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SYMPOSIUM ARTICLES

THE CENTRAL EUROPEAN NATIONS AND THE EU WAITING ROOM—Why Must the Central European Nations Adopt the Competition Law of the European Union?

*Eleanor M. Fox**

I. INTRODUCTION

Seven years have passed since the democracy revolutions transformed the societies and the economies of the Central European countries (CEECs). Moving from communism to democracy and from command-and-control economies to markets, the nations adopted competition policy as an important element for and after the transitions. They embarked upon privatizations, restructurings, lowering barriers to trade, creating incentives for business firms to compete and perform, and organizing competition offices to police the rules of the game. By these and related policies, the nations sought to develop healthy economies, to integrate their economies with those of trading partners, to stabilize political relations, and also to legitimate freedom of enterprise by putting a lid on “greedy” exploitations by powerful firms. The nations strove to reform their economies both by initiatives “from the top”—privatizations and break-up of the huge, inefficient state owned monopolies, and by initiatives “from the bottom”—fostering entry, growth, and responsive behavior by entrepreneurs.

At the dawn of this new era many Americans urged the post-communist nations to adopt U.S. style antitrust rules, while Europeans suggested that the competition law of the European Community (EC) provided a better fit. The European

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model, which offers greater concern for open markets and business opportunity, promised an anchor of stability from the ship of a friendly neighbor, a basis for more fluid trade with Western Europe, and an entrée card to the European Union (EU). The American model, which focuses on the consumer and on optimal output, offered the virtue of less government when government itself had been the devastating problem, and, possibly, it offered a shorter track to efficiency.¹

This stage of the debate is now over. The CEECs have adopted laws drawn largely from the model of the EU. Seeing their economic growth and economic and political well-being linked to Western Europe, most of the CEECs have entered the waiting room for membership in the EU and have signed Europe Agreements.² Under the Europe Agreements, the CEECs agree to adopt EC competition rules for matters affecting trade or competition with the EU.³ Further, each promises to change its own national law so as to "approximate" the competition law of the EC.⁴ EU officials have stated that in principle the CEECs will be accepted as Members of the EU; that they will be admitted as soon as they are ready democratically, institutionally, and economically (though recent financial and monetary crises that must be resolved among the current 15 Members of the EU may suggest a longer time frame). Success of the CEECs in approximating EC law is understood to be a critical factor in reaching the state of "readiness" for member-

1. For a comparison of U.S. laws and European Community (EC) law on abuse of dominance, see Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 987-90 (1986).

2. The Europe Agreements are a series of association agreements that the EC entered into with various CEECs pursuant to the authority granted in Article 238 of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. See Roger J. Goebel, *The European Community and Eastern Europe: "Deepening" and "Widening" the Community Brand of Economic Federalism*, 1 NEW EUR. L. REV. 163, 218-23 (1993); see also Association Agreements with the Countries of Central and Eastern Europe: A General Outline, Angence Europe, Eur. Docs. No. 1646/47 (Sept. 7, 1990).

3. See, e.g., Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland on the other part, Dec. 16, 1991, art. 63(1)-(3), 1993 O.J. (L 348) 2, 16 (1993) [hereinafter Poland Europe Agreement]. Poland's Europe Agreement will be used for illustrative purposes throughout this article. The same provisions are in the other Europe Agreements, but are differently numbered.

4. See, e.g., *id.*, arts. 68-69.

ship in the EU.

This essay looks at the virtues and costs of the EC requirement that the CEECs national laws "approximate" EC law. It looks at the significance of approximation both in the specific European context and in the context of the dialogue on harmonization and convergence of the law of trading partners of the world.

In this essay I describe the Europe Agreements and the CEECs obligations thereunder to "approximate" EC law. I then briefly describe the competition laws of the four nations directly to the east of Germany and Austria, all thought to be serious candidates for admission to the EU soon after the turn of the century—Poland, Hungary, the Czech Republic and the Slovak Republic (hereafter called the Visegrad countries, so named after a summit conference in that Hungarian city). I then consider how closely the competition laws of these nations have converged with the EC competition laws. Next, I discuss the wisdom of forced convergence, and finally I comment on the benefits conferred by EC oversight and pressure for competition policy.

