The international dimension of the antitrust practice in Poland, Hungary and the Czech Republic

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Executive Summary

The objective of this paper is to analyse how the competition authorities in the Czech republic, Poland and Hungary (CPH) have dealt with the interface between trade and competition in their actual practice.

Competition authorities are confronted with issues of trade and more generally issues of economic integration in various ways. First, and most fundamentally, competition authorities need to consider the exercise of their jurisdiction over cases with an international dimension. The exercise of jurisdiction is constrained by domestic legal frameworks as well as international treaties and rules. For the countries under review, the Europe agreements with the European Union (EU) provide the only conventional (Treaty) framework for the exercise of jurisdiction. Accordingly, we consider how domestic competition authorities have exercised jurisdiction within this framework and more generally whether this framework has operated well.

We find there has not been any conflict in the allocation of jurisdiction between CPH on the one hand and the EU on the other hand. The Europe agreements have however been largely dormant even at the level of consultation and the absence of conflict is probably associated, to some extent, with limited integration between the EU and the countries under review so that few cases could have arisen in the first place. The absence of conflict is also probably associated with a fairly favourable, if not permissive, attitude towards foreign firms in CPH so that few European firms have complained to the EU. That is not say however that the Europe agreements had not effect. Clearly, for antitrust authorities in Central Europe, the prospect that they may have to implement European law in addition to their own law has given them as strong incentive to approximate the latter with the former. Hence, the Europe agreement will probably be remembered by economic historians more as tool to foster convergence in anti-trust practice than an instrument to regulate the allocation of jurisdiction.

Second, competition authorities face the delineation of the relevant market in its geographic dimension. The relevant market will be dependent on the extent to which competitors located at different locations act as competitive constraints on one another in the short term. Competition agencies will also typically consider international competition in the assessment of dominance. In particular, when the relevant market has been delineated as national, the extent to which large domestic firms will be able to raise price will be affected by the prospect of entry by domestic but also foreign firms. The analysis of the entry barriers that potential competitors abroad would face will thus be an important issue in the assessment of dominance.

The definition of the relevant geographic market suffers from significant shortcomings in each country under review, but to a different degree. Overall, there is a general bias in favour of narrow market definition. In the Czech republic, the legal framework introduces the presumption of a prohibition for mergers on the basis of a market share in the domestic economy. This framework does not allow for mergers meeting the threshold to be waived simply because the relevant market is broader than the Czech republic. In Poland, there is at

times a bit of a confusion between geographic market definition and the analysis of dominance. In Hungary, foreign competition is only considered as a relevant factor to assess dominance. A proper market definition, which fully recognises the importance of foreign competition would allow for an evaluation of competition which is better informed. In Poland and Hungary, the shortcomings of the current approach could be easily remedied. From this prospective, it would useful for the antitrust agencies to adopt a clear definition of what is meant by the relevant market for instance through a set of published guidelines.

Third, beyond their prime responsibility in the implementation of the competition statutes, antitrust authorities often play an important role in terms of competition advocacy. Competition advocacy by the antitrust authorities is an essential counter-weight against the many organised lobbies wishing to reduce competition for the sake of appropriating rents. Protection from foreign competition is of course an area where organised lobbies are particularly active and often successful. The antitrust authorities thus have an important role to play in the formulation of trade policies and we seek to assess the role that they have played.

We observe that anti-trust agencies have attempted to advocate competition in the formulation of trade policy. The evolution of their independence is however mixed. There are some worrying signs that the Polish agency has become less independent whereas the Hungarian agency has probably become even more independent.

Finally, competition authorities often pursue objectives that may be broader than simply maintaining effective competition in the domestic market. Industrial policy is one of these considerations which might sneak in competition decisions in a more or less open fashion. The treatment that will be reserved to foreign firms is the particular breed of industrial policy that is of interest to us. On the one hand, there may be a tendency for antitrust authorities to favour foreign direct investments because they expect that they will bring about wider benefits like technology transfers. On the other hand, there may be a concern that control over domestic activities will be lost to foreign investors and this concern may lead to a bias against foreign direct investment.

It appears that anti-trust agencies in all three countries could indeed be pursuing objectives of industrial policy in the exercise of merger control. The situation gives rise to particular concern in Poland where the suspicion arises that profitable market positions have been auctioned off to foreign buyers in exchange for commitments which are unrelated to the competitive situation. In the other two countries, it seems that the attitude towards foreign firms has been quite favourable. For instance, the prospect for restructuring or technology transfer associated with foreign ownership is often cited as a benefit which can trump concerns about reduction of effective competition.

1. Introduction

The objective of this paper is to analyse how the competition authorities in Poland, Hungary and the Czech republic have dealt with the interface between trade and competition in their actual practice.

Competition authorities are confronted with issues of trade and more generally with issues of economic integration in various ways. First, and most fundamentally, competition authorities need to consider the exercise of their jurisdiction over cases with an international dimension. The exercise of jurisdiction is constrained by domestic legal frameworks as well as international treaties and rules. For the countries under review, the Europe agreements with the European Union (EU) provide the only conventional (Treaty) framework for the exercise of jurisdiction. It will be important to consider how domestic competition authorities have exercised jurisdiction within this framework and more generally whether this framework has operated well.

Second, competition authorities face the delineation of the relevant market in its geographic dimension. The relevant market will be dependent on the extent to which competitors located at different locations act as competitive constraints on one another in the short term. Market definition is an essential step in the assessment of antitrust cases, not only in the assessment of mergers but also in the analysis of anti-competitive agreements and potential abuse of dominance. Often, the delineation of the relevant market in its geographic dimension will also reduce to the choice between a small set of alternatives; in particular, whether the relevant market is national or includes several countries will thus often be the focus of attention. The extent to which foreign firms might constrain the exercise of market power in the domestic economy will then be a central issue. It will be important to consider how competition authorities have handled the issue.

Third, competition agencies will typically also consider international competition in the assessment of dominance. In particular, when the relevant market has been delineated as national, the extent to which large domestic firms will be able to raise price will be affected by the prospect of entry by domestic but also foreign firms. The analysis of the entry barriers that potential competitors abroad would face will thus be an important issue in the assessment

of dominance. Here again, it will be important to consider how competition agencies have handled the issue.

Fourth, beyond their prime responsibility in the implementation of the competition statutes, antitrust authorities often play an important role in terms of competition advocacy. This role is arguably particularly important in developing and transition economies where market mechanisms may not be firmly established or even well understood. But even in mature market economies, competition advocacy by the antitrust authorities is an essential counter-weight against the many organised lobbies wishing to reduce competition for the sake of appropriating rents. Protection from foreign competition is of course an area where organised lobbies are particularly active and often successful. The antitrust authorities thus have an important role to play in the formulation of trade policies and we will seek to assess the role that they have played.

Finally, competition authorities often pursue objectives that may be broader than simply maintaining effective competition in the domestic market. Such broader objectives may be explicitly assigned to them (market integration being a case in point for the EU), but they may also be led to pursue these objectives by other constituencies and allowed to do so because of ineffective mechanisms of accountability. Industrial policy is one of these considerations which might sneak in competition decisions in a more or less open fashion. The treatment that will be reserved to foreign firms is the particular breed of industrial policy that will be interest to us. On the one hand, there may be a tendency for antitrust authorities to favour foreign direct investment because they expect that it will bring about wider benefits like technology transfers. On the other hand, there may be a concern that control over domestic activities will be lost to foreign investors and this concern may lead to a bias against foreign direct investment.

In what follows, we will review the activities of the competition authorities of Poland, Hungary and the Czech republic in the last four years. We will focus on the issues just identified where the interface between competition and economic integration appears to be most important. We will take each country in turn and for each country, we will organise our discussion around three themes, namely the analysis of foreign competition in market definition and the analysis of dominance, the role of advocacy in the formulation of foreign

economic policy and the attitude towards foreign firms. The relative attention which is given to each of these themes will however vary across countries.

To the extent that the framework for the exercise of jurisdiction in the context of the Europe Agreements is the same for the three countries concerned, we will also discuss this framework and its operation at the outset (section 2).

Some brief outline of our methodology may also be useful. Our review of the work undertaken by competition authorities[1] is mostly based on the analysis of actual decisions and interviews with the competition authorities. We have also interviewed officials at the Competition directorate of the European Commission and the OECD as well as some anti-trust practitioners.

For each country, we have made a first selection of cases on the basis of the publications of the antitrust authorities. We have then asked the authorities to make their own selection and we have validated their choice through an interview. Our analysis of the cases thereby selected is based primarily on the published decisions. In many instances, only a summary version of the decision, or none at all, was available in English. Hence, we had to find partners or associates who were fluent in the original language and competent in modern antitrust analysis. We discussed the content of the full decisions directly with them[2]. Cases were then also discussed directly with the antitrust authorities.

