economy, without significantly deterring growth.

If the main purpose of antitrust laws is to maximize consumer welfare and economic efficiency, to succinctly define the process that will achieve the goal of market-based competition is useful. Several draft antimonopoly laws of Eastern and Central Europe have attempted to do this. The United States antitrust laws, however, do not attempt to define competition, partially because Congress enacted them when an existing market economy used the court system to define the specifics of the law and competition.[27] In short, people understood competition because they experienced it in most industries. In the formerly centrally planned economies of Europe, no such tradition exists, and often the court systems have been poor arbiters of conflicts and commercial disputes. Accordingly, defining competition is the logical starting place of a new law, both in terms of clearly stating the goal of the competition policy and providing guidance to the courts. One definition that might be appropriate for Eastern European governments to use is:

> Competition is economic rivalry in a market in which each seller and buyer independently makes decisions, so that consumers have sufficient choice among sellers (or potential sellers) to force the actions of sellers (1) to effectively limit each other's ability to raise prices above costs for significant periods of time, (2) to drive costs to their lowest level, and (3) to encourage creation and production of goods that buyers demand.

This definition highlights the elements of competition that maximize welfare and efficiency—buyer choice, and independent behavior of sellers—and provides the major outcomes of such a competitive market.

B. Competition Policy as Part of the Market Creation Process

Authorities suggest that the existence of competition is the fundamental difference between a centrally planned economy and a true market-based economy.[28] Centralized price controls and monopolization of production and distribution by state owned enterprises charac-

27. *See* R. Bork, *supra* note 14, at 58-61 (addressing the ambiguous meaning of "competition" and providing definitions of the term).

28. *See* Building Free Market Economies, *supra* note 4, at 2 (recommending that all economic reforms need to be placed in the context of a broader strategy aimed at modifying attitudes toward a market economy and developing a supporting legal and institutional framework).

terize the economies of Central and Eastern Europe. As privatization, price decontrol, and laws encouraging the creation of new business are implemented, the governments must take steps to ensure that public monopolies do not become private monopolies. To control monopoly abuse, competition laws in some countries, such as the Federal Republic of Germany and Poland, have anti-"price gouging" statutes enabling antimonopoly officials to roll back price increases that they have determined to be supracompetitive.[29] However, such price regulation can return the economy to a centralized pricing system with all of its associated problems. In a market economy, competition from other domestic or foreign firms can limit price increases to those justified by costs and serve as a substitute for price controls.

To illustrate how such competition and demonopolization are necessary parts of market reforms, consider how they complement price liberalization. Price liberalization is the ability of enterprises to set their own prices rather than having a central planning office calculate prices, and is essential for any decentralized market economy. When managers are free to contract they can better gauge the demand for their products by testing the price consumers are willing to pay and by buying the goods needed to produce those products. In a framework of enforceable property rights, managers will respond to the long run interests of the enterprise's shareholders by supplying products where the price they can charge equals or exceeds the costs of production.[30] In 1776, Adam Smith was the first to describe this "invisible hand" process of decentralized decision-making,[31] the central feature of market economies.

29. BONER & KRUEGER, *supra* note 15, at 882-83 (stating that the German Federal Cartel Office has imposed administered prices in order to remedy dominant enterprises' abuses).

30. *See generally*, M. HINDS, *supra* note 6, at 100 (proposing that market forces cannot efficiently allocate resources absent private ownership as a means of production). Property rights are important because if they are inadequately defined, managers and workers will not make correct long run investment decisions. For example, in Poland and Yugoslavia, the government gave managers the ability to set prices and make investment decisions in state-run enterprises. The government, however, did not judge managers' ability to efficiently produce goods consumers demanded and to provide profits to shareholders that invested in the enterprises. *Id.* Instead, managers only had the incentive to keep workers and themselves satisfied because the government focused on the lack of labor unrest when evaluating their performance. *Id.* This situation led to the granting of relatively high wages for all in the enterprise in the short run, but there was virtually no new investment. *Id.* The competitiveness of Yugoslav companies suffered greatly yielding the same result of government-owned enterprises in the rest of Central Europe: poor quality expensive products which will lead to lower wages for the workers in the long run as the enterprises try to make up for higher costs through real wage cuts. *Id.* at 17-21.

31. A. SMITH, THE WEALTH OF NATIONS (1776).

Along with price liberalization and privatization, competition is critical to establishing a market economy. Citizens will not receive the full benefits of a market economy if economic reform leaves enterprises and citizens with no consumer choice. Only when buyers can choose between competing goods will competition—or potential competition from new entrants—limit price increases and eliminate the need for price controls. Absent consumer choice, prices will tend to be set at monopoly levels and output will be reduced, whether enterprises are state or privately owned.[32] This is even more likely when the entry of new competitors is time consuming and difficult. Entry is difficult, for instance, when countries do not have a developed credit and banking system or when monopoly suppliers of essential products and services are in a position to block entry. For this reason, creation of consumer choice from independent suppliers should be one of the first goals of all market reforms.[33]

Establishing competition is a critical step in the transition from a centrally planned to a market economy.[34] For example, Central and Eastern European countries need to reform prices, many of which are set below costs of production, in order to encourage the production of desirable goods and discourage the production of unwanted goods.[35] When to establish competition and how to establish competition, however, may prove difficult to determine. For instance, the Soviet Union recently demanded that its Eastern European trading partners, formerly connected through Council of Mutual Economic Assistance (COMECON),[36] have payment arrangements for Soviet oil based on

32. *See Prices up Sharply in Czechoslovakia*, *supra* note 13 (stating that Czechoslovakia and Bulgaria have recently experienced this occurrence).

33. If there is only one or very few buyers, then a similar problem may arise called "monopsony."

34. *See* BUILDING FREE MARKET ECONOMIES, *supra* note 4, at 2 (noting that the most important reform is to encourage competition).

35. *See The Value Subcontractors of Eastern Europe*, *supra* note 9 (noting that free-market prices force the economy to use resources efficiently).

36. *See* M. HINDS, *supra* note 6, at 7, n.10 (listing COMECON members as Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, Cuba, Mongolia, Vietnam, and the U.S.S.R.); *see also* Brus, *Postwar Reconstruction and Socio-Economic Transformation*, in II THE ECONOMIC HISTORY OF EASTERN EUROPE 1919-1975, at 571 (M.C. Kaser ed. 1986) (describing the origins of the COMECON). The Soviet Union created this economic organization in response to the Marshall Plan; *see generally*, KASER, COMECON: INTEGRATION PROBLEMS OF THE PLANNED ECONOMIES (2d ed. 1967) (providing an in-depth description of the COMECON). COMECON will be abolished soon. *The Warsaw Pact Vanishes*, Wash. Post, Feb. 28, 1991, at A15; *COMECON Calls It Quits*, Wall St. J., Jan. 7, 1991, at A10.

the use of world prices.[37] These demands, combined with the cut in Iraqi oil supplies due to the war in the Persian Gulf, further weakened vulnerable and inefficient economies.[38] Ideally, the decentralized price setting would allow oil prices to rise to reflect the Soviets' costs and to encourage individuals and enterprises to conserve energy. In reality, however, absent competition in the sale and distribution of oil and other goods within Poland, prices may have been raised beyond the level dictated by cost increases to also reflect monopoly profits.[39] The structure of the household sector (e.g. central heating systems for large sections of cities) often does not allow for a rapid change in consumer behavior, and a quick response to price changes is tempered by supplier/client links that cannot be changed overnight. Although the anticompetitive effect may not prove true with regard to oil in Poland, there is evidence to suggest that such results occurred with respect to other goods in Czechoslovakia and Poland.[40]

The difficulty of establishing competition quickly cannot be underestimated. As suggested by Kroll, introducing competition prior to the decontrol of prices is unquestionably an economically desirable strategy; whether it is practicable, however, remains to be seen.[41] Implicit in the proposed strategy is the premise that breaking up state enterprises can introduce competition into a socialist economy without difficulty.

C. CAN FREE TRADE TAKE THE PLACE OF COMPETITION POLICY?

Some argue that economies of countries such as Poland, Czechoslovakia, Bulgaria, and others, are sufficiently small that the act of opening the borders to trade without tariffs or quotas and the creation of convertible currency will be sufficient to instill competition in these

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37. *See Czechs Lay down the Line on Energy Policy*, Financial Times (London), Feb. 15, 1991, at 4 (reporting that Czechoslovakia seeks to reduce its dependence on Soviet oil); *Gas Line or No Line, Either Way, It's a Problem in E. Europe*, Wash. Post, Jan. 3, 1991, at A18 (reporting that Poland's gas prices will likely rise from two dollars a gallon to three or four dollars a gallon).

38. *See* Knight, *Cautious Capitalism*, U.S. NEWS & WORLD REP., Nov. 5, 1990, at 54 (noting that energy costs nearly tripled after the Soviet Union raised oil prices and that the Gulf crisis cost eight billion dollars in hard currency).

39. *Prices up Sharply in Czechoslovakia*, *supra* note 13; *Bulgaria Announces Sharp Price Increase*, N.Y. Times, Jan. 30, 1991, at A3.

40. *See Prices up Sharply in Czechoslovakia*, *supra* note 13 (reporting that state monopolies took advantage of the freeing of prices to raise prices 80 to 100%). Miroslav Zamocnik, spokesman for the Finance Ministry, stated that the high prices have no relation to the state enterprises' costs. *Id.*

41. KROLL, REFORM AND MONOPOLY IN THE SOVIET ECONOMY 36 (1990) (explaining the difficulty of the breaking up of state enterprises).

countries. Free trade is especially vital to Eastern Europe.[42] It is the single most effective way—perhaps the only way—to instill real competition in the industries of Eastern Europe, which are otherwise too concentrated, too politically powerful, or too small to generate domestically based competition. Free trade will allow Eastern Europe to "import" a rational price structure.[43]

Most Western economists agree that import competition may be the sole means to ensure competition in certain concentrated industries.[44] Several factors suggest, however, that an active antitrust policy combined with privatization is also necessary and may even need to precede full trade liberalization. First, trade liberalization alone may cause too strong of a shock to an economy whose enterprises cannot compete in a free market. For example, Poland suffers from a significant reduction in output and increased unemployment due in part to the trade liberalization of January 1, 1990, currency convertibility, and the reduction of tariffs and other trade barriers which have enabled Polish consumers to substitute Western for Polish goods.[45]

Second, not all markets are international, so there is the potential for monopoly pricing nationally and locally.[46] To illustrate, Central European countries currently undergoing reform range in population from forty million (Poland) to nine million (Bulgaria). While economies of these sizes are not likely to be as self-contained as countries the size of the United States, their size is comparable to many regional United States markets. Local United States markets, often smaller than this, can experience anti-competitive effects in industries such as health care, real estate, food distribution, and certain industrial processes.[47] Third, the variation in exchange rates and trade barriers exist in even the most open economies, and can inhibit effective competition from imports.

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42. *See Sachs on Poland*, ECONOMIST, Jan. 19, 1991, at 61 (declaring that free trade is "vital to Eastern Europe").

43. *Id.*

44. *Id.*

45. *The Value Subcontractors of Eastern Europe*, *supra* note 9, at 51 (reporting that Poland's enterprises laid off workers and ran below capacity because the government introduced free trade prematurely). *But see Sachs on Poland*, *supra* note 42, at 43 (describing Poland's increase in net trade from $8.5 billion to $11.4 billion in 1990). Some industries expanded export while Poles bought fewer foreign goods due to the low value of the zloty. *Id.*

46. BONER & KRUEGER, *supra* note 15, at 20.

47. *See Preferred Physicians, Inc.*, 110 F.T.C. 157 (1988) (discussing anticompetitive effects in the health care industry); *Multiple Listing Service Mid County, Inc.*, 110 F.T.C. 482 (1988) (alleging anticompetitive effects in the real estate industry); and *Allegheny Corp.*, 110 F.T.C. 93 (1988) (regarding the reduction of competition in the production and sale of title information).