II. THE EUROPE AGREEMENTS AND THE WHITE PAPER

The Europe Agreements apply to transactions affecting commerce with the EU or any of its Members. They contain provisions to safeguard free movement of goods, services, capital and workers—provisions adopted from the basic economic blueprint for the EC as set forth in the Treaty Establishing the European Community (EC Treaty).⁵ Also, as in the EC Treaty, the Europe Agreements provide for economic, cultural and financial co-operation; non-discrimination in public contracting; and adoption of EC competition rules for the free trade area. The Europe Agreements expressly require that any practices contrary to the competition rules be "assessed on the basis of criteria arising from the application of the rules of [the EC Treaty]."⁶ Further, the Europe Agreements state:

[t]he Contracting Parties recognize that the major precondition for [e.g.,] Poland's economic integration into the Community is *the approximation of that country's existing and future*

5. See *supra* note 2.

6. Poland Europe Agreement, *supra* note 3, art. 63(2).

legislation to that of the Community. Poland shall use its best endeavors to ensure that future legislation is compatible with Community legislation.⁷

It is this provision that requires the CEECs to harmonize their national competition laws with those of the EU. No such obligation is imposed on the Member States of the EU, which have the right to retain the competition law of their choice.

There is room for debate about the construction of the word "approximation" in the quoted article of the Europe Agreements.⁸ The European Commission's White Paper on Enlargement (White Paper)⁹ takes the view that approximation means transplanting EC competition law into the CEECs' national law. The White Paper acknowledges that the EU Member States themselves have no obligation to align their domestic law with EC law.¹⁰ It notes, however, that EC law is directly effective within the Member States (*i.e.*, it is automatically a part of the Member States' national law whenever Member State trade is affected), and EC competition law is enforced by a central authority.¹¹

The White Paper continues:

For the CEECs, the situation is obviously different [from the situation in the Member States]. An obligation for approximation was considered indispensable because there could be no extension of Community law to them as is the case for Member States. Such an approximation is therefore necessary *inter alia* to ensure that economic operators can be sure to act on a level playing field, and in order to prepare the CEECs' economies for future membership.¹²

Turning to the level of detail required by the concept of "approximation," the White Paper states that "the key ele-

7. *Id.*, art. 68 (emphasis added).

8. *See id.*

9. White Paper, Preparation of the Associated Countries of Central and Eastern Europe for Integration into the International Market of the Union, COM(95)163 final [hereinafter White Paper]; *see also* Addendum: Annexe to White Paper, Preparation of the Associated Countries of Central and Eastern Europe for Integration into the International Market of the Union, COM(95)163 final/2 [hereinafter White Paper Annex].

10. *See* White Paper annex, *supra* note 9, at 59

11. *See id.* at 58.

12. *Id.* at 59.

ments" of EC competition law must be put into place in the CEECs; and that EC group exemptions and notices "must . . . be considered as constituting key elements of the Community competition system."¹³

Several arguments support the requirement of approximation and the broad construction urged by the White Paper. First, it is argued, that it is necessary for the CEECs to adopt EC competition law to make them ready for membership. Second, it is necessary to assure a level playing field for Western European business. Third, since EC law is not automatically a part of CEEC national law even where cross-border effects occur, and since there is no central system for enforcement of the EC principles, it is necessary to establish a mechanism to bring EC law into the legal systems of the CEECs.

Fourth, it is thought, approximation will be good for the CEECs. The CEEC economies are so small, and so many of their transactions will affect trade with the EU, that it would be unduly burdensome if not impossible for a Central European nation (having agreed to apply EC rules in the free trade area) to maintain two sets of rules and regulations in tandem.