Several benchmarks have been used for the assessment of the decisions taken by the competition authorities. First, we have considered the consistency of the decisions both internally (in terms of the reasoning proposed in individual decisions) and across decisions. Second, we have considered whether the economic analysis proposed in the decisions being reviewed is convincing, in terms of reasoning and in terms of the evidence presented to support the arguments. The type of reasoning and evidence which is usually presented in other jurisdictions that we are familiar with (in particular the EU, but also some member states) is an implicit benchmark in this evaluation. It should be stressed however that we are

[1] We have focused on the activities of the competition agencies which account for the bulk of antitrust decisions in the countries under review. However, for the cases that we have analysed, we have also considered, if any, the decisions made on appeal.

[2] We preferred this solution over the alternative of having the decisions translated. Indeed, important details or nuances are often lost in the process of translation by professionals who are not familiar with antitrust analysis.

not in a position to judge whether decisions were "right". All we can do is to evaluate the quality of the arguments that were put forward, recognising that other arguments that were or were not considered by the antitrust authorities could be decisive.

2. The exercise of jurisdiction

The exercise of jurisdiction in international matters can appeal to various principles (see Neven and Mavroidis, 1999, for a discussion of the issue). In the area of antitrust, most countries currently adhere to the so called "effects doctrine". According to this approach, a country can exercise jurisdiction whenever effects of an activity are being felt within its territory. Effects can be felt with respect to inbound or outbound trade. In the former case, the Competition Authority asserting jurisdiction does so in order to counteract negative effects stemming from imports in its own market; in the latter, in order to address negative effects against its exports to foreign markets.[3]

The legal framework of both Poland and the Czech republic have make clear reference to this principle from their inception in the early nineties. For instance, Art. 2.3 of the Act on the Protection of Economic Protection in the Czech republic (from January 30, 1991[4]) states that "The act shall also apply to activities or conduct abroad as long as the effects thereof influence the domestic market". Similarly, Art. 1.2 of the Act on Competition and Consumer Protection in Poland stipulates that "The act governs the rules and measures of counteracting competition restricting practices and anti-competitive concentrations of entrepreneurs and associations thereof, where such practices or concentrations cause or may cause effects on the territory of the Republic of Poland"[5]. On both occasions, the effects doctrine is limited to inbound trade.

The situation in Hungary is different. The first version of the law (20 November 1990) did not contain such a provision. Its first article indicated that "This Act shall apply to economic activities of entrepreneurs on the territory of the republic of Hungary, unless

[3] It is submitted that the former case has stronger links with the territoriality principle which is the governing principle when it comes to asserting jurisdiction and hence on most occasions such exercise of jurisdiction is in conformity with public international law. In the later case, the links with the territoriality principle are substantially weaker and hence conformity with international law is problematic.

[4] Amended by Acts 495/1992 and 286/1993.

[5] Wording from the new draft law currently presented to the Economic Committee of the Council of Ministers. Earlier versions contained a similar provision, see Fingleton et al (1996).

otherwise provided by any other act". Hence, it appears that economic activities taking place abroad were not covered even if they had effects on the Hungarian territory. This has been recognised as a problem by the Hungarian authorities in the context of international mergers[6]. Accordingly, the Hungarian law was amended and since January 1, 1997, the law covers (article 1) "market practices of undertakings carried out abroad if they may have effects on the Territory of the Republic of Hungary".

Hence, all three countries now adhere to the effects doctrine and have exercised jurisdiction over "inbound trade" (practices abroad having effects on their territory). However, to the best of our knowledge, none of the countries has so far exercised jurisdiction over foreign practices which affect its exports ("outbound" trade). The Czech competition agency has even taken the view that its legal framework, in its current wording, would not allow it to assert jurisdiction over such cases.

To the extent that the effects of particular practices extend over several jurisdictions and to the extent that such jurisdictions operate according to the effects principle, there will be a simultaneous exercise of jurisdiction. International agreements are meant to regulate, or at least organise, such instances of overlapping jurisdiction. For the countries under review, the Europe Agreements between themselves and the EU is the most important piece of legislation which contains provisions for the exercise of jurisdiction in antitrust matters.

With respect to this issue, the Europe Agreements signed with Poland, the Czech republic and the Hungary are virtually identical. In what follows, we will refer to the provisions relating to the agreement with the Czech republic but they apply mutatis mutandis to the other two countries. We first review the main characteristics of this agreement and subsequently discuss their operation.

2.1. Jurisdiction under the Europe Agreement

Art. 64 of the Europe Agreements stipulate that whenever trade between the EU and the Czech republic is affected, antitrust enforcement with respect to agreement, abuse of dominance and state aids in the territories of the two signatories shall take place in accordance

[6] See for instance the annual report on competition law developments, January 96-June 97, which cites the Ciba-Geigy/ Sandoz merger as a case in point.

with the criteria laid down in EC competition law (Arts. 81ff. as numbered in the Treaty of Amsterdam) and its case law. Hence, although substance is regulated, the procedural vehicle necessary to implement it is not elaborated[7].

A series of discussions took subsequently place between officials of competition authorities concerned aiming at providing such procedural vehicle[8].

Finally, the Implementing Rules were adopted in 1996 (see Decision of the Association Council between the EC and the Czech Republic OJ L 31 of 9.2.1996 at pp. 21ff.). The Implementing Rules provide the procedural vehicle to be used in antitrust cases of mutual interest.

The Implementing Rules provide for symmetric obligations in antitrust enforcement relating to each and every conceivable case, except for mergers : with respect to the latter, asymmetric obligations binding only the EC are incorporated.

With respect to non-merger antitrust enforcement, Art. 4 of the Implementing Rules provides for a 'positive comity'-type of obligation, whereby one of the signatories can request information relating to cases properly before the other signatory and where the latter competition authority has decided to exercise jurisdiction. Such flow of information aims at ensuring that the point of view of the affected competition authority will be in time taken into account by the authority exercising jurisdiction. On the other hand, Arts. 2 and 3 provide that when a competition authority of one signatory is dealing with a case likely to affect the interests of the other party, even in the absence of an Art. 4 notification, it must inform the other party of the case at hand (Art. 3). The objective is to end up with a mutually satisfactory solution (Art. 2).

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[7] There is a noticeable discrepancy between the Draft and the Final Agreement Establishing the Free Trade Area between the European Community (EC) and the Czech Republic, the former opting for more far reaching obligations than the latter.

[8] An informal document dated 15.3.1995 explores the possibility for the two competition authorities to co-operate in (I) cases where both the EC Commission and competition authority of the respective country have jurisdiction; (ii) cases within the competence of one authority but where the interest of the other party may be significantly affected; (iii) cases of negative conflict of competence. It must be noted of course, that it is not always clear what the exact point of departure is: there is substantial disagreement among both practitioners and academics as to the permissible extent of national jurisdiction. Since at the end of the day reasonableness has to be exercised in this context, practice reveals quite divergent attitudes with respect to extraterritorial enforcement of national antitrust laws.

In cases where no mutually satisfactory solution can be reached, the case will be referred to the Association Council which can recommend an appropriate course of action (Art. 9).

With respect to mergers enforcement, the National Competition Authority is endowed with the right to express its views on cases handled by DG IV and which affect the domestic interests. The Commission (DG IV) is under the unambiguous legal obligation to take into account the opinion of the National Authority, without however being obliged to follow it (Art. 7 of the Implementing Rules).

2.2. The operation of the agreement

In Poland and the Czech republic, neither the Europe Agreements nor the Implementing Rules were challenged and both are in principle enforced. It appears however that the Europe Agreements with respect to these countries are largely dormant. According to the Czech competition authority, there has not been a single case between the Czech Republic and the EU before the Association Council. It also appears that neither the EU nor the Czech authorities have requested information from one another. With respect to Poland, communication between the antitrust agency and the EU has also been very limited. Recently however a complaint has been lodged with the Commission regarding an (vertical) agreement which affects trade with Poland. It appears that the EU has applied the comity principle envisaged in the agreement and that the case may soon come in front of the Association Council.

The situation in Hungary is more intricate to the extent that both the antitrust provisions of its Europe Agreements and the Implementing Rules have been challenged in front of the constitutional court. The plaintiff (a well known Professor of Law) first claimed that the Europe Agreements implied a breach of the Hungary sovereignty to the extent that it was committing Hungary to apply a law that had been formulated by another party and which was also bound to evolve without allowing a representation of Hungarian interests. The Hungarian Constitutional Court ruled in 1998 that the Europe Agreementa were not anti-constitutional but added that the competition office should not be allowed to implement EU law, because it could not be presumed that Hungarian firms are aware of the European law.