Finally, anticompetitive agreements can exist between domestic and foreign firms. Under certain circumstances, a single large firm's unilateral actions can damage competition. As Part III of this article notes, several factors suggest that these conditions and practices are more likely to occur in countries that are emerging from a system of state-owned monopolies than in countries that have long free-market traditions.

Wary of the four factors discussed above, many economists believe that active competition policy and trade liberalization must go hand in hand to ensure competition. For example, Boner and Krueger conclude:

> Antitrust policy is best suited for protecting competition among domestic suppliers and can be effective in protecting competition among foreign suppliers. . . . In this sense, antitrust policy is a (perhaps limited) substitute for trade policies that permit . . . foreign competition . . . . Nevertheless, it is more appropriate to view antitrust policy and trade liberalization as complementary means of pursuing economic efficiency since the effect of trade liberalization on competition is solely structural. Thus, trade liberalization cannot encourage competitive behavior and performance in economic markets that are concentrated at the international level, nor can it ensure competitive *conduct* as antitrust policy does.[48]

We agree that the Central and Eastern European countries need to develop adequate antitrust laws and law enforcement capabilities in order to stimulate competition and fully benefit from the economic reforms. The governments of Central and Eastern Europe recognize the need to create strong laws and institutions to nurture competition, but they are just embarking on the process. Poland, Hungary, and Czechoslovakia now have antimonopoly agencies, although only Poland's and perhaps Hungary's agencies have been established long enough to be fully functioning.

III. SOME KEY DIFFERENCES IN ANALYZING COMPETITION IN THE UNITED STATES AND CENTRAL AND EASTERN EUROPE

A. ECONOMIC DIFFERENCES

For the past forty years, Central and Eastern European leaders forced their economies to centralize production and distribution, and made competition illegal. This centralization created large, inefficient firms that were incapable of competing outside the sheltered trading of COMECON, unless the state heavily subsidized the production. In Czechoslovakia, for example, the average enterprise has three thousand

48. BONER & KRUEGER, *supra* note 15, at 115 (emphasis in original).

employees, while in the West the average is closer to three hundred.[49] Further, prices in Central and Eastern Europe seldom reflect the costs of production.[50] Rationing, rather than price, has been the main method of allocating scarce goods and services. This system has resulted in a progressive decline in the standard of living over the past ten years, the result of forty-five years of central planning.

During the last ten years, attempts at reform in Poland, Hungary, and Bulgaria produced little economic improvement. Bulgaria, for example, attempted to encourage the creation of new independent enterprises beginning in 1982. A recent study, however, revealed that few new independent firms appeared in the main areas of the economy, while many new large state enterprises developed.[51] Recent radical changes worsened conditions in Eastern Europe rather than improved them. Countries raised the prices of staple goods in order to cover their costs and stimulate supply. Price increases in Poland,[52] Czechoslovakia,[53] Hungary,[54] and Bulgaria,[55] when accompanied by wage restraints as in Poland, resulted in a significant reduction in real income.[56] Without the wage restraints, however, hyperinflation threatens to strangle these economies, as almost occurred in Poland.

49. Authors' interviews with Czechoslovak officials, Prague, Czechoslovak, September 16-30, 1990.

50. *See Soviets Bar Hike in Bread Price*, NEWSDAY, June 15, 1990, at 7 (reporting that government plans to raise the price of bread ignited severe protest). For example, bread costs the equivalent of only a few pennies in the Soviet Union and Bulgaria, although its costs of production are significantly higher. *Id.* Consequently, farmers in the Soviet Union feed their livestock bread instead of the grains that go into its manufacture. *See id.* (noting that the nonsensical relation between cost and price encourages waste).

51. Presentation by D. Jones and M. Meurs, *On Entry in Socialist Economies: Evidence from Bulgaria*, Allied Social Sciences Association Meetings, Atlanta, Georgia, 1989, at 19 (commenting that "[a]t the productive heart of the economy, few small, independent firms have emerged and the number of extremely large state firms have actually increased").

52. *Poland Gets New Prime Minister, Walesa Appointee Promises to End "Totalitarian Legacy,"* Chicago Tribune, Jan. 5, 1991, at 4.

53. *See Prices up Sharply in Czechoslovakia, supra* note 13 (reporting that retail prices increased by an estimated 80-100% between Sept. 30, 1990 and Jan. 30, 1991).

54. *See Hungary: Price Rises to Come into Force in Near Future*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 10, 1991, at EE/W0161/A/1 (reporting that price increases in January 1991 will raise the price of milk and dairy products by 35%).

55. *See Bulgaria Announces Sharp Price Increases, supra* note 39 (reporting that the price of electricity, heating coal, and gas would increase by 400-600%).

56. *See Poland Gets New Prime Minister, Walesa Appointee Promises to End "Totalitarian Legacy," supra* note 52 (reporting that reforms caused almost a one-third drop in real incomes). *But see* Sachs, *supra* note 42 (suggesting that Western economists overstate the size of real income). Even if overstated, little doubt exists that these transitions created significant economic hardships.

Implementing competition policy can prevent both private and state enterprises from engaging in monopoly practices that aggravate the woes resulting from price increases and structural transformations. Antitrust officials in these countries, therefore, confront different economic conditions than do their counterparts in established market economies. Nevertheless, emerging antitrust agencies should ask the same basic questions in investigating and deterring anticompetitive acts as established agencies. For example, a competition agency may use the existence and unlawful exercise of market power to identify areas of activity in either an established or a burgeoning market economy. The new agencies will find, however, that the answers to some of the basic questions about the existence of market power will differ substantially between the United States and the economies undergoing transformation.

Several aspects of the Eastern and Central European economies create cause for concern regarding the existence and abuse of market power. Most of their industries consist of state-owned monopolies or state-sponsored cooperatives. Import impediments may persist even if import controls and hard currency shortages end. Barriers to entry exist in Eastern and Central European markets. Finally, managers trained in centrally planned economies tend to collude rather than compete.

In most Central and Eastern European industries either state-owned monopolies or a small number of state-sponsored cooperatives exist. These companies tend to be inefficiently large and actively protected from competition. Denied a reliable market system to provide their basic needs, these enterprises vertically integrated in order to provide inputs that companies in a market economy would purchase.[57] Creating competition and making these enterprises efficient, particularly for large enterprises in heavy industry such as automobile manufacturing and petroleum refining and distribution, pose serious problems. These enterprises have controlled key inputs and distribution centers, making domestic competition for these manufacturers impossible.[58] New competitors are then forced to overcome these established relationships or create their own systems. To become efficient, these firms must also

57. For example, many Polish enterprise managers in industries such as dairy, meat and fish processing, construction, and textile manufacturing manage enterprises that own machine shops, retail and distribution centers, and vacation and health facilities for workers. Many of these enterprises were local monopolies supporting underutilized subsidiaries that were not part of their core business. (Account based on author's recent trip to Poland.)

58. *See* Harden, *supra* note 8 (noting that until recently the largest Polish chocolate manufacturer nearly monopolized the import of cocoa).

shed underutilized subsidiaries such as machine shops. Such activity will improve efficiency as a competitive market for these inputs develops. If the monopolists or a number of small competitors acting together retain key inputs or distribution centers, however, then they may charge monopoly prices absent effective competition from imports. Monopoly potential through vertical integration rarely occurs in established market economies. Where vertical integration is efficient, competition forces companies to develop their own supplies. Where such integration is not efficient, companies rely on independent suppliers. Antitrust officials seek to prevent the creation of market power through non-competitive means but permit a concentration of market power if the economics of production and the competitive process result in a small number of firms.

Second, the removal of import impediments such as import controls and hard currency shortages will not ensure competition in many industries. As suggested in Part II above, the lack of established trading companies can still impede competition from imports in Central and Eastern European countries. Moreover, the lack of capital and consumer savings place many inputs and consumer products out of the reach of companies and individuals. Unlike countries such as the United States, where imports can check domestic firms' potentially anticompetitive behavior, imports into these countries barely police such conduct. Trade is potentially more important to these countries than it is to the United States, however, because their small economies, with the exception of the Soviet Union, enable only one or two producers to operate efficiently within many industries.

Third, significant barriers to entry exist in Eastern and Central European markets. In well-developed capital markets, with managers and workers trained in business, risk taking, and the market system, imbued with entrepreneurial spirit, entry can quickly eliminate or forestall anticompetitive behavior or actions. The emerging market economies lack these capitalist qualities. The need for capital is a barrier to entry in these countries. Entrepreneurial skills and the lack of key inputs are also barriers. For example, the inefficient construction industries in these countries may take five to ten years to build an apartment building. The United States Department of Justice's Merger Guidelines classify an industry with barriers to entry as one where it takes more than two years for effective entry.[59] Under this definition, many industries that would not be subject to market power due to potential entry

59. U.S. Department of Justice Merger Guidelines—1984, 4 Trade Reg. Rep. (CCH) ¶ 13,103, § 3.3, at 20,562 (June 14, 1984).

in the United States could be subject to the abuse of market power in Eastern and Central Europe.

Fourth, Eastern bloc managers have been trained to collude, rather than compete. Thus, even if the changes in Eastern and Central Europe create independent enterprises, these managers will tend to organize in order to coordinate pricing and divide markets. Managers in the United States, trained to compete in the free market and exposed to antitrust law, are less likely to collude or otherwise restrict competition.

These four aspects of the economies in Eastern and Central Europe illustrate the important role that market power and efficiency questions play in competition analysis. In addition, the recent history of the centrally planned economies portends that answers to these questions will vary greatly from those reached in analyses of market economies. Many of the variations, in fact, suggest that greater potential for anticompetitive activities exist in these countries, at least during a transitional period, than in the United States.

B. INSTITUTIONAL DIFFERENCES

Not only must Central and Eastern Europeans modify and privatize state owned enterprises in order to create a market economy, they must also streamline the remaining parts of their governments to facilitate the transition. This process can be painfully slow. For example, in one year of reforms, the Polish government successfully privatized many small businesses[60] but only five large "joint stock" companies.[61] Czechoslovakia, meanwhile, enjoys success in its systematic sale of small assets, such as restaurants and retail establishments,[62] but has yet to privatize large enterprises. In light of the difficulty of transforming institutions and eliminating "red tape," the ability of these governments to sell assets so quickly is impressive. To develop competition policy, these governments will have to consider four points: (1) the need for quick action; (2) the limitations on competition agencies; (3) the limitations on governmental infrastructures; (4) and the manner in which regulators traditionally addressed industrial organization matters. Each

60. Telephone interview with Swierkocki, Polish Antimonopoly Office (Feb. 13, 1991) (reporting that Poland had privatized over half of all trucks).

61. *See* Newman, *supra* note 8 (noting that the government selected these five companies to act as models of privatization); Engelberg, *supra* note 8 (reporting that four of the five companies failed to sell all their stock).

62. *See Czechoslovakia Aims to Open Stock Exchange this Year, May Issue Vouchers to All Citizens*, 8 Int'l Trad Rep. (BNA) 206 (Feb. 6, 1991) (reporting that the government had sold thousands of hotels, restaurants, and other small businesses).

of these aspects of competition policy poses particularly difficult problems in the transition to a market economy.

First, the demand for prompt privatization exemplifies the need for quick decision-making by a competition agency. After suffering a significant decline in living standards, the citizens of Central and Eastern Europe have little patience for further hardships. These hardships are inevitable, however, as states close inefficient enterprises, create more efficient ones, and dismantle the institutions of state planning. If competition policy slows this process, then its costs may outweigh its benefits.