Two necessary assumptions and one normative conclusion underlie these arguments. The first assumption is that the EC competition rules are as good as or better than any other possible set of competition rules. The second assumption is that no special tailoring of the EC rules is needed or appropriate for transition economies (or for these transition economies). The normative conclusion is that Western Europe needs (or is enti-

13. See *id.* at 58. The group exemptions and notices are "secondary legislation" of the EC. They establish many rules. The level of detail is great and is not necessarily dictated by coherent competition policy. For example, group (or block) exemptions are provided because, under the EC system, exemption by the European Commission is required to establish the validity of agreements that have at least a minimal possibility of affecting competition. The group exemption system allows automatic exemption for contracts that fit a certain blueprint. Block exemptions specify lists of required clauses, permissible clauses, and prohibited clauses.

However, the prohibited clauses do not always coincide with harm to competition; the permissible clauses do not represent a full list of clauses that are pro-competitive or benign; some permissible clauses may be anticompetitive and vice versa. This over and under inclusiveness is a predictable result of a system overwhelmed by notifications on which the competition agency must act. The block exemptions reflect the search for common transactional forms that can be given a presumptive "seal of approval" without individual scrutiny. See GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY, & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 729-32 (1993).

tled to) a "level playing field." While the rationale for a "level playing field" entitlement is not spelled out, the concept apparently reflects a Western European fear that CEEC businesses will be in a position to out-compete Western European firms in Western Europe if trade barriers go down but the CEECs have not replicated EC competition law. The theory is that cartel or monopoly profits, state aids, or even efficiencies achieved in the domestic market by practices forbidden in the EU¹⁴ but not in the CEEC will subsidize or enable low pricing in Western Europe. The assumptions are not necessarily true, and the normative conclusion is controversial.

III. THE COMPETITION LAWS OF THE VISEGRAD NATIONS

All four of the Visegrad nations have laws against restrictive contracts and abuse of dominance, and merger control. They prohibit cartels, anticompetitive collaborations, resale price maintenance, and exclusionary and restrictive vertical restraints. Hungary and the Czech and Slovak Republics amended their statutes to assure coverage of vertical restraints. All four nations' abuse of dominance laws now, after amendments, nearly track Article 86 of the EC Treaty (although, unlike EC law, they concentrate on excessively one-sided bargains). Dominance is presumed at 30% or 40% market share. Mergers must be notified and are to be prohibited if (in some nations) they impair competition or (in other nations) they create or entrench dominance, unless (in three nations) economic advantages to the nation outbalance the anticompetitive effects.

The laws are interpreted to protect market actors from unfair abuse, to help create markets, and to facilitate the growth of small and middle-sized firms.¹⁵

14. Certain principles of EC competition law could prevent European Union (EU) firms from achieving maximum efficiencies in their distribution systems. *See, e.g.,* Joined Cases 56 & 58/64, *Consten and Grundig v. Commission*, 1966 E.C.R. 299, 340-45 (1966) (agreements that strictly limit distributors of a single manufacturer's product to a specific Member State and prevent other distributors of the same product from selling in that Member State violate Article 85 of the EC Treaty, despite potential for such agreements to improve market efficiency).

15. *See* JOHN FINGLETON, ELEANOR FOX, DAMIEN NEVEN, & PAUL SEABRIGHT, *COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE* 114-47 (1996).

IV. HARMONIZATION

Approximation of CEEC law to EC law must be seen in a larger context. The larger context is the discussion surrounding harmonization of the laws of trading nations of the world so as to break down barriers to trade and tend towards a more nearly integrated world economy. Some observers and policy makers state the ultimate objective of harmonization as merely an increase in the flow of trade and investment, with resulting lower costs to intermediate buyers or consumers. Others see the objective as the formation of "community," entailing mutual respect of peoples and a more promising environment for peace. Harmonization tends to facilitate market integration, whereas the existence of many different systems of law, without bridges and interfaces, can tend to breed isolationism and lack of understanding.