The second challenge, against the Implementing Rules, focused on the status of the competition agency (as well as the principle of block exemptions). The Constitutional Court, in line with the spirit of its earlier ruling, indicated that to entrust the competition agency with the implementation of EU law was anti-constitutional. However, the Court did not annul the Implementing Rules directly and offered a grace period. This grace period has elapsed on January 1st 2000 and a request to extend it is pending in front of the Court.

Hence, the allocation of jurisdiction in antitrust matters between Hungary and the EU is a bit unclear at the moment and it does not seem that a minor adjustment to the agreement would suffice to meet the concerns of the Constitutional Court (with respect to the implementation of a case law the evolution of which is not subject to any form of Hungarian control). This matter will however become obsolete at the time of membership and may not be worth adjusting within that horizon.

Still, it appears that paradoxically the agreement has been less dormant with Hungary than with the other countries. The EU has received complaints in two important cases: an agreement in the distribution of beer involving a community firm and one concerning one of the two merger prohibitions ever ruled by the Hungarian authority which involved MATAV, the incumbent telephone operator in Hungary. In both cases, the EU requested information but did not pursue the matter further.

3. Poland

The Polish Anti-monopoly office (AMO) was created in 1990 at the outset of transition. It had broad responsibility for promoting "the conditions for the development and protection of competition, and counteracting the monopolistic practices on the territory of Poland". The basic statutes prohibited the abuse of dominant positions and agreements restricting competition and allowed for merger control (see Fingleton, Fox, Neven and Seabright (1996), for a detailed discussion). A couple of amendments have been made to the original statute up until 1996 and dealt mostly with the provisions relating to abuse of dominance.

A major modification of the statute took place in 1996 (and was implemented as of 1 October 1996). The AMO was replaced by the Office for Competition and Consumer

Protection (OCCP). The mandate of this new institution has thus been enlarged to include issues of consumer protection. The catalogue of monopolistic practices has been expanded to include the « creation of adverse conditions for consumer claims ». Furthermore, the "State Supervision of Commerce" (Panstwowa Inspekcja Handlowa) has been subordinated to the Office of Competition and Consumer Protection[9]. This agency is in charge of monitoring prices at the retail (and wholesale) level but also of monitoring the extent to which sellers comply with various regulations like sanitary rules which have little to do with antitrust rules.

The significance of this change should however not be overemphasised. Indeed, it appears that even prior to 1996, the AMO effectively dealt with a large number of cases of consumer protection. As indicated in the 1995 report of the AMO, prior to 1996, there were two institutions dealing with customer protection, namely the AMO and the Department of consumer protection on monopolised markets. Still about 70 % of all cases of customer protection were already handled by the AMO in 1995.

Yet another change in the statute is currently being prepared. The new law is meant to move closer to the corresponding European Statute (Arts. 81, 82 and the merger regulation) and even anticipates some of the changes that are currently discussed in the White Paper on the reform of Art. 81. As discussed below (section 3), the provisions of the new statute however tend to move apart from the EU benchmark whit respect to the treatment of efficiency defence in merger control.

As indicated by table 2, the workload of the agency with respect to agreements and abuse of dominance (which include consumer protection) did not increase until 1998. A large increase in complaints still took place during 1998 and, according to the agency, is mostly associated with issues of consumer protection.

[9] Since the first of January 1999, the State Supervision of Commerce has been renamed as Trade Inspection.

Table 1 : Merger control - Poland			
	1996	1997	1998
Number of cases	…	1387	1872
Violation found	1	2	1
Violation not found	374	1225[10]	1510

Table 2 : Agreements and abuses of dominance - Poland			
	1996	1997	1998
Proceedings instituted ex officio	27	45	38
Proceedings instituted on motion	164	165	268
Violation found	79	73	124
Violation not found or proceeding discontinued	63	70	136

The activities of the agency also increased markedly during the period in the area of merger control (the number of cases more than tripled over two years – see table 1). This increase is presumably associated with the wave of restructuring and privatisation which occurred rather belatedly (relative to other transition economies) in that period. It is also remarkable that so few violations were found during that period; indeed, during the previous four years, as many as 18 violations were found, out of 21 formal decisions that were taken (see Fingleton et al. (1996)).

[10] The relatively big difference between the number of cases examined and the number of opinions issued is a result of the fact that often the issuance of opinion was immaterial since when a specific case was examined, it turned out that the concerned undertakings were under no obligation to inform the office of their intention to merge, or when the case was examined the parties renounced their earlier notified intention to merge.

Table 3 : Resources of the polish competition office

Number of employees	As of 31 Dec. 1996	As of 31 Dec. 97	As of 31 Dec. 98
Headquarters	102	112	123
Representations	65	69	69
Total	167.75	181	192

Overall, this enhanced activity has also taken place with a modest increase in resources (see table 3). Between the end of 1995 (159 employees as reported by Fingleton et al. (1996)) and the end of 1998, the staff has increased by about 20 %. Interestingly, it also appears that the average seniority of the officials (as measured by their tenure in office) has increased significantly over time. Total resources have also more than doubled over time (in terms of EUROs – from 1.45 million in 1995 to about 3 million in 1998). This increase presumably reflects to some extent the evolution of salaries for skilled personnel during the period but is also affected by the appreciation of Sloty.

3.1. Foreign competition

In the cases being reviewed, the AMO has never taken the view that the relevant market was broader than Poland but it has taken into account the effect of foreign competition in a number of cases.

First, in the acquisition of *Polam-Pabianice SA* by *Philips Lighting Holding*[11], the AMO considered the market for light bulbs. It took the view that concentration had to be assessed "not only in the domestic market, but also with the European market in mind". Effectively, the AMO observed that the merged entity would have a dominant position in the Poland with a market share around 80 %. But the AMO also observed that the imports accounted for 10 % and that import duties on light bulbs were not large (11 % from Russia and CIES countries and none from the EU and CEFTA countries). On the basis of this

[11] See for instance annual report 1996.

evidence, the AMO cleared the concentration, which in its view would also bring large benefits to the Polish economy (see section 3.3. below).

The approach followed by the AMO in this decision is not clearly articulated. In particular, it is not clear whether it considered that the relevant market was Poland or a broader area (the Central European Free Trade Association (CEFTA) or CEFTA and the EU). The decision might be interpreted as suggesting that Poland was the relevant market but that long term entry would not allow the merged entity to exercise market power. Yet, the existence of imports and the low level of import duties are factors which are more relevant for substitution in the short term than entry in the medium/long term. On balance, given the evidence provided, it may have been more sensible for the AMO to conclude that the relevant market was CEFTA and to perform its analysis of domiance in that market. It is still doubtful however whether the evidence being provided was sufficient to conclude that the market is broader than Poland. This is especially so since an import share of 10 % is relatively small.

In any event, it seems that the AMO should have paid more attention to the competitive situation in CEFTA. Indeed, it appears that three large multinationals carved up the CEFTA market for lights bulbs; in addition to the Philips acquisition in Poland, General Electric acquired the main supplier in Hungary and Osram acquired the main supplier in the Czech republic. The CEFTA market is thus characterised by a high concentration with three large suppliers each holding a substantial part of overall market and by a large amount of geographical specialisation. Whether the acquisitions by the multinationals were co-ordinated is not clear, but the outcome is certainly one that is a matter of concern in terms of collective dominance. That is, the respective positions of the firms (in terms of size and geographical distribution) create conditions that may be favourable for tacit co-ordination.

In the *Steelmill* case[12], the AMO was confronted with a complaint lodged by a purchaser of acid resistant steel against a polish steelmill company. The customer complained about onerous contract terms and in particular the requirement that it should pay for the steel in advance of delivery. The AMO first enquired whether the Steelmill company had a dominant position. The AMO analysed the flow of imports, which turned to account for more than 75 % of apparent consumption and enquired about formal barriers to trade, which took the form of import duties in the range of 10-15%. The AMO also undertook a

customer survey which revealed that imported steel was of higher quality than domestic products and that foreign firms provided a better service. According to the AMO, the import surcharge was not so large to render the foreign firms uncompetitive, given the higher quality of their products. On the basis of this evidence, the AMO considered that the Steelmill under investigation only had around 10 % of the Polish market and hence could not be seen as dominant.

This approach is odd. It is clear that in order to compute market shares in any given area, the total quantity being supplied to that area has to be taken into account (in the denominator). Accordingly, imported quantities into Poland had to be taken into account to compute market shares. However, the importance of imports into Poland suggests that relevant antitrust market is broader than Poland. As a consequence, the market share that is relevant to assess the dominance of Steelmill is not its market share in Poland but its market share in the broader area that constitutes a relevant market (for instance CEFTA or CEFTA and the EU).

In the *Nitrogen* case[13] , the AMO investigated a possible cartel between three producers of Nitrogen fertiliser. The parties denied the existence of an explicit or tacit agreement between them. They also argued however that their industry was unprofitable because of pressure form imports and admitted that they had collectively sought support from the relevant ministries to shield them from foreign competition. Hence, it appears that the relevant market for Nitrogen fertilisers may actually be broader than Poland and that a cartel among Polish producers could only operate profitably if it was protected from imports. An effective remedy to the situation would thus involve the removal of import protection. This remedy was unfortunately not considered or advocated by the AMO.