Each evolving economy approaches this problem differently. In Poland, the Ministry of Ownership Transformation (the Ministry) must obtain approval from the Antimonopoly Office before selling joint stock companies.[63] Such an approval process, unless performed efficiently, could slow the transformation process. The Antimonopoly Office often analyzes the sale in order to certify that the transformation will not create competitive problems.[64] Realizing the potential for delay, the Antimonopoly Office, with the assistance of the Ministry, attempts to obtain records at the same time as the Ministry in order to gain a head start in its analysis.[65]

Similarly, other countries, such as Czechoslovakia and Bulgaria, have drafted laws requiring the competition agency to approve contracts before they take effect.[66] Competition agencies in developed market economies typically do not review contracts in advance because of the administrative burden of tracking and reviewing countless transactions. Because prior approval requirements tax even efficient established agencies of countries not experiencing the dramatic changes of Central and Eastern Europe, the evolving agencies should consider approaches other than prior approval. For example, agencies could require business people to provide notice of contracts likely to be problematic. While notification may create some uncertainty for business people, the agencies could reduce this uncertainty by reducing the punishment for those who register. In turn, the competition agency's difficulty of obtaining information will diminish.[67]

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63. Polish Monopolistic Practices Act, ch. 2, art. 4, § 1(3) (Feb. 24, 1990).
64. *Id.* at ch. 5, art. 10, § 1(5).
65. *Id.* at ch. 5, art. 20, § 3(2).
66. Arbess, *Czechoslovakia Opens for Business*, Financial Times (London), Mar. 7, 1991, at 23.
67. There is little information on most industries in these countries, in large measure due to accounting data that bears no relation to the economic value of assets. The Antimonopoly Office relies heavily on universities and research institutions to develop meaningful statistics on issues such as market shares.

Second, to develop competition policy governments must provide their competition agencies with effective organization. The organization of these agencies depends on many factors. In the United States, the FTC and the DOJ each have their own strengths and weaknesses. The DOJ prosecutes alleged violators of antitrust statutes before the federal courts. The FTC prosecutes and adjudicates cases before they reach the general court system. The FTC uses "administrative law judges"—high level civil servants—and five Commissioners, of which no more than three may be from one political party, to decide claims based on antitrust statutes through administrative proceedings.[68] Upon receiving the final administrative decision, parties to the claims seek review of the decision in the federal courts of appeal.

The ultimate organization of an antimonopoly office partially depends on the existence and scope of other institutions, such as the judiciary. Most of the Central and Eastern European countries lack the strong, independent judiciary that the United States has. Therefore, the establishment of administrative bodies such as Poland's Antimonopoly Office and Court, fashioned after the FTC, may be effective.

Third, the agencies' ability to analyze competition quickly will shape antimonopoly laws. If a country lacks a strong legal system or has little expertise in administering complicated regulations or conducting case-by-case analyses, then that country should consider adopting a simple antimonopoly structure and regulatory framework. At present, the evolving market countries do not have experience with competition issues and with the difficult process of obtaining accurate data and records. Accordingly, evolving countries with transitional economies should adopt *per se* rules rather than the complex rule of reason analysis until the reviewing system develops expertise.

Finally, to effectively implement competition policy these governments might consider changing the manner in which they address industrial organization matters. Most economists and government officials trained in centrally planned economies think in terms of setting price and output rather than delegating these decisions to managers of competing enterprises. Accordingly, in implementing new antimonopoly laws and price control laws regulators may focus on "price gouging" cases. In such cases, regulators face the nearly impossible task of determining the correct price of a good or service from a government office.

68. The FTC also prosecutes and adjudicates claims based on several statutory provisions that are not addressed to antitrust, but to other aspects of business activities affecting consumers. These include that portion of the FTC Act aimed at "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57(a).

Such cases potentially recreate the inefficient government initiated pricing system. They also divert limited resources away from the structural changes that create competition by creating consumer choice. In contrast, antitrust policy in the United States avoids setting prices despite better access to company records because of the belief that markets, rather than governments, best set prices.

IV. MAINTAINING VERSUS CREATING COMPETITION: HOW TO ACHIEVE CONSUMER CHOICE

In the evolving market economies of Central and Eastern Europe, antimonopoly laws have two basic goals. First, they must help guide the economy through the transition from a centrally planned to a market economy. Second, they must defend the market economy from attempts to reimpose monopoly practices. This section first addresses the basic components of a law designed to maintain competition, and then discusses how such a law might be altered in order to create competition in a formerly centrally planned economy.

A. MAINTAINING COMPETITION

Antitrust law in the United States is effective at maintaining competition. It approaches potentially anticompetitive acts using a "*per se*," "rule of reason," or "*prima facie*" decision rule, depending on the category of the restraint.[69] Most Eastern and Central European laws and draft laws embody a similar approach. Yet, they tend to categorize the restraints and the conditions under which the restraints are likely to be held illegal in ways that are much closer to those used by the German Cartel Office and the European Community. Before addressing these differences, however, this section will consider the relative benefits of each approach.

Clearly, the competing *per se* and rule of reason standards can create tension in competition law and policy.[70] Competition agencies and courts must balance judicial efficiency, business certainty, and judicial accuracy.[71] A *per se* standard provides clear guidance to businesses and promises judicial efficiency by limiting delays in determining the legal-

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69. J. Langenfeld, *Antitrust Enforcement: The Gray Area of Agreements among Competitors*, presented at the CATO Institute Conference: A Century of Antitrust: The Lessons and the Challenges, 21-22 (Apr. 11, 1990).

70. *Id.* at 2.

71. *See* Fisher, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777 (1989) (discussing the trade-off between simple and complex legal rules in antitrust).

ity of an act or ownership transformation.[72] While the *per se* rule may condemn some activities that benefit consumers and promote economic efficiency, reduced costs of decision-making and the increased business certainty will offset the loss of these benefits. Further, because *per se* bans on certain agreements among competitors encourage challenges of potentially anticompetitive acts, a plaintiff can devote less time and energy to bringing a case than under a rule of reason inquiry, discussed below. Moreover, a plaintiff successfully characterizing a restriction as *per se* illegal usually wins.

A rule of reason analysis, in contrast, weighs the probable benefits against the potential harms of an act. A rule of reason analysis could be made in most areas of competition analysis, but it is cumbersome and time-consuming. Moreover, the rule of reason analysis demands reliable information on the industry in question and on the actions of its enterprises. This information increases the accuracy of the decision-making process by devoting resources to weighing the potential anticompetitive costs against the benefits of the action. This process, however, entails a great deal of time and expense. In addition, it creates uncertainty in the business community, both foreign and domestic, and as a result, discourages some procompetitive activities. Nonetheless, because plaintiffs in the United States carry the burden of proof in rule of reason cases and then must satisfy certain evidentiary requirements to prevail, rule of reason analysis tends to favor defendants.[73]

The *prima facie* approach has the same drawbacks as the rule of reason.[74] It also requires sophisticated economic judgments.[75] Unlike the rule of reason approach, however, the *prima facie* approach shifts the burden of proof from the plaintiff to the defendant. Like the *per se* approach, therefore, the *prima facie* approach favors the plaintiff. One disadvantage of the *prima facie* approach is that it may give large,

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72. Langenfeld, *supra* note 69, at 4.

73. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 187 (1977) (describing the elements of the rule of reason). First, the plaintiff must specify the practice involved. *Id.* Second, the plaintiff must show that the purpose of the practice was anticompetitive. *Id.* Third, the plaintiff must prove that the restriction imposed substantially impedes competition. *Id.*

74. Under this approach, the plaintiff presents limited evidence which, if not rebutted by the defendant, is held sufficient to sustain the plaintiff's case. A typical example is a charge of price discrimination under section 2(a) of the Robinson-Patman Act. Typically, the plaintiff shows a price difference charged by a seller to competing customers. The price difference makes out a *prima facie* case of price discrimination held injurious to competition among the competing customers. The charge can be rebutted by the seller showing that its price difference was cost based, or that its lower price was to meet a lower price charged to the customer by a competitor of the seller.

75. The judgments are needed both in terms of the types of cases suitable for this approach, and in terms of developing and interpreting rebuttal evidence.

sophisticated enterprises a competitive advantage because they possess a greater ability to collect and present the evidence necessary to prove the efficiency of a practice or its lack of harmful effect on consumers.[76]

United States law has used all three of these approaches. Which one is used depends on the likelihood that the activity in question will reduce competition already existing or will enhance that competition by encouraging more efficient methods of production or distribution. For example, United States law targets certain agreements among competitors as *per se* unlawful because economic theory and practical experience indicate that these "horizontal" agreements present the clearest danger of monopolistic pricing. United States law includes horizontal price fixing, bid rigging, market division, and certain group boycotts in its *per se* category because these actions directly limit competition by effectively enabling competitors to act as if there was one firm setting price, and offer substantial efficiencies in a relatively limited set of cases.[77] The DOJ can even file criminal suits against those engaging in these *per se* illegal activities.[78]

In contrast, the recently enacted competition law of Czechoslovakia follows an approach closer to that of Germany and the EC. It analyzes potential cartel arrangements under a rule of reason standard by explicitly balancing efficiencies against anticompetitive concerns rather than treating them as *per se* illegal. United States law also treats many types of agreements among competitors under a rule of reason or a *prima facie* approach,[79] particularly research and development and other joint ventures where there is an integration of assets.[80] Experience suggests, however, that maintaining competition requires vigilance and strong remedies when dealing with horizontal restraints.

United States law now treats vertical arrangements as rule of reason cases, with the exception of resale price maintenance.[81] For other vertical arrangements, such as price discrimination and tying, United States law uses a set of screening procedures to determine if the actions can be classified as illegal. German and EC laws, however, tend to be much

76. This potential disadvantage may be offset if the law targets dominant firms for extra antitrust scrutiny, as do many of the draft and existing Eastern and Central European laws.

77. There are even exceptions to this generalization. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (discussing price setting).

78. Sherman Act, 15 U.S.C. §§ 1-8.

79. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (2d ed. 1984); *Massachusetts Board of Optometry*, 110 F.T.C. 549 (1988).

80. Antitrust Enforcement Guidelines for International Operators—1988, 4 Trade Reg. Rep. (CCH) ¶ 13,109 (Nov. 10, 1988); National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-05.

81. ABA ANTITRUST SECTION, *supra* note 79, at 119.

harsher in their regulation of firms' treatment of their suppliers in order to prevent "abuse" of a dominant position.

Vertical agreements between a buyer and a seller may be anticompetitive, but their use may also improve competition. Under United States law, a rule of reason analysis of vertical restraints weighs the potential anticompetitive harm against the potential pro-competitive benefits. One example of a pro-competitive vertical restraint occurs where a manufacturer grants the distributor the exclusive right to distribute the products. This may be the only way to convince distributors to carry its products and advertise them. New entrants often use this arrangement to begin selling their products in market economies. A ban on exclusive distribution rights between a manufacturer and a distributor can prevent new products from reaching consumers. Therefore, challenges to this type of buyer-seller agreement occur only if evidence shows that the agreements reduce total output in a market by either raising prices or reducing product quality or services. Given the existence of a competitive market, there is a danger that interfering with a company's right to contract with its suppliers and distributors will reduce, not foster, competition.

Problems will arise if the law does not distinguish between horizontal and vertical restraints. For example, the impact of territorial-based sales agreements can be different depending on whether the agreement is between a producer and a distributor or between competitors. Horizontal territorial-based sales agreements between producers is a form of collusion that is highly likely to restrict competition and limit consumer choice. However, to increase its sales, a food processing plant may, for example, want to have exclusive sales territories for its distributors, a vertical agreement. Although such an agreement may restrict competition between distributors for the food processor's output, the restriction could increase competition between food processing plants as the food processor finds it easier to get distributors at more locations to carry its products thereby giving the consumer of the finished product more choice.

United States law also targets unilateral actions by firms designed to maintain or create a monopoly under section two of the Sherman Act, which requires that the monopoly firm be engaged in "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[82] To decide when to attack a monopolist's practice that might be considered anticompetitive, the United

82. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

States relies on a higher level of market share than those used in the EC.[83] Many of the draft and enacted Central and Eastern European laws require that there be a "dangerous probability" of the practice being successful. In countries with economies much smaller than the United States economy, domestic firms may need to be large to achieve economies of scale in production. Accordingly, why such low thresholds would be necessary or desirable once there has been a transition to a functioning market economy is unclear.