Much has been written about the enterprise of harmonization. It has been argued by some that harmonization is essentially wrong-headed on grounds that it involves a relinquishment of sovereignty of nations, and that domestic or lower-level solutions are more likely than multinational solutions to serve the people of the participating nations and to be tailored to their particular needs. On the other hand, harmonization has the virtue of increasing trade flows by eliminating unnecessary transaction costs and putting businesses from different nations on the same "track."

Harmonization could have the virtue of moving the world towards "better law," in that the process of harmonization involves conversation and information flows and is often a process of enlightenment. But harmonization can have the pitfall of degrading law, because agreement may be possible only at the lowest common denominator; because harmonization to a sub-optimal standard may be forced by one country on another; or because conditions may change and, in a world of mandated common principles of law, adaptation is difficult to achieve.

In some areas of law the claim for harmonization is much stronger than in others. The claim is strongest where, as in environmental law, there are pervasive externalities, and where the protection of values that a society chooses to protect entails high costs in a world of disparate law. The claim is less strong in competition law than in regulatory areas such as

environmental law for four reasons. First, competition law is not essentially cost-raising, as is law requiring investment in environmental controls; it is essentially market-freeing and cost-lowering. As a result, there is no perceptible race to the bottom (degrading one's law to attract capital), and the argument—We pay the costs of antitrust; therefore you should too—is based on the false premise that antitrust in essence imposes costs on business. Second, externalities (*e.g.*, from off-shore cartels) can usually be controlled by accepted uses of the effects doctrine; that is, nations can legitimately apply their law to foreign actors who intend to harm and do harm commerce within the regulating nation.

Third, only certain antitrust rules have a distinct impact on trading relations. Anticompetitive conduct with direct trade effects includes, particularly: competitor cartels dividing markets at borders, and anticompetitive market access restraints. Market access restraints can be horizontal (cartels with boycotts), or vertical (*e.g.*, exclusive dealing or refusals to deal in concentrated high barrier markets where the restraints prevent outsiders from getting to market or from doing so at a competitive price). Also, anticompetitive discriminations by buyers or sellers with market power (*e.g.*, public procurements) have a distinct fit with trade law where the discrimination favors nationals. Mergers and monopolistic conduct with exploitative spill-over effects abroad are also matters of more than national concern. On the other hand, rules protecting fairness, such as rules against one-sided bargains, do not hurt trade.

Fourth, most nations have or are adopting competition laws, and the laws are relatively similar. Where antitrust-related trade friction exists, it is not because of lack of harmonization of competition laws. The differences in formulation of principle virtually never produce trade friction, even though the differences are often based on different values (*e.g.*, whether the law should protect fairness and small business). The friction is most commonly produced by non-enforcement of existing law.¹⁶

16. See Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law—The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 WORLD COMPETITION L. & ECON. REV. 5, 8-9, 11-29, 33-34 (1995).

"Soft" harmonization is often beneficial, for it implies and is the result of conversation and learning and the tendency of nations to adapt their methods to those that they come to view as better. But, as the foregoing analysis implies, there is not a strong case for a more aggressive project for harmonization of the competition laws of nations—even among equal nations.¹⁷

V. APPROXIMATION

The enterprise of harmonization as applied to Central Europe is yet more complex. First, at the moment of the recent democracy revolutions, the CEECs did not start with a developed competition law; they started more or less with a clean slate. Therefore, there is no project to harmonize two sets of existing laws. Second, the European Union not only had and has a developed law, but the approximation it envisions is approximation to *its* law; a unilateralist version of harmonization.

One might expect that the CEECs, with no pressure at all, would be happy to adopt the general open-market, no abuse principles of the EU into their own competition laws; one would expect them to choose general competition principles similar to those of the EU.

But might a CEEC prefer not to adopt the detail of EC competition law, or not to adopt selected details; or might it prefer simply to retain the right to choose what if any details to adopt?