These cases illustrate that while the AMO has taken into account foreign competition, it has not properly recognised its significance. In particular, it has not properly distinguished between foreign competition which is relevant for market definition (short term supply substitution) and foreign competition which is relevant for the assessment of dominance (medium term entry). Moreover, it has failed to recognise that when short term

[12] See decision reported in the Bulletin, issue 11, 1996. Decision of July 1996, N° DDP 22/96.
[13] Decision of september 7, 1994 - N° DO-I-50/S/2/94/DG - see bulletin N° 3, 1994.

substitution from imports is strong, the relevant market is broader and market shares that are relevant for the analysis of dominance should be computed in that broader area.

At the opposite, there are a number of cases where the AMO did not consider foreign competition even though it probably should have done so. *Fiat Auto Poland*[14] is such a case. In this case, the AMO considered a complaint against Fiat Auto Poland for onerous contract terms with respect to the sale of the Fiat 126, Cinquecento and Uno. The AMO investigated first whether Fiat had a dominant position and suggested that the relevant market was the market for small passenger cars in Poland. In that market, Fiat had a market share of 88 % and hence, was considered dominant. Still, the AMO did not consider whether imported second hand cars (possibly larger ones) could be seen as close substitutes to new small cars by Polish consumers. Given the flood of imported second cars observed in the early years of transition, this issue was presumably worth investigating.

Parallel imports is also a central issue at stake in the *Sony*[15] case. This was a complaint against the exclusive distribution system being implemented by *Sony* Poland. The complaint was lodged by *Niku*, a local company which was not granted the status of exclusive dealer by *Sony*. *Niku* alleged that it did not obtain this status because it was routinely importing original *Sony* equipment from other countries and in particular from Singapore. Indeed, the contract between *Sony* and its exclusive dealers prevented the latter from undertaking parallel imports. The AMO ruled that exclusive distribution systems were not unlawful *per se* but that any dealer should be in a position to import equipment directly from other sources. In this respect, the decision of the AMO is in line with the approach adopted by the EU which always insists on preserving the possibility for parallel imports in the case of vertical restraints. This practice has been much criticized (see for instance, Korah, 1990) on the grounds that if inter-brand competition is sufficient, inducing intra-brand competition may not be necessary. Indeed, inducing intra-brand competition may reduce competition (and market integration) if in the absence of an exclusive distribution system, the firm contemplating exports prefers to abstain from exporting at all. Still, the insistence on intra-brand competition may be more sensible in the case of *Sony* Poland, because of reduced inter-

[14] Decision of december 21, 1994 - N° DO-II-50-S/5/94/57/HS - see bulletin N° 6, 1995.
[15] Decision of october 20, 1995 - N° DO-II-54/S/3/93/1126/DK - see bulletin N° 7, 1995.

brand competition (as documented by the applicant[16]). Hence, it appears that in this case, the AMO has, for better reasons, followed the approach commonly found in EU practice.

There are also a number of cases where the geographic market definition turned out to be a central issue and where the analysis does not appear to be fully convincing. For instance, in the merger between two cement producers, *Grosowice* and *Gorazdze*, the AMO decided that each Voivode was a separate relevant market[17]. A Voivode was (at the time of the case) a reasonably small territorial unit, which is on average about the size of a French department (with about 50 Voivode for the whole of Poland). The AMO cited the importance of transport costs to justify its position but gave no figure. Further analysis might have been useful however given that in other jurisdictions (the EU or Switzerland for instance), the relevant market is often considered to be national rather than regional. There is even some evidence that bulk imports of cement by ship from far away destination is sometimes profitable. In any event, the AMO considered the effects of the concentration on 12 distinct Voivode. Given uncertainty about market definition, it would have been useful to examine whether these Voivoide were or not contiguous. Indeed, if they were, the scope for the exercise of market power may have been greater.

Lack of some basic quantification is also a concern in another decision involving Cement. In this case, a cement company attempted to integrate vertically by acquiring *Faelbud*, a company selling ready mix concrete as well as pre-formed concrete products. This concentration was a concern because it had a horizontal dimension, as the (mother) cement company appeared to control another company (*Prefabeton*) selling ready mix concrete and concrete products. According to the AMO, the relevant market was the Voivode of Lublin (where the companies were active). The concentration was prohibited and the parties appealed. The court dismissed the analysis of the AMO with respect to the geographical market definition and ruled that the market for concrete products should encompass several Voivode. The court found that it was economical to transport these products over a distance of some 150 to 200 kms on the basis of evidence on transport costs submitted by the parties. Apart from the question of whether the evidence used by the court

[16] The applicant claimed that Sony had a dominant position in the market for high quality color television. Whether this is a relevant antitrust market is of course debatable and no evidence was provided to that effect by the applicant.

[17] The decision of the AMO was appealed and reversed (see section 3.3. below). However, the appeal did not focus on market definition.

was convincing (which is hard to assess), it is clear that a more detailed analysis of the geographic market by the AMO (using transport costs but also observed prices and flows across Voivoide) would have been useful.

To summarise, it appears that the analysis of competition across the geographic dimension in the cases being reviewed often suffers from important shortcomings. First, there is at times a bit of a confusion between geographic market definition and the analysis of dominance. From this prospective, it would be useful for the AMO to adopt a clear definition of what is meant by the relevant market. At times, the AMO has adopted language which is close to that found in the EU (in particular the notion that "market include such goods which can be treated as substitutes in terms of application, use and price from the consumers' standpoint). Still, the AMO could usefully clarify the underlying principle of market definition - such that a relevant antitrust market is one in which a hypothetical monopolist could exercise some degree of market power. This could be done through a set of published guidelines. Such guidelines could outline (as in the US or the EU) the types of factors that will be taken into account at the stage of market definition and those that will be taken into account for the analysis of dominance.

Second, it seems that the AMO could have adopted a more systematic approach to evaluate substitution across different geographical areas. Quantification, when it is undertaken, is limited to the evaluation of transport costs. Clearly, much more could be done, for instance in terms of simple price comparisons across different territories, analysis of the correlation of prices over time or analysis of import and export flows, to name just a few.

3.2. Competition advocacy

According to their statute, the AMO and later the OCCP are supposed to participate in the preparation of new laws. Over the course of the last few years, the AMO and OCCP have also actually taken part in the preparation of laws affecting trade and in particular on the issue of "administration of turnover in goods and services with foreign countries", the "protection against imports at dumped prices into the Polish customs territory", the "protection against excessive imports of certain textiles and garments into the Polish customs territory" and the "protection against excessive imports of certain goods into the Polish customs territory".

It is of course difficult to judge *ex post* whether the AMO and OCCP were a real advocate of competition and whether they played an effective role. According to Cadot et al (2000), there is a significant return to a more protectionist stance in Polish commercial policy after the initial wave of liberalisation. This by itself is of course not an indication that the competition authorities were ineffective. It is also worth noting however that the OCCP expressed some dissatisfaction with the outcome of the working party on trade issues. Looking at the views sometimes defended by the competition agency, as reported in their Bulletin, some suspicion might also arise. For instance, the insistence by the OCCP that "some companies are of special importance for the national economy" might raise some eyebrows. The *Nitrogen* case mentioned above is also striking. It is clear from the decision that the firms under investigation for cartel behaviour had lobbied the appropriate ministries to obtain some import protection. What is puzzling is that the AMO did not challenge the view that measures should be taken to make sure that domestic prices should be allowed to increase in order to reflect the increase in domestic costs. All what the AMO expressed concern about is the existence of co-ordination in the market in raising prices. The AMO did not take the view that import competition was as important as domestic competition and did not see joint action in a ministry to obtain protection as evidence of cartel behaviour.

If it is difficult to assess the outcome of competition advocacy, it appears however that the institutional set-up has become less favourable for the agency in the pursuit of this role. As mentioned above, the activities of the AMO have been modified in 1996. But this change in the statute was accompanied by a significant institutional change. Previously, the head (President) of the competition office was accountable to the Prime minister. The Competition office did not have the status of a full ministry but the President was still routinely invited to attend the Council of Ministers, without a vote[18]. The terms of appointment for the President was also indefinite.

When the AMO was transformed into the OCCP, its President became accountable not to the Prime minister alone but to the Council of Ministers. The President of the OCCP is no longer invited to the Council of Ministers. He is now occasionally invited to the meetings of top cabinet members and civil servants who prepare the Council of Ministers. The terms of the office of the President is not specified. In the draft new law, a period of five years is

[18] This practice was initiated by Anna Fornalcyk, the first President of the AMO who was very influential and widely respected. The practice was not discontinued for its successors.

considered and it is proposed that no President should have more than two succeeding terms of office. One can wonder whether this approach is wise ; given that elections for parliament take place every four years, the President would then have an horizon which broadly coincides with the electoral cycle. Finally, it may also be worth noting that the first president of the OCCP stayed less than three years in office. He was also removed after the election in 1997 and replaced by somebody with no experience in competition matters.