Professor Fox has pointed out that European "[C]ommunity law evolved from a tradition of hospitality to industrial concentration combined with receptivity to government regulation that would limit the exercise of power."[84] The American approach has been to maintain consumer choice by preventing excessive concentration resulting from anticompetitive acts. The highly active United States merger law provides a good example of this philosophy.[85] As Aaron Director and Edward Levi suggested:

> A perennial fear in the application of the Sherman Act is that it will cut down units which have grown to great size only because of the economies of large scale, that is, in response to the demands for efficiency. But during this earlier period [around 1900], the means of growth used by monopolies in many industries were mergers or acquisitions. It could be argued, although not without some doubt, that, presumably, growth because of the economies would not take the form of merger or acquisition in so many industries. The underlying rationale behind this presumption is that it would strain credulity to believe that in so many industries that ideal arrangement for one firm would be merely the collection into one ownership unit of factories which were originally justified as parts of separate firms. In the reasoning of the law, the method of growth through mergers or combination thus could be used as some evidence of intention to monopolize, and as an answer to the efficiency argument.[86]

United States merger policy, as described in the DOJ Merger Guidelines, takes a *prima facie* approach. Given certain concentration levels and barriers to entry, the DOJ will challenge mergers absent clear reasons why the merger is unlikely to lead to a tendency to reduce competition.

The EC's *United Brands v. Commission*[87] case highlights the problems with an approach that relies primarily on regulating behavior

83. *See* BONER & KRUEGER, *supra* note 15, at 34, 35, 39.

84. Fox, *supra* note 19, at 982.

85. About one-half of FTC competition expenditures are on merger enforcement.

86. Director & Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281, 282-83 (1956).

87. 1978 E.C.R. 207, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429 (1978), as discussed in Fox, *supra* note 19, at 994-1004.

rather than structure. United Brands was a vertically integrated company with forty to forty-five percent of the sales of bananas to the Community. Olesen, the largest ripener-distributor in Denmark, wanted preferential treatment over United Brands' other distributors, but United Brands refused. Olesen then became an exclusive dealer to one of United Brands' competitors. United Brands' sales fell in Denmark as Olesen deliberately pushed the competitor's bananas and took more care in ripening the competitor's bananas, leading United Brands to terminate Olesen. The Court of Justice of the European Communities held that the termination was an abuse of dominant position because United Brands' market share was above the EC market share cut-off. The court reasoned that "a dominant firm . . . cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary."[88] As illustrated, such reasoning can confuse protecting competition with protecting a medium-sized competitor. United Brands had good reason to terminate Olesen and replace it with another distributor that would provide adequate service. As Professor Fox suggests, "the sanction may have been excessive, even under United States law."[89] The EC apparently continues to pursue such cases.[90] Given the difficulty of determining which acts are anticompetitive, the United States approach is advantageous. Such an approach targets potentially anticompetitive actions only when firms have much larger market shares, and accordingly, a higher probability of succeeding than those shares noted in EC and other European laws. The United States also attempts to balance efficiency explanations for most vertical arrangements without the presumptions built into EC law.

B. CREATING COMPETITION

Although United States policy to maintain competition may be preferable to the approach taken by Germany and the EC, antitrust laws similar to those in the United States could be insufficient during the transition from a centrally planned to a market economy. For instance, many enterprises in centrally planned economies are state-owned and operated monopolies that have not obtained their position by offering better products at lower costs. Instead, they have obtained their positions by governmental fiat. Moreover, the United States bases antitrust

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88. *Id.* at 292; Fox, *supra* note 19, at 996.
89. Fox, *supra* note 19, at 1003.
90. *Exclusive Sales Scheme for Distribution of Cosmetics Runs Afoul of Article 85*, 60 ANTITRUST & TRADE REG. REP. (BNA) No. 1505, at 322 (Feb. 28, 1991).

laws on the assumption of well-defined private property rights and freedom of voluntary exchange in a generally competitive environment.[91] In contrast, state enterprises are different from United States private enterprises because state enterprises operate under different rules and their managers are subject to different incentives.[92] These differences in rules and incentives could require antitrust powers different from those in the United States.

In particular, antitrust laws in the United States do not govern the activities of government controlled enterprises and only have limited control over regulated industries.[93] In Central and Eastern Europe, the existence of well established state monopolies could hinder the development of new competitors by denying the new entrants access to critical distribution facilities or to inputs needed for production. Accordingly, if state-owned enterprises are not all quickly privatized, then strong antimonopoly laws must govern state as well as private enterprises at least through the transitional period.

In addition, laws such as those of the German Cartel Office and the EC could provide additional muscle to fight entrenched monopolies that could use their existing contracts, control over resources, and distribution systems to prevent competition.[94] Such additional power is most appropriately directed at phasing out monopolies, as in the case of the Czechoslovak competition law, because there is a potential for some aspects of these laws to be used to prevent, rather than encourage, competition.

Although there are differences between the United States and Central European economies with respect to the specific economics and the stages of market development, the analytic approaches do not vary, and the goals of creating consumer choice and promoting economic efficiency would be the same.

Many observers agree that an aggressive "demonopolization" campaign is necessary to create competition. In examining the most problematic of all these economies to reform, the Soviet Union, the Interna-

91. *See* R. POSNER, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 20-32 (1974) (describing the basis of antitrust law in the United States and citing the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act).

92. *See supra* note 4 (describing the motivations of state enterprises vis-a-vis the private enterprises).

93. ABA ANTITRUST SECTION, *supra* note 79, at 605-19 (1984) (setting forth the effect of government involvement in United States antitrust law); *see also id.*, ch. X (outlining the exemptions from antitrust coverage under United States law).

94. It is difficult to see why relatively low concentration levels used in EC and German competition policy would be used to classify an enterprise as a dominant firm, unless the measure of market share includes many firms that would not be included in an antitrust market.

tional Monetary Fund, the World Bank, the Organization for Economic Cooperation and Development (OECD), and the European Bank for Reconstruction and Development conclude:

> there is also an urgent need for an effective framework of antimonopoly laws and regulations, along with the institutions to enforce them. The framework should abolish . . . restrictions that limit the range of goods that a firm can produce, assure rights of new entrants, help prevent collusion among enterprises and discourage predatory behavior that would lead to the monopolization of an industry. The current tendency for enterprises which are now in a particular branch ministry, to join together in trade associations is a matter of concern, since it may favor oligopolistic rather that competitive behavior. One major barrier to the entry of new firms is the highly monopolized state supply system. The breakup and privatization of wholesale trade should thus be among the first priorities of economic reform.
>
> Because production in some sectors is concentrated in a single or very few enterprises, it will be desirable to split up such firms in order to increase competition.[95]

Active use of antimonopoly laws to discourage monopolistic practices is needed, but a program to create consumer choice rapidly will probably be most effective at creating a true market economy.

Creation of consumer choice may be achieved through several means in the state-owned enterprise countries. First, where possible, governments could divide state monopolies into several independent companies manufacturing the same or similar products. Ideally, this process would occur as the state enterprises are privatized as contemplated in Poland and Czechoslovakia,[96] but such division probably should not be delayed even if privatization is slowed due to non-economic reasons.[97] The number of effectively competitive firms created by dividing existing state monopolies will vary, depending on the specific industry, the economics of production, and distribution. For example, initially there may be little need for single enterprises to control multiple retail establishments in a relatively small geographic area. Independent retail stores that are free to set their own prices can offer local customers selection and would have incentive to vie for customers by cutting prices and reducing costs, particularly if those stores are privatized. Czechoslovakia's

95. THE ECONOMY OF THE USSR: A STUDY UNDERTAKEN IN RESPONSE TO A REQUEST BY THE HOUSTON SUMMIT; INTERNATIONAL MONETARY FUND, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, AND EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT 28 (Dec. 1990) [hereinafter THE ECONOMY OF THE USSR].

96. *Id.*

97. *See Dialog* (television broadcast, Oct. 9, 1990) (interview with a senior manager of Celex) (suggesting that smaller enterprises may be easier to privatize than larger enterprises).

rapid "small privatization" is an explicit recognition of the lack of significant competitive problems associated with privatizing these establishments.[98]

Multiple plant manufacturing and distribution firms could also be broken into independent competitors, particularly if there are not significant cost savings from a single company operating the plants. Such a program could be carried out even if an enterprise can only be divided into two, three, or four independent competitors because each additional competitor is likely to enhance marginally the prospects of competition, and some industries may achieve competition with only a few competitors. However, to create sufficient choice of input suppliers, and prevent existing enterprises from denying key resources to new entrants, it may be necessary to be aggressive in cutting connections between input suppliers and manufacturers of final goods. How much vertical integration should be encouraged should depend on the industry in question, and the extent to which integration can be the source of productive efficiencies. In certain circumstances, the efficiency benefits of vertical integration may have to be balanced against the benefits of creating new competition through privatization and demonopolization.

For example, if some firms are privatized by separating input supply facilities from "downstream" functions so that producers and users of these input products are separate enterprises, this may create another market which was otherwise missing. This new market may foster competition and entry at both levels, both among producers and users of the input product. Accordingly, it may be better to err on the side of creating too many firms rather than too few, and then permit mergers only if there is good reason for reconsolidation. Once such a division of state-owned enterprises takes place, active enforcement of the state's competition law is likely to be necessary to prevent former colleagues from agreeing to charge the same price or divide markets into local monopolies.

A second method of creating buyer choice would be to permit the import of products from other countries. An influx of imports can create choice almost instantly. Imports may be the best alternative when breaking monopoly enterprises into multiple independent suppliers is not possible and when the minimum efficient-sized firm is one plant or a single enterprise. In fact, the ultimate goal of market economies is to minimize tariffs, quotas, and other impediments to internal and international trade, as suggested by the GATT agreements. Such trade is particularly important where local monopolies control the supplies of

98. *Id.*

products.[99] If trade liberalization is not possible for all goods, liberalization could be targeted towards those industries where consumers will not otherwise have choice.

If the lack of convertible currency or limited buyer income prevents imports from providing effective consumer choice in monopolistic industries, then a state may pursue two legislative solutions to achieve a market economy: (1) a competition law to create conditions encouraging new market entries; and (2) a price regulation law to control monopoly pricing by some existing enterprises. Statutes designed to create competition and place any limits on pricing may be phased out or eliminated once sufficient competition is created in all targeted industries. To be most effective, the government ministry in charge of privatization should be required to act within the confines of the creation of competition law. The law might require consultation between that ministry and the agencies enforcing the full scope of the country's competition laws, and perhaps have the right to veto the sale of an enterprise as the Polish antimonopoly law and the Czechoslovak privatization law apparently permit.

Conditions to encourage new entry might also include the requirement that the monopolist help subsidize new entrants in all levels of production and distribution, including producing inputs, producing the product itself, and establishing distribution.[100] The government should, however, limit any price controls to the monopolist and not the new firms and phase them out as new entrants provide sufficient competition.[101] This would be similar to the experience of the United States in demonopolizing long distance telecommunications. As discussed above, price controls of any sort could re-evolve into the centralized pricing system that has performed so poorly in these countries during the last forty years.

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99. *See* K. DAM, GATT: LAW AND THE INTERNATIONAL ORGANIZATION 17-22 (1970) (describing GATT's philosophy of inhibiting tariff and non-tariff barriers to free trade).

100. The United States has forced the limitation as well as the subsidization of production and distribution of certain products in monopoly enterprises. *See* Tucher, *ATT Rivals Ask for Help; Complain of High Costs, Regulation May Do Them in*, Wash. Post, May 5, 1985, at F1 (describing how "competition may be dead before it takes its first breath" with respect to ATT's monopolistic dominance of the United States telecommunications industry).

101. *See* Troutman, *FCC Says It Will Review ATT's Market Dominance*, REUTER BUS. REP., Apr. 12, 1989, at 1 (describing FCC restrictions placed on ATT, but not on other carriers because of ATT's dominant position in the telecommunications market).