First, for the sake of autonomy, a nation may cherish the sovereign right to choose. To be sure, by their decisions to apply for membership in the European Union, the CEECs effectively declared themselves prepared to do what is necessary and appropriate to ready their economies for membership. But adoption of a number of the details of EC competition law, including obligations regarding distribution of products and details specified in block exemptions, may be perceived as having no link to trade or efficiency; and since detail itself may burden a newly evolving system, the requirement of approxi-

17. There is a much stronger case, however, for the internationalization of a few consensus competition principles that lie at the intersection of trade and competition. See Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 29-33 (1995).

mating the detail of EC law may be perceived as weighing down rather than lifting up the effort to establish appropriate and enforceable law.

Second, the CEECs may prefer a set of details tailored to their own economies. For example, some nations may wish to elevate the efficiency goal, and may believe that their business firms are likely to become viable and stronger faster under rules focused on this goal. Alternatively, they may wish to stress equity, and they may wish to apply equity principles (e.g., against excessively one-sided contracts) even when the alleged abuse is of no concern under EC competition law.

VI. OPEN ARCHITECTURE FOR MARKET INTEGRATION

The White Paper urges that approximation even on detail is necessary for several reasons,¹⁸ most particularly, that approximation will ensure uniformity of competition principles (viz., the EC principles) in matters affecting trade, and that it will move the CEECs toward market integration with the EU. Therefore, it remains to be asked: Had the Europe Agreements simply required CEEC acceptance of EC law for the free trade area, would lack of a CEEC obligation to accept EC principles as their national law have hindered market integration objectives?

In embarking on this inquiry it is important to recognize four points. First, competition rules against private restraints are not the only or even the main mechanism for liberalization that facilitates market integration. Most of the weight belongs on GATT-type¹⁹ disciplines on governments such as those imposed by EC Treaty Articles 9, 12, 30, 59 and 60.²⁰

Second, trade liberalizing competition policy is a small piece of competition policy. One would not write a comprehensive competition law if one's objective were only to remove blockages to trade and to move one nation's economy along a path towards integration with another economy. This is so because competition offenses are comprised of both exclusionary and exploitative conduct, and much of the exploit-

18. See *supra* Part II.

19. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

20. These articles deal with freedom of movement of goods and services. See generally EC TREATY, arts. 9, 12, 30, 59, 60.

ative conduct is not exclusionary, and much of the exclusionary conduct is local and does not extend to or cross national boundaries. Even a nation-wide price-fixing cartel—which is seriously anticompetitive—would not (absent government barriers) undermine trade and integration unless the cartel were accompanied by a boycott against imports. Rather, the high cartel price would trigger a flow of trade.

Third, if antitrust prohibitions are overbroad they can retard the development of efficient, procompetitive activity that itself can facilitate trade.

Fourth, it follows that a sound competition policy will catch all trade-restraining *anticompetitive* restraints, and a sound trade policy would not demand more of a nation's competition policy.

A simple competition law would thus satisfy all requirements for trade and competition that may reasonably be expected of national competition law.

Yet it is argued that failure to duplicate EC rules designed to promote the free flow of parallel imports, as well as the failure to adopt the EC block exemptions, would be a sign of inhospitality towards market integration. To be sure, the EU has a strong policy to protect the flow of parallel imports. The policy gave birth to the rule of *Consten and Grundig*²¹ and many related rules that restrain a producer in deciding how to distribute its own product, even when the producer faces strong competition. The EC rules put into tension the dual objectives of freedom of firms to pursue efficiency, and the free flow of goods across borders. The EU itself has produced a discussion paper and is reexamining its law on point, for it is not clear that the EC rules do, as intended, advance market integration.