Overall, it seems that the reform has reduced the standing of the competition authority which is now less powerful than before. These developments may or may not affect the independence of the agency with respect to decision making on individual cases but it almost certainly reduces the effectiveness of the agency as an advocate of competition ; first, the agency has less standing than before and can be expected to be less of a counter-weight against powerful ministries (like the ministry of the economy) which may be closer to particular interests. From this perspective, it may be interesting to note that the competition agency has recently lost much of its competence which respect to state aids, which are now the sole responsibility of the ministry of the economy. Second, to the extent that the President is politically exposed, he is less likely to confront powerful interests and may thus in some circumstances be less vigorous in its advocacy of competition.

3.3. Foreign direct investment

As mentioned above, competition policy sometimes pursues broader objectives than simply ensuring effective competition. Competition agencies may thus wish to bring about particular industry configurations. With respect to foreign firms, there may be a tendency for antitrust authorities to favour foreign direct investment because they expect that they will bring about wider benefits like technology transfers. On the other hand, there may be a concern that control over domestic activities will be lost to foreign investors and this concern may lead to a bias against foreign direct investment.

Merger control is also an area where multiple objectives will often come into play. This is indeed the area where antitrust policy affects the industry structure most directly and hence where particular industry configurations can be most easily engineered. In most jurisdictions, industrial policy is not directly recognised as a legitimate objective of merger control but a number of jurisdictions (in particular the US, the UK and Germany) allow for a

so called efficiency defence. That is, mergers which bring about significant efficiencies will be more likely to be allowed. The evaluation of potential efficiencies is however often very speculative and the very notion of potential efficiencies is somewhat vague. For instance, it could include anything from an improvement in productivity for the merging firms to induced benefit for the organisation of the industry, the region and the labour market. As a result, there is a risk that efficiency defences will act a as veil under which industrial policy will creep in.

Unlike other transition economies, Poland does not formally allow for efficiency defences or broad considerations in merger control. It has a strict standard of competition in terms of the creation or strengthening of a dominant position. However, also unlike other transition economies, the AMO has no duty to prohibit mergers which do not meet the standards[19]. Accordingly, the statute allows for broad discretion at the level of agency.

There are a number of cases where the AMO has used its discretion and decided not to prohibit mergers. At the same tine, the AMO has been quite transparent in its decisions about its motivations and those are revealing.

The acquisition of *Brevopola* by Heineken in 1998 raised concern, according to the AMO, because the merged entity would control a large share of the beer distributors. It is hard to tell whether the competition concern of the agency were well founded. Indeed, it is not clear from the decision what share of the actual distribution networks would be controlled by the merged entity and whether the merger actually made matters worse for competitors (as it seems that both Brevopola and Heineken operated with exclusive distributors before the merger). Whatever the merit of the argument, the AMO reported that it could obtain significant commitments from Heineken and that in view of these commitments would allow the concentration to go through. These undertakings are such that Heineken commits to buy hay (Houblon) from Poland for as much as 25 % of its requirements in 1999 and 50 % for at least five years thereafter and as long as it market share is above 35 % , such that Heineken will invest as least 2 million $ in to the transformation of hay within three years and such that it will maintain the production of some specified products.

[19] The draft revision of the law introduces both an efficiency defense and a duty to prohibit if the standard is not met. From this perspective, the new statute would converge towards that found in other transition economies. But it would diverge from the EU standards in terns of efficiency defense.

These undertakings are clearly not designed to meet particular competition concerns. At best, they reflect an active policy of industrial engineering being pursued by the AMO. At worst, they might reveal a situation where a profitable dominant position in the Polish market has been "sold off" to a foreign buyer (by the AMO !).

The suspicion that a profitable market position could have been auctioned off to foreign buyers also clearly arises in the acquisition of *Polam-Pabianice SA* by *Philips Lighting Holding*. As mentioned above, the competitive analysis of this concentration is not fully convincing and there are some reasons to think that this merger may be seriously anti-competitive (at least relative to some alternatives involving for instance the break up of Polam-Pabianice into several units). The decision also outlines the reasons as to why the merger was not prohibited and makes a systematic comparison between the undertakings offered by Philips and those offered by a rival foreign buyer (Osram). In particular, it appears that Philips was selected because it was offering a larger investment, provided employment guarantees for longer and could commit (given the characteristics of its own product range) to discontinue fewer products originally offered by Polam-Pabianice.

The acquisition of *Grosowice* by *Gorazdze* discussed above is also revealing. This acquisition was prohibited by the AMO but the decision was appealed in Court and reversed. As indicated in the Court proceeeding, Gorazdze is also owned by CBR Baltics (a Dutch subsidiary of CBR, the multinational cement company of Belgian origin). The original AMO decision focused mostly on the competitive analysis of the merger. It noted that Grosowice was operating with old equipment and was not profitable but declined to apply the failing firm defence. The Court proceedings reveal a wholly different approach. First, the Court decisions paint a much more pessimistic picture of Grosowice's situation and appealed to the failing firm defence. The court emphasised Grosowice's lack of reserves of raw material, its long term losses and even the recent flooding of its plant. These arguments sound as if they were extracted from the parties' pleading and should presumably not be sufficient to justify the application of the failing firm defence (which normally requires to verify that no alternative which involves less anti-competitive effects was available).

Second, and most importantly, the Court also dwelt at length on the benefits accruing from the acquisition. The catalogue of benefits is impressive ranging from technology

transfer, the scope for specialisation of plants, the synergies in marketing and the improvement of the environment. It also appears that the Court asked CBR to submit a detailed business plan, specifying the size of its planned investment, the details of it social plans and its strategy towards environmental clean up. At the end, the Court cleared the acquisition, emphasising that the presence of foreign firm was a decisive factor in its ruling.

Overall, these three cases certainly illustrate that the AMO and the Court have been at times willing to pursue objectives of industrial policy. It even appears that domestic firms with strong marketing positions have been auctioned of to foreign buyers in exchange for commitments which are unrelated to the competitive situation. One would expect finance or industry ministries to adopt such an approach, in particular in the context of privatisation. What is a source of concern is that the competition agency, not only accepts this approach, but seems to actively pursue it itself. This observation is particularly worrying in Poland where large scale privatisation has started much later than in other countries and is far from being completed.

The attitude towards foreign competition is also more ambiguous than the attitude towards initial foreign direct investment. This appears in a number of internal studies undertaken by the AMO. For instance, the AMO undertook a study in 1996 to evaluate the potential damage that foreign supermarkets were inflicting on local distributors. The objective of this study is by itself puzzling but its arguments are also at times a source of concern: the study observes as a main argument in favour of foreign competitors that they sell a majority of goods produced in Poland. This admission has potentially mercantilist undertones that you would not expect from an antitrust agency.

Fiat Auto Poland is another case along those lines. In this decision, the AMO was investigating onerous contract terms in Poland and compared the pricing policies of Fiat in Poland with that observed in other countries. It also found that Fiat was selling many more units in other countries than in Poland (ten times more) at a time when there were long delays for delivery in Poland. This, according to the AMO, as evidence that Fiat held a dominant position in Poland. Still, it seems that the choice between export and domestic sales should be left to Fiat and it would be unreasonable to impose on Fiat the obligation to serve domestic customers first. This suggestion has again some troubling undertones when it comes to the consideration of foreign markets.

4. Hungary

The Hungarian competition statute was enacted in 1990 and was substantially revised in 1996. This statute contains provisions relating to anti-competitive practices (agreements, abuse of dominance) and merger control but also consumers fraud and unfair market practices. The amendments extended the coverage of the law to include practices taking place abroad but having an effect on the territory of Hungary (see above). Amendments with respect to agreements and abuse of dominance also achieved a substantial approximation of the Hungarian provisions to corresponding European ones. For instance, the prohibition of vertical agreements was extended (the original provision only covered resale price maintenance), the scope of the prohibition towards agreements has adopted the exact language of Art. 81 (namely the "prevention, restriction and distortion of competition"), agreements which fall under the prohibition have been made void, the concept dominance has abandoned reference to market share thresholds and is defined in terms of the "ability to act independently to a great extent from other market participants" and the exemplary list of abuses now mimics almost exactly that found under Art. 82.