V. COUNTRIES

After a general discussion about competition policy and the transformation of centrally planned to market economies, it is useful to consider specifics of some of the countries in Central and Eastern Europe. Although there are many similarities, each country faces somewhat different problems and is approaching the changes in at least slightly different ways.

A. POLAND

In many ways, Polish antimonopoly policy is the most developed of all the Central and Eastern European countries. Poland has had an established antimonopoly law and operating office since early 1990. This office has initiated many investigations and, at the time of this writing, has had at least one of its cases on appeal in the Polish Supreme Court. This lead is not surprising, however, given Poland's ten year period of reform that has lead to the radical changes over the last two years.

On July 22, 1952, a new constitution made Poland a "people's democracy" similar to the Soviet type.[102] After attempts to rebuild an economy ravaged by the Second World War, anger at a collapsing economic system overwhelmed with debt and an artificial and incompetent political system, reached a breaking point in August of 1980. A strike began in the shipyards of Gdansk and then spread to other industries, forcing the government to accept the right of workers to organize in independent unions, a first for any Marxist state.[103] Solidarity, the free union founded by Lech Walesa, motivated workers to launch a drive for social and economic liberty and improved working conditions.[104] A national strike for five days in 1981 led to anti-strike legislation and ultimately, to martial law, which did not end formally until mid-1984.[105] In response to dissent, the Polish government embarked on a

102. *See* POLAND: A HANDBOOK 167-68 (Wydawnictwo Interpress pub. 1974) (describing the adoption of the constitution for the Polish People's Republic).

103. *See* Seligman, *Poland Might Be Only the Beginning*, TIME, Dec. 1, 1980, at 103 (speculating on the effects of the successful Polish workers revolt in other Central and Eastern European nations).

104. *See Polish Unions, Party, Church Join Unity Call*, Wash. Post, Dec. 17, 1980, at A1 (describing the unrest during the 1980 Polish worker strikes).

105. *See* Fascell, *Helsinki, Gdansk, Madrid*, 7 WASHINGTON Q. 170, 170 (1984) (describing the effect of martial law on Poland).

series of partial reforms of the economy that proved insufficient to overcome the mismanagement of the economy through central planning.[106]

Despite Prime Minister Rakowski's attempts to decentralize the private sector, the statistics for 1989 showed little improvement, and the Prime Minister's well-intentioned efforts failed to arrest the economic decline.[107] There was no real growth in Gross Domestic Product (GDP) for 1989.[108] Investment spending declined two percent, and personal consumption decreased one percent.[109] The current account deficit for 1989 tripled to two billion dollars (three percent of GDP) from $580 million in 1988.[110] Poland's hard currency debt totaled approximately forty billion dollars at the end of the year.[111] The soft currency debt, most of which Poland owes to the Soviet Union, was 5.8 billion transferable rubles at the end of 1989 ($1.4 billion at early 1990 exchange rates).[112] Recently, though, Western industrialized nations agreed to erase fifty percent of Poland's debt, forgiving thirty percent of their loans immediately, and another twenty percent in three years if Poland sticks to its reform plans.[113]

The failing economy led to increased resistance to the government and, thus, to another wave of strikes in 1988.[114] Consequently, the government re-legalized Solidarity and allowed its members to compete in elections because the government could not quell the dissent.[115] Solidarity achieved a stunning victory, acquiring almost all of the Senate seats and all 169 seats they were allowed to contest in the Sejm.[116]

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106. *See* U.S. DEP'T. OF COMMERCE, FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES, POLAND 1-12 (1990) (describing the economic situation in Poland in 1990).

107. *See id.* at 4 (explaining Prime Minister Rakowski's efforts to decentralize the state-run economy after taking office in September 1988). "A 'second stage' of economic reform launched in October 1987, following the unsuccessful 1981-1986 "first stage," yielded little improvement in the [Polish] economy." *Id.*

108. *Id.* at 5.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* In addition to Poland's total hard and soft currency debts, Poland owes the Soviet Union approximately one billion dollars in hard currency. *Id.*

113. *Polish Debt Cut in Half*, Wash. Post, Mar. 16, 1991, at A1.

114. *See* Echikson, *Poland's 'Economic' Decision to Close Shipyard is Laced with Politics*, Christian Sci. Monitor, Nov. 2, 1988, at 13 (reviewing the demands of the Polish workers during the 1988 strike); *Poland; No Way Out*, ECONOMIST, Aug. 27, 1988, at 41 (considering the effect of the 1988 Polish worker's strike on Poland's economy).

115. *See* Singer, *Solidarity—The Road to Power*, NATION, Oct. 1989, at 1 (describing how Solidarity achieved political power through strikes).

116. *See id.* (citing Solidarity's sweeping victory in the 1989 legislative elections); *see also The Curtain Rises*, L.A. Times, Dec. 17, 1989, at Q6 (considering Poland's move into "unchartered territory" and the emerging political position of Solidarity).

At the beginning of 1990, the Polish government introduced an unprecedented economic reform program seeking to abolish the Soviet-style central planning system and to institute a market economy based on free prices, private property, and unrestrained competition.[117] In this "leap to the market,"[118] the new Polish government slashed the budget, cut subsidies, tightened the money supply, and radically devalued the zloty.[119] Further, by decontrolling prices, the government sought to encourage foreign competition even at the risk of bankrupting state enterprises.[120] Poland's "leap to the market," however, resulted in swift and traumatic economic effects.[121] By late January 1990, inflation had soared to eighty percent and then subsided to an approximately five percent rise each month.[122] Wages dropped sharply in real terms. In September 1990, four percent of the work force, 700,000 workers, were unemployed. Analysts then expected this to nearly double by the end of 1991. As of April 1991, unemployment had already risen to over seven percent of the workforce.[123] Additional joblessness will likely grow from mass bankruptcies as the economy forces old and/or obsolete enterprises to close.[124] Furthermore, the Polish standard of living has dropped as much as thirty percent in the last year alone.[125]

Throughout 1990, the Polish zloty has been internally convertible so that any Pole can exchange zlotys for Western currency.[126] As a result, the once familiar black market money traders have virtually disappeared.[127] Although, Polish companies, both private and public, have

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117. Singer, *supra* note 115, at 7.

118. House, *supra* note 8.

119. *Id.*

120. *Id.*

121. *Id.* Within a few weeks the costs of some basic necessities such as electricity increased more than 300%, and the price of vodka doubled. *Id.*

122. *Id.*

123. *See* Horne, *Currency Devalued by Poland*, Wash. Post, May 18, 1991, at C2. (describing Poland's deepening economic troubles in achieving a market economy).

124. *See* Knight, *Poland's Feud in the Family*, U.S. NEWS & WORLD REPORT, Sept. 10, 1990, at 52, 56.

125. *Id.* at 56. "[A] year ago today [in Poland], 30% of an average family's income was spent on food; today, the toll is 60% because wages are not keeping pace with rising prices as government subsidies are lifted. Using a car has become a luxury; gasoline prices are up 500 percent." *Id.*

126. *See* Engelberg, *Czech Conversion to a Free Market Brings the Expected Pain, and More*, N.Y. Times, Jan. 4, 1991, at A3 (describing Czech and Polish efforts toward a free market economy); *see also* House, *supra* note 8 (explaining why Poles no longer demand payment in dollars).

127. *See* Engelberg, *supra* note 126 (contrasting the free exchange of zloty for Western currency in Poland to the limited exchange of $200 a year in Czechoslovakia and the effect on each country's black market).

shown surprising strength in the international market, the country had a trade deficit of $225 million in April 1991.[128]

The Polish Antimonopoly Office (PAO) began operation in April 1990, following passage of The Monopolistic Practices Act on February 24, 1990.[129] The prime minister appointed the president, Anna Fornalczyk (an academic economist from the University of Lodz), a vice president, and a director general. The PAO is a central state administrative institution subordinate to the Council of Ministers. It consists of seventy lawyers and economists and should expand to 120 lawyers in the near future.[130] The PAO coordinates all matters within antimonopoly jurisdiction as well as any organizational changes in the Polish economy, superseding the Department of Counteracting the Monopolization of the Economy in the Ministry of Finance.[131] The Department of Counteracting the Monopolization of the Economy includes two units—the Jurisdiction Section and the Antimonopolistic Policy Section.[132]

The Jurisdiction Section has concluded 220 cases against monopolistic practices[133] in its first two years.[134] The Antimonopoly Office began nineteen cases as of May 1990. During the entire existence of the Antimonopoly Office and its predecessor agency, 200 decisions resulted in the imposition of sanctions.[135] Moreover, the Jurisdiction Section carried out emergency interventions along with legal interpretation of economic policy.[136] PAO had initiated nineteen cases through September 1990.[137]

The agency is divided into two groups. One group, managed by lawyers, focuses on monopolistic practices and has spearheaded a number of cases brought under the price gouging statute. The other group, managed by economists, is in the process of studying the structure of Polish industry to develop a plan for structurally demonopolizing Polish

128. Powers, *In Poland's Economic Path—Potholes*, L.A. Times, May 17, 1991, at A5.
129. Polish Monopolistic Practices Act (Feb. 24, 1990), *supra* note 63.
130. Supplemental Letter provided by the Polish Anti-Monopoly Office [hereinafter Supplemental Letter]; *see also* Polish Monopolistic Practices Act, *supra* note 63, ch. 5, art. 17 (describing the hierarchy of the PAO).
131. Supplemental Letter, *supra* note 130; *see also* Polish Monopolistic Practices Act, *supra* note 63, ch. 5, art. 19 (stating that the duties of the PAO include monitoring observance of the act, monitoring the formation of prices, issuing decisions and researching the state of the economy).
132. Supplemental Letter, *supra* note 130.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

industries. The agency will use this group's findings to determine which industries trigger a presumption of market dominance. In identifying priorities for demonopolization, the PAO plans to determine which enterprises to break up by (1) identifying industries with high market shares and significant barriers to entry; (2) determining if the enterprise is engaged in monopolistic practices; and (3) identifying sub-elements, such as factories, that have expressed interest in being separated from the state monopoly.

The Antimonopolistic Policy Section (Policy Section) dealt with cases concerning structural changes in the Polish economy.[138] Such changes included the division and combination of firms as well as the formation of new enterprises.[139] In 1988 and 1989, the Policy Section turned down nine of the forty-eight applications received and did not introduce their changes.[140]

The Ministry of Finance chose five companies to spearhead the transition from "socialist property"[141] to joint-stock companies. All five are labor intensive, use regional raw materials, and are not high technology industries. The first, Exbud, sends Poles abroad to construct roads and factories. The second, Prochnik, exports trenchcoats. The third, Silesian Cable, spins high quality copper wire. The fourth, Krosno Glassworks, creates fine, hand blown crystal. The last, Tonsil, assembles sound systems for sale under Japanese and German labels.[142] Moreover, the antimonopoly body, at the impetus of the registration courts, commented on the question of eighty-four commercial companies.[143] There were no objections in fifty-one cases, eighteen of them were turned down and there were certain reservations in fifteen cases.[144]

Many of the basic provisions in the Polish antimonopoly law are consistent with antitrust principles that have developed in market economies. As noted above, the Polish law is primarily modelled after Germany's legislation. For example, firms with relatively low levels of concentration (thirty percent) can be classified as dominant, subjecting them to statutes that significantly restrict the types of agreements that can occur between buyers and sellers. There also appears to be a willingness to use the law to enable the Antimonopoly Office to roll back price increases that are not justified in terms of increased cost. This

138. *Id.*
139. *Id.*
140. *Id.*
141. Newman, *supra* note 8.
142. *Id.*; Engelberg, *supra* note 8.
143. Supplemental Letter, *supra* note 130.
144. *Id.*

"price gouging" statute, similar to those seldom used statutes in the German and EC laws,[145] has presented problems for the PAO and created concern in the business community.