In any event, if there were a perceived gap in national law regarding border restraints inhospitable to market integration (e.g., if failure of a CEEC to adopt the *Consten and Grundig* principle²² into national law was deemed hurtful to market integration goals), enforcement of EC law would close the gap. If Cepelia, seller of Polish folk arts and crafts, licensed a German distributor to sell Cepelia products in Germany only, and

21. See *supra* note 14.

22. See *supra* note 14.

if the German distributor wished to sell to Polish as well as German buyers, the restraint imposed by Cepelia would literally restrain EU's outbound trade. Under the Europe Agreements, the principles of EC law are applicable. The EU could seek enforcement of the Europe Agreement obligations by the Polish Antimonopoly Office, and, failing Polish enforcement, the European Commission could enforce EC law directly against Cepelia.²³ Clearly, EC law would apply to Cepelia's agreement to keep parallel imports out of Germany.²⁴ The important point is that all trade-related restraints are subject to scrutiny under EC law.

In sum, competition law loosely harmonized in principle to EC competition law, combined with national obligations to apply EC competition law in the free trade area, would seem to provide the "open architecture" necessary for market integration.

VII. THE REALITY OF THE TASK OF APPROXIMATION

The EU might indeed have not required the CEECs to copy EC law into their national systems. But they have done so, and we now have six years of experience under the obligation to approximate. What observations can be made about the benefits or detriments of the task? I use the Visegrad nations as my sample.

First, all of the nations took their obligations seriously. They changed their statutes progressively, to approximate EC law, and they studied and often adopted EC case law precedents. They had visits from and visited the European Commission. They worked with EC experts (and others), learning from them. The heads of the Antimonopoly Offices sometimes were

23. In enforcing its own law, the European Commission would face possible jurisdictional problems regarding the scope of EC law as applied to acts taken outside of the EU that impact only EU outbound trade. This should not pose difficulties. The CEEC parties to the Europe Agreements, like the members of European Free Trade Area (Iceland, Norway and Lichtenstein), have agreed to be subject to the principles of EC competition law where EU trade is affected. *See, e.g.,* Poland Europe Agreement, *supra* note 3, art. 63(2). The countries have the obligation to make these principles legally binding on their nationals and to enforce the principles. *See, e.g., id.* If the CEECs fail in these obligations, it is a small step to allow the EU, in effect, to enforce the obligations by direct application of EC law.

24. *See* Joined Cases 89, 104, 114, 116, 117, 125-129/85, *Ahlström Osaakeyhtiö v. Commission*, 1988 E.C.R. 5193, 5240-43 (1988).

able to rely upon their obligations to approximate in urging pro-competition policies for their nation. As a result, the voice for competition became stronger than it might otherwise have been.

Second, one of the nations in particular expressed difficulties with adopting certain EC principles, and argued for the right to pursue more liberal policies in the area of vertical restraints;²⁵ but eventually all of the nations conformed more or less with the EC law, though adoption of block exemptions was more spotty, and the White Paper obligation to adopt the block exemptions was apparently not pressed.

Third, European Commission authorities did press the Visegrad nations to adopt virtually all of the EC prohibitory rules, but apparently did not express concern when the nations adopted laws that were significantly more prohibitory than the law of the EC; *e.g.*, the law against dominant firms' imposing excessively one-sided contracts.²⁶

VIII. CONCLUSION

With respect to the CEECs, the European Union chose a course of unilateralist harmonization. This route had two serious downsides: (1) the CEECs lost their freedom to choose and tailor competition law to their needs; and (2) parts of EC competition law are probably not optimal for CEEC needs. The choice had one major advantage; the nations have developed a much greater commitment to competition policy than would probably otherwise have been the case.

The validity of the market integration and "readiness for membership" rationales for forced harmonization are theoretically unconvincing. In fact, however, the communications, interactions and pressures surrounding the approximation obligation and process proved to be of major importance in the effort to begin to connect the CEEC economies with that of the EU in a positive, open-market sense.

25. Cf. Ferenc Vissi, *Challenges and Questions Around Competition Policy: The Hungarian Experience*, 18 *FORDHAM INT'L L.J.* 1230, 1239-44 (1995).

26. For a critique of the Visegrad countries' allocation of most of their competition resources to correcting one-sided bargains and similar "unfair abuses," see FINGLETON, FOX, NEVEN, & SEABRIGHT *supra* note 15, at xiv, 139-41, 178.