With respect to mergers, differences with the European statute have widened. In addition to minor changes with respect to the thresholds and the definition of a concentration, the amendment has profoundly changed the nature of control : whereas in the original statutes, the Competition agency had to prohibit mergers which impeded the formation, development or continuation of competition, the Competition agency is now under the obligation not to prohibit mergers which do not create or strengthen a dominant position. Hence, like the Polish AMO but unlike the Merger Task Force, the Hungarian Competition agency may choose not to prohibit mergers which create or strengthen a dominant position.

Table 4. Activity of the Hungarian competition authority

Decisions	96-June 97	June- Dec 97	98
Consumer fraud (and others)	114	49	72
- violations	54	14	39

Agreements - violations	10 7	5 -	15 1
Abuse of dominance - violations	69 12	28 4	44 5
Mergers - prohibitions	30 -	25 -	49 1

As indicated in table 4, the workload of the Hungarian agency with respect to consumer fraud, agreements and potential abuse of dominance has remained roughly constant. Over time the number of merger cases has however increased by about 50 %. This increase in the workload has been accommodated without a concomitant increase in resources (see table 5). It is partly associated with the change in the legal framework which extended the scope of merger control to foreign firms (See above).

Table 5 Resources of the Hungarian competition authority

	95	96	97	98
Budget ($ Mio)	1.8	1.8	1.8	1.8
Personnel	115	106	106	111

4.1. Foreign competition

The Hungarian competition agency has so far never taken the view that the relevant market could be broader than Hungary. However, foreign competition has been taken into account in a number of cases as a relevant factor to assess dominance. Such an approach has important drawbacks that we discuss first. We will subsequently turn to cases where the relevant market could be narrower than the entire territory of Hungary.

4.1.1. Hungary versus a broader area

The *Hollow Ware Orosháza/Glassworks Sajószentpéter* merger provides a good illustration of the trade-off that arises when foreign competition is not fully taken into account

at the level of market definition. Both *Hollow Ware Orosháza* and *Glassworks Sajószentpéter* manufacture and distribute preserve jars and glass bottles. The competition Council considered that hollow glass was the relevant product market because of limited substitution with other products and, without much discussion, that the relevant geographic market was Hungary. On the market for hollow glass, the merged entity had a market share of 67 % in Hungary (where 90 % of their sales were concentrated). Still, when assessing the potential dominance of the merged entity, the Council appealed to the importance of imports, which accounted for 29 % of sales in Hungary. The Council also observed that imports had increased by 120 % between 1995 and 1997 and that import duties had fallen from 19.8 % in 1995 to zero in 1997. The Council emphasised that imports, in particular from neighbouring countries, would seriously constrain the merged entity in its pricing policy and welcome import pressure as a mechanism to discipline domestic producers and force them to rationalise production. The concentration was authorised without remedy.

One can wonder whether on the face of the evidence provided by the Council the relevant geographic market for hollow ware should not be broader than Hungary. The imports figures in particular are suggestive of a broader market, possibly extending to CEFTA. Of course, if the relevant market had been broader, to the extent that the market share of the merged entity in that alternative market would have been smaller (according to the Hungarian competition agency), it is likely that the concentration would also have been allowed. Arguably, whether foreign competition is considered at the level of market definition or at the stage of the analysis of dominance would not have mattered for the outcome in this particular case.

However, it seems that a proper market definition, which fully recognises the importance of foreign competition, provides a useful discipline and allows for an evaluation of competition which is better informed. For instance, in the *Hollow Ware* case the significance of imports as a competitive constrain could not be assessed precisely because there was no information on the breakdown of imports by competitors. Arguably, whether imports were achieved by a small number of foreign competitors or by a large number of competitors would matter to assess the significance of the competitive constraint. The Council ended up computing the change in the Herfindahl index associated with the concentration assuming that all imports were undertaken by a single firm. The resulting concentration (an impressive 5340 after the concentration) is almost surely biased upwards.

By contrast, if the Council had considered that the relevant market was broader, it would have computed market shares in that market using the actual shares of the competitors and it would have obtained a more precise assessment of the competitive conditions.

Obtaining information about market shares in broader area that the national market is possibly more difficult even though such information can probably be requested from merging parties. This might point to a step by step approach whereby the market is first deemed to be national and market shares are computed in that area. Only if a potential problem of dominance is observed in that area would the agency consider obtaining information about market shares for alternative (broader) relevant markets. This seems to be the approach which is currently espoused by the Hungarian agency.

The presumption that if there is no issue of dominance in a narrow market, there will *a fortiori* not be any in a broader is however not entirely sound. Indeed, if the distribution of firms' sales is highly asymmetric, it is quite possible that market shares are small in a particular subset of the relevant market and would not trigger any concern in that region but still large in the relevant market as a whole. Accordingly, narrow markets do not always provide a reliable screen of the competition problems that can arise in broader areas.

On the whole, it seems that the approach of the Hungarian agency has significant drawbacks and it might find it useful to consider foreign competition explicitly at the level of market definition. Indeed, the hollow ware case is not an isolated event. There are a number of cases where foreign competition has been appealed to in the analysis of dominance in a manner which is less than fully transparent.

For instance, in the *Graboplast /Keszta-Dunawall* case, the merging parties had more than 30 % of the market for wallpaper in Hungary. The concentration was allowed because imports accounted for 2/3 of sales, which again suggests that the relevant market was broader. In the *Nestlé/Jupiter* case, the acquisition by Nestlé of a domestic producer of animal (dog and cat) food was allowed because imports accounted for more than 50 % of sales. Particular concerns about market power could however arise in this case because Nestlé is presumably also an important supplier in neighbouring markets. Only a proper analysis of competition in broader areas could answer this concern. A similar concern could arise in the *Gyõri Keksz/Stollwerck* case, where United Biscuits (the owner of the Gyõri Keksz) gained control

of Stollwerck and achieved a market share of 64 % in the market for special biscuits. The transaction was cleared because of potential imports from CEFTA but it is not clear what is the market share of United Biscuits in neighbouring markets. Finally, in the *Henkel/Kemikál Barcs* case, Henkel gained control of Kemikál Barcs, which held 25 % of the market for building chemicals. The Council argued that there was strong competition from imports but also acknowledged that Henkel was a significant importer of building material. It is not clear from the decision what is the combined market share of imports and domestic sales that will be controlled by the merged entity.

It is worth re-emphasizing at this stage that the analysis of published decisions that we have undertaken is not meant to evaluate whether decisions were "right" or "wrong". Indeed, upon discussions with the agency, it appeared that many of the issues discussed in the previous paragraphs were well understood by the agency and that the potential shortcomings that that we mention in some decisions would not have been decisive. It seems, however, for the sake of transparency and consistency in decision making that the full reasoning of the agency should appear in the decision.

4.1.2. Regional markets

There are a number of decisions where the Competition authority could arguably have taken the view that the market was regional rather than national. After having discussed the matter with the authority, it appeared that regional markets had been considered during the proceedings but that the full analysis that had been undertaken was not reflected in the published decision.

For instance, the Council considered two merger cases in the oil industry, namely the *BP/Mobil* merger and the *OVM Hungaria/Áfor/Benzinkút* merger. Both instances involved the distribution of petrol through local stations. Given limited opportunities for demand substitution, there is a strong presumption that market for the distribution of petrol are regional (as confirmed by the recent EU Commission decisions in the *Exxon/Mobil* or *Tota Fina/Elf* decisions). Even though the published decision is silent on the matter, it appears that the Hungarian competition agency actually considered regional markets and checked whether the merger would increase concentration at the regional level.

Similarly, in the *Bank Ausztria/Creditanstalt* merger, the authority considered in the published decision that the relevant market was the credit market in Hungary. In bank mergers, it is however customary to consider very narrow markets (see Neven and von Ungern, 1998, for a survey). Again, it emerged from discussion with the authority that narrow markets had been considered during the investigation.

Even if in the approach followed by the authority was probably adequate in these two cases, it seems that for the sake of legal certainty, the authority should be more transparent in published decisions and explain its motivation in full.

There is however one case where arguably the Council has not considered that the markets could be regional and possibly should have done so. In the *Lapker Rt/Buvihir jsc* case, the Hungarian post office privatised seven newspaper distributors though a tender procedure. The same company, *Lapker*, won all seven tenders and asked the authority for authorisation to acquire control in the companies that it had won. The authority gave the authorisation but failed to consider (at least in the published decision) whether the distribution companies has overlapping networks. Arguably, markets for the distributions of newspapers are regional and the competitive impact of a joint control of all seven companies would indeed depend on their geographical coverage. For instance, if all seven companies are active in different regions, the competitive impact of the transaction will be reduced by comparison with a situation in which all seven companies are active in the same area.