Both the group in charge of policing monopolistic practices and the group designed to spearhead structural monopolization had found significant problems obtaining the information necessary to conduct their mandate. Accordingly, Polish government officials asked the FTC/DOJ working team[146] extensive questions about how United States antitrust agencies gather information on basic subjects such as sales and market shares.[147] The PAO is developing alternative data sources, utilizing research institutes and universities to assist with the data collection.

In addition, the PAO experienced administrative and organizational problems in its first few months. The administrator in the FTC/DOJ working team explained how the FTC organized its regional offices so that the PAO could learn from the FTC. In addition, Polish officials wanted to discuss methods to ensure such basic concerns as workers putting in a full eight hour day and other similar concerns.

PAO officials also discussed several alleged violations of the Polish Antimonopoly law with members of the working team. Some of the most visible allegations involved prosecution of "price gouging." One of the first of these involved an automobile manufacturer called FSO. The PAO alleged that the automobile manufacturer had raised the price of medium sized automobiles to monopoly levels. There are only two automobile manufacturers in Poland, FSO and FSM, and few imported cars that sell at prices Polish citizens can afford. Accordingly, there may be valid reasons to believe that FSO would be able to keep prices above cost at least in the short run. It was, however, extremely difficult for the PAO to demonstrate that the prices were not just adjusting to reflect the true cost, and the Antimonopoly court overturned the decision to force FSO to roll back prices. This case is now on appeal to the Polish Supreme Court.

Another case that focuses on potential price gouging targeted the Ursus Tractor Company. The Ursus Tractor Company is the only manufacturer of one type of particularly popular farming tractor, although there is competition in other types of tractor manufacturing. In March 1990, the company raised prices 100%, followed by a fifty percent increase later in that month. In June 1990, it increased prices ten percent

145. BONER & KRUEGER, *supra* note 15, at 31, 38; Treaty of Rome, *supra* note 21, art. 86.

146. The FTC/DOJ mission to Poland took place from September 16-30, 1990.

147. The Polish government has essentially collected such information in the past, but that data were frequently unreliable and now many are no longer even collected.

more. As with the FSO case, demonstrating that these price increases are not cost based is difficult. Such calculations might be material to some types of antitrust in the United States where there are good cost data and a relatively stable market that has based prices on cost for a number of years. In Poland, however, many prices have been suppressed below the actual cost of production. Further, accounting and other data are extremely poor and do not reflect the market value of imports or assets. Accordingly, the PAO is seeking alternative methods to determine what are "extremely high prices." Its inquiry examined tractor prices in other countries, but international comparability issues are difficult to resolve, especially during Poland's transitional period.

The PAO also investigated monopolistic practices and collusion among competitors that would lead to investigations under United States antitrust law. For example, the PAO is investigating the actions of forty-five local grain processing and milling enterprises. Defining the geographic market was problematic, however, because each of the processing and milling enterprises had limited local storage that prevented enterprises from different regions from actively competing for the grain production by farmers in more distant localities. Whether the local monopsonies (monopoly buyers) were due to technological constraints or to the grain processors' efforts to suppress the price of grain sold by the farmers, however, was unclear at the time of our discussions. Upon further analysis, the PAO determined that there were indeed competitive, not technological problems. Accordingly, it has issued seventeen decisions to break these processors up, two of which have already been implemented.[148]

Similar questions arose regarding dairy cooperatives after they were allowed to act as independent enterprises, while they were still state-owned. Evidence indicated that after dairy production and pricing decisions were decentralized, the dairies decided that they would divide the market so that they could charge monopoly prices for processed milk while paying below competitive level prices for the raw milk. In the context of United States antitrust enforcement, such agreements would be found *per se* unlawful, and those involved in the conspiracy could be subject to criminal penalties.

Another horizontal price fixing case involved Poznán, a city of about 500,000 inhabitants.[149] Hotel prices rose two hundred to three hundred percent during the week of an annual international fair in 1990. The

148. Letter to Dr. Langenfeld from Anna Fornalczyk, Director General of the Polish Antimonopoly Office, April 15, 1991.
149. *Id.*

state-run tourist agency, Orbis, published the tariffs that all hotels in the city followed, although Orbis only owned three of the five city hotels. Such price increases, however, could reflect "peak load" pricing, for example, entailing increased prices of hotels during the high season in a resort area. Because all rooms appeared to be full in the city during this peak period, that is, there was no reduction in output to raise prices, United States law most likely would actively pursue this pricing as anticompetitive only if there were some evidence of an agreement on prices between Orbis and the other hotels in the city.

Some of the most problematic questions placed before the PAO involved Hortex. Hortex owns between eight and ten food processing plants. A French investor expressed interest in buying the entire company but refused to purchase any parts of the company if it were broken into two or more competitors.

Under these circumstances, antimonopoly and other policies create tension. Hortex badly needed new capital to improve its production processes and modernize equipment. Such improvements would lower costs, improve distribution, lower prices, and increase quality of processed food in Poland. If there is not adequate competition from imports, however, the French investor could solidify the monopoly position of Hortex, delaying competition in the food processing industry. Solutions considered included reducing the tariffs on imported processed foods from twenty percent to a nominal figure in order to provide a check on any attempt to raise prices to a monopolistic level.

In other areas, the beginnings of demonopolization are taking place. Although the Polish privatization has not yet affected many firms, there has been at least one case in which the PAO directly addressed competition concerns in the privatization process. This case involved a large grain milling firm with three plants northwest of Warsaw that was split into three separate firms in the course of the privatization process. The PAO has considered other candidates for break-ups in the privatization process, including a national network of twelve gas producers and a vertically integrated tobacco monopoly.

In sum, the PAO is extremely active in grappling with many difficult questions and trade-offs. Only the Polish people, however, can make the multidimensional trade-offs facing them in their transition period.

B. CZECHOSLOVAKIA

Czechoslovakia is not as far along in its implementation of a competition policy as Poland. This is consistent with the Czechoslovak government's slower implementation of market reforms. Czechoslovakia has not experienced a long period of failed reforms as Poland has, and the economy is not in as critical condition. Accordingly, Czechoslovakia has adopted a more cautious approach to market reforms. Like Poland, Czechoslovakia is working to restructure its economy from a state-controlled to a free-market system.[150] To this end, the Czechoslovak government passed legislation in 1989 regarding state-owned enterprises, joint ventures, tax reform, banking and currency, and a realignment of the wholesale pricing structure.[151] The banking reform would, in theory, give the central bank the authority to set monetary and credit policy without government control, a major step if this works in practice.[152]

Nevertheless, Czechoslovak GDP growth was under two percent in 1989.[153] Czechoslovakia's hard currency borrowing grew slowly and still remains low and largely connected with trade financing.[154] In 1989, the Czechoslovak government reported foreign debt at $6.7 billion,[155] and asserted that developing countries' debts to Czechoslovakia offset this debt.[156] The relatively low level of debt and its modest hard currency surpluses have made the country appealing to Western bankers, though there is concern over the country's ability to service the debt in the long run.[157] As a result of this uncertainty, Czechoslovakia allows only businesses planning investments for overseas trade to exchange large quantities of crowns for Western currencies.[158]

The Czechoslovak government began its privatization initiative in 1991 by compensating or returning assets to owners of the assets prior

150. *See* White, *Trading Stalinism for Capitalism*, L.A. Times, Feb. 3, 1991, at D1 (describing Czechoslovakia's plans of privatization).

151. *See* INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, FOREIGN ECONOMIC TRENDS (FET) AND THEIR IMPLICATIONS FOR THE UNITED STATES: CZECHOSLOVAKIA 8 (1990) [hereinafter FOREIGN ECONOMIC TRENDS: CZECHOSLOVAKIA] (describing the 1990 economic situation in Czechoslovakia).

152. *Id.* at 8.

153. *Id.* at 3.

154. *Id.* at 7.

155. *Id.* at 8.

156. *Id.* This claim, though, remains moot due to the problems arising from collection of this debt. *Id.*

157. *Id.*

158. *See* Engelberg, *supra* note 126 (comparing the internal convertibility of national currencies in Poland and Czechoslovakia for Western currencies). Czechoslovak economic reforms have resulted in hardships on the nation's path to capitalism. *Id.* The government has slightly increased coal prices, in contrast to the 600% increase in the cost of coal in Poland. The government has postponed adjusting other energy costs, however, until it can fit apartments with thermostats. Costs of staples such as meat, bread, and sugar increased sharply but the effects of these increases have been delayed due to hoarding. *Id.* In Western terms, these increases do not sound severe, but the average Czechoslovak wage is estimated at only $130 a month. *Id.*

to their takeover by the Communist regime.[159] Perhaps most important, it has begun a process of "small privatization" where retail establishments, such as restaurants, have been auctioned to private citizens[160] and the "Large Privatization Law" was passed February 26, 1991,[161] which includes antitrust review of privatization of companies with thirty percent or more of a market.[162]

A major concern in Czechoslovakia has been maintaining the rights of the two separate republics that comprise the Federation: the Czech and the Slovak Republics. This concern touches all aspects of reform, including the creation and implementation of competition policy. The Slovak Republic has had a functioning Antimonopoly Office since mid-1990. The Czech Republic named someone to head its office in June. The Federal Office for Economic Competition began formal operation in May 1991. Minister Imrich Flassik, a Slovak, heads the federal office, which is located in Bratislava, the capital of Slovakia. All three agencies will enforce the antimonopoly law passed in February 1991.[163]

An FTC/DOJ working team visited Prague and Bratislava in October 1990. They explained United States antitrust laws and provided

159. *Czechs to Return Seized Property*, N.Y. Times, Feb. 22, 1991, at A10; *Czechoslovakia's Parliament Approves Privatization Law*, Wash. Post, Feb. 27, 1991, at A16.

160. White, *supra* note 150.

161. Arbess, *supra* note 66.

162. White, *supra* note 150.

163. Competition Protection Act of January 30, 1991, Pt. III, Offices for Economic Competition, art. 10. The act distributes authority between the three agencies as follows:

(1) The authority of the office for economic competition is vested with

(a) the Federal Office for Economic Competition, in cases concerning

1. protection against limiting or eliminating competition in cases when supplies by an entrepreneur or joint supplies based on contracts in accordance with Articles 3, 4, and 8, take or may take a share of the relevant market of the Czech Republic and the Slovak Republic each, in excess of 40 per cent,

2. representation of the Czech and Slovak Federal Republic in international negotiations and agreements with authorities for economic competition in other countries,

b) the Office of the Czech Republic for Economic Competition, in cases concerning protection against limiting or eliminating competition which may have effects in the territory of the Czech Republic, apart from execution of authority in accordance with Section a/1.,

c) the Slovak Antimonopoly Office, in cases concerning protection against limiting or eliminating competition which may have effects in the territory of the Slovak Republic, apart from execution of authority in accordance with Section a/1.

(2) The offices, on mutual agreement, may submit to one another individual cases concerning protection of economic competition to be dealt with and decided, if this is advantageous for a better and faster investigation into the case, and if the entrepreneurs concerned agree.

Id.

comments on a small number of investigations taking place at the Slovak Antimonopoly Office. At the end of the mission, Finance Minister Vaclav Klaus asked for informal technical comments on draft antimonopoly and price control laws. Subsequently, the Federal Legislature passed the Competition Protection Act of January 30, 1991.[164]

The competition law addresses how to maintain and create competition and is also largely based on German cartel laws. To create competition, the law includes a section on temporary measures granting the agencies additional powers during the transition period. These additional powers give the competition agencies power to ensure that during privatization no local monopolies will be created by state and local officials.

The law does not differentiate between agreements among competitors and agreements between buyers and sellers. Yet, the most significant danger to competition occurs when entrepreneurs competing with each other agree not to compete. Accordingly, the close policing of agreements between entrepreneurs selling the same or similar products could be an important part of preventing supracompetitive pricing, while most agreements between buyers and sellers will be procompetitive.

The law envisions limiting the ability of firms to contract, whether a contract is between competing firms or between a buyer and seller. A general limitation of such agreements could greatly undermine any decentralized market economy. One of the keys to a successful market economy is that independent firms must live up to their commitments. Otherwise, a succession of breached commitments would create business uncertainty, discouraging investment and entrepreneurial activity. Competition might be encouraged more if the competition agency had the power, subject to the appropriate court review, to negate only those contracts found in clear violation of the competition law.