The authority also handled a merger notification where the extent of the geographic market turned out to be a central issue. In the *Hajdútej Tejipari Ltd /Lakto 2000* case, *Hajdútej Tejipari* (controlled by *Nutricia* of the Netherlands) and active in the milk processing industry gained control of Lakto 2000, another milk processing firm active in the same region (Szabolcstej). In that region (four counties of East Hungary), the merged entity would control about 90 % of the milk purchased from farmers. In addition, it appeared that *Nutricia* was also controlling another dairy producer in an adjacent region. The authority considered however that the transportation cost of fresh milk was relatively small and that supply substitution would be important. That is, one could expect dairy producers to organise the collection of milk from other regions if the merged entity would exercise buyer power towards the small farmers. The reasoning of the authority seems convincing. One can only regret that its argument about supply substitution was not supported by factual evidence.

In the end the authority considered that the relevant geographic market was the Eastern part of Hungary where the market share of the merged entity amounts to some 30-35% and the merger was allowed.

4.2. Competition advocacy

According Fingleton et al. (1996), the Hungarian competition agency has been fairly independent from its inception. However, these authors also note that this independence may have been achieved at the cost of limiting the role of the agency in terms of competition advocacy, in particular regarding the privatisation process.

Two remarks are in order. First, it appears that if anything the independence of the authority has been enhanced in the last few years. The independence of the president and vice-presidents has arguably been improved; candidates are now subject to a parliamentary hearing before their nomination by the Prime Minister. Such enhanced accountability to parliament further limits the scope that the Prime Minister might have in nominating inadequate candidates. The independence of the council members with respect the President of the office has also been improved. Council members are now nominated by the President of the Republic (and no longer by the President of the office) for an indefinite period of time. They can only be dismissed by the President of the Republic (formerly the President of the office) and only on grounds that are identical to those applied to judges.

Second, the competition authority seems to play a regular role in the implementation of trade policy. The authority is represented in both the market protection and tariff committees and apparently argues regularly against targeted reductions in import tariff rates as well as temporary import surcharges. According to the authority, requests for temporary protection have not increased over time and protection has only been granted to declining industries like steel and heavy chemicals. There is also, according to the authority, a broad scepticism towards individual waivers in import duties.

4.3. Foreign direct investment

As illustrated above in the case of Poland, competition agencies can sometimes pursue objectives that may be broader than maintaining effective competition, in particular in the

area of merger control where efficiency defences can be used as cover for industrial policy. Under the new law, the competition authority does not have to prohibit mergers which create or reinforce dominant position as a result of which effective competition is reduced. Hence, a lax attitude towards mergers could also be associated with underlying objectives of the competition authority which for instance favour industrial consolidation.

There is at least one case for which suspicion arises. In the Sugar case, the competition authority allowed one large sugar producer to buy two smaller companies controlled by another large sugar producer. The effect of the merger was to create a balanced triopoly in the Sugar market. The authority found that the symmetric structure resulting from this operation was pro-competitive. Still, one could certainly argue that the formation of a symmetric triopoly should help producers in achieving effective tacit co-ordination.

The *Lapker Rt/Buvihir Rt* case mentioned above is also odd. The authority argued that joint control of the seven distribution companies auctioned off by the post office should be allowed because it would not deteriorate the situation by comparison with that found before privatisation (when the Post office controlled all seven). But of course, one of the main objective of privatisation is presumably to improve the competitive structure and as advocates of competition, the authority should not be satisfied with the status quo. One can also wonder whether the fact that Lapker is a foreign company played any role in the decision.

The importance of the technological transfer expected from foreign acquisition is also explicitly mentioned in the *Henkel/Kemikál Barcs* decision. The prospect for restructuring and enhanced export potential associated with a foreign partner is also considered in that decision. Similar consideration can be found in the *Bestfood/Globus* case in which a dutch company acquired a Hungarian producer of food products, and again in the *Egis Pharmaceuticals/Nutricia* case in which a joint venture was formed between a foreign company (Nutricia) and a Hungarian firm to produce and sell baby foods.

Hence, it seems that the attitude towards foreign direct investment is quite favourable.

5. The Czech republic

The Czech Competition Authority is an independent administrative the decisions of which can be appealed in front of a domestic court (a High Court, which in turn, has de facto become specialised in competition law cases).

Approximately thirty five professionals work in the Czech Competition Authority. The workload has been increasing in particular with respect to agreements and abuse of dominance (see table 6). Merger notifications have increased by a factor of more than 3 between 1992 and 1996 and seem to have stabilised thereafter at around 60 notifications per year[20]

Table 6. Activity of the Czech competition agency

	96	97	98
Agreements and abuse	54	32	98
Mergers	74	58	57

The Czech Competition Authority applies the Act on the Protection of Economic Competition of January 30 1991 (as amended by Acts 495/1992 and 286/1993, see Fingleton et al. (1996) for details).

This competition law contains a provision on merger control which has direct implications for the treatment of cases with an international dimension. The provision reads as follows :

> « (1) Concentrations which distort or may distort economic competition shall be subject to approval by the Ministry. Competition shall be deemed distorted if the merging undertakings' shares exceed 30% of the total turnover in the nation-wide or local market for the given product.

[20] Source: See DAFFE/CLP(99) 14/26, OECD/DAFFE, Annual Report on Competition Policy in the Czech Republic, 23 April 1999.

(2) The Ministry shall approve of a concentration if the applying competitors prove that any detriment which may result from the distortion of competition will be outweighed by the economic benefits brought about by this concentration....

(3) Competitors are obliged to apply to the Ministry for approval of a concentration between undertakings under paragraph (1). »[21]

Two remarks are in order. First, it appears that only mergers that can be presumed to be unlawful have to be notified. Second, and more importantly, all concentrations which lead to a market share of 30 % in the Czech republic (or part of it) are deemed to distort competition. This implies that foreign competition cannot be fully taken into account. Indeed, the competition authority cannot, according to the statute, allow a merger which leads to a market share of 30 % in the Czech simply because the relevant antitrust market is broader or because foreign competition is strong.

As a consequence, international mergers which take place in a broader relevant market can only be allowed in the Czech republic (when they have a market share above 30 %) if they can invoke an efficiency defence (see second paragraph).

Of course, the Czech Competition Authority does not have to automatically exercise jurisdiction in such case and examine whether the notified merger complies or not with the criteria laid down in the Act (essentially whether an efficiency defence can be accepted under the circumstances). In fact, the Czech Competition Authority could very well examine whether it is reasonable for another national authority to intervene and examine conformity of the notified merger with its own national laws. There is no evidence however that the Czech authority ever declined to assert jurisdiction in such cases (and indeed such deference is rarely, if ever, encountered in other jurisdictions).

5.1. Foreign competition

Let us first consider agreements and abuse of dominance. The Czech Competition Authority applied, since 1996, its own law on eight (8) cases of inbound trade (relating to either agreements and/or concerted practices -- horizontal/vertical restraints—, or abuse of

[21] We should note that we work from an official translation in English of the Act provided to us by the Czech Competition Authority.

dominant position in the Czech market), namely 1 case in 1996, 4 in 1997, 2 in 1998 and 1 in 1999[22].

Given the very limited number of such cases, it is hard to draw firm conclusions regarding the way in which the Czech Competition Authority treats agreements and abuse of dominance with an international dimension.

However, when it comes to defining the relevant geographic market, the 'rule of thumb' applied by the Czechs is to define an area within which conditions for competition are to a large extent homogeneous.

It also appears that when defining the geographic market, the Czech Competition Authority will take into account production characteristics, fluctuation of prices and transport costs.

Let us now turn to mergers. As indicated above, there is large number of such cases. In addition, the Czech Competition Authority often examined mergers between at least one foreign and one Czech undertaking and sometimes between two foreign undertakings. This element (foreign nationality of one of the undertakings involved) in itself provides an international dimension to the case handled by the Authority and might call for some form of co-operation.

The fact that many foreign entities were involved is in itself not surprising. The gradual opening up of the Czech economy led to penetration of the Czech market through investment or through trade by foreign companies. And, as stated above, all mergers which lead to market share of 30 % in the Czech republic or a substantial part of it have to be notified

For the purposes of this study, we examined cases with a clear international dimension. We believe that such cases are the most representative to demonstrate a certain trend in antitrust enforcement. Hence we chose eight cases of mergers notifications involving solely foreign companies. These cases are listed in table 7.

[22] Source: Czech Competition Authority

Table 7. Merger cases involving foreign companies in the Czech republic

No	File Number	Date of Decision	Applicants	Outcome
1.	S7/97-220	3.7.1997	Fresenius/ WR Grace	approved
2.	S64/97-210	1.8.1997	Hewlett-Packard/ Verifone	approved
3.	S84/97-220/1086	8.12.1997	Procter&Gamble/ Tambrands	approved
4.	S82/98-220/1665	17.7.1998	Exxon/Shell	approved
5.	S91/98-220/1666	23.7.1998	Lubrizol/BP	approved
6.	S145A/98-220/3477	9.12.1998	GE/Elscint	procedural errors
7.	S137/98-220/3559	18.12.1998	Johnson &Johnson/ DePuy	approved
8.	S21/99-850/99-210	13.5.1999	Deutsche Post/ Danzas	approved

In case 1, the applicants were of German and US nationality; in cases 2, 3 and 4 both US, in case 5 one US, one UK; in case 6 one US, one Israel; in case 7, both US, in case 8, one German and one Swiss.