The law also envisions that the agency will approve of many sales contracts in advance. Complete review of sales agreements between buyers and sellers, however, could overload the staff of a competition agency. If so, automatic approval of agreements if no challenge took place within two months would speed the reform process, but could also miss important antitrust cases. An antimonopoly agency might want to reserve the right to challenge such agreements if their effect proves anticompetitive. The competition agency, therefore, could overturn agreements that proved anticompetitive. It might be desirable to condemn in advance only agreements that can be shown to have anticompetitive

164. Competition Protection Act of January 30, 1991, No. 63/1991.

consequences, such as price fixing and market division among competitors. Although this approach in itself would create some business uncertainty, to use this rule of reason style of analysis rather than one that discourages entire classes of agreements that are likely to be efficient might be better.

The law also lists exceptions to agreements that would otherwise be illegal. In particular, the law exempts agreements that include less than thirty percent of the market. There are good economic reasons to believe that agreements among competitors without market power would have no anticompetitive effects, and the thirty percent cut-off is presumably a proxy for that. United States law, however, completely bans some agreements that have been found to have significant anticompetitive potential and few redeeming virtues. The law also allow firms to negate contracts unilaterally if one of the parties decides that the agreement disadvantages them. Under certain circumstances, such as where there is an inability to deliver goods due to natural disasters, contracts should be breached. The competition laws, however may not be the place to define such breaches. Instead, they should be defined in, for example, the Uniform Commercial Code. Instead of giving parties the right to breach contracts, it may be better to give the competition agencies the power to invalidate contracts when they are anticompetitive. Parties to such contracts could be able to petition the competition agency, but they should not necessarily be given the right to withdraw.

The draft law also created a presumption of illegality of a merger if one of the merging parties had twenty percent or more of the market. The United States also pursues a vigorous enforcement policy against potentially anticompetitive mergers, but the level of sales triggering concern in many instances in the United States is higher than twenty percent.[165] Considering the relative size of the United States and Czechoslovak economies, it is surprising that Czechoslovakia would consider such a low standard even though barriers to entry are unquestionably higher in Czechoslovakia. In the final version of the law, this threshold was raised to thirty percent. Such a change is a clear improvement, but the threshold may still be too low. Specific mention of the importance of barriers to entry in the analysis of mergers would also have improved the Czechoslovak approach.

Similar to other Eastern and Central European laws, this law could be used to protect competitors rather than competition. Vigorous competition will always work to the detriment of some entrepreneurs, par-

165. Department of Justice Merger Guidelines—1984, *supra* note 59, § 3.1, at 20,560.

ticularly those that are inefficient and unresponsive to consumer demand. Although a firm with market power or a large share of a market may be able to damage a competitor unfairly by, for example, raising the costs of a new entrant, this will take place only under certain circumstances. The guide of thirty percent for market dominance and the attendant presumption against certain agreements between buyers and sellers, although consistent with EC law, would be considered too low in the United States, and may be too low in an economy the size of Czechoslovakia's. Hence, if Czechoslovakia should seek a competition law similar to that in the United States, then that law would not be used to protect firms that would be driven out of business because they cannot compete.

Moreover, the law envisions government-approved cartels similar to those the German Cartel Office approves. Given the difficulty in transforming enterprises into competitive entities, such condoning of cartels could hinder the transition without necessarily providing benefits to the competitiveness of Czechoslovak enterprises. Although there are good reasons for harmonizing Czechoslovakia's competition laws with those of its Western European trading partners, condoning cartels may not be the best way to transform its economy into a competitive one.

Czechoslovakia has established a system of state and national antitrust enforcement similar to that of the United States. Although the system has worked in the United States, the system may have drawbacks for a country the size of Czechoslovakia. Permitting each republic to decide independently whether to challenge a potentially anticompetitive act could lead to overly aggressive enforcement of a competition law and could result in unnecessary business uncertainty and impediments to competition.[166]

The Czechoslovak law gives the federal antitrust agency primary jurisdiction over agreements and mergers for firms that comprise (or

166. For example, consider a merger of two firms that have plants in the Czech and Slovak republics. Assume that the acquiring firm plans to shut down a plant in Slovakia and expand production facilities in Bohemia, resulting in an increase in employment for both the republics. In addition, assume the cost reductions associated with the merger reduces prices throughout Czechoslovakia. United States antitrust laws would usually permit such a merger. Unless a "public interest" standard is clearly defined in the Czechoslovak antimonopoly law, an individual republic could stop such a merger, which would not improve competition and would likely harm consumers.

As a second example, assume that there is an inefficient firm in Bohemia that has lost market share to a more efficient competing firm offering lower prices. The more efficient firm is primarily located in Slovakia. It might be possible for the firm in Bohemia to petition the Czech Republic to prevent what the Bohemian firm claims are "monopolistic practices," but which simply reflect socially desirable competition from the Slovak firm.

could comprise) more than forty percent of a relevant market in both the Czech and Slovak republics. The offices can, on mutual agreement, submit individual cases to one another. However, the potential problems of enforcement efforts that will harm the country overall while benefitting one republic still exist, particularly in the area of monopolistic practices where the federal government will apparently play no role.

Similar to the Polish Antimonopoly Office, there appears to be a tendency to regulate price rather than industry structure. For example, in Slovakia, the Antimonopoly Office was investigating recent price increases in refrigerators by Celex. Rather than relying on cost data, the Antimonopoly Office concentrated on the fact that the manufacturer alleged stockpiling of refrigerators by Celex, creating an artificial shortage to force prices up. As discussed above, such "price gouging" statutes can be counter-productive because they can discourage new entrants and foreign investment.

On balance, Czechoslovakia appears to be taking a slower, and perhaps more methodical, approach to competition policy. Problems may arise in its enforcement, however, if the three agencies cannot effectively coordinate their activities.

C. BULGARIA

Despite the severe economic crisis facing it, Bulgaria has decided that competition policy is an important part of its reforms. The country just recently passed legislation.

Like Poland, Bulgaria's economic performance gradually has deteriorated since the early 1980's and is currently in a state of deep crisis.[167] At the end of 1989, total external debt was $10.2 billion.[168] Between 1986 and 1989, the budget deficit ranged from four percent to seven percent of G.D.P.[169] Inflation rose in the first quarter of 1990 to 9.4%,[170] and the average rate of inflation in 1989 was 6.2%.[171] In 1990, the trade deficit widened, exports to convertible currency markets were low,[172] and foreign direct investment was limited.[173] Industrial

167. BULGARIAN ECONOMIC GROWTH & TRANSITION, *supra* note 6, ch. 3, at 4.
168. I. Angelov, *Background and Current Situation of the Bulgarian Economy*, in BULGARIAN ECONOMIC GROWTH & TRANSITION PROJECT, *supra* note 6, ch. 2, at 4 (1990).
169. *Id.* at 5.
170. *Id.* at 8.
171. *Id.*
172. *Id.* at 12.
173. *Id.* at 13.

output fell 8.5% in the first quarter of 1990.[174] According to Prime Minister Dimiter Popov, leader of the current *de facto* coalition government,[175] this reduction in output was due to a shortage of raw and prime materials, "the upset production and technology relations,"[176] and the restriction of markets for certain kinds of products.

Bulgaria recently has taken a number of significant steps towards creating a market economy. These steps include devaluing the exchange rate and creating a floating exchange rate,[177] lifting restrictions on the establishment and staffing of private enterprises,[178] significant liberalizing of prices,[179] and re-establishment of private ownership rights.[180] Although no actual privatizations have yet taken place, the Bulgarian government implemented a decree in January 1989 that has set the stage for privatization.[181] The government circulated draft legislation for comments in February 1991 that would establish an Economic Coordination and Development Agency and a Privatization Agency, along with draft laws on foreign investment,[182] and exchanges.[183] It has adopted a law establishing the ownership and use of agricultural lands.[184] The coalition government freed most prices on February 1, 1991.[185]

In the fall of 1990, a group of Bulgarians representing various political factions visited the FTC to discuss competition policy and a draft competition law with FTC Commissioners Azcuenaga, Strenio, and Owen. In late November, the FTC and DOJ made informal comments on a draft Bulgarian competition law. The Agreement between the Political Forces Represented in Parliament on Guaranteeing a Peaceful Transition to Democratic Society, signed in Sofia on January 3, 1991,

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174. *Bulgarian Output Drops 8.5%*, Wall St. J., May 14, 1990, at A10.

175. *Bulgaria Says It Plans Economic Shake-Up*, N.Y. Times, Jan. 24, 1991, at A8.

176. Declaration by the Chairman of the Council of Ministers of the Republic of Bulgaria Dimiter Popov on Behalf of the Government, Sofia (Jan. 23, 1991).

177. BULGARIAN ECONOMIC GROWTH & TRANSITION, *supra* note 6, ch. 3, at 2.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* ch. 4, at 4. The decrees that enacted the reform package approved by the International Monetary Fund (IMF) were independent of this document, but they reflected many of the basic principles of transition to a market economy discussed in this document.

182. *Id.* ch. 1, at 15-22.

183. *Id.* ch. 3, at 6.

184. *Id.* ch. 3, at 4.

185. Crawshaw, *Call for Urgent Action to Avert "Catastrophe" in Bulgaria*, Independent, Feb. 16, 1991, at 12.

ordered the transition toward a market oriented economy.[186] Finishing the drafting of a bill on the protection of competition and demonopolization was a high priority under this agreement.[187] At the request of the Bulgarian government and the United States Department of State, a total of four economists and lawyers (two from the FTC and two from the DOJ) visited Sofia and Plovdiv, Bulgaria's two largest cities, to consult with government officials on demonopolization and competition policy. These talks, taking place between March 18 and March 27, 1991, involved meetings with Deputy Prime Minister Ludjev. The DOJ and FTC subsequently submitted additional informal comments to the Bulgarian government on issues arising out of these talks. Similar to many Central and Eastern European countries, calculating market shares and the potential for market power can be difficult. The comments focused on the method of determining "market definition" provided by section two of the United States Department of Justice Merger Guidelines, as well as the application of broad industrial codes as a precursor for determining market share and market power. A market share based definition could provide enterprises with more certainty about whether they are in monopoly positions because it is easy to ascertain one's market share. At the same time, however, a market share based definition could prohibit practices that would have no anticompetitive effects. For example, if entry by new competitors is not difficult, then market share alone will not indicate market power. Also, enterprises whose temporary monopoly position results from entrepreneurship do not pose a threat to the competitive process, but may simply be the result of competition.

It was unclear whether the draft law contemplated the commission and specialized court system or an agency acting as a prosecutor in the context of a general court system. The decision makers in the commission system are trained in applying a decidedly complex law and are better equipped to use sophisticated economic reasoning. The United States, however, uses its strong court system to provide a check on both the FTC and the DOJ, and this appears to function well.

The draft law did not provide criminal penalties. It may be desirable to deter some illegal behavior with the prospect of criminal punishment as well as with large monetary penalties. Such penalties should only be appropriate for well-defined and well known anticompetitive acts, such

186. Agreement between the Political Forces Represented in Parliament on Guaranteeing a Peaceful Transition to Democratic Society, Jan. 10, 1991, Bulgaria, FBIS-EEU-91-007.

187. *Id.* at 13.

as price-fixing. There are also reasons to have the penalty be a multiple of the illegal gain or at least large enough to deter illegal behavior. It was not certain that the fines envisioned would be large enough to deter illegal behavior.

Under the draft law, the Commission, along with the Ministry of Trade and Services, may establish conditions for contracts and prices compulsory for persons in monopoly positions. As discussed above, competition better ensures reasonable prices and choice of products than does price regulation. In the United States, industry-specific legislation determines whether to regulate and how to get a regulated price only in the rare cases where natural monopolies are found to exist. Most economists would agree that the burden should be on those who wish to regulate prices to prove that such regulation is necessary. This should subject fewer industries and more of the economy to market forces. Price regulation is most effective in situations where consumers have essentially one supplier, imports cannot compete, and new sources of supply cannot enter.

It also may be important to give the competition agency authority over other parts of the government for the purpose of encouraging competition. Similar to the Czechoslovak law, the Bulgarian Commission may have the power to sue other governmental agencies to compel the division of companies established by them. However, the Council of Ministers, Bulgaria's equivalent of the executive branch of the United States government, apparently has taken the position that the ministries controlling state enterprises can and will rapidly move to demonopolize the Bulgarian economy.[188]

There are advantages to having one government agency perform both functions of enforcing antimonopoly and consumer protection laws. Briefly stated, buyers can make correct purchasing decisions only on the basis of truthful information. Advertising, however, is generally procompetitive, so too vigorous a consumer protection policy may limit some truthful information and thus damage competition. Accordingly, where deceptive advertising practices are found, it is desirable to consider the effect on competition. This may best be done by having one agency enforce both competition and consumer protection laws.

188. Discussions with the staff of the Council of Ministers, Sofia, Bulgaria, March 18-27, 1991.

D. HUNGARY

Of all of the Central and Eastern European countries, Hungary appears to have the most experience with market economies and is closely tied historically to Germany. It is not surprising, then, that its competition policy appears to be most closely tied to Germany's. Despite these ties, the Hungarian economy is in need of economic reform.

In 1990, the GDP per capita in Hungary was $2,206, lower than in both 1988 and 1989.[189] Production and profitability have declined.[190] Inflation was more than twenty percent during the first half of 1990.[191] Hungary's gross hard currency debt is approximately $21.7 billion.[192] Its 1989 trade surplus was $540 million.[193]

According to Prime Minister Jozsef Antall, privatization in Hungary will occur over a period of three to five years during which the government will liberalize ninety percent of prices and abolish most subsidies.[194] Currently, competition is very weak in Hungary. Large corporations having 10,000 or more employees hold monopoly positions.[195] The government, an enterprise, or an external party may initiate privatization. One hundred thirty enterprises were privatized in 1990, and 400 firms are to be privatized in 1991.[196] The State Property Agency has instituted new rules that could affect the speed at which privatizations are accomplished.[197] Hungary is unique because many firms are self-owned and controlled by councils generally composed of management.[198] "Sweetheart deals," known as "spontaneous privatizations," between managers and buyers occur frequently.[199]

Hungary has announced a battery of initiatives to reduce the state control. It aims to reduce state control from eighty-five to fifty percent

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189. U.S. DEP'T. COM., FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES: HUNGARY, FET 90-74 (1990).

190. *Id.* at 3.

191. *Id.*

192. *Id.* at 5.

193. *Id.* at 6.

194. *National Bank of Hungary Executive Challenges Atlantic Council Position*, MTI ECONEWS, Feb. 22, 1991.

195. Voros, *Collusion between Market Operators and Abuse of Dominant Position: The Hungarian View*, 7 OECD (1990).

196. *Hungary Revises Privatization Program to Allow Hostile Takeover Proceedings*, 8 Int'l Trade Rep. (BNA) No. 3, at 93 (Jan. 16, 1991).

197. *See id.* (quoting Property Agency Director Lajos Csepi: "Under the change, investors can ask the agency to privatize a business, bypassing the sometimes uncooperative management committees of the state-owned concerns themselves.").

198. D. ELLERMAN, MODELS AND METHODS OF PRIVATIZATION FOR HUNGARY, EMPLOYEE OWNERSHIP SERVICES INC. AND INDUSTRIAL COOPERATIVE ASSOCIATION, SOMMERVILLE, MA, at 2.

199. *Id.* at 2-3.

of the competitive sector of the economy within three years.[200] The country has taken the major step of permitting investors to stage "raids" on state owned companies, unless they are clear monopolies, utilities, or financial institutions.[201]

On May 11, 1990, a delegation from the FTC and the DOJ, including FTC Chairman Janet Steiger and Assistant Attorney General James Rill, met with Ferenc Vissi, President of the Hungary National Price Office, and other government authorities on competition policy. Dr. Vissi informed the delegation that their draft competition law and draft price regulation law reflected three years of study by thirty to forty specialists reviewing competition laws throughout the world. The Hungarian government enacted a competition law in late 1990.

To the extent that the draft legislation did not change substantially, the final competition legislation suffers from several weaknesses. First, similar to the law in Czechoslovakia, the proviso of a dominant firm at thirty percent appears too small. In most American industries, which are larger and less concentrated than industries in the smaller Hungarian economy, antitrust officials believe that seventy percent market share would be necessary for a firm to truly dominate a market.[202]

Second, the law appears to focus too much on protecting competitors and not enough on protecting competition. This confusion existed at times during the antitrust enforcement history of the United States. This country's antitrust agencies, however, now are committed to competition and consumer welfare rather than to protecting competitors.

Third, the cartel office offers advance advisory opinions to firms attempting to organize or increase competition. Rendering such advisory opinions would require a very large staff and could delay many procompetitive activities.

Finally, the law prohibits exclusive franchises without any market power test. Such a prohibition could eliminate what has been found to be a very efficient form of organization in the American economy. Similarly, another section of the law made dealer termination *per se* illegal.

Antitrust law in the United States generally classifies price fixing, bid rigging, and group boycotts, and all other horizontal restraints as *per se* illegal, while vertical restraints, with the exception of resale price maintenance, are governed by a rule of reason analysis.[203] The

200. *Sara Lee Buys into Hungarian Food Company*, Financial Times (London), Feb. 22, 1991, at 5.
201. *Id.*
202. *See* ABA ANTITRUST SECTION, *supra* note 79, at 118.
203. *See* R. BORK, *supra* note 14, at 260-98 (discussing the treatment of horizontal and vertical restraints under *per se* and rule of reason analyses).

Hungarian law apparently reverses this approach by making vertical restraints *per se* illegal and horizontal restraints subject to rule of reason analysis. As already discussed, currently prevalent antitrust and economic theory do not support this.

Some sections of the draft law's description of the Antimonopoly Office's powers were noteworthy. One section of the draft law provided that the parties could seek an advisory opinion from the competition supervising authority as to whether the department will prohibit the proposed merger. This would be useful, particularly at the beginning of implementation. This section, however, might also pose difficulties by diverting staff and resources away from general enforcement activities to relatively few individual matters.

Finally, the investigatory powers of the Hungarian competition supervising authority seem overly broad in comparison with the powers of the United States antitrust authorities. For instance, the person carrying out the investigation can enter any room or part of the premises of the entrepreneur and can ask for any information verbally or in writing from any employee of the entrepreneur concerned. Further review of the Hungarian competition situation is clearly warranted, since the competition authority appears to be well on its way to being a fully functioning agency in an economy that has the longest exposure to the market systems of the West. Furthermore, the draft price regulation legislation we viewed would involve the cartel office in actively setting prices, rather than allowing the market to do so. That legislation attempted to make "price gouging" and "unfair prices" illegal. There could be shortages due to unanticipated demand, and the price system, which allows prices to rise and induce more production, is the best way to eliminate such shortages. These price changes are natural and not anticompetitive but are difficult to distinguish from conduct that may be characterized as "gouging."

E. SOVIET UNION

The Soviet Union has not yet passed an antimonopoly law, although a draft law has been introduced at the legislature. The Russian Republic enacted a competition law in March 1991. How these laws will fit into the current economic reforms is unclear.

In October 1990, President Gorbachev unveiled his plan for the Soviet Union's transition to a market economy.[204] The plan required dis-

204. Brady & Boyle, *The Economy Will Turn into a Wild Beast*, BUS. WK., Nov. 5, 1990, at 71.

mantling of the economic monopoly of the state government.[205] Beyond this broad policy objective, the plan had no further details.[206] Indeed, a recent study of the economy of the Soviet Union concluded that the plan did not provide for the elimination of restrictions on the products which individual enterprises are permitted to produce and did not even mention how import liberalization can promote competition.[207] The Gorbachev plan also postponed the liberalization of the pricing system and the abolition of subsidies to unprofitable firms.[208] A committee composed of republic representatives would oversee economic policies under the plan.

On November 23, 1990, President Gorbachev presented a Union Treaty to the Supreme Soviet.[209] At that time, what the relative roles of the union and republic governments would be in promulgating and enforcing competition policy were unclear.[210]

As of February 1991, the Soviet Union's economic reform was in disarray.[211] The Soviet Union's economic situation contributed to the difficulty in implementing reforms. For example, at the end of 1989, the gross hard currency debt of the Soviet Union was approximately $48 billion.[212] Its gross debt was approximately $33 billion,[213] and output of key industries declined in 1989.[214] Gross National Product Per Capita was $9,236 and fell two percent in 1990.[215] National income fell by four percent in 1990, and labor productivity by three percent.[216]

It is widely believed that Moscow is shying away from a market-oriented economy.[217] New relationships continued to develop between the various republics and the all-union government, and events in the Baltic republics put Soviet membership in various international organi-

205. *Id.*
206. *Id.*
207. THE ECONOMY OF THE USSR, *supra* note 95, at 12.
208. Brady & Boyle, *supra* note 204, at 71.
209. Demchenko & Tsikora, *Russia Has Ratified the Treaty, Decision Was Unanimous*, Soviet Press Digest, Nov. 23, 1990.
210. *Id.*
211. Drozdiak, *European Community Set to Resume Aid to Soviets; Shipments Halted over Baltic Crackdown*, Wash. Post, Feb. 20, 1991, at A15.
212. *Soviet Payment Delays Now Require that Companies Use Caution in Arranging Terms*, BUS. AM., July 2, 1990, at 12.
213. *Id.*
214. KROLL, *supra* note 41, at 2.
215. Porubcausky, *Moscow to Ration Meat, Grain, Vodka*, Wash. Post, Jan. 26, 1991, at A10.
216. *Id.*
217. Drozdiak, *supra* note 211, at A15.

zations on hold.[218] On February 13, 1991, the Kremlin announced a plan to raise retail prices two to three times, but the legislature of the Russian Republic rejected this the very next day.[219] Subsidies on most consumer goods also would be lifted according to this plan.[220]

In November 1990 and February 1991, staff of the FTC and the DOJ participated in OECD consultations with the Soviet Union and the Russian Republic concerning their draft antimonopoly laws. At the invitation of the OECD Center for Cooperation with European Economies in Transition, Soviet and Russian officials consulted with officials from six OECD countries and with the OECD Secretariat. The draft laws appeared similar to those of the Central European countries, containing many of the same strengths and weaknesses. The draft legislation of the Russian Republic was subsequently enacted. The FTC and the Antitrust Division of the DOJ are planning to hold a seminar on competition policy and law enforcement for both union and republic officials in Washington, D.C. in the near future.

CONCLUSION

If the old production, distribution, and governmental structures are swept away, and strong financial institutions are developed, and new institutions create the proper incentives, then a competitive market system similar to that in the United States and other market economies is likely to grow in Eastern and Central Europe. An effective competition policy is an integral part of these changes. Although it is unlikely that competition policy in these countries will mirror that of the United States, the American system has a great deal to offer in terms of analytic approach and institutions. Thus countries such as Poland, Czechoslovakia, and Bulgaria have been motivated to seek technical assistance from the FTC and the Antitrust Division of the DOJ in developing and applying competition policy.[221] While competition policy may not be the first thing needed in these countries, it is a key part of the reform process.

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218. Uchitelle, *IMF is Now Cool on Soviet Membership*, N.Y. Times, April 30, 1991, at D1.
219. *Russia's Legislature Rejects Soviet Price Increases, Challenging Gorbachev*, Wash. Post, Feb. 15, 1991, at A12.
220. *Kremlin Unveils Plan to Double Prices*, N.Y. Times, Feb. 14, 1991, at A3.
221. Future long-term assistance from the agencies will further address the needs of these countries.