Some of the foreign entities have their subsidiaries incorporated under Czech laws in the Czech Republic (i.e, case 3, where Procter & Gamble's subsidiary, Rakona a.s., is incorporated under Czech laws). However, the fact that the applicant owns such a subsidiary has had no impact in the Czech Competition Authority's appreciation of the undertakings at

hand as bearing a foreign nationality. What counted is whether the turnover-threshold was surpassed independently of the nationality of the undertakings at hand ('effects').

In all these cases, the Czech Competition Authority has considered that the relevant geographic market was the Czech republic and has asserted that the geographic market can at the maximum extend to the Czech Republic. As indicated above, this approach is indeed dictated by the legal framework. In order to assess whether regional markets would be appropriate, the Czech authority has considered whether the conditions of competition were homogenous (as in the case of agreements, see above).

The analysis of the case law thus confirms that the Czech legal framework has a bias towards potentially narrow market definitions. The importance of foreign competition cannot be fully recognised in this framework. Mergers that take place in a broader relevant market can only be allowed on the basis of an efficiency defence.

5.2. Efficiency defence and foreign direct investment

In the overwhelming majority of merger cases, the Czech Competition Authority ended up with a favourable decision. According to the Czech Competition Authority, the sole valid prohibition of a notified merger took place in 1996 in re: *REC Mankovice, s.r.o/Veterinarni asanacni ustav Tisice a.s.* In this case, the relevant market was defined as consisting of two markets, namely the market for veterinary sanitation of animal waste and the market for animal based proteinous powder. The concentration was not approved due to the high concentration in both markets, the high barriers to entry as well as to the strengthening of their market power, already connected to each other through capital and personnel links.[23]

As stated above, all eight notified mergers were also approved. Typically, the Czech Competition Authority will accept mergers that (i) enable a better product-quality ;(ii) result in more efficient (cost-saving) production (cases 4 and 5) ;(iii) result in the supply of new or

[23] We note a discrepancy here with the aforementioned OECD report which mentions (p. 9) that a valid prohibition was pronounced on two occasions, but does not contain any further information with respect to these cases. The Czech Competition Authority has repeatedly stated that they are aware of only one such case.

value-added services (case 7). It does not appear from the decision that claims of efficiency gains are given a full critical hearing by the authority.

The Czech authority thus appears to be rather flexible when it comes to efficiency considerations. Its bias against international mergers with respect to the evaluation of international competition seems to be compensated by a possibly lenient consideration of efficiency claims.

5.3. Consistency across jurisdictions

Given that the international mergers reviewed above have been considered by other jurisdictions, it is interesting to wonder whether the Czech Competition Authority has taken notice of parallel procedures and possibly co-operated with other agencies.

With respect to the relevant product market, it appears that the Czech Competition Authority consistently applies a criterium which is formally close to that found in the EU. A relevant product market typically includes all identical and substitutable products, the latter being defined as those that taking into account their qualities, price, end-use, can substitute the 'inner' circle of identical products.

Hence, the Czech Competition Authority when defining whether two products are substitutable will: (i) focus on their detailed description; (ii) compare their end-uses and (iii) analyse the structure of their supplies.

In some cases, a reference is made to decisions by the European Community (EC) or another national competition authority. Such references usually act as confirmation regarding the correctness of the outcome reached by the Czech Competition Authority (i.e., in case 3, the Czech Competition Authority mentions that a similar outcome was reached by the EC).

Consistency can be appreciated only if certain threshold criteria regarding comparability are met: cases 4 and 5 meet such criteria, since they relate to the same relevant product market. On both occasions, the relevant product market was defined in a *quasi* identical manner.

On a number of cases, reference has been made to decisions of the EC or other national competition authorities. The following examples illustrate this point :

(i) case 3 : the Czech Authority, when analysing substitutability, arrived at the same conclusion as the EC and added an explicit reference to EC decision 94/893 to illustrate this point ;

(ii) case 4 : the Czech Authority reflects in the *ratio decidendi* of its decision that it was informed by the applicants that their merger had already been approved by the EC ;

(iii) case 5 : the Czech Authority reflects in the *ratio decidendi* of its decision that it was informed by the applicants that their merger had not been previously notified to the EC since, given its importance, it did not fall within the scope of the EC jurisdiction. The merger was nevertheless notified to the national competition authorities of Belgium, Greece, Portugal, Germany, United Kingdom (as well as to the authorities of Australia, the Slovak Republic and the US). None of these authorities had reached a conclusion by the time the Czech Authority had issued its decision and there is no evidence of 'horizontal' co-operation between the Czech Authority and another national authority ('horizontal' as opposed to 'vertical' co-operation that we use to qualify the links between the Czech Competition Authority and DG IV) ;

(iv) case 7 : the Czech Authority stated that the merger at hand had already been approved by DG IV ;

(v) case 8 : the Czech Authority states that its product market definition is consistent with that reached by DG IV and cites the relevant EC decisions (TNT/GD Net No IV/M102 dating from 1991 and Deutsche Post/Danzas No IV/M from 1999).

Hence, we can conclude that the Czech Competition Authority, when appropriate (that is, even if not informed to this effect by the applicants) will check the outcome (and the process leading to the outcome) and reflect it in its decision in order to confirm the conclusions reached. Since there are no reported cases of divergent conclusions reached by the Czech Authority and DG IV, it is at this stage impossible to state the attitude that the Czech Authority would follow in such cases.

6. Conclusion

A number of conclusions emerge from our review of the antitrust practice in cases with an international dimension.

First, there has not been any conflict in the allocation of jurisdiction between Poland, Hungary and the Czech republic on the one hand and the EU on the other hand. The Europe agreemeents have however been largely dormant even at the level of consultation and the absence of conflict is probably associated, to some extent, with limited integration between the EU and the countries under review so that few cases could have arisen in the first place. The absence of conflict is also probably associated with a fairly favourable, if not permissive, attitude towards foreign firms in Central European Countries so that few European firms have complained to the EU (arguably Community firms would indeed be the first to call on the EU to assert jurisdiction). The Europe Agreements, which have given rise to so much controversy in Hungary, are thus likely to become obsolete (upon accession) before they get a chance of being seriously activated. That is not say however that this agreement had not effect. Clearly, for antitrust authorities in Central Europe, the prospect that they may have to implement European law in addition to their own law has given them as strong incentive to approximate the latter with the former. Hence, the Europe Agreements will probably be remembered by economic historians more as tool to foster convergence in anti-trust practice than an instrument to regulate the allocation of jurisdiction.

Second, the definition of the relevant geographic market suffers from significant shortcomings in each country under review, but to a different degree. Overall, there is a general bias in favour of narrow market definition, which is well illustrated by the fact that none of the authority has ever considered that the market was broader than their national territory (even though there are clear indications in some cases that the market was broader). In the Czech republic, the legal framework introduces the presumption of a prohibition for mergers on the basis of a market share in the domestic economy. This framework does not allow for mergers meeting the threshold to be waived simply because the relevant market is broader than the Czech republic. Accordingly, there is a strong bias against international mergers in the Czech republic with respect to the evaluation of international competition. In Poland, there is at times a bit of a confusion between geographic market definition and the analysis of dominance. In Hungary, foreign competition is only considered as a relevant factor to assess dominance. A proper market definition, which fully recognises the importance of foreign competition would allow for an evaluation of competition which is

better informed. In Poland and Hungary, the shortcomings of the current approach could be easily remedied. From this prospective, it would useful for the antitrust agencies to adopt a clear definition of what is meant by the relevant market for instance through a set of published guidelines. Such guidelines could outline the types of factors that will be taken into account at the stage of market definition and those that will be taken into account for the analysis of dominance. All three countries should also be encouraged to rely on a more quantitative approach in delineating the market and to publish their reasoning and supporting evidence in full.

Third, we observe that anti-trust agencies have attempted to advocate competiton in the formulation of trade policy. The evolution of their independence is however mixed. There are some worrying signs that the Polish agency has become less independent whereas the Hungarian agency has probably become even more independent.

Fourth, it appears that anti-trust agencies in all three countries could be pursuing objectives of industial policy in the exercise of merger control. The situation gives rise to particular concern in Poland where the suspicion arises that profitable market positions have been auctioned off to foreign buyers in exchange for commitments which are unrelated to the competitive situation. In the other two countries, it seems that the attitute towards foreign firms has been quite favourable. For instance, the prospect for restructuring or technology transfer associated with foreign ownerhip is often cited as a benefit which can trump concerns about reduction of effective competition.

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